IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	**BRIEF ON BEHALF OF THE UNITED STATES**
v.	)	Crim. App. No. 24042
Staff Sergeant (E-5), **ONETERA G. NELSON,** United States Air Force, *Appellant*.	)	USCA Dkt. No. 26-0059/AF 17 March 2026

BRIEF ON BEHALF OF THE UNITED STATES

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

ISSUE PRESENTED

WHETHER THE DEFENSE COUNSEL'S MERE FAILURE TO OBJECT WHEN THE MILITARY TRIAL JUDGE DOES NOT EXECUTE HIS *SUA SPONTE* DUTY TO INSTRUCTION ON ALL REASONABLY RAISED DEFENSES AMOUNTS TO AN AFFIRMATIVE WAIVER ON THE RIGHT TO HAVE A PANEL INSTRUCTION ON ALL REASONABLY RAISED DEFENSES.

INTRODUCTION

Appellant's claim of instructional error is based entirely on the faulty premise that ineptitude is an *affirmative* defense to dereliction of duty under Article 92, UCMJ. But ineptitude is not an *affirmative* defense, and no legal authority has ever said that it was, so the military judge was not required to instruct on it absent a request from Appellant. In Appellant's case, trial defense counsel

affirmatively waived the right to contest instructional error by repeatedly affirming that they had no objections to the military judge's proposed instructions and by expressly declining to request additional instructions – demonstrating that this was not a case where counsel merely failed to object. Given that Appellant thrice intentionally relinquished the right to raise instructional error on appeal, waiver applies and there is no issue for this Court to review. Thus, this Court should deny Appellant's claims that the evidence reasonably raised the defense of ineptitude and should affirm the findings and sentence.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(d), UCMJ. This Court has jurisdiction over this matter under Article 67(a)(3), UCMJ.[1]

RELEVANT AUTHORITIES

R.C.M. 916(a) – *In general.* As used in this rule "defenses" includes any special defense which, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly or partially, criminal responsibilities for those acts.

R.C.M. 920(a) – *In general.* The military judge shall give the members appropriate instructions on findings.

[1] References to the punitive articles are to the Manual for Courts-Martial, United States ("MCM" or "the Manual") 2019 edition. All other references to the UCMJ, R.C.M., and Mil. R. Evid. are to the MCM 2024 edition.

R.C.M. 920(e)(3) – *Required Instructions*. Instructions on findings shall include:

(3) A description of any special defense under R.C.M. 916 in issue.

MCM, pt. IV, para. 18.b.(3)(a)-(c) – *Dereliction of Duty Elements*

(a) That the accused had certain duties;
(b) That the accused knew or reasonably should have known of the duties; and
(c) That the accused was (willfully) (through neglect or culpable inefficiency) derelict in the performance of those duties.

MCM, pt. IV, para. 18.c.(3)(c) – *Derelict*. A person is derelict in the performance of duties when that person willfully or negligently fails to perform that person's duties or when that person performs them in a culpably inefficient manner. "Willfully" means intentionally. It refers to the doing of an act knowingly and purposely, specifically intending the natural and probable consequences of the act. "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. Culpable inefficiency is inefficiency for which there is no reasonable or just excuse.

MCM, pt. IV, para. 18.c.(3)(d) – *Ineptitude*. A person is not derelict in the performance of duties 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. For example, a recruit who has tried earnestly during rifle training and throughout record firing is not derelict in the performance of duties if the recruit fails to qualify with the weapon.

STATEMENT OF THE CASE

Appellant rejected an offer for non-judicial punishment under Article 15, UCMJ, and opposed a motion for a summary court-martial. (*First Indorsement to the Charge Sheet*, ROT, Vol. 1.) As a result, charges were preferred and referred to a special court-martial. (JA at 8-9). A panel of members found Appellant guilty

of one charge and the following two specifications of dereliction of duty in violation of Article 92, UCMJ:

> Specification 2
>
> Who should have known of her duties at or near Tyndall Air Force Base, Florida, on or about 18 July 2023, was derelict in the performance of those duties in that she negligently failed to update the facility folders on the office share drive as instructed by Technical Sergeant [DH], as it was her duty to do.
>
> Specification 3
>
> Who should have known of her duties at or near Tyndall Air Force Base, Florida, between on or about 7 July 2023 and on or about 8 July 2023, was derelict in the performance of those duties in that she negligently failed to follow instructions given to her by Technical Sergeant [DH] by marking five inspections as complete on Defense Occupational and Environmental Health Readiness System without review by Technical Sergeant [DH], as it was her duty to do.

(JA at 11.) The panel acquitted Appellant of one specification of dereliction of duty in violation of Article 92, UCMJ, (Specification 1) and one charge and two specifications of making a false official statement in violation of Article 107, UCMJ. The military judge sentenced Appellant to a reprimand. (JA at 12.) The convening authority took no action on the findings or sentence. (Id.)

STATEMENT OF THE FACTS

Appellant's request for a mental health examination

Prior to Appellant's court-martial, trial defense counsel submitted a motion for appropriate relief requesting that the military judge order a mental examination under R.C.M. 706(b)(2) (JA at 15.) In the motion, trial defense counsel stated there was "reason to believe that [Appellant] lacked mental responsibility to commit the charged offenses and lacks capacity to stand trial." (Id.) Trial counsel did not object to the examination, and the military judge granted the motion. (JA at 19, 21-22.) A sanity board convened and made the following findings:

> a. At the time of the alleged criminal conduct, did [Appellant] have a severe mental disease or defect? The term "severe mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, or minor disorders such as nonpsychotic behavior disorders and personality defects. **No**
>
> b. What is the clinical psychiatric diagnosis?
>
> F43.23 Adjustment Disorder with Mixed Anxiety and Depressed Mood
>
> F88 Other Specified Neurodevelopmental Disorder with Processing Speed and Working Memory Deficits
>
> c. Was [Appellant], at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his or her conduct? **No**

> d. Is [Appellant] presently suffering from a mental disease or defect rendering her unable to understand the nature of the proceedings against her or to conduct or cooperate intelligently in the defense? **No**

(JA at 23.)

Appellant became the Non-Commissioned Officer in Charge (NCOIC) of Food and Public Facility Sanitation

During the trial on the merits, Technical Sergeant (TSgt) DM and TSgt DH, Appellant's leadership, testified about Appellant's duties and her role in Community Health. Community Health was part of the 325th Operational Medical Readiness Squadron, Public Health Unit that oversaw preventative medicine for the entire installation at Tyndall AFB. (JA at 152-53.) Prior to June 2023, Appellant was the Community Health NCOIC. (JA at 212.) On 1 June 2023, TSgt DH returned from maternity leave and took over as the NCOIC of Community Health element. (JA at 210.) Appellant then became the NCOIC of the Food and Public Facility Sanitation – a division within Community Health – primarily responsible for all food and public facility inspections for the installation. (JA at 162, 212.) As the NCOIC of Community Health, TSgt DH was Appellant's direct supervisor. (JA at 211-12.) When TSgt DH returned from maternity leave, she took over the section because she outranked Appellant. (JA at 180.)

