IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

United States
Appellee

v.

Staff Sergeant
Onetera G. NELSON
U.S. Air Force
Appellant

Amicus Curiae Brief

Crim. App. Dkt. No. ACM 24042

USCA Dkt. No. 26-0059/AF

Brief of the National Institute of Military Justice in Support of Appellant

March 2, 2026

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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.

Granted Issue

> Whether the defense counsel's mere failure to object when the military trial judge does not execute his *sua sponte* duty to instruct on all reasonably raised defenses amounts to an affirmative waiver of the right to have a panel instructed on all reasonably raised defenses.

Relevance of the Brief

Amicus asks the Court to reconsider its waiver doctrine on required instructions and argues that an accused cannot waive a special defense instruction. If an accused can waive the instruction, she may do so only with the protections afforded to those who waive a lesser included offense instruction. The Court should review for plain error.

Facts

Appellant was convicted of negligent dereliction of duty under Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892. At trial, the military judge asked whether there were any objections to the instruc-

tions, and Appellant's counsel responded that there were none. *United States v. Nelson*, No. ACM 24042, 2025 WL 2993424, at *1 (A.F. Ct. Crim. App. Oct. 24, 2025). On appeal before the Air Force Court of Criminal Appeals, the defense argued that the military judge was required to instruct on the defense of ineptitude in light of evidence that Appellant "had an inability to accomplish her duties because of her mental health issues," and that the judge failed to do so. *Id.* The CCA held that waiver applies "to a military judge's *sua sponte* responsibilities to instruct on affirmative defenses," but that by stating "no objections," the accused affirmatively waived the instruction. *Id.* at *3 (citing *United States v. Nicholas E. Davis*, 79 M.J. 329, 332 (C.A.A.F. 2020)).

Rule for Courts-Martial 920

The President has the authority to prescribe court-martial procedures, "which shall, *so far as he deems practicable*, apply the principles of law ... generally recognized in the trial of criminal cases in the United States district courts." Article 36(a), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 836(a) (emphasis added). Thus, federal court rulings on federal procedural issues, such as waiver and forfeiture, may have only limited application to interpreting the President's Rules for Courts-Martial.

Pursuant to his authority, in 1984, the President prescribed that "the military judge *shall* give the members appropriate instructions on findings." Rule for Courts-Martial (R.C.M.) 920(a) (emphasis added).

(e) *Required instructions*. Instructions on findings *shall* include:

(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.

> (f) Failure to object to an instruction or to omission of an instruction before the members close to deliberate forfeits the objection.

R.C.M. 920.

Since the President prescribed R.C.M. 920 more than four decades ago, this Court has interpreted it in several ways. *See, e.g.*, *United States v. Taylor*, 26 M.J. 127 (C.M.A. 1988) (the defense could not waive a required instruction), *overruled in part by United States v. Joshua C. Davis*, 76 M.J. 224 (C.A.A.F. 2017); *United States v. Strachan*, 35 M.J. 362 (C.M.A. 1992) (required instructions could be affirmatively waived); *United States v. Payne*, 73 M.J. 19 (C.A.A.F. 2014) (equating R.C.M. 920 with Fed. R. Crim. P. 30 despite the difference in the text).

The Air Force Court's decision in this case rests on this Court's most recent interpretation of R.C.M. 920 in *United States v. Nicholas E. Davis*. *Nelson*, No. ACM 24042, 2025 WL 2993424, at *3. There, the 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 regard to the elements of the offense." *Nicholas E. Davis*, 79 M.J. at 332. The Court declined to apply the R.C.M. 920(f) forfeiture provision because the defense counsel had affirmatively declined to object, and the forfeiture provision applied only when the law changed between the trial and the appeal. *Id.*

In 2023, the President amended R.C.M. 920 by adding paragraph (g):

> (g) Instructions on a lesser included offense *shall* not be given when both parties waive such an instruction.... The accused must affirmatively acknowledge that the accused understands the rights involved and affirmatively waive the instruction on the record. The accused's waiver must be made freely, knowingly, and intelligently.

(emphasis added); *see*, Exec. Order No. 14,103, 88 Fed. Reg. 50561 (Aug. 2, 2023).

Argument

1. The military judge erred by failing to give an instruction on a special defense.

The military judge erred because the plain language of R.C.M. 920 mandates that judges instruct the panel on affirmative defenses. Unless a legal text is ambiguous, courts treat the plain language as controlling unless it leads to an absurd result. *United States v. Csiti*, 85 M.J. 414 (C.A.A.F. 2025); *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012) ("The words of a governing text are of paramount concern, and what they convey in their context is what the text means."). The plain language of R.C.M. 920 does not lead to an absurd result; therefore, it should control.

