IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

United States Appellant **v.** Lieutenant Colonel **Ashley R. ELLIS** United States Army Appellee	*Amicus Curiae* Brief Crim. App. Dkt. No. 20240254 **USCA Dkt. No. 25-0197/AR**

Brief of the National Institute of Military Justice In Support of Appellee

James A. Young
Colonel (Ret.), USAF
National Institute of Military Justice
1300 Crystal Dr. # 1601
Arlington, VA 22202
(703) 216-3769
jayoung3@icloud.com
USCAAF Bar No. 19942

Ann Ching
Clinical Professor of Law
Arizona State University
National Institute of Military Justice
111 E. Taylor Street
Phoenix, AZ 85004-4467
(480) 727-6242
ann.ching@asu.edu
AZ Bar No. 020407

Counsel for *Amicus Curiae*

August 30, 2025

INDEX OF BRIEF

Table of Authorities

Statutes

Rules for Courts-Martial (R.C.M.)

Federal Rules of Criminal Procedure

Other Materials

To the Honorable Judges of the United States Court of Appeals for the Armed Forces

Interest of Amicus

The National Institute of Military Justice (NIMJ) is a private, non-profit organization founded in 1991 dedicated to ensuring the fair administration of justice within the armed forces and to improving public understanding of military justice. NIMJ's leadership includes former judge advocates, private practitioners, and legal scholars. The issues presented in this case provide the Court with another opportunity to continue its recent focus on waiver jurisprudence.

Certified Issues

I. Whether the Army Court erred by finding Appellant had not waived whether the military judge should have instructed the panel on the state of law of the 1st Amendment.

II. Whether the Army Court erred by omitting analysis regarding forfeiture on whether the military judge should have instructed the panel on the state of the law of the 1st Amendment.

III. Whether the Army Court erred by finding a mandatory panel instruction on the state of the law of the 1st Amendment that the military judge failed to give.

IV. Whether the Army Court erred by finding the military judge needed to provide a panel instruction regarding a question of law.

Relevance of the Brief

Amicus invites this Court to reframe the issues and conclude that Appellee did not waive the required instruction on his First Amendment af-

firmative defense, and that this Court should affirm the ruling of the Court of Criminal Appeals to remand for a rehearing. Alternatively, this Court should remand the case to the lower court to resolve the two other issues Appellee initially presented there.

PRELIMINARY MATTER

Appellant's four certified issues misdirect this Court's attention by challenging the rulings of the Court of Criminal Appeals. However, that court's rulings were based on what the Appellee did and what the military judge did not do at trial. In such cases, this Court has typically "pierce[d] through" the decision of the intermediate level court, "examined the military judge's ruling, then decided whether the Court of Criminal Appeals was right or wrong in its examination of the military judge's ruling." *United States v. Shelton*, 64 M.J. 32, 37 (C.A.A.F. 2006) (internal quotation marks and citation omitted); *accord United States v. Blackburn,* 80 M.J. 205, 211 (C.A.A.F. 2020).

In light of that concept of operations and to refocus on what occurred at trial, *Amicus* invites the Court to reframe the issues as follows:

1. Did Appellee's defense counsel waive an affirmative defense findings instruction?
2. Are the terms of the Government's proposed remand to the Court of Criminal Appeals the appropriate remedy?

This Court should reconsider its Rule for Court-Martial (R.C.M.) 920(e) and (f) jurisprudence. It should hold: (1) the military judge erred by not *sua sponte* instructing on Appellee's affirmative defense—that the

charged conduct was protected speech under the First Amendment— and affirm the decision of the Court of Criminal Appeals to remand for a rehearing; (2) alternatively, that Appellee did not waive this defense; and (3) that the remand instructions proposed by the Government are not appropriate.

FACTS

Having no access to the record of trial, *Amicus* accepts the facts as stated in Appellee's brief.

LEGAL BACKGROUND

Congress imposed a duty on law officers to instruct the court members as to the elements of the offense, the presumption of innocence, and the requirement that the prosecution bears the burden of proving the accused's guilt beyond a reasonable doubt. Article 51(c), UCMJ, 50 U.S.C. § 626(c) (1950).[1] The President initially interpreted the statute as *not requiring* the law officer "to give the court any instructions other than those required by Article 51(c)." *Manual for Courts-Martial* (*MCM*) ¶ 73*c* (1951 ed.).

Early in its history, this Court summarized its precedents concerning the failure of the law officer to give instructions required by Article 51(c): the failure of the law officer to provide such required instructions "constitutes error as a matter of law." *United States v. Mundy*, 9 C.M.R. 130, 132

[1] Presently 10 U.S.C. § 851(c), UCMJ.