Appellant was aware of her new tasks at the Food and Public Facility Sanitation because she would do them as the NCOIC of Community Health prior

to June 2023. (Id.) TSgt DH's arrival to the unit relieved Appellant of some of her responsibilities, but she maintained a small portion of what duties she had previously as the NCOIC of Community Health. (Id.)

Appellant's new role included administrative tasks, such as record keeping for all food and public facility inspections for the installation. (JA at 212.) Appellant was responsible for keeping hard copies of inspection documents and maintaining an electronic folder in the office shared drive for each food facility on the installation containing inspection documents. (JA at 212-13.) These folders were viewed by the Community Health NCOIC and other leadership regularly. (JA at 212.) Appellant was also responsible for inputting data in the "Defense Occupational and Environmental Health Readiness System" ("DOEHRS IH") – also reviewed by leadership. (JA at 34, 213.)

Appellant failed to keep facility folders up to date (Specification 2)

TSgt DH testified that once she joined Community Health, she had a discussion with her leadership that outlined Appellant's duties to have all inspections printed as a hard copy, saved in the facility folder drive, and contained within the DOEHRS IH system. (JA at 215.) TSgt DH also explained that her leadership made Appellant aware of these duties prior to TSgt DH's arrival to the Community Health Unit. (Id.) Still in June 2023, TSgt DH had to remind Appellant of these duties even though Appellant was aware of them before

TSgt DH joined Community Health. (JA at 214.) TSgt DH sent two e-mails – one on 13 June 2023 and another on 30 June 2023 – to Appellant about following up about inspections that were not contained in the applicable facility folders in the shared drive. (JA at 24, 26.)

Around June 2013, when TSgt DH reviewed the inspection log for the inspection folders, she found "holes and gaps." (JA at 215.) For example, the inspection log showed that an inspection was completed, but then the facility folder on the shared drive would not have the associated inspection documents. (Id.) TSgt DH tasked Appellant to review the 2023 inspection folders to determine "what inspections were officially missing." (Id.) Appellant told TSgt DH that there were no missing inspections even though documentation was not "showing in the drive" and in the physical folder. (JA at 215-16.) TSgt DH reminded Appellant via e-mail in July 2023 that she needed to update the facility folders in the drive. (JA at 38.) TSgt DH noted that in the shared drive, there were 13 food facility folders that had incomplete documentation that Appellant failed to update. (Id.)

Appellant failed in her duties by improperly marking inspections on DOEHRS IH as complete before TSgt DH completed leadership review (Specification 3)

TSgt DH testified that Appellant was instructed and trained to get a quality control check from leadership prior to marking inspections as complete in the DOEHRS IH system. (JA at 222.) This duty was also documented in an e-mail

dated 7 July 2023 where TSgt DH told Appellant, "before marking inspection as 'complete,' please allow me to review first as you can't make changes after." (JA at 34.) TSgt DH explained that once information was submitted on DOEHRS IH, she could not make edits, which is why Appellant was instructed to get a quality control check prior to submitting anything on DOEHRS IH as complete. (JA at 223.) Appellant was trained on this protocol on more than one occasion. (JA at 223.) Appellant was familiar with the system because she was previously tasked with building the DOEHRS IH system, and she was going to provide training to the flight on how to use DOEHRS IH. (JA at 223.)

On 8 July 2023, upon reviewing the DOEHRS IS system, TSgt DH noticed that five inspections were marked as complete even though TSgt DH had not conducted a leadership quality control check. (JA at 224-25.) In an e-mail sent the same day, TSgt DH told Appellant that five inspections were marked as complete that TSgt DH did not review.

Appellant did not want to work under TSgt DH's supervision

TSgt DH testified that she went to great lengths to communicate and support Appellant through daily "morning huddles," multiple e-mail threads, and phone calls. (JA at 24-40, 218.) Rather than asking for help or accepting TSgt DH's offers to help, Appellant would insist "Yes, it's done" and "I got it. Everything's good." (JA at 218-19.) And when TSgt DH asked Appellant to see her taskers,

Appellant would tell TSgt DH "no." (JA at 219.) TSgt DH described that she would be "shooed away" by Appellant, and Appellant would slam the door on TSgt DH on multiple occasions. (JA at 219, 237.)

TSgt DM, the Public Health Flight Chief, testified that in July 2023, he, Appellant, and TSgt DH met to discuss Appellant's performance issues. (JA at 161.) At that meeting, TSgt DM asked Appellant if "[TSgt DH] [was] the reason why she is not doing her work." (JA at 162.) In response, Appellant "shook her head yes." (Id.) TSgt DH's testimony elaborated on Appellant's response and explained that Appellant "nodded her head up and down and began sobbing, and then started talking about how she felt that everything was being taken away from her and that [Appellant] didn't want to work for [TSgt DH]." (JA at 252.)

At this meeting, TSgt DH also recalled Appellant saying that she was able to complete her job when TSgt DH did not micromanage her. (JA at 251.) TSgt DH testified that TSgt DM told Appellant that TSgt DH did not micromanage Appellant but held her accountable and up to standards by assigning "suspenses" and "tasks." (JA at 251.)

Also at this meeting, Appellant asked if there was a way to "get [TSgt DH] out of the element." (JA at 252.) This request was denied, and as a result, Appellant asked to be moved out of the unit and out of the military. (JA at 252.)

Appellant's mental health concerns

At trial, Appellant testified that her commander directed a mental health evaluation on 7 June 2023. (JA at 297.) Appellant then had six follow-up mental health appointments from 7 June 2023 to 8 July 2023. (Id.) So, there was at least six days that Appellant was not present for duty. (Id.)

Appellant testified that her mental health improved once she moved "to a different assignment." (JA at 300.) When asked how she was doing in the different assignment, Appellant responded, "I'm doing great. Excellent." (Id.) Appellant explained that she was able to accomplish all of her tasks at this new assignment. (Id.) Moving assignments helped her mental health. (Id.)

Appellant's leadership was aware of Appellant's mental health issues. TSgt DM testified that Appellant's mental health issues were ongoing since early 2023. (JA at 179.) TSgt DH was not aware that Appellant had a mental health disorder but was aware that Appellant had been to the mental health clinic. (R. at 193.)

Defense's theory of the case

Trial defense counsel's opening statement stated that Appellant "suffers from mental disorders; that she is having a rough go of things," but trial defense counsel never once equated her mental health struggles to ineptitude, lack of ability or skills, or even mentioned the word ineptitude. (JA at 150.) In closing argument, trial defense counsel argued that TSgt DH should have known that Appellant was

suffering with mental health issues. (JA at 344.) Thus, TSgt DH should have been aware that Appellant's would miss entire days of work due to mental health appointments instead of "hammering those tasks keeping a record of it." (Id.) So the crux of the defense's theory of the case was highlighting the lack of good leadership, given that TSgt DH burdened Appellant with a heavy task load, an "ever-growing list," that Appellant was "chipping away at." (Id.) Trial defense counsel further argued that leadership should have assisted Appellant in getting tasks completed rather than sending e-mails reminding Appellant that they have not been completed:

> Maybe [TSgt DH] should have spent that time as a leader in the Air Force helping get these tasks done if they are so important as we heard her say they are. If they are so important, why are you sending an e-mail reminding [Appellant] that they haven't been completed rather than just helping her get them done if, in fact, they are so important.

