IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	
Private (E-2) **JOSHUA C. DAVIS** United States Army, Appellant	)	Crim. App. Dkt. No. 20130996
	)	USCA Dkt. No. 16-0306/AR

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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 PRECEDENTS IN UNITED STATES v. TAYLOR, 26 M.J. 127 (C.M.A. 1988); UNITED STATES v. DAVIS, 53 M.J. 202 (C.A.A.F. 2000); AND UNITED STATES v. STANLEY, 71 M.J. 60 (C.A.A.F. 2012).

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

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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 PRECEDENTS IN UNITED STATES v. TAYLOR, 26 M.J. 127 (C.M.A. 1988); UNITED STATES v. DAVIS, 53 M.J. 202 (C.A.A.F. 2000); AND UNITED STATES v. STANLEY, 71 M.J. 60 (C.A.A.F. 2012).

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice [hereinafter

UCMJ], 10 U.S.C. § 866(b) (2012). The statutory basis for this Court's jurisdiction is Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A general court-martial composed of enlisted and officer members acquitted appellant, in accordance with his pleas, of two specifications of rape by force, one specification of abusive sexual contact, and one specification of communicating a threat in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920, 934 (2012). The panel convicted appellant, contrary to his plea, of one specification of rape by force, in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2012), and sentenced him 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 appellant with one day against his sentence of confinement.

On November 25, 2015, the *en banc* Army Court affirmed the findings and the sentence. (JA 001). On January 29, 2016, appellant petitioned this Honorable Court for review, and this Court granted appellant's petition on March 30, 2016.

Statement of Facts

A. Background.

Appellant and Private First Class (PFC) BJH were friends having gone through basic training and advanced individual training together, and then both were assigned to Germany. (JA 058). On 15 December 2012, PFC BJH alleged

that while she and appellant were driving at night, appellant parked the car in a deserted area and forced her to commit oral sodomy upon him and forcefully inserted his finger into her vagina. (JA 060-062).[1] About two weeks later, after morning physical training, PFC BJH ran into appellant and decided to confront him. (JA 065-066). When PFC BJH confronted appellant, he invited himself up to her room and asked if they could speak there. (JA 066).

Upon entering her barracks room with appellant, PFC BJH left the door to the room open while she went into the bathroom to change out of her physical training gear and into her duty uniform. (JA 066-067). As she was pulling up her fatigue pants, she looked up and saw that the room door had been closed and appellant was walking towards her stating, "You don't need to put those pants on," and then picked her up and dropped her onto her bed. (JA 069). Appellant pinned her arms down and, while doing so, he retrieved a dildo from her nightstand and forcibly inserted it into her vagina. (JA 069-070). Appellant kept inserting the dildo into PFC BJH's vagina while she told him to stop. (JA 070). At some point she began to cry. (JA 070).

During trial, PFC BJH testified that once she started to cry, appellant stopped assaulting her with the dildo, got up, and threatened to rape her with an empty wine bottle if she did not "do him." (JA 070, 072). The encounter

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[1]Appellant was acquitted of this charge.

eventually ended when PFC BJH was able to text her girlfriend, Specialist (SPC) BH, for help and appellant left the room. (JA 074-075). Upon receiving PFC BJH's text, SPC BH went to PFC BJH's barracks room and after hearing what happened she decided to confront appellant. (JA 075). The two of them went to his barracks room where, in response to SPC BH asking "what the fuck did you do to her. . . She is crying. She is telling me that something happened," appellant responded, "oh I thought it was a joke. I didn't think she was being serious. And I didn't realize it until she started crying." (JA 179).

B. Instructions.

After trial and defense counsel rested, the military judge held a conference to discuss and finalize the panel instructions. (JA 120-122). Appellant never requested a mistake of fact instruction. (JA 120-122).

Further, the military judge asked counsel, "What other instructions do the parties request?" (JA 122). Defense counsel answered, "Sir, those were the only ones defense was tracking." (JA 122).

All other facts necessary for the disposition of the granted issue are set forth below.

Summary of Argument

The Army Court correctly applied forfeiture and reviewed the military judge's failure to instruct on the affirmative defense of mistake of fact for plain

error. Despite this Court's holding in *United States v. Taylor*, this Court has repeatedly applied forfeiture and reviewed mandatory instructional errors for plain error absent an objection at trial.

This Court should expressly overrule *Taylor* and adopt the Army Court's reasoning in applying forfeiture absent an objection at trial. Overruling *Taylor* would be directly in line with numerous cases decided by this Court and would also be in line with the position of civilian courts about this same issue. Moreover, this Court has currently applied forfeiture to mandatory instructions dealing with elements and lesser-included offenses. Therefore, this Court should apply the same standard when dealing with affirmative defenses to ensure uniformity.

