

24 March 2026

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

---

**UNITED STATES,**  
*Appellee,*

v.

**ONETERA G. NELSON,**  
Staff Sergeant (E-5),  
United States Air Force,  
*Appellant.*

---

USCA Dkt. No. 26-0059/AF

Crim. App. Dkt. No. ACM 24042

---

**REPLY BRIEF ON BELHALF OF APPELLANT**

---

LUKE D. WILSON, Lt Col, USAF  
U.S.C.A.A.F. Bar No. 35115  
Air Force Appellate Defense Division  
1500 Perimeter Road, Suite 1100  
Joint Base Andrews NAF, MD 20762  
(240) 612-4770  
Luke.wilson.14@us.af.mil

*Counsel for Appellant*

**Index of Brief**

**Index of Brief ..... ii**

**Table of Authorities ..... iii**

**Argument .....1**

**A. Ineptitude is an affirmative defense.....1**

**B. The Government’s arguments regarding affirmative waiver lack merit .....6**

**C. There is no requirement that defenses be “clearly and obviously raised by the evidence.”.....8**

**D. The failure to instruct on the defense of ineptitude was not harmless beyond a reasonable doubt .....9**

**E. This Court should set aside Appellant’s conviction..... 11**

## Table of Authorities

### Supreme Court Cases

*McKelvey v. United States*, 260 U.S. 353 (1922).....6

### CAAF and CMA Cases

*United States v. Barnes*, 39 M.J. 230 (C.A.A.F. 1994).....9, 11

*United States v. Curry*, 38 M.J. 77 (C.M.A. 1993).....1, 2

*United States v. Davis*, 53 M.J. 202 (C.A.A.F. 2000).....8

*United States v. Maynulet*, 68 M.J. 374 (C.A.A.F. 2010).....8

*United States v. Powell*, 32 M.J. 117 (C.M.A. 1991).....4, 5

*United States v. Taylor*, 26 M.J. 127 (C.M.A. 1988).....8

*Willenbring v. Neurauter*, 48 M.J. 152 (C.A.A.F. 1998) ..... 1, 2, 3, 4

### Other Authorities

*Substantive Criminal Law*, § 1.8(c) (1986).....2, 4

*The Empirical Reasonable Person*, 72 Ala. L. Rev. 887 (2021) .....10

*United States v. Dixon*, 901 F.3d 1170 (10th Cir. 2018).....5

*United States v. Harstock*, 347 F.3d 1 (1st Cir. 2003)..... 2, 4, 6

## Argument

### A. Ineptitude is an affirmative defense.

The Government's reliance on *United States v. Curry*, 38 M.J. 77 (C.M.A. 1993), for the proposition that ineptitude is not an affirmative defense is misplaced because the "substantive defenses" the *Curry* Court spoke of are a type of affirmative defense. *See* Brief on Behalf of the United States at 18.

At first glance, it appears as though *Curry* differentiates "affirmative defenses" from what the Court called a "substantive law defense." *Id.* at 80 (citations omitted). However, a more thorough look shows that the Government's reliance on this as the center of its argument is, at heart, grounded in a strained interpretation that ultimately results in no difference in what counts as an affirmative defense.

In 1993, the *Curry* Court said, "Accident, while loosely called an 'affirmative defense,' is more accurately a 'substantive law defense which negatives guilt by cancelling out' one or more *mens rea* components." *Id.* (citations omitted). Whatever distinction might have been suggested in *Curry* was dropped five years later when this Court again articulated its understanding of affirmative defenses: "An affirmative defense is a matter that 'negatives guilt by cancelling out the existence of some required element of the crime . . . [or that] shows some matter of justification or excuse which is a bar to the imposition of criminal liability.'" *Willenbring v. Neurauter*, 48 M.J. 152, 176 (C.A.A.F. 1998) (citations omitted)

(ellipsis and brackets in original), *overruled on other grounds by, United States v. Mangahas*, 77 M.J. 220, 222 (C.A.A.F. 2018) (subsequent history omitted).