(JA at 345.) Trial defense counsel argued that Appellant did not have the "opportunity to get all these tasks done" and did not have enough time "to meet unrealistic expectations that were exclusively her's." (JA at 347.)

Finally, trial defense counsel summarized the defense's theory as follows:

> To summarize everything, this case is about conduct of [Appellant] from basically 1 June until the middle of July. It all has to concern with these tasks she is required to get done, this paper trail that created, these mental health evaluations and the treatment that followed up, and how there is no grace. When you've identified an issue with an

> airman the [course of action] is to hammer them with e-mail, tasks, create the paper trail, and publish [sic] them. That is what happened in this case.

(JA at 350.)

Findings Instructions

The military judge engaged in the following colloquy with counsel regarding findings instructions:

> MJ: Does either side have any objection to those instructions? Trial Counsel?
>
> TC: No, Your Honor.
>
> MJ: Defense Counsel?
>
> DC: No, sir.
>
> MJ: What other instructions do the parties request? Trial Counsel?
>
> TC: None, sir.
>
> DC: No additional instructions, sir.

(JA at 314-15.) Next, the military judge gave the parties about a 30-minute recess to review thoroughly and print the draft instructions. (JA at 317-19.) After the recess, and after the written instructions were marked as Appellate Exhibit XIV (JA at 316), the military judge provided one last opportunity for changes before instructing the members:

> MJ: Counsel, have you all had an opportunity to fully review Appellate Exhibit XIV? Trial Counsel?

TC: Yes, Your Honor.

DC: Yes, Your Honor.

MJ: Any objections to Appellate Exhibit XIV? Trial Counsel?

TC: No, Your Honor.

MJ: Defense Counsel?

DC: No, Your Honor.

(JA at 319.) The military judge proceeded to instruct the members with no objections from either party. (JA at 322.)

SUMMARY OF THE ARGUMENT

The military judge was not required to give the instruction on his own initiative because ineptitude was not an "affirmative" or "special" defense. Under R.C.M. 920(e)(3), a military judge's *sua sponte* duty to instruct applies only to special defenses listed in R.C.M. 916. R.C.M. 920(e)(3). An affirmative defense, also known as a "special defense" under R.C.M. 916(a), does not deny the accused committed the objective acts constituting the offense charged, but instead "denies, wholly or partially, criminal responsibility." Ineptitude, unlike an affirmative defense, is a "negative" or "failure of proof" defense because it negates a required element of negligent dereliction of duty – specifically that the accused is negligently derelict. MCM, pt. IV, paras. 18.b(3)(c) and 18.c.(3)(d). Ineptitude is not a defense that challenges an accused's criminal culpability when the

prosecution otherwise proves every element of the offense. In essence, if ineptitude applies, the prosecution has not met its burden of proving every element of the offense under Article 92, UCMJ. Because ineptitude is not a special defense, much less one listed in R.C.M. 916, the military judge had no *sua sponte* duty to instruct on it. The military judge did not err, much less plainly err, in failing to instruct on ineptitude.

Assuming that ineptitude was an affirmative defense, this Court has held that an accused can still affirmatively waive required instructions, which Appellant did here. United States v. Davis, 76 M.J. 224, 229 n.6 (C.A.A.F. 2017). Appellant affirmatively waived any right to challenge the omitted instruction. On three separate occasions during the trial, trial defense counsel stated that they either had no objection or did not request "additional instructions." (JA at 314-15, 319.) These statements constituted an intentional relinquishment of a known right and not a mere failure to object, as supported by this Court's recent decision in United States v. Malone, 2026 CAAF LEXIS 62 (C.A.A.F. 20 January 2026).

Even if this Court finds that ineptitude was an affirmative defense and required instruction and that Appellant did not waive the instruction, Appellant has not met her burden under the plain error standard. Davis, 76 M.J. at 229. There was no plain and obvious error because the evidence at trial did not reasonably raise the defense of ineptitude requiring the military judge to *sua sponte* instruct.

Appellant acted with defiance and lack of integrity rather than making honest efforts to complete her assigned duties that she was already experienced in accomplishing. (JA at 180, 250.) Assuming error, it was harmless beyond a reasonable doubt because even without the instruction of ineptitude, Appellant was still able to set forth a defense that primarily blamed poor leadership and mental health struggles. (JA at 345, 350.) Even if the members were instructed on ineptitude, they still would have convicted Appellant because the evidence did not show that she was inept. Thus, the failure to instruct did not contribute to the verdict, and any error was harmless beyond a reasonable doubt. Accordingly, this Court should affirm the findings and sentence.

ARGUMENT

BECAUSE THE DEFENSE OF INEPTITUDE WAS NOT AN AFFIRMATIVE DEFENSE AND NOT LISTED IN R.C.M. 916, THE MILITARY JUDGE DID NOT HAVE A *SUA SPONTE* DUTY TO INSTRUCT THE MEMBERS ON IT. REGARDLESS, TRIAL DEFENSE COUNSEL AFFIRMATIVELY WAIVED ANY INSTRUCTIONAL ERROR.

Standard of Review

"This Court reviews de novo whether an accused has waived an issue." Malone, 2026 CAAF LEXIS 62, at *7. "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is

the intentional relinquishment or abandonment of a known right." United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009) (quoting United States v. Olano, 507 U.S. 725, 733 (1993)). While this Court reviews forfeited issues for plain error, this Court cannot review waived issues because a valid waiver leaves no error for a court to correct on appeal. United States v. Campos, 67 M.J. 330, 332 (C.A.A.F. 2009). Whether a required findings instruction was "reasonably raised by the evidence" at trial is a question of law that this Court reviews de novo. Davis, 76 M.J. at 229.

When an accused fails to preserve an "instructional error by an adequate objection or request," this Court reviews for plain error. Id. at 229. Under the plain error standard, the burden is on the appellant to prove: (1) there was an error, (2) that the error was clear or obvious, and (3) the error caused material prejudice to the appellant's substantial rights. Id. at 230.

Law and Analysis

A. The military judge did not have a *sua sponte* duty to instruct on ineptitude because it was not an affirmative defense, and was not listed in R.C.M. 916.

R.C.M. 920(e)(3) provides that required instructions include "[a] description on any special defense under R.C.M. 916 in issue." Special defenses are also called "affirmative defenses." R.C.M. 916(c), Discussion. As a result, a military judge has a *sua sponte* duty to instruct on an *affirmative defense* under R.C.M. 916

if that affirmative defense is reasonably raised by the evidence. United States v. Barnes, 39 M.J. 230, 232 (C.M.A. 1994) (emphasis added).

1. Affirmative defenses are legally distinct from other defenses.

An affirmative defense is a "defendant's assertion of facts and argument that if true, will defeat" the prosecution's claim that an accused is guilty of an offense "even if all the allegations are true." Black's Law Dictionary 528 (11th ed. 2019). In Black's Law Dictionary, an affirmative defense is contrasted with a "negative defense" or "general offense" which are defined respectively as "[a] defendant's outright denial of the plaintiff's allegations without additional facts pleaded by way of avoidance," and "[a] denial in broad terms of at least one element in a complaint or charge." Id. at 528, 530, 826.

