

12 December 2025

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

UNITED STATES,
Appellee,

v.

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

USCA Dkt. No. 26-XXXX/AF

Crim. App. Dkt. No. ACM 24042

SUPPLEMENT TO PETITION FOR GRANT OF REVIEW

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

Counsel for Appellant

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Error Assigned for Review

DESPITE THE DEFENSE OF INEPTITUDE BEING REASONABLY RAISED BY THE EVIDENCE, THE MILITARY JUDGE FAILED TO INSTRUCT THE MEMBERS ON THE DEFENSE, AND THE TRIAL DEFENSE COUNSEL FAILED TO OBJECT TO THE OMISSION. ON APPEAL, THE AIR FORCE COURT OF CRIMINAL APPEALS FOUND TRIAL DEFENSE COUNSEL'S FAILURE TO OBJECT TO BE AN AFFIRMATIVE WAIVER OF THE DEFENSE INSTRUCTION. DID AFCCA'S FINDING AMOUNT TO AN ERROR THAT RESULTED IN PREJUDICE THAT WAS NOT HARMLESS BEYOND A REASONABLE DOUBT?

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866. This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Summary of Proceedings

Staff Sergeant Onetera G. Nelson (Appellant) was tried by a special court-martial composed of a panel of members at Tyndall Air Force Base (AFB), FL, on 16-17 January 2024. The Charges and Specifications on which she was arraigned, her pleas, and the findings of the court-martial are summarized as follows:

Charge	UCMJ Art	Spec	Summary of Offense	Plea	Finding
I	92			NG	G
		1	Who should have known of her duties at or near Tyndall AFB, FL, o/a 8 July 2023, was derelict in the performance	NG	NG

			of those duties in that she negligently failed to complete the inspection folders for the month of June 2023 as instructed by Technical Sergeant (TSgt) DH, as it was her duty to do.		
		2	Who should have known of her duties at or near Tyndall AFB, FL, o/a 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 TSgt DH, as it was her duty to do.	NG	G
		3	Who should have known of her duties at or near Tyndall AFB, FL, b/o/a 7 July 2023 and o/a 8 July 2023, was derelict in the performance of those duties in that she negligently failed to follow instructions given to her by TSgt [DH] by marking five inspections as complete on Defense Occupational and Environmental Health Readiness System without review by TSgt [DH], as it was her duty to do.	NG	G
II	107			NG	NG
		1	Did at or near Tyndall AFB, FL, b/o/a 1 Jan 2023 and o/a 30 June 2023, with intent to deceive, sign an official record, to wit: the Public Health Sexually Transmitted Infection Log, which record was false in that the cases were not reported in the Air Force Disease Reporting System, and it was then known by the said [Appellant] to be so false.	NG	NG
		2	Did at or near Tyndall AFB, FL, b/o/a 1 Jan 2023 and o/a 30 June 2023, with intent to deceive, make to TSgt [DH] an official statement, to wit: when	NG	NG

			asked if [Appellant] had previously confirmed an inspection appointment with Ms. [TC], [Appellant] stated “no,” or words to that effect, which statement was totally false, and was then known by the said [Appellant] to be so false.		
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The military judge sentenced Appellant to a reprimand. Tr. at 336. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action.

The AFCCA denied relief and affirmed the findings and sentence on 24 October 2025.

Statement of Facts

In early 2023, Appellant was a Community Health Non-Commissioned Officer in Charge (NCOIC). Tr. at 160-61. In that role she was responsible for inspecting all food facilities on Tyndall AFB for sanitary conditions and vulnerability purposes. Tr. at 103-04, 160-61. Once the inspections were made, Appellant was then responsible for recording the results of those inspections in an electronic system called Defense Occupational and Readiness Health System as well as in hard copy folders. Tr. at 105, 146-47, 161.

Although Appellant was the Community Health NCOIC, when TSgt DH returned from maternity leave on 1 June 2023, TSgt DH took over as the Community Health NCOIC and Appellant was reduced to the food and public facility sanitation

NCOIC. Tr. at 160-61. At that point, TSgt DH then became Appellant's direct supervisor. Tr. at 103.

In June and July 2023, TSgt DH identified issues with the inspections folders for which Appellant was responsible. Tr. at 108. TSgt DH then raised those issues to her supervisor, TSgt DM. Tr. at 103, 108.