What the *Curry* Court suggested to separate out as “substantive defenses” are, in fact, just another type of affirmative defense. Indeed, as pointed out explicitly in *Willenbring*, there are multiple types of affirmative defenses. *Id.* Some of them “negative[] guilt by cancelling out the existence of some required element,” while others present a justification for the otherwise-criminal conduct, and still others provide an excuse for the conduct. *Id.* But they are all affirmative defenses. *Id.*

While the labeling of defenses can vary from jurisdiction to jurisdiction, the First Circuit has explained “the label ‘affirmative defense’ applies to different categories of defenses.” *United States v. Harstock*, 347 F.3d 1, 8 (1st Cir. 2003) (citing 1 LaFave, *Substantive Criminal Law*, § 1.8(c) (1986)). “One such category is defenses that ‘negative guilt by cancelling out the existence of some required element of the crime.’” *Id.* “Other categories of affirmative defenses . . . do not negate an element of the crime, but instead provide a justification sufficient to overcome or mitigate criminal liability.” *Id.* The third category is a catch-all for the “individual exceptions to substantive crimes” . . . “typified by ‘an exception or proviso setting for the defense.’” *Id.* (citing *United States v. Barthelo*, 71 F.3d, 436, 440 (1st Cir. 1995) then quoting *LaFave, Substantive Criminal Law*, § 1.8(c)).

Though the Government argues that ineptitude is not an affirmative defense on the basis that it functions to cancel out the required negligence mens rea, Brief on Behalf of the United States at 21, the Government’s reasoning demonstrates a misunderstanding of how the ineptitude defense works. To be clear, however, even if ineptitude were categorized in such a way, it would—as discussed above—still be an affirmative defense. *Willenbring*, 48 M.J. at 176 (“An affirmative defense is a matter that ‘negatives guilt by cancelling out the existence of some required element of the crime . . .’”).

It is apparent that ineptitude is not a defense that negatives guilt by cancelling out the existence of a required element of the crime because ineptitude does not cancel any element out of the dereliction offense. As the military trial judge instructed, negligent dereliction of duty has three elements: (1) the existence of a duty, (2) the accused’s knowledge of said duty, and (3) the negligent failure to perform the duty. JA at 323-24. “‘Negligently’ means an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances.” *Id.* at 375 The Government does not dispute that ineptitude does not “negative” the existence of Appellant’s duty. Brief on Behalf of the United States at 21. Nor does ineptitude “negative” Appellant’s knowledge of the duty.

The Government is correct to acknowledge that there is an intersection between ineptitude and the final element of negligence. Brief on Behalf of the United States at 21 (citing *MCM*, pt. IV, ¶ 18.c.(3)(d)). But the Government’s brief misses the distinction in how the two concepts are analyzed. Negligence is assessed through an objective lens, asking what a “reasonable person would have” done. *Elons v. United States*, 575 U.S. 723, 739 (2015). But the defense of ineptitude does not ask whether a “reasonable person” would have been just as bad as an accused at the duty at hand. Rather, the defense of ineptitude is assessed based on an individualized determination, regardless of how a reasonable person would be expected to perform. *See Powell*, 32 M.J. at 121 (“[I]neptitude as a defense is largely fact-specific, requiring consideration of the duty imposed, the abilities and training *of the soldier* upon whom the duty is imposed, and the circumstances in which he is called upon to perform this duty.”) (emphasis added).

Conduct that is negligent cannot be made into non-negligent conduct by ineptitude; the negligent conduct is explained by the ineptitude.