This Court explained the difference between an affirmative defense and a "substantive law defense" – in United States v. Curry, 38 M.J. 77 (C.M.A. 1993). In Curry, the Court used the defense of accident as an example to distinguish between the two. The Court noted that accident, although listed as a defense, "is in reality, merely the absence of mens rea." Id. at 80 (citing W. LaFave & A. Scott, Substantive Criminal Law § 1.8(c) (1986) (other internal citations omitted)). While accident is "loosely called an 'affirmative defense,' [it] is more accurately a 'substantive law defense which negates guilt by cancelling out' one or more mens rea components." Id. at 80. A claim of accident attacks an element of the offense

and therefore the defense "cannot exist side by side with the Government's prima facie case." Id. at 80 n.4. In other words, in affirmative defense can co-exist where the government has proven all elements of the offense. And similarly, this Court has noted that some "defenses" are not affirmative defenses, but "simply element rebuttal." United States v. Berri, 33 M.J. 337, 343 (C.M.A. 1991).

Other jurisdictions have recognized similar distinctions between affirmative defenses and other defenses. Other defenses are sometimes referred to as a "failure of proof defense." *See* W. LaFave, Substantive Criminal Law § 9.1(a) (2d ed. 2003). A failure of proof defense does "not provide an independent basis for escaping criminal liability, but arises when a defendant introduces evidence that tends to show that the prosecution has failed to prove some element of the charged offense beyond a reasonable doubt." United States v. Jumah, 493 F.3d 868, 873 (7th Cir. 2007). A failure of proof defense does not excuse conduct but rather puts the prosecution to its burden of proving each element of an offense beyond a reasonable doubt. Id. at 873-74. On the other hand, affirmative defenses "excuse conduct otherwise punishable without controverting the evidentiary sufficiency of the Government's proof of the elements of the underlying offense." Id. at 874. While not terming other defenses "failure of proof defenses" per se, the Ninth Circuit Court of Appeals clarified that classic affirmative defenses, such as self-defense and necessity, do not negate any elements of the crime but rather provide

justification or excuse that bars criminal liability. United States v. Sandoval-Gonzalez, 642 F.3d 717, 723 (9th Cir. 2011). Other "defenses" "are advanced simply to negate an element of a crime." Id. And the Seventh Circuit has recognized that with respect to some offenses, self-defense might be a "negative defense" rather than an "affirmative defense," if the successful assertion of self-defense serves to negate an element of the crime, rather than to justify or excuse the defendant's conduct. Brown v. Eplett, 48 F.4th 543, 554 (7th Cir. 2022).

The distinction between an affirmative defense and other defenses is fundamental in criminal law. United States v. Williams, 836 F.3d 1, 13 (D.C. Cir 2016). For example, if an element is missing, such as malice aforethought, an accused could not have been guilty of second-degree murder, and therefore an affirmative defense would not apply because the prosecution did not prove all elements of the offense. Id. On the other hand, the conduct of an accused who knowingly and purposely killed in self-defense still met all the elements of murder, but the accused was not criminally liable because his actions were justified as self-defense – a well-established affirmative defense. Id. Following the practice of other federal courts, this Court should reaffirm, as it recognized in Curry and Berri, that when a defense merely challenges an element of an offense, it is not an affirmative defense.

2. The defense of ineptitude is not an affirmative defense.

The military judge had no *sua sponte* duty to instruct on ineptitude – especially under a plain error standard – because ineptitude negated the "negligent dereliction" element of negligent dereliction of duty and therefore was not an affirmative defense. A person is not derelict in the performance of his or her duties if the failure was caused by ineptitude rather than by willfulness, negligence, or culpable inefficiency. MCM, pt. IV, para. 18.c.(3)(d). The Manual's description of ineptitude confirms that this defense is not an affirmative defense because ineptitude negates the negligent dereliction element required under MCM, pt. IV, para. 18.b.(3)(c). This Court has clarified that ineptitude applies when someone "earnestly tried," demonstrated "honest effort," or "zealously applied himself," but was still inefficient. United States v. Powell, 32 M.J. 117, 121 (C.M.A. 1991). To that end, an ineptitude defense negates the mens rea component of dereliction of duty because at the very least, the accused's intention was a positive one and not one caused by willfulness, negligence, or culpable inefficiency.

R.C.M. 916 states that the term "defenses" as used in the rule includes "any" affirmative defense "which, although not denying that the accused committed the objective acts constituting the offense charge, denies wholly or partially, criminal responsibility for those acts." The defense of "ineptitude," as relevant to negligent dereliction of duty, does not meet this definition. According to the Manual,

"'Negligently' means an act or omission of a person which exhibits a lack of that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances." MCM, pt. IV, para. 18.c.(3)(c). An assertion of ineptitude does not admit the accused committed the objective acts that constitute the charged offenses – it asserts that the accused did *not* commit the "act or omission . . . which exhibits a lack of that degree of care which a reasonable prudent person would have exercised." Id. Rather than admitting to committing the charged offense, "ineptitude" challenges the element that the accused was "through neglect derelict in the performance of those duties." Id. Indeed, the Manual's explanation of ineptitude states that a recruit "who earnestly tries" but fails to quality with a weapon "*is not derelict*," which is a required element (and the actus reus) of the offense. MCM, pt. IV, para. 18.c(3)(d) (emphasis added). Given that ineptitude does not admit that the accused committed the "negligent dereliction" that constitutes the offense, it is failure of proof or negative defense attacking an element, rather than an affirmative defense. Significantly, Powell, the seminal case from this Court on ineptitude, never characterized ineptitude as an *affirmative* defense. 23 M.J. at 120-21. Accordingly, consistent with the Manual, precedent, and federal case law, ineptitude is not an affirmative defense because it negates an element of an offense.

Unlike other punitive articles, which list affirmative defenses in the President's enumerations, Article 92, UCMJ, does not identify ineptitude as an affirmative defense. For example, for drunkenness and other incapacitation offenses under Article 112, UCMJ, the Manual outlines that an accused's lack of knowledge of the duties assigned is an "affirmative defense." MCM, pt. IV, para. 49.c.(2)(b). Likewise, for offenses of making, drawing, or uttering check, draft, or order without sufficient funds under Article 123a, UCMJ, the Manual mentions honest mistake as an "affirmative defense." MCM, pt. IV, para. 70.c.(18); *see also* MCM, pt. IV, para. 99.c.(4) (recognizing that legal separation is an affirmative defense for extramarital sexual conduct offenses under Article 134, UCMJ).

The language of the Manual explaining ineptitude reveals that it is not an affirmative defense. If ineptitude was an affirmative defense, the Manual would say so like it does for other enumerated articles. The canon of statutory interpretation "expressio unius est exclusio alterius" – the expression of one thing implies the exclusion of other – applies "when the items expressed are members of an 'associated group of series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003) (quoting United States v. Vonn, 535 U.S. 55, 56 (2002)). Thus, had the President wanted to classify ineptitude as an affirmative defense – an associated group of defenses – he would have mentioned it in his

enumerations contained in the Manual. Under this textualist approach of expressio unius, this Court should find that the plain language controls and ineptitude is not an affirmative defense. *See* United States v. Lewis, 65 M.J. 85, 88 (C.A.A.F. 2007) ("We use well-established principles of statutory construction to construe provisions in the Manual for Courts-Martial.").