Around July 2023, Appellant, TSgt DM, and TSgt DH met to discuss Appellant's work performance. Tr. at 110. TSgt DM asked Appellant why she was missing her deadlines. *Id.* Trial defense counsel explored this conversation, asking TSgt DM, "Were you aware of [Appellant's] mental health last summer, June and July of 2023?" TSgt DM responded, "Not everything. She mentioned that some of the responsibilities she couldn't – some of the suspenses she couldn't meet were due to her mental health status." Tr. at 125. TSgt DM became concerned enough about Appellant's mental health that he took his concerns to his Senior Enlisted Leader as well as his flight commander. Tr. at 126.

In fact, Appellant had received multiple mental health evaluations by this time. Tr. at 193. On 7 June 2023, she was ordered by her commander to complete a mental health evaluation. Tr. at 246. She then had at least six days of follow-up for mental health. *Id.*

When asked on cross-examination, Appellant's direct supervisor, TSgt DH, acknowledged that she would "mostly likely" expect performance to dip for a

subordinate dealing with mental health issues. Tr. at 185-86. TSgt DH also stated that Appellant was “incapable” of doing more than she was doing at the time, and recounted that Appellant would ask for “mental health days.” Tr. at 191-93.

However, once Appellant was transferred out of TSgt DH’s section to another assignment, her mental health improved. Tr. at 249. When Appellant took the stand in her defense, she explained that once her mental health improved she was able to accomplish all her tasks at the new assignment. *Id.*

During his opening statement, trial defense counsel noted that during the charged timeframe TSgt DH:

[I]s aware that [Appellant] suffers from mental health disorders; that she is having a rough go of things. You are going to see in the evidence that despite that knowledge, [TSgt DH] just keeps pinging her, pinging her, pinging her with these duties that . . . aren’t too difficult to accomplish[.]”

Tr. at 99.

Trial defense counsel then noted:

Now it’s not just [TSgt DH] that is aware of [Appellant’s] mental health disorder, her declining mental health, and her struggles every day. It’s everyone she works with, yet the leadership keeps pinging her, and that’s all levels. It’s her direct supervisor all the way up, keeps pinging her over and over and over again. This is a troop that’s having a rough time . . . As you listen to the evidence today and hear these witnesses testify, ask yourself has this person given her a chance to regain her mental health to be fit to fight?

Tr. at 100.

Trial defense counsel carried these facts through closing argument. Trial defense counsel argued:

We heard that she's in treatment all day sometimes. Did she have the ability, the opportunity to get all these tasks done? She did not. She didn't have enough time to meet unrealistic expectations that were exclusively her's (*sic*).

Tr. at 296.

Despite the evidence and the arguments regarding Appellant's mental health and its effect on her ability to carry out her duties, the military judge did not instruct the members on the defense of ineptitude to dereliction of duty offenses. *See* Tr. at 271-82.

On appeal, the AFCCA did not reach the merits of that omitted instruction. *See United States v. Nelson*, No. ACM 24042, 2025 CCA LEXIS 483 (A.F. Ct. Crim. App. 24 Oct. 2025) (Appendix). Instead, it found that the trial defense counsel's failure to object to the military trial judge's omission of the defense of ineptitude affirmatively waived the issue. Appendix at 6.

Reasons to Grant Review

THIS COURT SHOULD GRANT REVIEW OF THIS ISSUE BECAUSE THERE IS A CONFLICT BETWEEN SERVICE COURTS OF CRIMINAL APPEALS AS TO WHETHER A DEFENSE COUNSEL'S MERE FAILURE TO OBJECT TO A MILITARY TRIAL JUDGE'S FAILURE TO EXECUTE HIS SUA SPONTE DUTY TO INSTRUCT A PANEL ON ALL REASONABLY RAISED DEFENSES AMOUNTS TO AN AFFRIMATIVE WAIVER.

Standard of Review

Whether an instruction on a defense was waived is a question of law reviewed under a de novo standard. *United States v. Rosenthal*, 62 M.J. 261, 262 (C.A.A.F. 2005).

“The question of whether a jury was properly instructed [is] a question of law, and thus, review is de novo.” *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002) (citation omitted). “Whether the error is harmless beyond a reasonable doubt is a question of law that we review de novo.” *United States v. Simmons*, 59 M.J. 485, 489 (C.A.A.F. 2004).