Lastly, under the doctrine of stare decisis, this Court's decision in *Taylor* is no longer workable and should thus be overruled. As such, this court should affirm the decision of the Army Court and grant appellant no relief.

Standard of Review

A Court of Criminal Appeals decision is reviewed for an abuse of discretion. *United States v. Taylor*, 47 M.J. 322, 325 (C.A.A.F. 1997). "The lower court is deemed to have abused its discretion if its decision is based on an erroneous view of the law." *Id. (quoting United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995).

Law and Analysis

Whether a panel was properly instructed is a question of law reviewed de novo. *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008). However, when defense fails to object or request a specific instruction at trial, any instructional error is forfeited on appeal absent plain error. *United States v. Payne*, 73 M.J. 19, 22 (C.A.A.F. 2014) (citing *United States v. Turnstall*, 72 M.J. 191, 193 (C.A.A.F. 2013)). "Under a plain error analysis, the [appellant] 'has the burden of demonstrating that: (1) there was error; (2) the error was plain and obvious; and (3) the error materially prejudiced a substantial right of the [appellant].'" *Id.* (quoting *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011)). Appellant bears the burden of demonstrating he meets all three prongs of the plain error test. *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008).

A. This Court should expressly overrule *Taylor* because this Court has continually declined to apply its holding when faced with instructional errors.

This Court should expressly overrule *Taylor*. As articulated in the Army Court's opinion, this Court's decision in *Taylor* rejected the language promulgated by the president in Rule for Courts-Martial (R.C.M.) 920(f) which "placed the burden on the parties to object to an instruction." *United States v. Davis*, 75 M.J. 537, 542 (Army Ct. Crim. App. 2015) (citing 26 M.J. 127, 128-29) (C.A.AF. 1988). In rejecting the language of R.C.M. 920(f), the *Taylor* Court also rejected the drafter's analysis. The Analysis to R.C.M. 920(f) notes that this subsection

was based on the last two sentences of Fed. R. Crim. P. 30, "Jury Instructions." *Manual for Courts-Martial, United States* (1984 ed.), Analysis of the Rules for Courts-Martial app. 21 at A21-70. At the time R.C.M. 920(f) was adopted, Fed. R. Crim. P. 30 provided, in relevant part: "No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection." Fed. R. Crim. P. 30, 18 U.S.C. app. at 622 (1982).

The *Taylor* Court relied on Article 51(c) of the 1950 UCMJ to hold that the military judge has a sua sponte duty to instruct on affirmative defenses and the absence of such instruction is reviewed for an abuse of discretion. That provision stated in pertinent part, "Before a vote is taken on the findings, the military judge or the president of a court-martial without a military judge shall, in the presence of the accused and counsel, instruct the members of the court as to the elements of the offense. . ." 10 U.S.C. § 851 (1950). This language led the *Taylor* Court to hold that failure to instruct on defenses should be reviewed de novo. However, as the Army Court properly pointed out, Article 51(c) of the 1950 UCMJ required instructions on elements but was silent on instructions on defenses. The Army Court further identified a flaw in the *Taylor* Court's argument insomuch as the

1950 version of Article 51(c) was directed at the "law officer" or "president" rather than an actual military judge. *Davis*, 75 M.J. 537 at n.7.

Not only was the decision in *Taylor* premised on a flawed reading of a currently irrelevant version of Article 51(c), UCMJ, this Court almost immediately departed from its decision in *Taylor* in numerous subsequent decisions dealing with instructional error. In *United States v. Eckhoff*, the defense requested an instruction on entrapment and the government requested a supplemental instruction "delineating the effect of a profit-motive on that affirmative defense." 27 M.J. 142, 144 (C.M.A. 1988). The defense did not object to the government's proposed instruction and the military judge gave the instruction. *Id.* In reviewing whether it was proper for the military judge to give the "supplemental" instruction on the affirmative defense, this Court reviewed for plain error. In using the plain error standard, the *Eckhoff* Court stated, "According to R.C.M. 920(f), Manual for Courts-Martial, United States, 1984, Failure to object to an instruction or to omission of an instruction before the members close to deliberate constitutes waiver of the objection in the absence of plain error." *Id.*

Similarly, in *United States v. Grier*, the appellant argued that the military judge incorrectly defined "consent" and "intoxication" for the panel. 53 M.J. 30, 34 (C.A.A.F. 2000). In reviewing whether there was error, this court noted that although instructional error is generally reviewed de novo, "Failure to object to an

instruction before the panel begins deliberation is waiver of the objection in the absence of plain error." *Id.* (Citing *United States v. Cooper*, 51 M.J. 247, 252 (C.A.A.F. 1999)) (Holding that the burden was on the appellant to have objected at trial to the military judge's comments on evidence and, in the absence of objection, a plain error analysis is appropriate). *See also United States v. Browning*, 54 M.J. 1, 6 (C.A.A.F. 2000) (holding defects in instructions on the elements of conspiracy were forfeited absent plain error); *United States v. Simpson*, 56 M.J. 462, 465 (C.A.A.F. 2002) (stating that a failure to object to an instruction on a lesser-included offense forfeited the error in the absence of plain error).