Appellant and amicus noted that R.C.M. 916 is not an exhaustive list of all affirmative defenses. (App. Br. at 12, Amicus Br. at 7.) But both pleadings overlook the distinction between an affirmative defense and other defenses. Neither party has offered any justification for why ineptitude should be treated as an affirmative defense. Even Appellant's arguments agree that ineptitude would have negated the mens rea requirement. Specifically, Appellant argues that her "mental health struggles negatively affected her ability to carry out her duties, thus making her inept, rather than *negligent*." (App. Br. at 13) (emphasis added.) The plain reading of Appellant's arguments supports the notion that ineptitude negates an element of an offense.

The rationale for requiring military judges to instruct on affirmative defenses does not extend to other, non-affirmative defenses like ineptitude. Instructions on affirmative defenses are required because the lack of such an instruction could result in a wrongful conviction. Unlike negative or failure of proof "defenses," "affirmative defenses" functionally add additional essential elements of proof the

government must negate for an accused to be held criminally culpable. *See* United States v. McDonald, 78 M.J. 376, 379 (C.A.A.F. 2019); Barnes, 39 M.J. at 233 (holding a military judge had a duty to instruct on an affirmative defense because without such an instruction, and with no dispute over a crime's statutory elements, the court members had no choice but to convict the accused). These defenses have also been called "offense modification" defenses because "the actor has apparently satisfied all elements of the offense charge," but yet "has not in fact caused the harm or evil sought to be prevented by the statute defining the offense." LaFave, Substantive Criminal Law, § 9.1(a)(2) at 6 (quoting Paul Robinson, Criminal Law Defenses, §23 (1984)). The point is that instruction on these affirmative defenses may be required as a matter of due process – to ensure only a legally culpable accused is convicted.

For Appellant, no such constitutional concern was at issue. Neither the origins nor purpose for instructing on affirmative defenses lend support for requiring instruction on a "defense" that merely negates an element required by the definition of the offense. Appellant's court members could only convict her if they found Appellant negligently failed to complete her duties. In other words, the court members could not convict Appellant if the evidence showed she failed to complete her duties because she was inept and lacked the requisite skills and ability, rather than because she was negligently derelict and failed to exercise the

due care a reasonably prudent person would. But the members were already instructed that they could not find Appellant guilty unless the government proved all elements beyond a reasonable doubt (JA at 331) so there was no due process requirement to tell them essentially the same thing through an instruction on ineptitude.

In sum, the defense of ineptitude was not a required instruction because it was not an affirmative defense. Even if it was, it was not an affirmative defense listed in R.C.M. 916, triggering the military judge's duty to instruct under R.C.M. 920(e)(3). And Appellant has cited no other authority saying that the defense of ineptitude, specifically, is a required instruction if raised by the evidence. *Cf.* United States v. Torres, 74 M.J. 154, 158 (C.A.A.F. 2015) (holding that a military judge should instruct on the affirmative defense of automatism if reasonably raise by the record, even though automatism is not listed in R.C.M. 916). If Appellant wanted an ineptitude instruction, she should have asked for it. *See* United States v. Smith, 34 M.J. 341, 342 (C.A.A.F. 1992) (finding that an accused is entitled to the good military character instruction – not listed in R.C.M 916 – upon request). The military judge did not have a *sua sponte* duty to give this instruction.

In the end, this Court should keep in mind that, in this appeal (assuming no waiver), the military judge's actions are analyzed for plain error. There can be no plain and obvious error in failing to instruct on ineptitude where ineptitude is not

listed as an affirmative defense in R.C.M. 916, is not termed an affirmative defense under Article 92, UCMJ, is not called an affirmative defense in Powell, does not meet the description of an affirmative defense in R.C.M. 916(a), and where Appellant cites no other legal authority saying ineptitude is a *required* instruction. The military judge thus did not plainly err by failing to instruct the panel of the defense of ineptitude, which was never a requested instruction by either party at trial.

B. Appellant affirmatively waived any claims of instructional error.

"Waiver extinguishes an issue, and as a result, the issue cannot be reviewed on appeal." Malone, 2026 CAAF LEXIS 62, at *8 (internal citations omitted). "Waiver can occur either by a party's intentional relinquishment or abandonment of a known right or by operation of law." Id. An "intentional relinquishment or abandonment of a known right" is an express waiver and occurs by affirmative action by the accused or accused's counsel. Id. at *9.

An affirmative statement that an accused has "no objection" or modifications to instructions generally "constitutes an affirmative waiver of the right or admission at issue." United States v. Swift, 76 M.J. 210, 217 (C.A.A.F. 2017) (citation omitted). "[A]s a general proposition of law, 'no objection' constitutes an affirmative waiver of the right or admission at issue." Malone, 2026 CAAF LEXIS 62, at *9 (citing United States v. Ahern, 76 M.J. 194, 198 (C.A.A.F.

2017)). An intelligent waiver depends "upon the particular facts and circumstances surrounding that case." Id. at *10.

An accused can waive his right to later challenge a military judge's instructions by affirmatively declining to object to the military judge's instructions and by declining to request additional instructions. United States v. Davis, 79 M.J. 329, 331 (C.A.A.F. 2020). Accused's can even waive all objections to instructions that relate to the elements of the offense, by "'expressly and unequivocally acquiescing' to the military judges' instructions." Id. Further, "even if an affirmative defense is reasonably raised by the evidence, it can be affirmatively waived by the defense." United States v. Gutierrez, 64 M.J. 374, 376 (C.A.A.F. 2007) (citing Barnes, 39 M.J. at 233 (C.M.A. 1994)).

Much of Appellant's argument seems premised on the idea that the rules for finding waiver of instructions should be more stringent for required instructions on affirmative defenses than for other instructions. (App. Br. at 29-34.) Since ineptitude is not an affirmative defense, and therefore not a required instruction, there is no reason to apply a heightened rule for finding waiver. But even if ineptitude were a required instruction, for the following reasons, Appellant affirmatively and unequivocally acquiesced to the military judge's instructions in a manner such that waiver should apply.

1. Trial defense counsel knew of the right to seek an instruction on ineptitude.

When reviewing the merits of a waiver issue, this Court first determines whether there was a "known right." Malone, 2026 CAAF LEXIS 62, at *12-13. The right at issue here was the defense of ineptitude instruction.

In Malone, this Court considered the following factors to find that the appellee knew of the "known right" to raise multiplicity as a ground for dismissal of specifications: (1) competent counsel would know that R.C.M.s plainly state that multiplicity is a ground for dismissal of specifications; (2) competent counsel would not overlook a potentially meritorious multiplicity claim; (3) the "savings clause" in the plea agreement contemplated that "one or more specifications [may be] amended, consolidated, or dismissed;" and (4) competent counsel would have discussed with his client the advantages and disadvantages of seeking to dismiss specifications on multiplicity grounds. Id. at *13-14.