Ineptitude is an “excuse” defense, which is also an affirmative defense. *See Willenbring*, 48 M.J. at 176 (“An affirmative defense is a matter that . . . shows some matter of justification or excuse which is a bar to the imposition of criminal liability.”) (quoting 1 LaFave, *Substantive Criminal Law*, § 1.8(c)); *Harstock*, 347 F.3d at 8 (citing 1 LaFave, *Substantive Criminal Law*, § 1.8(c)). Generally, an excuse

defense is one where an “actor suffer[s] an impairment of his ability to control his conduct such that he cannot properly be held accountable for it.” *United States v. Dixon*, 901 F.3d 1170, 1183 (10th Cir. 2018). When correctly considered this way, it is clear that the ineptitude defense is a legally sufficient explanation as to why a person acted negligently, which, in turn, functions to bar criminal responsibility.

Further proof that ineptitude is an affirmative defense is found in how the defense is raised. As pointed out by this Court in *Powell*, “ineptitude as a defense is largely fact-specific, requiring consideration of the duty imposed, the abilities and training of the soldier upon whom the duty is imposed, and the circumstances in which he is called upon to perform this duty.” 32 M.J. at 121. Thus, in order for the defense of ineptitude to be reasonably raised, facts that are outside of the proof of the elements of dereliction of duty must be established. An accused’s abilities, training and circumstances are not the prosecutor’s burden to produce. Because those facts are not the prosecution’s burden to produce, they are ordinarily the accused’s burden to produce—at least if the accused wants to raise the defense of ineptitude. *See Xiulu Ruan v. United States*, 597 U.S. 450, 475-76 (2022) (Alito, J., concurring) (noting the defendant’s traditional burden of production for an affirmative defense under the common law). And if those facts are the accused’s burden to produce, the defense of ineptitude must be an affirmative defense, rather than an “element cancelling” defense because affirmative defenses shift the burden of production to

the defense. *See Harstock*, 347 F.3d at 7-8 (“Generally, with affirmative defenses, the defendant bears at least the burden of production.”) (citing *McKelvey v. United States*, 260 U.S. 353, 357 (1922)).

**B. The Government’s arguments regarding affirmative waiver lack merit.**

The Government’s entire argument that trial defense counsel knew of the defense of ineptitude (and, therefore, intelligently waived Appellant’s right to have the members instructed on the defense) consisted of one sentence; “competent counsel would know that ineptitude is a defense plainly articulated in the Manual that negated a mens rea element for dereliction of duty.” Brief on Behalf of the United States at 29-30.

The Government’s own misunderstanding as to how the defense of ineptitude functions illustrates how even a competent counsel could misunderstand ineptitude and, thus, incorrectly fail to request an instruction on it. In its brief, the Government repeatedly and mistakenly argues that traits that are specific to Appellant (i.e., her mental health issues) can be factored into an objective negligence analysis. *See* Brief on Behalf of the United States at 14 (“Ineptitude . . . negates a required element of negligent dereliction of duty – specifically that the accused is negligently derelict); 45 (“Here, notwithstanding the lack of instruction, the members were still free to find that, based on Appellant’s mental health struggles, the government had not proven the negligent dereliction element of the offense.”) As discussed in this reply,

both *supra* and *infra*, negligence is analyzed by the objective “reasonable person” standard. Because of this, factors that are specific to Appellant are *not* taken into account when determining if she acted with due care. *See* subsection D, *infra*.

As discussed in Appellant’s opening brief, if the trial defense counsel knew about the ineptitude defense he would have requested an instruction on it; it fit with the facts he presented. *See* Brief on Behalf of Appellant at 17. The fact that he failed to request an instruction that matched so well with his factual theory leads to the presumption that he did not know how Appellant’s mental health issues related to the defense.

Because the “trial defense counsel either did not know or did not understand that, despite raising facts of the defense throughout trial, he was actually presenting the defense of ineptitude,” he could not have intentionally relinquished Appellant’s right to have the members instructed on the defense. *Id.* at 17-18. The Government’s argument that, “[a]lthough the defense’s case made references to Appellant’s mental health concerns from voir dire through findings argument, the defense never connected Appellant’s mental health issues to ineptitude,” actually supports this very conclusion. Brief on Behalf of the United States at 33. Of course the trial defense counsel did not connect the dots between the facts he presented and the defense of ineptitude; he “either did not know or did not understand” the defense. *See* Brief on Behalf of Appellant at 17-18.