(C.M.A. 1953). Nevertheless, the Court warned that "when defense counsel *consciously and affirmatively* causes the removal from the court's consideration of the issue ..., he thereby waives his right to have the court instructed thereon." *Id.* at 134 (emphasis added).

In *Mundy*, the defense counsel declined to take a position when asked whether the law officer should instruct on a lesser-included offense. *Id.* at 133. The law officer gave the instruction, but later withdrew it. He asked counsel for the parties if they objected to the instructions or requested additional ones. The parties answered that they did not. *Id.* Despite an inference that can be drawn from Article 51(c) that an instruction on lesser-included offenses was required, this Court held that the defense counsel's "actions were affirmative, deliberate and evidential of a conscious design," and thus he had waived the issue. *Id.*

Eight years later, however, this Court determined that the military judge had "a duty to instruct" on affirmative defenses reasonably raised by the evidence regardless of defense theories or requests." *United States v. Steinruck*, 11 M.J. 322, 324 (C.M.A.1981).

In 1984, the President revised the *MCM* and adopted Rules for Courts-Martial, which expanded the list of required instructions that a military judge "shall give. Currently, the list of instructions the military "shall" give is as follows:

> (1) A description of the elements of each offense charged, unless findings on such offenses are unnecessary because they have been entered pursuant to a plea of guilty;

> (2) A description of the elements of each lesser included offense in issue, unless trial of a lesser included offense is barred by the statute of limitations (Article 43) and the accused refuses to waive the bar;
>
> (3) A description of any special defense under R.C.M. 916 in issue;
>
> (4) A direction that only matters properly before the court-martial may be considered;
>
> (5) A charge that—
>
> (A) The accused must be presumed to be innocent until the accused's guilt is established by legal and competent evidence beyond reasonable doubt;
>
> (B) In the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and the accused must be acquitted;
>
> (C) If, when a lesser included offense is in issue, there is a reasonable doubt as to the degree of guilt of the accused, the finding must be in a lower degree as to which there is not reasonable doubt; and
>
> (D) The burden of proof to establish the guilt of the accused is upon the Government. [When the issue of lack of mental responsibility is raised, add: The burden of proving the defense of lack of mental responsibility by clear and convincing evidence is upon the accused. When the issue of mistake of fact under R.C.M. 916(j)(2) is raised, add: The accused has the burden of proving the defense of mistake of fact as to consent or age by a preponderance of the evidence.]
>
> (6) Directions on the procedures under R.C.M. 921 for deliberations and voting; and
>
> (7) Such other explanations, descriptions, or directions as may be necessary and which are properly requested by a party or which the military judge determines, sua sponte, should be given.

R.C.M. 920(e).

This Court initially interpreted R.C.M. 920(e) as establishing two categories of instructions: those the judge must give in every case (1)–(6), and those that are case-specific and left to the judge's discretion (7). *United States v. Taylor*, 26 M.J. 127, 128 (C.M.A. 1988), *overruled by United*

States v. Joshua C. Davis, 76 M.J. 224, 225–26 (C.A.A.F. 2017). In *Taylor*, the military judge failed to *sua sponte* instruct on an affirmative defense. The Government argued that under R.C.M. 920(f), by not requesting the instruction, the defense had relieved the military judge of his duty to provide it. *Id.* at 128. At that time, R.C.M. 920(f) stated: "Failure to object to an instruction or to omission of an instruction before the members deliberate constitutes waiver of the objection in the absence of plain error." This Court concluded, albeit in *dictum*, that not requesting the instruction did not waive the requirement to instruct on an affirmative defense. The Court understood R.C.M. 920(f) as applying only to 920(e)(7) instructions. *Id.*

Four years later, the composition of the Court had completely changed. In *United States v. Strachan*, citing cases decided before *Taylor* and before R.C.M. 920(e) was promulgated, this Court held that a required instruction could be *affirmatively* waived. 35 M.J. 362, 364 (C.M.A. 1992) (by withdrawing request for a lesser-included offense instruction, the defense affirmatively waived the instruction). The Court reinforced this conclusion in *United States v. Barnes,* ruling that an accused did not waive an affirmative defense instruction by failing to request it, only by affirmatively waiving it. 39 M.J. 230, 233 (C.M.A. 1994); *see United States v. Shaun M. Smith*, 50 M.J. 451, 456 (C.A.A.F. 1999) (the defense affirmatively waived an objection to a required instruction by requesting an instruction on the elements of a lesser-included offense and

acquiescing to the wording given by the military judge); *United States v. Gutierrez*, 64 M.J. 374, 377–78 (C.A.A.F. 2007) (defense's specific request that an affirmative defense instruction not be given waived any objection); *United States v. Elespuru*, 73 M.J. 326, 328–29 (C.A.A.F. 2014) (defense waived multiplicity objection by agreeing the elements test had not been met). In each of these cases, this Court's conclusion that the defense waived a required instruction was based on the defense counsel's actions with regard to a specific required instruction, not simply a "no objection" to the combined instructions.