Although Appellant's case is factually distinct from Malone in that Appellant did not enter into a plea agreement, and there was no issue of multiplicity, Malone is still instructive to demonstrate that Appellant knew of a "known right." Like multiplicity – which is listed as a ground for dismissal in the Rules for Courts-Martial – ineptitude is also mentioned in the Manual, but in the President's enumerations of the dereliction of duty offense as a reason why an accused might not be guilty of the offense. Thus, competent counsel would know

that ineptitude is a defense plainly articulated in the Manual that negated a mens rea element for dereliction of duty.

Based on these circumstances, this Court should conclude that Appellant knew of the right to seek an instruction on ineptitude.

2. Defense counsel intentionally relinquished the right to request an instruction on the defense of ineptitude.

After determining whether there was a "known right" in Malone, this Court determines whether an appellant "intentionally relinquished" that right. Malone, 2026 CAAF LEXIS 62, at *16. The particular facts and circumstances of this case show that Appellant intelligently and affirmatively waived a "known right." Trial defense counsel, along with trial counsel, had three opportunities to raise concerns with the military judge's findings instructions. First, the military judge asked if either party had any objection to the instructions, to which trial defense counsel responded, "No, sir." (JA at 314.) Second, the military judge asked, "what other instructions do the parties request?" to which trial defense counsel responded, "No additional instructions, sir." (JA at 314-15.) Third and lastly, the military judge gave the parties a thirty-minute recess to thoroughly review the written findings instructions, and after the recess the military judge asked once again asked whether any party had "any objections to Appellate Exhibit XIV," (written findings instructions) and trial defense counsel responded, "No, Your Honor." (JA at 319.)

In all, trial defense counsel made three affirmative statements that waived instructional error.

The scenario here is akin to those cases where a defense counsel responds, "no objection" "to a proposed legal action," which this Court has "consistently held that this constitutes an 'intentional relinquishment.'" Malone, 2026 CAAF LEXIS 62, at *16 (citing cases where "no objection," defense counsel's agreement with the military judge's proposal, failure to allege ineffective assistance of counsel (IAC) along with defense counsel's statement of "no objection," and " no changes" were affirmative statements or actions constituted an "intentional relinquishment" of a "known right"). This concept is further supported by federal cases. *See* Lawn v. United States, 355 U.S. 339, 353 (1958) (finding that an affirmative statement that the defense had "no objection" was a conscious and intentional waiver of all objections to admission of documents in evidence); United States v. Natale, 719 F.3d 719, 729-30 (7th Cir. 2013) ("Ordinarily, we treat an affirmatively stated 'no objection' to a jury instruction as a waiver."); United States v. Booker, 57 F3d 506, 511 (8th Cir. 2009) (finding waiver when defense counsel stated he had no objection to a jury instruction); United States v. Adams, 422 F.2d 515, 518 (10th Cir. 1970) (stating no objection to the admission of evidence constitutes waiver).

Appellant's statements, "No, Your Honor," when asked about objections to instructions, and "No additional instructions, sir" "constituted an affirmative waiver " – undermining any argument that this was just a mere failure to object. *See* Swift, 76 M.J. at 21. Appellant has not offered any persuasive argument why this Court should depart from its recent decision in Malone that recognizes that "as a general proposition of law, 'no objection' constitutes an affirmative waiver of the right or admission at issue." Malone, 2026 CAAF LEXIS 62, at *9 (citing Ahern, 76 M.J. at 198). If trial defense counsel's statements were not indicative of an intelligent waiver, then what more could realistically be required? Appellant's position would disallow waiver without an individual colloquy between the military judge and trial defense counsel on every conceivable motion that could be raised. Such a tedious and unfeasible requirement would defeat the purpose of the waiver doctrine, which is to promote the efficiency of the entire justice system. *See* United States v. Nelson, 82 M.J. 336, 339 (C.A.A.F. 2022) (Ohlson, C.J. concurring). Competent counsel at the trial level are in the best position to determine what issues to waive or preserve. And responses such as "no objection" or "no additional instructions" to the military judge's course of legal action should suffice to prove affirmative waiver.

All considered, this Court should find that Appellant unequivocally affirmatively waived the military judge's omission of the defense of ineptitude in his findings instructions.

3. Trial defense counsel made an intelligent and purposeful waiver despite asserting Appellant's mental health struggles throughout trial.

Appellant asserts that she did not make an intelligent waiver because trial defense counsel presented to the panel members all the facts necessary to find the existence of the "affirmative defense of ineptitude," which demonstrated that "there was no purposeful decision on the trial defense counsel's part to waive the ineptitude instruction." (App. Br. at 17.) But this claim fails. Although 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.

"Inept" is defined as lacking in fitness or aptitude; generally incompetent. Inept, Merriam Webster Dictionary (Online ed. 2026). "Incompetent" is defined as "lacking necessary ability or skills." Incompetent, Merriam Webster Dictionary (Online ed. 2026). But trial defense counsel never challenged Appellant's fitness or aptitude to get the job done or lack of skills or ability. Rather Appellant set forth a defense that her mental health impacted her willingness to complete her tasks but not her ability to complete tasks.

The ineptitude defense is a fact-specific inquiry considering the duty imposed, the abilities and training of the service member, and the circumstances in which he or she is called up to perform this duty. Powell, 32 M.J. at 121. The evidence here showed that Appellant had the training and ability to do the job at Food and Public Facility Sanitation because she was once successful as the NCOIC of Community Health that oversaw Food and Public Facility Sanitation. (JA at 180.) Further, Appellant admitted that she had the aptitude to do administrative work in the military because when she changed assignments, she completed all of her tasks. (JA at 300.) The evidence also showed that Appellant admitted to her leadership that she was able to complete her job but for TSgt DH micromanage her. (JA at 251.)

The circumstances show that this case was never about ineptitude but rather about Appellant not wanting to work for TSgt DH. Appellant felt "that everything was being taken away from her and that [Appellant] didn't want to work for [TSgt DH]." (JA at 252.) Rather than showing an honest effort to complete her taskers or accept help from TSgt DH, Appellant would insist "Yes, it's done" and "I got it. Everything's good." (JA at 218-19.) When TSgt DH asked Appellant to see her taskers, Appellant responded "no." (JA at 219.) Further, Appellant would shoo TSgt DH away or close the door on TSgt DH on multiple occasions when approached. (Id.) These were not the characteristics of a service member who was

inept to do the job, but evidence of a service member who did not like working for her direct supervisor.

Based on the evidence showing that Appellant successfully completed these duties in the past while in the higher position of NCOIC of Community Health, trial defense counsel would have known that trying to claim ineptitude would have been a losing proposition. Thus, there was a purposeful decision to waive the instruction of ineptitude. Accordingly, this Court should not reach the merits of Appellant's claim because the claim was waived, leaving this Court with no issue to review. *See* Malone, 2026 CAAF LEXIS 62, at *8.

4. Appellant did not merely fail to object to the military judge's proposed instructions requiring plain error review.

Appellant argues that this Court has not treated affirmative declination to object as an intelligent waiver. (App. Br. at 32-33 citing Davis, 76 M.J. 224 and United States v. Davis, 73 M.J. 268, 269 (C.A.A.F. 2014).) But these cases are not helpful to Appellant's argument because in both Davis cases, the opinion was unclear whether the defense merely failed to object or affirmatively stated "no objection" to the military judge's proposed instructions. Regardless, this case is distinguishable because Appellant's counsel on three separate instances expressly told the military judge that they did not have any objections or request additional instructions. (JA at 314-15, 319.) This was an affirmative waiver and not a mere failure to object.