But further, and more importantly, *nothing requires a trial defense counsel to make that connection* to receive an instruction on a defense. This is because “[t]he defense theory at trial is not dispositive in determining what affirmative defenses have been reasonably raised.” *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000). Regardless of the connections made by a trial defense counsel, the military judge still has the sua sponte duty to instruct the members on all reasonably raised affirmative defenses. *United States v. Maynulet*, 68 M.J. 374, 376 (C.A.A.F. 2010).

**C. There is no requirement that defenses be “clearly and obviously raised by the evidence.”**

The Government argues that the evidence of a defense must be “clearly and obviously” raised before an instruction is required. *See* Brief on Behalf of the United States at 40. This is not so.

“The test whether an affirmative defense is reasonably raised is whether the record contains *some evidence* to which the court members may attach credit if they so desire.” *Davis*, 53 M.J. at 205 (emphasis added). That unit of “some evidence” need not “be compelling or convincing beyond a reasonable doubt.” *United States v. Taylor*, 26 M.J. 127, 129 (C.M.A. 1988), *overruled on other grounds*, *United States v. Davis*, 76 M.J. 224, 226 (C.A.A.F. 2017). There is no requirement that the evidence be clear, nor is there any requirement that the evidence be obvious.

As discussed in Appellant’s opening Brief, there was a substantial amount of evidence of ineptitude that the members could have attached credit to if they desired.

See Brief on Behalf of Appellant at 13-14. TSgt DM testified that Appellant was unable to complete her tasks due to her mental health. JA at 171, 176-78. TSgt DH testified that mental health issues would most likely cause a deterioration of work performance, that Appellant was incapable of performing higher than she did, that Appellant received multiple mental health evaluations, and that Appellant “needed to leave work for mental health days.” JA at 236-37, 242-44. Additionally, Appellant herself explained that she was ordered by her command to undergo mental health evaluations. JA at 297. She also explained how her mental health appointments interfered with her ability to complete her duties. JA at 297-98. Additionally, Appellant also explained how, after her mental health improved, she was able to accomplish her duties again. JA at 300. Any of these standing on their own would have provided “some evidence” of ineptitude, but together the evidence of ineptitude that the members could attach credit to stretched from one end of the trial to the other.

**D. The failure to instruct on the defense of ineptitude was not harmless beyond a reasonable doubt.**

The Government’s attempt to distinguish the results of *United States v. Barnes*, 39 M.J. 230 (C.M.A. 1994), fails because it is based on a misunderstanding of the ineptitude defense.

The Government argues that, unlike *Barnes*, “notwithstanding the lack of instruction, the members were still free to find that, based on Appellant’s mental

health struggles, the government had not proven the negligent dereliction element of the offense.” Brief on Behalf of the United States at 45. But as discussed above, negligence is based on an objective standard; what amount of due care would a reasonable person have exercised? A specific individual’s traits (in this case, individual disabilities and mental health issues) do not factor into an objective standard. See *The Empirical Reasonable Person*, 72 Ala. L. Rev. 887, 895 (2021).

As pointed out in *The Empirical Reasonable Person*,

[T]he reasonable person standard is generally understood as an objective standard rather than a subjective one. This means two things. First, it means that the inquiry is whether the defendant's (external) conduct was reasonably careful, not whether the defendant's (internal) intention was to be careful. Second, it means the standard is typically not tailored to the particulars of the defendant; the defendant's conduct is compared to the reasonable conduct of a *generic person*, rather than to the reasonable conduct of a person *with the defendant's specific attributes*.

*Id.* (emphasis in the original).