Citing the drafters' comments, this Court interpreted R.C.M. 920(f) as being equivalent to Fed. R. Crim. P. 30, which provided in part that "[n]o 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." *United States v. Payne*, 73 M.J. 19, 23 (C.A.A.F. 2014). Of course, if the President had wanted to adopt Fed. R. Crim. P. 30 in the Rules for Courts-Martial, he could have. Comparing Rule 30 with the words contained in R.C.M. 920, it is clear that he did not do so. The Court eventually reviewed the accused's general objections to all the instructions for plain error. *Id.* at 25–26.

In *United States v. Joshua C. Davis*, the Court held that "[t]o the extent that *United States v. Taylor*, 26 M.J. 127 (C.M.A. 1988), holds that an accused's right to a required instruction on findings is not waived (that is,

extinguished on appeal) by a failure to object *without more*, it remains good law." 76 M.J. at 225–26 (emphasis added). Waiver requires affirmative action. *Id.* at 229. The Court did not define the parameters of "without more." The Court stated that its ruling in *Taylor* "held that silence with respect to such required instructions would not be deemed waiver under R.C.M. 920(f)," but did not rule out review for plain error. *Id.* Actually, in *Taylor*, the Court opined that R.C.M. 920(f) applied only to R.C.M. 920(e)(7)–those instructions "properly requested by a party or which the military judge determines, sua sponte, should be given." It did not apply to the mandatory instructions listed in R.C.M. 920(e)(1)–(6). *Taylor*, 26 M.J. at 128. Nonetheless, in *dictum*, the Court overruled *Taylor* to the extent it held that R.C.M. 920(f) did not apply to all required instructions. *Id.* at 230.

Three years later, citing a 1953 military case and two irrelevant federal cases, this Court held that by affirmatively declining to object to the military judge's combined instructions, the accused "waived all objections to the instructions, including in regards to the elements of the offense." *United States v. Nicholas E. Davis*, 79 M.J. 329, 332 (C.A.A.F. 2020) (citing *United States v. Charles E. Smith*, 9 C.M.R. 70, 72 (C.M.A. 1953)). In reaching its conclusion, the Court misinterpreted *Charles E. Smith.* There, the defense counsel "spelled out in detail the constituent elements of larceny" during his closing argument and assured the members that the law officer would later instruct them accordingly. 9 C.M.R. at 71. The law of-

ficer told the members he would not instruct on the elements of the offense, as the defense counsel had already done so correctly, and directed them to specific paragraphs in the *Manual for Courts-Martial*, *id.* at 71–72, copies of which they received for their deliberations. *Id.* at 74 (Latimer, J., concurring). When asked, the defense counsel affirmatively declined to object.

In other words, this Court was unwilling to find error when the defense itself provided the members with appropriate instructions during closing argument, the military judge endorsed the defense's closing argument, and the court members received copies of the *MCM*, which included the instructional information. However, the Court emphasized that its decision was "not to be understood as saying that mere failure to object will constitute a waiver to improper instructions. Nor do we here decide that a complete failure to instruct could be waived by defense." *Id.* at 72. Although framed in terms of waiver, the decision should more appropriately be considered a harmless error case.

The federal cases cited in *Nicholas E. Davis* also do not support the Court's holding. In *United States v. Wall*, part of the judge's instruction explaining the elements of the offense was requested and specifically approved by the defense, making it distinguishable from Appellee's case. 349 F.3d 18, 24 (1st Cir. 2003). The second cited case, *United States v. Billy Dwight Smith, Jr.,* did not even concern required instructions. 531 F.3d 1261 (10th Cir. 2008). There, the Court held that the accused waived an

appellate challenge to the admission of evidence by affirmatively declining to object. *Id.* at 1268.