Law and Analysis

In March 2024, the Army Court of Criminal Appeals (ACCA) decided *United States v. Coley*, No. ARMY 20220231, 2024 CCA LEXIS 127 (A. Ct. Crim. App. Mar. 13, 2024). In *Coley*, the ACCA ruled that this Court’s reasoning behind the waiver provision of *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020), that an appellant who has bypassed an offered opportunity to challenge the instructions

waived the right to challenge them on appeal, was inapplicable to a situation regarding instructions on affirmative defenses. *Coley*, 2024 CCA LEXIS 127, at *10.

In the instant case, the AFCCA held exactly the opposite. *See* Appendix at 5-7. Thus, there is a conflict between CCAs which ought to be resolved, namely 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 reasonable raised defenses. *See* C.A.A.F. R. 21(b)(5)(B)(ii).

A. Trial defense counsel did not affirmatively waive an instruction on the defense of ineptitude.

“A 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.’” *United States v. Barnes*, 39 M.J. 230, 233 (C.A.A.F. 1994) (citation omitted). “Such instruction can only be ‘affirmatively waived.’” *Id.*

There is a difference between a waiver and an affirmative waiver. *See United States v. Vangelisti*, 30 M.J. 234, 236 (C.A.A.F. 1990) (“[W]e find that a demonstration of waiver not amounting to an affirmative declination of counsel is permitted by [Military Rule of Evidence] 305(g)(2[.]”) “Waiver is defined as ‘an intentional relinquishment or abandonment of a known right.’” *Id.* at 241 (Cox, J.

concurring) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). “Affirmative, used as an adjective, is defined as ‘asserting that the fact is so.’” *Id.* (citing *Webster’s Ninth New Collegiate Dictionary* 61 (1988)). “Thus, in combination an ‘affirmative waiver’ is an express relinquishment of a known right.” *Id.* “The determination of whether there has been an intelligent waiver . . . must depend, in each case, upon the particular facts and circumstances surrounding that case” *United States v. Elespuru*, 73 M.J. 326, 328 (C.A.A.F. 2014) (citing *Johnson*, 304 U.S. at 464).

In the instant case, the AFCCA reasoned that an instruction on an affirmative defense is no more “mandatory” or “essential” than an instruction on the elements of an offense. Appendix at 5-6. Therefore, the AFCCA found that instructions on reasonably raised affirmative defenses are waivable and this Court’s reasoning in *United States v. Davis* is applicable to the instant case. *Id.* at 5-6. The AFCCA then held that the trial defense counsel’s failure to object to the military judge’s omission of the reasonably raised defense of ineptitude waived the defense. *Id.* at 6.

The ACCA, on the other hand, found *Davis* to be distinguishable from a situation in which a military judge failed to instruct on a reasonably raised affirmative defense and the trial defense counsel failed to object to the omission. *Coley*, 2024 CCA LEXIS 127, at *9-10. First, the ACCA reasoned that the *Davis* case was distinguishable from *Coley* because *Davis* did not involve instructions on

affirmative defenses, which the judge had a sua sponte obligation to provide. *Id.* The ACCA additionally cited to a different *Davis* case decided by this Court for the proposition that the omission of required instructions on affirmative defenses is reviewed for plain error, rather than waived. *Id.* at *9 n.7 (citing *United States v. Davis*, 76 M.J. 224, 226 (C.A.A.F. 2017) (“Because appellant failed to object to the omission of a required instruction on a special defense, we review the military judge's instructions for plain error.”)). The ACCA then “reject[ed] the government’s assertion that this issue is waived.” *Id.* at *10.

Of course, an instruction on reasonably raised affirmative defenses can be waived. “[T]here are no magic words to establish affirmative waiver.” *United States v. Gutierrez*, 64 M.J. 374, 377 (C.A.A.F. 2007). Instead, “[i]n making waiver determinations, [this Court] look[s] to the record to see if the statements signify that there was a ‘purposeful decision’ at play” by the defense counsel. *Id.* Affirmative waiver of a defense was found in *Gutierrez* because the military judge specifically asked the defense counsel whether he wanted a specific defense instruction, and the trial defense counsel declined it. *Id.* at 377. Importantly, this Court also pointed out that “affirmative defenses . . . cannot be waived simply by counsel’s failure to request such instructions.” *Id.* Unlike the AFCCA’s reasoning in the instant case, the ACCA’s reasoning in *Coley* appropriately reconciles this Court’s holding in *Gutierrez* with its holding in the *Davis* case of 2020.