In *United States v. Gomez,* this Court looked to other circuit and states courts in determining to apply forfeiture and review for plain error when a mandatory instruction was not objected to or requested. 46 M.J. 241, 247 (C.A.A.F. 1997).[2] For instance, the Court cited *United States v. Lopez Andino*, where the 1st Circuit Court of Appeals discussed whether it was plain error not to give a mandatory

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[2]Although this Court has swayed from *Taylor* in many instances, this Court has followed *Taylor* in other cases at least in the context of some affirmative defenses. *See United States v. Stanley*, 71 M.J. 60, 62-63 (C.A.A.F. 2012) (citing *Taylor*, 26 M.J. at 128) (reviewing self-defense instruction de novo despite no objection at trial); *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2003) (citing *Taylor*, 26 M.J. at 127) (reviewing mistake of fact instruction de novo despite no objection at trial); *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000) (citing *Taylor*, 26 M.J. at 128) (reviewing accident instruction de novo despite no objection at trial); *United States v. Barnes*, 39 M.J. 230, 233 (C.M.A. 1994) (citing *Taylor*, 26 M.J. at 129) (reviewing inability instruction de novo despite no objection at trial).

instruction on lesser included offenses and in its discussion stated, "Federal Rule of Criminal Procedure 30 requires the parties to raise objections to the instructions before the jury retires to consider its verdict." 831 F.2d 1164, 1170 (1st Cir. 1987). The Court in *Lopez Andino* further noted that, "A defendant, however, also is entitled to forgo the instruction for strategic reasons."[3] *Id. See Look v. Ameral*, 725 F.2d 4, 9 (1st Cir. 1984) (The 1st Circuit Court of Appeals held that the trial judge not giving lesser-included offense instruction was due to the acquiescence of the appellant's counsel and, "Having gambled and lost [the appellant] may not now complain."); *State v. Keffer*, 860 P. 2d 1118, 1137 (Wyo. 1993) (In reviewing Wyoming rule of criminal procedure 31 the Court held, "The plain meaning of both the former and the present rule is that an objection must be imposed to give the trial court an opportunity to correct possible error in instructions before the jury retires.").

Moreover, most recently, in *United States v. Payne*, this Court cited approvingly the Drafters' Analysis and Fed. R. Crim. P. 30—the same analysis the *Taylor* court rejected in construing R.C.M. 920—and held that the instructional error claimed there, despite being about the elements of the offenses, was forfeited. 73 M.J. at 23 (citing *Manual for Courts-Martial, United States* (2012 ed.), app. 21

[3] The Court also reviewed the appellant's contention that the trial judge failed to properly instruct the jury of the elements of the charged offense for plain error.

at A21-70). The *Payne* court's reliance on federal civilian practice in construing R.C.M. 920(f) is supported by Congress's mandate to the President to promulgate procedural rules for courts-martial that, "so far as he considers practicable, apply the principles of law . . . generally recognized in the trial of criminal cases in the United States district courts . . . ." Article 36(a), UCMJ, 10 U.S.C. § 836(a). *See also United States v. Tunstall*, 72 M.J. 191, 194 (C.A.A.F. 2013) (holding that where instruction on lesser-included offenses was not objected to, review was for plain error); *United States v. Wilkins*, 71 M.J. 410 (C.A.A.F. 2012) (Reviewing lesser-included offense instruction for plain error where there was no objection at trial).

Further, this Court applied forfeiture in the recent decision of *United States v. Caldwell*, reviewing the defense counsel's failure to object to the "negligence mens rea" instruction given at trial for plain error. *Caldwell*, _M.J._, 2016 CAAF LEXIS 371, at *15-16 (C.A.A.F. 16 May 2016). (Finding that the appellant did not meet the burden imposed by the first prong of the plain error analysis) (Citing *Payne*, 73 M.J. at 19).

B. The doctrine of stare decisis does not support the continued viability of this Court's decision in *Taylor*.

This Court should overrule *Taylor* in light of the doctrine of stare decisis because the doctrine of stare decisis does not support the decision's continued viability. Under stare decisis, this Court considers "whether the prior decision is

unworkable or poorly reasoned; any intervening events; the reasonable expectations of servicemembers; and the risk of undermining public confidence in the law." *United States v. Quick*, 74 M.J. 332, 336 (C.A.A.F. 2015) (footnote omitted). Here, *Taylor* is both poorly reasoned and unworkable. In fact, in *United States v. Brown*, while acknowledging its precedent in *Taylor*, this Court went so far as to suggest that it would consider overruling *Taylor*, but declined to do so stating,

> Absent RCM 920(e)(3), Manual for Courts-Martial, United States, 1984, we might consider overruling *United States v. Taylor*, *supra*, and require that an accused must request instructions on affirmative defenses or else the issue is waived, absent plain error. Even if there were any interest in this, we would be reluctant to overrule a precedent of this Court unless we were requested to do so and had the benefit of the briefs and arguments of the respective parties.