The concurrence in *Nicholas E. Davis* acknowledged that, consistent with the *Military Judge's Benchbook*, military judges invariably ask counsel whether they object to the proposed instructions. 79 M.J. at 333 (Maggs, J., concurring). Judge Maggs also warned that by answering "no" to the judge's inquiry about objections to the instructions, counsel "waived (and not merely forfeited) any objection to the instructions and that this waiver prevents any review of the instructions." *Id.*

ARGUMENT

The Government argues that the Court of Criminal Appeals should have affirmed Appellee's conviction. It maintains that the lower court erred in concluding that an instructional error occurred at trial and that Appellee did not waive the instruction. The Government asks this Court to vacate the lower court's ruling to remand the case for a rehearing, and to send the case back to the Court of Criminal Appeals to issue a new opinion that aligns with the law as the Government interprets it.

Amicus disagrees. This Court should affirm the lower court's ruling to order remand for a rehearing.

1. This Court should reconsider its waiver of required instructions jurisprudence.

There are strong reasons for this Court to revisit its jurisprudence regarding the waiver of required instructions. First, the analyses in *Taylor*, the initial opinion thoroughly analyzing R.C.M. 920(e), and in *Joshua C. Davis,* the opinion partially overruling *Taylor*, are *dicta*. In both cases, the accused failed to put the affirmative defense "in issue," as required by R.C.M. 920(e)(3). Therefore, neither accused was entitled to an instruction even if requested.

Second, the *Nicholas E. Davis* opinion essentially holds that a required instruction is not truly required—an accused can waive an instruction that the President ordered the military judge to give. This Court should consider whether an accused has the authority to do so.

Third, the Court's holding in *Nicholas E. Davis* renders R.C.M. 920(f) superfluous.

Fourth, much of this Court's jurisprudence since the adoption of the Rules interprets R.C.M. 920(e) and (f) is based on caselaw decided before the Rules were promulgated. This Court should review R.C.M. 920 thoroughly and focus on interpreting the Rules as written.

2. Appellee could not waive the military judge's duty to give the court members required instructions.

The President has decreed that the "military judge *shall* give the members appropriate instructions on findings." R.C.M. 920(a) (emphasis

added). These appropriate instructions "*shall* include" the items listed in R.C.M. 920(e) (emphasis added). The traditional rule is that the term "shall" is to be read as mandatory, and mandatory words create a duty. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 112 (2012).

An accused may have a right to a properly instructed panel under the Due Process Clause of the Fifth Amendment. However, the President also imposed a duty on the military judge to provide the court members with specific instructions contained in R.C.M. 920(e). While the accused may waive the right to specific instructions, he has no authority to waive a duty imposed by the President. Therefore, the Appellee could not waive the instruction on the affirmative defense.

3. Appellee did not waive his objection to the military judge's failure to provide a required affirmative defense instruction.

This Court reviews *de novo* whether the military judge properly instructed the panel and whether the accused preserved an objection for appeal. *United States v. Quezada*, 82 M.J. 54, 57 (C.A.A.F. 2021) (citing *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008)).

The Court has identified two methods of waiving an instruction: (1) through operation of law; or (2) by intentionally waiving the issue. *United States v. Hasan*, 84 M.J. 181, 239 (C.A.A.F. 2024), *cert. denied*, 145 S. Ct. 1470 (2025).

3.1. Appellee did not waive by operation of law.

Waiver by operation of law occurs "when a procedural rule or precedent provides that an objection is automatically waived upon the occurrence of a certain event and that event has occurred." *Id.* (citation omitted). No procedural rule provides for such an automatic waiver of a required instruction when the accused affirmatively declines to object to the military judge's instructions. If the accused affirmatively declines to object, that still constitutes a failure to object, which R.C.M. 920(f) states is forfeiture, not waiver.

As shown in Legal Background, *supra*, this Court's precedent regarding the waiver of required instructions is unsettled. Currently, this Court holds that an accused waives a required instruction by affirmatively declining to object to the military judge's proposed combined instructions, even regarding the elements of the offense. *See Nicholas E. Davis*, 79 M.J. at 329. Although there might be an argument that some required instructions are more important than others, by listing them all as required instructions, the President has decreed that they all be treated equally; the military judge must give them.

3.2. Appellee did not intentionally waive the instruction.

If this Court determines that Appellee was authorized to waive a required instruction, it must address the friction between waiver and forfeiture. By affirmatively declining to object to the military judge's instruc-

tions, did defense counsel waive an affirmative defense instruction or simply forfeit it?

"[W]aiver is the intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733 (1993) (quotation marks and citation omitted); *United States v. Blackburn*, 80 M.J. 205, 209 (C.A.A.F. 2020). Conversely, forfeiture is a "[f]ailure to object to an instruction or to the omission of an instruction before the members close to deliberate." R.C.M. 920(f).