Looking to the entire record in this case, not only do the particular facts and circumstances show that trial defense counsel never *expressly* relinquished an instruction on the defense of ineptitude, there is nothing in the record to even suggest that the defense counsel knew that the defense of ineptitude even existed. From the opening statement through the witnesses and into the closing argument, the defense counsel presented the theory that – due to her mental health issues – Appellant was unfit and unable to carry out her duties. In other words, the defense theory was one of ineptitude. There would have been no drawback to the defense’s theory if ineptitude was instructed on. Thus, presumably, had the defense known of the instruction, defense counsel would have asked for it given that he built almost the entire defense theory around it.

Additionally, application of the waiver doctrine to the instant case would result in a manifest injustice. Appellate courts “have discretion to consider waived arguments ‘where necessary to avoid a manifest injustice[.]’” *United States v. Omotayo*, 132 F.4th 181, 195 n.6 (2d Cir. 2025). As more fully explained below in the prejudice section, given the defense counsel’s theory of ineptitude by reason of mental health impairment, the Government’s own witnesses agreeing that Appellant had mental health issues and was having them treated, and the fact that the trial counsel largely did not challenge this, it would be a manifest injustice to allow

Appellant's conviction to stand without a panel ever being properly instructed on a defense that clearly applied to the case and was raised at trial.

B. The AFCCA's error resulted in prejudice that was not harmless beyond a reasonable doubt because the defense of ineptitude was reasonably raised and should have been instructed on.

A military judge has a sua sponte duty to instruct on an affirmative defense if reasonably raised by the evidence. *United States v. Maynulet*, 68 M.J. 374, 376 (C.A.A.F. 2010). The failure to so instruct must be tested for "prejudice using a 'harmless beyond a reasonable doubt' standard." *United States v. MacDonald*, 73 M.J. 426, 434 (C.A.A.F. 2014).

"The test whether an affirmative defense is reasonably raised is whether the record contains some evidence to which the court members may attach credit if they so desire." *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000). "It is not necessary that the evidence which raises an issue be compelling or convincing beyond a reasonable doubt." *United States v. Taylor*, 26 M.J. 127, 129 (C.M.A. 1988).

"The defense theory at trial is not dispositive in determining what affirmative defenses have been reasonably raised." *Davis*, 53 M.J. at 205. Any doubt whether an instruction should be given should be resolved in favor of the accused. *Id.*

"A 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.'"

United States v. Barnes, 39 M.J. 230 (C.A.A.F. 1994) (citation omitted). “Such instruction can only be ‘affirmatively waived.’” *Id.* A court “cannot affirm appellant’s conviction if there is a ‘reasonable possibility’ the judge’s error in failing to instruct ‘might have contributed to the conviction,’ and we are not persuaded the error was harmless.” *Id.*

1. Ineptitude is a defense to the offense of dereliction of duty.

Not all affirmative defenses are listed in Rule for Courts-Martial (R.C.M.) 916. *MacDonald*, 73 M.J. at 434-35. The list of defenses in R.C.M. 916 is illustrative, rather than exhaustive. *Id.* at 435.

Ineptitude is a defense to the offense of dereliction of duty under Article 92, UCMJ. *See United States v. Powell*, 32 M.J. 117, 120 (C.M.A. 1991) (stating the *Manual for Courts-Martial (MCM)* “delineates the defense of ineptitude which [the Court of Military Appeals has] acknowledged as existing with respect to this offense.”).

“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.” *MCM*, pt. IV, ¶ 18c(3)(d).

In explaining the defense of ineptitude, the *Powell* court noted and adopted an earlier edition of the *MCM* had a slightly expanded discussion regarding ineptitude, which said:

Thus, if it appears that the accused had the ability and opportunity to perform his duties efficiently, but performed them inefficiently nevertheless, he may be found guilty of this offense. However, an accused may not be charged under this article, or punished otherwise, if his failure in the performance of his duties is caused by ineptitude rather than by willfulness, negligence, or culpable inefficiency.

Powell, 32 M.J. at 120 (emphasis in the original). This discussion lines up with the standard definition of ineptitude. Merriam-Webster's Collegiate Dictionary defines ineptitude as "the quality or state of being inept" and defines inept as "lacking in fitness or aptitude." Merriam-Webster's Collegiate Dictionary, 638 (11th ed. 2003).