Appellant's reliance on United States v. Feliciano, 76 M.J. 237 (C.A.A.F. 2017) is also unpersuasive. In Feliciano, neither counsel objected to the instruction of voluntary abandonment, and this Court reviewed for plain error. Id. at 239-40. Trial defense counsel was asked whether he had "any additional instructions," and responded, "No, [y]our honor." Id. at 239. Still, the difference here was that trial defense counsel made multiple affirmative statements of, "No, sir," or "No, Your Honor" when asked about any objections regarding instructions, along with saying "No additional instructions sir," when asked about additional instructions to the proposed instructions. (JA at 314-15.) There is no indication in the opinion that the trial defense counsel in Feliciano were asked if they objected to the findings instruction and affirmatively said they had "no objections."

Appellant's reliance on Barnes is also unfounded. In Barnes, this Court noted that "the right to an instruction on an affirmative defense which is reasonably raised by the evidence 'is not waived by a defense failure to request such an instruction. . . Such instruction can only be 'affirmatively waived.'" 39 M.J. at 233. But the Barnes opinion only suggested that trial defense counsel failed to request an instruction and did not discuss whether trial defense counsel stated "no objection" to the proposed instructions or declined to request additional instructions. The difference here was that the record is unmistakable that trial defense counsel told the military judge twice that he had no objections and told the

military judge once that he did not want to request any additional instructions, which constituted affirmative waiver not reviewable for plain error. Thus, whatever this Court may have said in Barnes is inapt here.

In sum, Appellant does not have a correct view of this Court's precedent. For instance, Appellant asserts that "[i]t is clear from this Court's precedent that a trial defense counsel affirmatively declining to object to the military trial judge's instructions when those instructions involve affirmative defenses has not amounted to an affirmative waiver of the right." (App. Br. at 33.) This is incorrect, because even when a military judge has a *sua sponte* duty to provide required instructions – regarding affirmative defenses or required elements – this Court has held that an accused can "affirmatively decline" using statements such as "no objections" and this Court will apply waiver. Malone, 2026 CAAF LEXIS 62, at *1; Davis, 79 M.J. at 331-32; Davis, 76 M.J. at 229 n.6. For these reasons, Appellant's request for this Court to narrowly construe Davis, 79 M.J. 329 "to not apply to a situation such as this where trial defense counsel merely tells a military judge that he has no objection to the judge's omission of an affirmative defense instruction" is without merit. (App. Br. at 29.)[2]

[2] Amicus also attempts to undermine this Court's decision in Davis, 79 M.J. 329 because the case cites a 1953 pre-Rules For Courts-Martial case. (Amicus Br. at 9 n.1.) Amicus argues that an appellate gets the benefit of the changes to the law between the time of trial and the time of his appeal and therefore the Rules for Court-Martial at the time of appeal apply. (Id.) An appellant gets the benefit of

Even if this Court finds that ineptitude was an affirmative defense, Appellant nonetheless affirmatively waived such instruction. Like this Court did in Davis, this Court should continue to affirm the principle that the defense can affirmatively waive required instructions and that Appellant did so here. *See* 79 M.J. at 329.

5. Appellant's arguments undermining Malone lack merit.

In Malone, when analyzing whether waiver occurred, this Court considered whether the appellee filed a claim of IAC. Malone, 2026 CAAF LEXIS 62, at *12 (citing Campos, 67 M.J. at 333). Appellant attacks this Court's decision in Malone, arguing that "there is little to no value in looking to whether [IAC] raised against trial defense counsel in order to determine if trial defense counsel's waiver was intelligent." Appellant's argument has no merit.

Appellant challenges this Court's interpretation of Strickland v. Washington, 466 U.S. 669, 689 (1984). (App. Br. at 22.) In Malone, this Court said that the appellant's "failure [to allege IAC] results in a presumption that defense counsel acted in a competent manner, and this presumption influences our analysis of the case." 2026 CAAF LEXIS 62, at *12. But Appellant makes the distinction that

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the change in judicially-made law at the time of appeal, but not when it comes to Rules for Courts-Martial or Rules of Evidence. *See* United States v. Fetrow, 76 M.J. 181 (C.A.A.F. 2017) (applying the Mil. R. Evid. at the time of trial on appeal); *see also* Exec. Order 13825, 83 Fed. Reg. 9889, 9890 (1 March 2018) (implying that retroactivity does not apply to changes in the R.C.M.s because "amendments . . . shall not apply in any case in which charges are referred to trial by court-martial before January 1, 2019").

the strong presumption of competence exists whether IAC is alleged or not, and therefore there is little value in looking at whether an appellant filed an IAC complaint. (App. Br. at 24.) Regardless, this distinction does not change this Court's analysis in Malone. The Malone court was not wrong to rely on Strickland for the proposition that trial defense counsel are presumed competent. And it is true that the lack of IAC claims reinforces the strong presumption that trial defense counsel acted in a competent manner in electing to intelligently waive a "known right." *See* Strickland, 466 U.S. at 689 (finding that a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance that the defendant must overcome that presumption). Appellant's distinction is not persuasive and therefore does not undermine this Court's rationale in Malone.

Appellant further alleges that considering IAC will hurt judicial economy because even claims that were forfeited will require a claim of IAC under the plain error standard. (App. Br. at 23-24). This suggestion is without merit because very recently in United States v. Matti, this Court found plain and obvious error in a trial counsel's unobjected-to findings argument without finding IAC or even analyzing whether it might have existed. 2026 CAAF LEXIS 189 (C.A.A.F. 17 February 2026). Even appellant admits that plain error can exist without IAC, so his argument in fact works against him because an appellate court need not review

a claim of IAC to find plain error. (*See* App. Br.at 24-25). In short, the Malone decision does not "co-mingl[e] the assessment of plain error with the assessment for IAC" because this Court has made clear it can analyze for plain error without also evaluating IAC. (*See* App. Br. at 26.)

Appellant's assertion that Malone would require more IAC claims on appeal is unsupported. (App. Br. at 27-28.) This is not the first time this Court has considered IAC as a factor in a waiver determination. In Campos – decided in 2009 – this Court found that the lack of an IAC claim was a factor to consider in a waiver determination. 67 M.J.at 333. Appellant provided no reason for this Court to believe that after Campos there was an increase in IAC claims on appeal. For these reasons, this Court should not credit Appellant's arguments undermining its recent decision in Malone.

C. Assuming the defense of ineptitude was an affirmative defense and a required instruction despite not being listed in R.C.M. 916, it was not clearly and obviously raised by the evidence.

Assuming this Court finds that Appellant did not waive the instruction and ineptitude was an affirmative defense, Appellant still has not met his burden under the plain error standard. *See* Davis, 76 M.J. at 229. The ineptitude defense in Article 92, UCMJ, dereliction of duty cases is associated with good faith and honest efforts to adhere to standards and duties. Powell, 32 M.J. at 120-21. In Powell, the Court, referring to the Manual, highlighted when ineptitude applies:

> For example, a recruit who has earnestly applied himself during rifle training and throughout record firing may not be punished because he fails to qualify with the weapon; *nor may a sergeant who, however inefficient, has made an honest effort to maintain direction, be punished for becoming lost with his squad on a maneuver; nor may an artillery battery commander who has zealously applied himself to the instruction of his battery in firing be punished because his battery fails to achieve a satisfactory score in a firing test*.