43 M.J. 187, 190 n.3 (C.A.A.F. 1995) (citing *United States v. Kossman*, 38 M.J. 258 (CMA 1993).

The opinion in *Taylor* disregarded the plain language of R.C.M. 920(f) because of the sua sponte nature of the military judge's duty to instruct on certain matters. But the military judge's sua sponte duty to provide mandatory instructions is fully consistent with forfeiture doctrine: While the military judge must give the instruction regardless of objections or requests of the parties, his failure to do so is reviewed for plain error on appeal if the parties do not assist her

by proposing additional instructions or objecting to the instructions given. The Army Court in this case ensured this was made clear stating, "While we determine that *Taylor's* continued vitality has been significantly eroded, the requirement that a military judge sua sponte give an instruction on a raised defense, even without a defense request, survives intact." 75 M.J. 537, 543 (Army Ct. Crim. App. 2016). (citing *United States v.* McDonald, 73 M.J. 426, 434 (C.A.A.F. 2014)). However, the Army Court further noted, "Nevertheless, in the case of any unpreserved error, the failure to request or object to an instruction on a defense forfeits the matter, absent plain error." *Id.* This dichotomy is workable because the standard of review for whether an instruction is a correct statement of the law is reviewed de novo. *United States v. Behenna*, 71 M.J. 228, 232 (C.A.A.F. 2012).

Application of *Taylor* has also proved unworkable, as demonstrated by the varying outcomes in this Court's decisions. There is no principled distinction between an instruction for entrapment and one for self-defense, yet this Court has applied forfeiture to the former but not the latter under *Taylor*. *Compare Eckhoff*, 27 M.J. at 144 *with Stanley*, 71 M.J. at 62-63. Most importantly, *Taylor* encourages defense counsel to decline to assist military judges in correcting known instructional errors in the hope that the accused may find appellate relief for the error in the event of a conviction. *See, e.g.*, *Payne*, 73 M.J. at 23 (holding error was forfeited where defense counsel apparently was "trying to preserve any

instructional error for appeal while simultaneously refusing to assist the military judge in correcting any error at the trial level."). Moreover, as courts have pointed out, defense counsel may have a strategic reason for not requesting an instruction. Defense should not receive a benefit on appeal for not requesting an instruction and not being given an instruction that was, at the time, aligned with their strategy. Judicial efficiency and timely justice are not aided by this incentive. *See Ameral*, 752 F.2d 4 at 9.

Next, intervening events have severely undermined *Taylor*'s force. Time and again, this Court has ignored *Taylor*'s claim to excise all mandatory instructions from R.C.M. 920(f)'s forfeiture provision, and has suggested that it should be overruled. Most recently, in *Payne*, this Court persuasively repudiated the *Taylor* court's rejection of the drafters' reliance on Fed. R. Crim. P. 30.

Further, the reasonable expectations of servicemembers would not be upset by overruling *Taylor* because no servicemember can reasonably expect any particular outcome in reliance on *Taylor*. The case purported to provide one rule for mandatory instructions (forfeiture is not applied) and another for non-mandatory instructions (forfeiture is applied). However, the decisions of this Court have followed no set path, such that practitioners and servicemembers can only guess as to whether an objection or proposed instruction is necessary to preserve appellate review. The best that can be synthesized from this Court's cases is that

Taylor has led to a sui generis rule of non-forfeiture for certain affirmative defenses, but maintained a forfeiture rule for all other mandatory instructions, including some other affirmative defenses. This state of the law supports overruling, not maintaining, *Taylor*. *Cf. United States v. Gutierrez*, 74 M.J. 61, 67-68 (C.A.A.F. 2015) (overruling prior precedent that created a "sui generis" standard in cases involving HIV).

Finally, public confidence in the law will suffer no harm from overruling *Taylor*. The correction of a rule of uncertain application that allows for defense counsel to knowingly permit legal error at trial to force reversal and retrial several years later will only increase public confidence in the law. This case presents the rare circumstance in which overruling a case will increase stability and confidence in the law, rather than decrease it.

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court affirm the decision of the Army Court.

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CERTIFICATE OF FILING AND SERVICE

I certify that the original was filed electronically with the Court at efiling@armfor.uscourts.gov on this 27 day of May, 2016 and contemporaneously served electronically and via hard copy on appellate defense counsel.

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