The *Powell* court then went on to say:

In view of the above, ineptitude as a defense is largely fact-specific, requiring consideration of the duty imposed, the abilities and training of the soldier upon whom the duty is imposed, and the circumstances in which he is called upon to perform this duty. The factfinder must determine whether this defense exists in a particular case.

Powell, 32 M.J. at 121. Thus, the nature of the defense of ineptitude centers on the fitness and ability of an accused.

2. There was evidence that the members could have attached credit to in order to find Appellant's mental health struggles negatively affected her ability to carry out her duties, thus making her inept, rather than negligent.

Although not phrased as such, trial defense counsel focused on the fitness and the ability of Appellant – that is to say, the ineptitude of Appellant -- throughout the trial. Beginning in the opening statement, trial defense counsel rhetorically asked, “[W]hy did these things happen?” and then argued that the offenses happened because Appellant “suffers from mental disorders; that she is having a rough go of things.” Tr. at 99. In other words, Appellant’s mental health problems negatively affected Appellant’s ability to carry out her duties; her mental health made her inept.

The trial defense counsel went on to say that Appellant’s supervisor was “aware of her mental health disorder, her declining mental health, and her struggles everyday.” Tr. at 100. “[W]e will deliver the why, and you will find that she had no intent to commit any offense, and she is not guilty of being derelict of her duties. . . . She is suffering. She does not deserve to be punished.” *Id.*

The defense counsel continued the presentation of Appellant’s ineptitude via mental health with the Government’s first witness, the Public Health Flight Chief and Appellant’s second line supervisor, TSgt DM. *See* Tr. at 120, 125-27. The defense specifically cross-examined TSgt DM regarding Appellant “raising her hand” to ask for help with her duties because she was “unable to complete [her] tasks, due to [her] mental health.” Tr. at 126.

The defense counsel further explored Appellant’s ineptitude with TSgt DH, Appellant’s direct supervisor. *See* Tr. at 180. TSgt DH agreed that Appellant’s “dip

in performance” could be due to mental health issues. Tr. at 185-86. TSgt DH also opined that Appellant was “incapable” of doing more than she did. Tr. at 191-92. TSgt DH also outlined the mental health evaluations Appellant underwent, as well as the “mental health days” Appellant requested. Tr. at 193.

During the merits of the case, Appellant herself presented evidence of her ineptitude. She explained how her mental health appointments interfered with her ability to complete her duties. Tr. at 246-47. She also explained how, after her mental health improved, she was able to accomplish her duties again. Tr. at 249.

Trial defense counsel continued presenting a theory of ineptitude through the closing argument. Counsel argued:

We heard that she’s in treatment all day sometimes. Did she have the ability, the opportunity to get all these tasks done? She did not. She didn’t have enough time to meet unrealistic expectations that were exclusively her’s (*sic*).

Tr. at 296.

The defense’s entire theory revolved around Appellant’s inability to function at a higher level and accomplish her duties because of the mental health issues she was struggling with. While some of that theory was presented as argument, much of it appears as testimony from the Government’s own witnesses. The members could have attached credit to this evidence to find Appellant’s struggle with mental health negatively affected her ability to carry out her duties, thus making her inept, rather than negligent.

3. The military judge's failure to instruct on the defense is not harmless beyond a reasonable doubt.

Despite the evidence of ineptitude in the record, the military trial judge failed to instruct the members on the defense. The prejudice resulting from this failure was not harmless beyond a reasonable doubt.

When evidence reasonably raises a defense, the failure to instruct on the defense has constitutional implications. *See United States v. Davis*, 73 M.J. 268, 271 (C.A.A.F. 2014). “Where an instructional error raises constitutional implications, this Court has traditionally tested the error for prejudice using a ‘harmless beyond a reasonable doubt’ standard.” *MacDonald*, 73 M.J. at 434 (citation omitted). “The test for determining if the constitutional error is harmless is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Id.* (cleaned up) (citations omitted).

It cannot be said that the military judge's failure to instruct on the defense of ineptitude did not contribute to the verdict beyond a reasonable doubt. It was almost the entire theory of the defense, while neither trial counsel nor any Government witnesses contested Appellant's mental health struggles. Trial counsel did not even discuss the struggles during the closing argument. The only missing components were the trial judge instructing the members that mental health struggles can lead to ineptitude, and that ineptitude is a defense to dereliction of duty.