1.1. Standards of Review

Interpreting a Rule for Courts-Martial is a question of law that this Court reviews *de novo*. *United States v. Batres*, 86 M.J. 152, 155 (C.A.A.F. 2025). This Court also reviews *de novo* whether the military judge erred by failing to give a mandatory instruction. *United States v. Schumacher*, 70 M.J. 387, 389 (C.A.A.F. 2011).

1.2. A military judge has an independent and affirmative duty to give a special defense instruction when it is in issue.

"The military judge *shall* give the members appropriate instructions on findings." R.C.M. 920(a) (emphasis added). Those instructions "*shall* include ... (3) A description of any special defense under R.C.M. 916 in issue." R.C.M. 920(e) (emphasis added). A special defense is one in which the accused does not deny committing "the objective acts constituting the offense charged, [but] denies, wholly or partially, criminal responsibility for those acts." R.C.M. 916(a). "Special defenses are also called 'affirmative defenses.'" R.C.M. 916(a) Discussion. "A matter is 'in issue' when some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose." R.C.M. 920(e) Discussion; *see Schumacher*, 70 M.J. at 389 (citing R.C.M. 920(e) definition with approval).

Unless expressly provided otherwise, the rules of construction in 10 U.S.C. § 101 apply to the Rules for Courts-Martial. R.C.M. 103(31) (2024 ed.). The term "'shall' is used in an imperative sense." 10 U.S.C. § 101(g)(1). *See also Shall, Black's Law Dictionary* (12th ed. 2024) ("Has a duty to; more broadly, is required to ....·This is the mandatory sense that drafters typically intend and that courts typically uphold"); Bryan A. Garner, *Garner's Modern American Usage: The Authority on Grammar, Usage, and Style* 446 (3d ed. 2009) (interpreting "shall" as "imperative = commanding, obligatory"). There is no express provision in R.C.M.

920(e) authorizing the use of the term "shall" in any sense other than "an imperative sense."

It is a defense to dereliction in the performance of duty if "the failure to perform those duties is caused by ineptitude rather than by willfulness, negligence, or culpable inefficiency, and may not be charged under this article, or otherwise punished." *Manual for Courts-Martial*, pt. IV, ¶ 16c(3)(d) (2019 ed.). Although "ineptitude" is not listed as a special defense in R.C.M. 916, the Rule "provides an illustrative rather than an exhaustive list of defenses." *United States v. MacDonald*, 73 M.J. 426, 435 (C.A.A.F. 2014). Appellant put the ineptitude defense in issue because "there was evidence Appellant had an inability to accomplish her duties because of her mental health issues." *Nelson*, 2025 WL 2993424, at *1. Therefore, the military judge had a presidentially imposed duty to instruct the members accordingly.

Despite the fact that it was the military judge who failed to obey the President's order to instruct on the special defense in issue, the consequences of that failure fall squarely on the accused. The judge erred, but because the defense counsel also erred, the judge goes free, and the accused gets convicted. Doesn't look much like justice.

1.3. An accused is not authorized to waive a required instruction on special defenses.

"[W]aiver is the intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733 (1993). The President authorized an accused to waive only one of the required instructions: the lesser-included offense instruction. R.C.M. 920(g). Even then, the President imposed strict conditions for that waiver: the *accused* must affirmatively acknowledge understanding the right to the instruction and "freely, knowingly, and intelligently" waive it. R.C.M. 920(g). From the President's limiting the waiver to only one of the required instructions, one can infer that he withheld authority for the accused to waive others. *See* Scalia & Garner, *supra*, at 107 (negative implication canon—*expressio unius est exclusio alterius*).

1.4. Appellant did not waive the ineptitude defense instruction.

Even if Appellant was authorized to waive the instruction, she did not. To determine whether an accused waived, courts must consider the right at stake, whether the accused must personally participate in the waiver, and whether the accused's decision must be informed or voluntary. *Olano*, 507 U.S. at 733.

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

1.4.1. Appellant 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.* (emphasis added) (citation omitted). No procedural rule provides for an automatic waiver of a required instruction when the accused affirmatively declines to object to the military judge's instructions. In fact, R.C.M. 920(f) treats the failure to object as forfeiture, which is analyzed for plain error.