In Appellee's case, the military judge asked counsel whether they were satisfied that he had "correctly, *subject to all the objections and such*, correctly advise the members as all of the substantive law in this case?" *United States v. Ellis*, No. ARMY 20240254, 2025 WL 1400359, at *2 (A. Ct. Crim. App. May 13, 2025) (emphasis added). It is unclear whether the military judge intended to limit his "subject to" to objections explicitly made to his instructions or if it also included objections raised during trial. The defense counsel's response indicated some confusion: "As best we could tell, yes, sir." *Id.* Defense counsel had clearly raised the First Amendment issue during trial, the military judge had considered how to instruct the panel, and then denied the defense's motion for dismissal. While it would have been better practice for the defense counsel to clarify any confusion, this ambiguity should benefit the Appellee.

3.3. This Court's R.C.M. 920 jurisprudence violates the surplusage canon.

"The surplusage canon holds that it is no more the court's function to revise by subtraction than by addition." Scalia & Garner, at 174. In other words, "[i]f possible, every word and every provision is to be given effect." *Id.*; *see United States v. Mendoza*, 85 M.J. 213, 219 (C.A.A.F. 2024); *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017). This Court's opinion in *Nicholas E. Davis* makes R.C.M. 920(f) superfluous, violating this contextual canon for interpreting legal texts.

In accordance with the Military Judges' Benchbook, military judges invariably ask whether the parties object to the instructions provided. *See Nicholas E. Davis*, 79 M.J. at 333 (Maggs, J., concurring). Counsel has three options: object, affirmatively decline to object, or refuse to respond. An objection preserves the issue for appeal. Under *Nicholas E. Davis*, affirmatively declining to object results in waiver. The refusal to respond would likely result in the military judge reprimanding counsel. Nevertheless, refusing to respond now seems to be the only situation in which appellate courts would apply R.C.M. 920(f).

4. The remedy proposed by the Government is unduly restrictive.

The Government seeks a remand for the Court of Criminal Appeals to affirm Appellee's conviction. *Amicus* considers that resolution to be unduly restrictive.

Given its decision to order a remand for a new trial, the Court of Criminal Appeals determined it was unnecessary to address the other two issues raised by Appellee. Unless this Court affirms the lower court's decision to remand for a rehearing, which *Amicus* believes is the correct approach, it should remand to the Court of Criminal Appeals to consider the two additional issues raised by Appellee below.

Conclusion

This Court should reconsider its jurisprudence on R.C.M. 920(e) and (f), restore its original ruling from *United States v. Taylor*, and affirm the decision of the Court of Criminal Appeals to remand for a rehearing. If the Court declines to do so, it should, at a minimum, overrule *United States v. Nicholas E. Davis*, 79 M.J. 332–33, to the extent it holds that an accused's "no objections" to the combined instructions waives a claim of error. Otherwise, the Court should hold that Appellee did not waive his claim that the military judge erred by failing to instruct on the affirmative defense raised.

Respectfully submitted

/s/
James A. Young
Colonel (Ret.), USAF
National Institute of Military Justice
1300 Crystal Dr. # 1601
Arlington, VA 22202
(703) 216-3769
jayoung3@icloud.com
USCAAF Bar No. 19942

/s/
Ann Ching
Clinical Professor of Law
Arizona State University
National Institute of Military Justice
111 E. Taylor Street
Phoenix, AZ 85004-4467
(480) 727-6242
ann.ching@asu.edu

Certificate of Compliance

I certify that this *amicus* brief complies with the maximum length authorized by Rule 26(d) as it contains fewer than 6,500 words, not including front matter, the certificate of compliance, and the certificate of filing and service. This brief complies with the typeface and typestyle requirements of Rule 37. It was prepared using the 14-point EB Garamond font.

/s/
James A. Young
Colonel (Ret.), USAF
National Institute of
Military Justice
1300 Crystal Dr. # 1601
Arlington, VA 22202
(703) 216-3769
jayoung3@icloud.com
USCAAF Bar No. 19942

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means on August 30, 2025, to the Clerk of the Court; counsel for the Government—nicholas.a.schaffer3.mil@army.mil;—Government Appellate Division—usarmy.pentagon.hqda-otjag.mbx.usalsa-gad@army.mil; Counsel for Appellee—eli.m.creighton.mil@army.mil; Defense Appellate Division—usarmy.pentagon.hqda-otjag.mbx.usalsa-dadservice@army.mil

/s/
James A. Young
Colonel (Ret.), USAF
National Institute of
Military Justice
1300 Crystal Dr. # 1601
Arlington, VA 22202
(703) 216-3769
jayoung3@icloud.com
USCAAF Bar No. 19942