WHEREFORE, Appellant respectfully requests this Honorable Court grant review and remand this case to the AFCCA for a new review of the substantive issue of the case.

Respectfully submitted,

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

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

Certificate of Filing and Service

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division at af.jajg.afloa.filng.workflow@us.af.mil on 12 December 2025.

Respectfully submitted,

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

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

Certificate of Compliance

This brief complies with the type-volume limitation of Rules 21(b) and 21(6) of no more than 9,000 words because it contains approximately 4,013 words.

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

Respectfully submitted,

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

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

Appendix

**UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

No. ACM 24042

UNITED STATES

Appellee

v.

Onera G. NELSON

Staff Sergeant (E-5), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary¹

Decided 24 October 2025

Military Judge: David M. Cisek.

Sentence: Sentence adjudged 17 January 2024 by SpCM convened at Tyndall Air Force Base, Florida. Sentence entered by military judge on 21 February 2024: A reprimand.

For Appellant: Lieutenant Colonel Luke D. Wilson, USAF; Major Frederick J. Johnson, USAF.

For Appellee: Colonel Matthew D. Talcott, USAF; Lieutenant Colonel Jenny A. Liabenow, USAF; Major Vanessa Bairos, USAF; Major Kate E. Lee, USAF; Major Tyler L. Washburn, USAF; Major Jocelyn Q. Wright, USAF; Mary Ellen Payne, Esquire; Jack C. Korologos, Legal Extern.²

Before JOHNSON, KEARLEY, and MCCALL, *Appellate Military Judges*.

Judge MCCALL delivered the opinion of the court, in which Chief Judge JOHNSON and Judge KEARLEY joined.

¹ Appellant appeals his conviction under Article 66(b)(1)(A), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1)(A) (*Manual for Courts-Martial, United States* (2024 ed.)).

² Mr. Korologos is a legal extern who was at all times supervised by an attorney admitted to practice before this court.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

MCCALL, Judge:

A special court-martial composed of officer and enlisted members convicted Appellant, contrary to her pleas, of two specifications of negligent dereliction of duty, in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892.^{3,4} Appellant was sentenced by the military judge to a reprimand. The convening authority took no action on the findings or the sentence, and provided the language of the reprimand.

Appellant raises one issue on appeal, which we have reworded: whether the military judge erred in failing to instruct the members on the defense of ineptitude. We find no error materially prejudicial to Appellant's substantial rights and affirm the findings and sentence.

I. BACKGROUND

Appellant entered the Air Force in 2014 as a public health technician. She remained in this career field through the time of her court-martial. On 1 June 2023, Appellant was assigned to a new role and began to have conflicts with her immediate supervisor. Part of Appellant's responsibilities were to conduct food facility inspections and file the reports in various electronic and hard copy filing systems. Appellant's supervisor identified multiple missing reports and tasked Appellant via email to update them. Appellant's supervisor also identified five inspections that were improperly marked as completed without following the appropriate review process. Appellant indicated she felt like she was being "badger[ed]" about her tasks, and "micromanaged." Appellant admitted to her flight chief that she was not doing her work because of her conflict with her supervisor and asked her leadership to remove her supervisor from the unit.

A panel of officers and enlisted members convicted Appellant for negligent dereliction in the performance of her duties when she failed to update facility folders on the office shared drive (Specification 2 of Charge I), and failed to

³ Unless otherwise noted, all other references in this opinion to the UCMJ and Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

⁴ Appellant was found not guilty of another specification of negligent dereliction of duty, in violation of Article 92, UCMJ; and two specifications of false official statement, in violation of Article 107, UCMJ, 10 U.S.C. § 907.

properly complete the process for five inspections (Specification 3 of Charge I). The members acquitted Appellant of all other offenses. The military judge sentenced Appellant to a reprimand.

II. DISCUSSION

Appellant contends the military judge erred by failing to instruct the members on the defense of ineptitude when Appellant committed the offense of dereliction of duty. Appellant claims the military judge was required to instruct on the defense of ineptitude as there was evidence Appellant had an inability to accomplish her duties because of her mental health issues.