Nevertheless, in *Nicholas E. Davis*, citing a 1953 pre-Rule case and two irrelevant federal cases, this Court held that, by "expressly and unequivocally acquiescing to the military judge's instructions, Appellant waived all objections to the instructions, including in regards to the elements of the offense."[1] 79 M.J. at 332 (quotation marks and citation omitted). In reaching this conclusion, however, the Court failed to conduct an *Olano* analysis. There is no discussion of the procedures that must be followed or of the extent, if any, to which the accused must participate in the waiver.

It is worth noting that this Court recently reviewed a similar forfeiture provision found in R.C.M. 919(c), and held that by failing to object to a findings argument, the accused forfeited the objection, which was review-

[1] "An appellant gets the benefit of changes to the law between the time of trial and the time of his appeal." *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019). At the time of trial, R.C.M. 920(f) provided that failure to object to the omission of an instruction constituted waiver in the absence of plain error. At the time of appeal, R.C.M. 920(f) provided that failure to object forfeits the objection. The Court failed to recognize that change, but it is unclear if it would have changed the resolution of the case. *Nicholas E. Davis*, 79 M.J. 332.

able“only for plain error.” *United States v. Matti*, No. 25-0148, 2026 WL 468928, at *4 (C.A.A.F. Feb. 17, 2026).

1.4.2. Appellant did not intentionally waive the instruction.

Because Appellant made a deliberate effort to present evidence supporting the defense of ineptitude, it is incongruous to believe that Appellant intentionally relinquished the right to a corresponding instruction. This conclusion aligns with R.C.M. 920(g), which authorizes an accused to waive only one mandatory instruction—the lesser-included offense instruction—and only after the accused affirmatively acknowledges understanding the right and knowingly and intelligently waives it. Under Appellant’s circumstances, even if the special defense instruction could be waived, doing so would require at least the same protections the President afforded an accused before an instruction on a lesser-included offense can be waived.

In *Nicholas E. Davis*, both the majority and the concurrence claim that the forfeiture provision of R.C.M. 920(f) applies only when the law changed between the trial and the appeal. 79 M.J. at 732. The Rule’s plain, unambiguous language does not support that interpretation. If the President had wanted to limit R.C.M. 920(f) that way, he would have done so, but he did not.

2. The error materially prejudiced Appellant's substantial rights.

"Failure to object to an instruction or to omission of an instruction before the members close to deliberate forfeits the objection." R.C.M. 920(f). Appellant failed to object to the omission of the instruction. Therefore, this Court should review for plain error—an error that is clear or obvious and results in material prejudice to the substantial rights of the accused. *Matti*, No. 25-0148, 2026 WL 468928, at *4. This is consistent with Article 59(a), UCMJ, 10 U.S.C. § 859(a), which requires material prejudice before a finding may be held incorrect in law.

There appear to be three categories of error: In the first category are errors, such as a faulty beyond a reasonable doubt instruction, *see* R.C.M. 920(e)(5), which are not subject to harmless error analysis because the error "vitiates all the jury's findings," *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993). Second, are other constitutional errors that do not require reversal if the Government can show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 279 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). The third category includes other errors for which the accused bears the burden of establishing material prejudice, *Matti*, 2026 WL 468928, at *4.

This Court need not decide which category this case falls into because the error materially prejudiced Appellant even under category three. To establish material prejudice, Appellant must "show *a reasonable probabili-*

ty that, but for the error," the outcome of the proceeding would have been different. *Molina-Martinez v. United States*, 578 U.S. 189, 194 (2016) (emphasis added) (quotation marks and citation omitted).

Appellant established material prejudice. Ineptitude was, in fact, Appellant's only viable defense, and it is one specifically recognized by the President. *MCM* pt. IV, ¶ 16c(3)(d) (2019 ed.). Without the instruction, the court members were left without direction on the extent, if any, to which they could consider the evidence of ineptitude in their findings deliberations. Under the circumstances, Appellant demonstrated a reasonable probability that, had the military judge properly instructed the court members on the defense of ineptitude, the outcome of the proceeding would have been different.

Conclusion

The President exercised the authority granted him by Congress under Article 36(a), UCMJ, to promulgate R.C.M 920(e)(3), which requires a military judge to *sua sponte* give instructions on special defenses in issue. The military judge in this case failed to perform that presidentially imposed duty, and Appellant could not waive this failure. Even if the Court were to find that Appellant could waive, she did not, and, consistent with R.C.M. 920(f), the Court should review for plain error. Appellant established that the military judge's failure to instruct was clear and obvious er-

ror that materially prejudiced her right to a fair trial. This Court should set aside her conviction without prejudice and remand.

Respectfully submitted

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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.

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Certificate of Filing and Service

I certify that a copy of the foregoing was transmitted by electronic means on March 2, 2026, to the Clerk of the Court; and

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