Id. at 120-21. (emphasis in original). The current explanation of ineptitude in the Manual reiterates the same sentiment. *See* MCM, pt. IV, para. 18.c.(3)(d) (describing that "a recruit who has tried earnestly during rifle training and throughout record firing is not derelict in the performance of duties if the recruit fails to qualify with the weapon").

The examples provided both in Powell and the current Manual consider ineptitude to be at issue when individuals "earnestly" tried, demonstrated an "honest effort," or "zealously applied himself [or herself]" but was still inefficient. Powell, 32 M.J. at 120-21; MCM, pt. IV, para. 18.c.(3)(d). In Powell, the appellant claimed that ineptitude provided a defense to dereliction when he had limited abilities in conjunction with minimal command support to manage a Marine Corps division's communication material system. Id. at 118, 121. The Court rejected this argument finding that the duties alleged did not require "great skill, ability, or assistance," and found that the appellant's failure to keep inventory, signing false

reports, and allowing others to sign false reports "were caused by lack of integrity rather than ineptitude." Id.

Appellant's primary argument is that her declining mental health negatively affected her ability to carry out her duties, and therefore she was inept. (App. Br. at 13-14.) But Appellant did not provide a nexus at trial nor on appeal connecting her mental health issues to ineptitude. Plain and simple, the record did not support a finding that Appellant was incapable, lacked fitness, or lacked the aptitude or skills. Appellant had the requisite skills to perform within the Community Health element. Her duties did not require great skill or ability, and she was well-versed in her role as the NCOIC of Food and Public Facility Sanitation because she would complete these same tasks when she was assigned to the higher position of NCOIC of Community Health. (JA at 180.) Appellant also admitted that she could perform her duties but for TSgt DH micromanaging her. (JA at 251.) Appellant was indeed experienced in her line of work and had demonstrated the aptitude and skills to complete her assigned tasks.

Appellant fails to articulate how she zealously applied herself and showed honest efforts to complete her duties such that the possibility of ineptitude would arise. The evidence showed that Appellant disregarded her duties and was untruthful to her leadership when she told TSgt DH that that "Yes, it's done" and "I got it. Everything's good," when in fact Appellant did not complete the tasks as

instructed. (JA at 218-19.) When TSgt DH tried to assist Appellant, Appellant would slam the door on TSgt DH. (JA at 219, 237.) This was not a case of ineptitude, where Appellant demonstrated genuine efforts to complete the tasks. Rather, Appellant did not complete her duties because she did not like working for TSgt DH, which is supported by Appellant's request to have TSgt DH leave Community Health or Appellant request to change assignments. (JA at 252.) Like in Powell, Appellant's behavior was associated with lack of integrity and good order, rather than ineptitude. 32 M.J. at 121.

Lastly, as Appellant correctly notes throughout her brief, the record referenced many instances of mental health issues, but her evaluation prior to trial showed that Appellant could appreciate the nature of her conduct during the charged time frame and that she had the capacity to stand trial. (JA at 13, 23.) TSgt DM said that Appellant had mental health issues early in 2023 when she was still successfully completing her duties. Her mental health issues had no bearing on her aptitude to fulfill her duties. (JA at 179.)

Rather than asserting Appellant's ineptitude, it appears that the defense essentially tried to argue partial lack of mental responsibility under R.C.M. 916(k)(2). In other words, the defense was suggesting that Appellant's mental health struggles – rather than her lack of skills – made her dereliction non-negligent. And, as stated definitively in R.C.M. 916, partial lack of mental

responsibility is *not* an affirmative defense requiring *sua sponte* instruction, but instead is an argument to undermine whether the accused had a state of mind necessary to an element of the offense. R.C.M. 916(k)(2) and Discussion. Here, the evidence did not plainly and obviously raise the defense of ineptitude, when trial defense counsel's case more expressly comported with a different negative or failure of proof defense mentioned in R.C.M. 916 – partial lack of mental responsibility. Either way, the military judge had no *sua sponte* duty to instruct the members regarding Appellant's mental health issues. In short, the evidence at trial did not plainly and obviously raise the defense of ineptitude. Thus, it was not plain and obvious error for the military judge to omit this instruction.

D. Appellant suffered no prejudice because any error was harmless beyond a reasonable doubt.

When instructional errors have constitutional implications, such as the case of failure to instruct on affirmative defenses, the error is tested for prejudice under a harmless beyond a reasonable doubt standard. United States v. Behenna, 71 M.J. 228, 234 (C.A.A.F. 2012); *see also* United States v. Tovarchavez, 78 M.J. 458, 460 (C.A.A.F. 2019) (testing for prejudice under the harmless beyond a reasonable doubt standard). "A constitutional error is harmless when it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." United States v. Chisum, 77 M.J. 176, 179 (C.A.A.F. 2018) (citations omitted).

Assuming plain and obvious constitutional error, there was no prejudice. Failure to give the instruction did not deprive Appellant of a defense. She still had the ability to argue that the government had not proved beyond a reasonable doubt – she could contend that her mental health problems, rather than her own neglect and lack of due care, prevented her from being able to complete the tasks. Appellant did not need the instruction on ineptitude to advance that theory of the case. She could simply argue that the government had not met its burden to prove all the elements of the offense beyond a reasonable doubt. Contrast this circumstance to Barnes, where the military judge failed to instruct on an affirmative defense, and "none of the elements were in dispute, and absent an instruction on an affirmative defense, the members were required to find appellant guilty." 39 M.J. at 233. 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.

Further, there is no reasonable probability that the failure to instruction on ineptitude contributed to the verdict. The evidence did not show that Appellant lacked the skills and the aptitude to complete her duties. In fact, the record showed that she had successfully completed all her duties in the past before TSgt DH became her supervisor. Nor did the record show that Appellant "earnestly tried," demonstrated "honest effort," or "zealously applied [her]self," but was still

inefficient. Powell, 32 M.J. at 121. In fact, the defense would not have benefitted from an ineptitude instruction because it would have highlighted uncontroverted evidence demonstrating that Appellant defiantly disrespected TSgt DH by shooing her away and slamming the door rather than displaying honest and zealous efforts associated with ineptitude. (JA at 219, 237.) Appellant suffered no prejudice and thus is not entitled to relief.

In sum, ineptitude was not an affirmative defense that required *sua sponte* instruction by the military judge. Even if it was, Appellant affirmatively waived the instruction by thrice affirmatively declining the opportunity to object to the findings instruction or request additional instructions. And even under a plain error standard, the evidence did not reasonably raise the defense of ineptitude nor did the lack of the instruction contribute to the verdict.

CONCLUSION

The United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the decision of the Court of Criminal Appeals.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means to the Court and the Air Force Appellate Defense Division on 17 March 2026.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because: This brief contains 10,567 words. This brief complies with the typeface and type style requirements of Rule 37.

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