A. Additional Background

After the presentation of evidence, the military judge discussed the findings instructions with both parties before reading them to the members. After reading the draft instructions aloud, with the members absent, the military judge asked both parties if there were any objections. Appellant's trial defense counsel indicated there were no objections. The military judge asked if there were any other instructions the parties requested, and the trial defense counsel responded in the negative. The military judge then printed out the draft instructions and gave the parties a 30-minute recess to review them. When court reconvened, the military judge confirmed both parties had an opportunity to review the findings instructions and asked whether there were any objections, with the members present. The trial defense counsel again stated they had no objection to the findings instructions.

B. Law

Whether a panel was properly instructed is a question of law reviewed de novo. *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011) (citation omitted). Military judges are required to "determine and deliver appropriate instructions." *United States v. Barnett*, 71 M.J. 248, 249 (C.A.A.F. 2012) (quoting *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008)). Required instructions include, *inter alia*, a "description of the elements of each offense charged," any applicable special defenses, and "[s]uch 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." Rule for Courts-Martial (R.C.M.) 920(e).

An affirmative defense is "in issue" when "some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose." *United States v. Schumacher*, 70 M.J. 387, 389 (C.A.A.F. 2011) (quoting *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007)) (additional citation omitted). "[S]ome evidence," entitling an accused to an instruction, has not been presented until "there exists evidence sufficient for a reasonable jury

to find in [the accused's] favor.” *Id.* (second alteration in original) (quoting *Mathews v. United States*, 485 U.S. 58, 63 (1988)) (additional citations omitted).

1. Ineptitude

Paragraph 18.c.(3)(d), *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), delineates the defense of ineptitude for dereliction of duty in violation of Article 92, UCMJ. That paragraph states:

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.

MCM, pt. IV, ¶ 18.c.(3)(d); *see also United States v. Powell*, 32 M.J. 117, 120–21 (C.M.A. 1991).

The *Powell* court referenced an earlier *MCM* version of this definition where it provided additional examples of situations where ineptitude would apply, including culpable inefficiency, defined as inefficiency for which there is no reasonable or just cause. Under culpable inefficiency, if it appears the accused had the ability and opportunity to perform the duties in question efficiently, but still performed them inefficiently, the member would be derelict in this duty. *See Powell*, 32 M.J. at 120–21 (citing *Manual for Courts-Martial, United States* (1951 ed.), pt. IV, ¶ 171.c)). The *Powell* court further opined:

[i]neptitude as a defense is largely fact-specific, requiring consideration of the duty imposed, the abilities and training of the soldier upon whom the duty is imposed, and the circumstances in which he is called upon to perform this duty. The factfinder must determine whether this defense exists in a particular case.

Id. at 121 (citations omitted). Thus, ineptitude is not a defense for inefficiency for a member who has the ability and training yet fails to accomplish assigned tasks.

2. Waiver

Whether an appellant has waived an issue is a legal question this court reviews de novo. *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) (citation omitted). However, “[t]here is ‘a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was an intentional relinquishment of a known right or privilege.’” *United States v. Smith*, 85 M.J. 283, 287 (C.A.A.F. 2024) (quoting *United States*

v. Sweeney, 70 M.J. 296, 303–04 (C.A.A.F. 2011)). Where an appellant “affirmatively decline[s] to object to the military judge’s instructions and offer[s] no additional instructions,” he may thereby affirmatively waive any right to raise the issue on appeal, even “in regards to the elements of the offense.” *Davis*, 79 M.J. at 331 (citations omitted). Instructions that would be otherwise required may be waived, such as instructions on affirmative defenses. *See, e.g., United States v. Rich*, 79 M.J. 472, 477 (C.A.A.F. 2020); *United States v. Gutierrez*, 64 M.J. 374, 377–78 (C.A.A.F. 2007). A valid waiver leaves “no error for [a reviewing court] to correct on appeal.” *Davis*, 79 M.J. at 331 (citation omitted).

C. Analysis

At issue are two questions, first, does waiver apply to a military judge’s *sua sponte* responsibilities to instruct on affirmative defenses, and second, did Appellant’s actions constitute an “affirmative waiver.” We answer both in the affirmative and find, under *Davis*, Appellant affirmatively waived the defense of ineptitude instruction. *See* 79 M.J. at 332.