The bounds of the reasonable person mean that, despite the Government’s contention, the negligence element turned on whether Appellant’s actions were *objectively* reasonable. Her mental health could not properly be factored into that analysis. Therefore, the Government’s argument that “members were still free to find that, based on Appellant’s mental health struggles, the government had not proven [negligence]” erroneously collapses the distinct legal concepts and inquiries

governing negligence and ineptitude into a single question or mens rea. Brief on Behalf of the United States at 45.

The Government's misunderstanding of this basic premise illuminates exactly why *United States v. Barnes* is on point, and why this error is not harmless beyond a reasonable doubt. Like in *Barnes*, the elements here were not in dispute. There was no dispute that Appellant had a duty. There was no dispute that Appellant did not carry out that duty. There was no dispute, even, that a reasonable person should have been able to carry out duty. From the defense's perspective, the only question was whether Appellant's failure was legally excused.

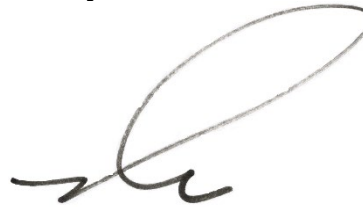
Because the members were not instructed on the defense of ineptitude, they could not have known that Appellant's ineptitude due to her mental health issues could function as a legal excuse to what they could find using the reasonable person standard to be negligence.

**E. This Court should set aside Appellant's conviction.**

In Appellant's opening brief, Appellant requested that this Court "reverse the Air Force Court of Criminal Appeals decision on waiver, and remand this case for an analysis of the substantive issue." Brief on Behalf of Appellant at 34. Upon further research and analysis in light of this Court's framing of the granted issue, *United States v. Nelson*, No. 26-0059/AF, 2026 CAAF LEXIS 41, at \*1 (C.A.A.F. Jan. 12, 2026) (order), this Court should remedy the instructional deficiency directly. That is

because this Court ordinarily pierces the decision of the Court of Criminal Appeals to address—much as was briefed here and in the Government’s submission—whether the military judge erred. *See United States v. Shelton*, 64 M.J. 32, 47 (C.A.A.F. 2006). In light of the military judge’s failure to give a constitutionally required instruction on an affirmative defense of ineptitude and the Government’s inability to show that error was harmless beyond a reasonable doubt, this Court should set aside Appellant’s convictions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'LUKE D. WILSON', with a large, stylized flourish above the name.

LUKE D. WILSON, Lt Col, USAF  
Appellate Defense Counsel  
Air Force Appellate Defense Division  
1500 West Perimeter Road, Suite 1100  
Joint Base Andrews NAF, MD 20762-6604  
Office: (240) 612-4770  
Email: [luke.wilson.14@us.af.mil](mailto:luke.wilson.14@us.af.mil)

## **Certificate of Filing and Service**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division at [af.jajg.afloa.filng.workflow@us.af.mil](mailto:af.jajg.afloa.filng.workflow@us.af.mil) on 24 March 2026.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'LUKE D. WILSON', with a large, stylized loop at the end.

LUKE D. WILSON, Lt Col, USAF  
Appellate Defense Counsel  
Air Force Appellate Defense Division  
1500 West Perimeter Road, Suite 1100  
Joint Base Andrews NAF, MD 20762-6604  
Office: (240) 612-4770  
Email: [luke.wilson.14@us.af.mil](mailto:luke.wilson.14@us.af.mil)

## **Certificate of Compliance**

This brief complies with the type-volume limitation of Rule 24 of no more than 6,500 words because it contains approximately 2,796 words.

This brief complies with the typeface and type-style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word with Times New Roman 14-point typeface.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'LUKE D. WILSON', with a large, sweeping loop at the end.

LUKE D. WILSON, Lt Col, USAF  
Appellate Defense Counsel  
Air Force Appellate Defense Division  
1500 West Perimeter Road, Suite 1100  
Joint Base Andrews NAF, MD 20762-6604  
Office: (240) 612-4770