Our superior court, the United States Court of Appeals for the Armed Forces (CAAF), has ruled that findings instructions, to include instructions which are required, like affirmative defenses, may be waived. *See, e.g., Rich*, 79 M.J. at 477; *Gutierrez*, 64 M.J. at 377–78. However, Appellant argues the application of this precedence should be limited. In support, Appellant highlights the recent United States Army Court of Criminal Appeals (ACCA) decision which held that *Davis* does not apply to affirmative defense instructions which the military judge was required to raise *sua sponte*, and advocates we do the same. *See United States v. Coley*, No. ARMY 20220231, 2024 CCA LEXIS 127 (A. Ct. Crim. App. 13 Mar. 2024) (unpub. op.), *aff’d on other grounds*, ___ M.J. ___, No. 24-0184, 2025 CAAF LEXIS 407 (C.A.A.F. 27 May 2025) (mem.).⁵

We do not find the *Coley* court’s reasoning persuasive. First, while the ACCA distinguishes the instructions arising from the military judge’s *sua sponte* responsibilities, claiming they cannot be waived, vice other instructions which can be waived by an affirmative declination to object, the Rule does not make the same distinction. Instead, R.C.M. 920 indicates required instructions should be given regardless of whether they are properly requested by a party

⁵ In *Coley*, the ACCA distinguished the facts of the case from *Gutierrez*, 64 M.J. 374, by finding CAAF’s ruling only applied to proposed instructions that were specifically raised and affirmatively declined. They further distinguished the facts of *Coley* from *Davis*, 79 M.J. at 329, as the *Davis* court was solely focused on an affirmative declination to object to the military judge’s instructions at trial, instead of the whether the military judge failed in his *sua sponte* duty to provide an affirmative defense instruction to the panel, regardless of trial defense counsel’s lack of objection or request.

or given by a military judge, sua sponte. See R.C.M. 920(e). Therefore, since both instructions are mandatory, there is no justification for allowing waiver of one but not the other. Second, in *Davis*, the CAAF stated the appellant's affirmative declination to object to the military judge's instructions "waived *all objections* to the instructions." 79 M.J. at 331 (emphasis added) (citations omitted). The instructional error waived in *Davis* concerning an element of the offense is no less essential than an instruction on an affirmative defense, especially given that elements of an offense must always be instructed upon, whereas affirmative defense instructions are only required when raised by the evidence. See also *United States v. Proctor*, No. ACM S32554, 2020 CCA LEXIS 196 (A.F. Ct. Crim. App. 4 Jun. 2020) (unpub. op.) (holding appellant affirmatively waived defense of property instruction the military judge did not instruct on, sua sponte, when appellant did not request the instruction, nor did appellant object to the proposed instructions during multiple Article 39(a), UCMJ, sessions to discuss proposed findings instructions).

Having found *Davis* applies to affirmative defenses, the second question is whether the waiver in this case was effective, *i.e.*, was it an intentional relinquishment of a known right or privilege as per *Sweeney*. Appellant asserts because the affirmative defense of ineptitude was not proposed or discussed, trial defense counsel never *expressly* relinquished, or affirmatively waived, the instruction. During the court-martial, the military judge reviewed the draft instructions with counsel, asked if there were any objections to the instructions, and trial defense counsel responded in the negative. The military judge then inquired about any other instructions, to which trial defense counsel responded there were "[n]o additional instructions." The military judge then gave counsel a 30-minute recess to "fully review" the instructions, in which trial defense counsel again indicated no objections to the instructions. Thus, trial defense counsel was given three opportunities to ask for additional instructions or object to the instructions on the record. They failed to do so. Like in *Davis*, Appellant's trial defense counsel "affirmatively declined to object to the military judge's instructions and offered no additional instructions." 79 M.J. at 331. As such, we conclude, as in *Davis*, Appellant's trial defense counsel "affirmatively waived any objection to the military judge's findings instructions." *Id.*; see also *United States v. Burnett*, No. ACM 39999, 2022 CCA LEXIS 342, at *22–25 (A.F. Ct. Crim. App. 10 Jun. 2022) (unpub. op.) (finding affirmative waiver of an involuntary intoxication instruction despite Appellant's argument there was no intentional relinquishment as the military judge and parties did not analyze the involuntary intoxication defense on its own).

III. CONCLUSION

The findings are correct in law. Article 66(d), UCMJ, 10 U.S.C. § 866(d), *Manual for Courts-Martial, United States* (2024 ed.). In addition, the sentence is correct in law and fact, and no error materially prejudicial to Appellant's substantial rights occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and sentence are **AFFIRMED**.



FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court