

*This opinion is subject to revision before publication.*

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

---

**UNITED STATES**  
Appellee

**v.**

**Onetera G. Nelson, Staff Sergeant**  
United States Air Force, Appellant

**No. 26-0059**  
Crim. App. No. 24042

Argued April 29, 2026—Decided October 8, 2026

Military Judge: David M. Cisek

For Appellant: *Lieutenant Colonel Luke D. Wilson*  
(argued); *Lieutenant Colonel Allen S. Abrams*.

For Appellee: *Major Vanessa Bairos* (argued); *Colonel Matthew D. Talcott* and *Mary Ellen Payne, Esq.* (on brief).

Amicus Curiae in Support of Appellant: *Philip D. Cave, Esq., Ann Ching, Esq., Brenner Fissell, Esq., Jason S. Grover, Esq., Frankin D. Rosenblatt, Esq., and James A. Young, Esq.*, (on behalf of the National Institute of Military Justice).

Judge HARDY delivered the opinion of the Court, in which Chief Judge MAGGS, Judge SPARKS, and Judge JOHNSON joined. Judge OHLSON filed a separate dissenting opinion.

---

Judge HARDY delivered the opinion of the Court.

Appellant was a public health technician at Tyndall Air Force Base, Florida, whose duties required her to inspect food facilities and file inspection reports. When Appellant failed to complete her assigned tasks, the Government charged her with three specifications of negligent dereliction of duty, in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892, and two specifications of making false official statements in violation of Article 107, UCMJ, 10 U.S.C. § 907.<sup>1</sup>

At Appellant's court-martial, after the presentation of evidence, the military judge convened an Article 39(a) session<sup>2</sup> and outlined the findings instructions he intended to present to the panel. He asked each party whether they had any objections to the instructions. The Government and trial defense counsel responded in the negative. He then asked if either counsel had any proposed additions to the instructions. Both counsel responded that they had none. The military judge then ordered a thirty-minute recess for the parties to review the instructions in written form. After the recess, the military judge reconvened the Article 39(a) session and asked again whether there were any objections to the instructions. Both Government and trial defense counsel reiterated that they had no objections. The panel convicted Appellant, contrary to her pleas, of two specifications of dereliction of duty under Article 92, UCMJ.<sup>3</sup> The United States Air Force Court of Criminal Appeals (AFCCA) affirmed.

---

<sup>1</sup> Unless otherwise noted, all references in this opinion to the UCMJ and the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*).

<sup>2</sup> See Article 39(a), UCMJ, 10 U.S.C. § 839(a) (authorizing military judges to conduct hearings outside the presence of the members for certain purposes).

<sup>3</sup> Appellant was found not guilty of another specification of negligent dereliction of duty, in violation of Article 92, UCMJ; and two specifications of making false official statements, in violation of Article 107, UCMJ.

We granted review to determine whether trial defense counsel’s statements—affirmatively declining to object to the instructions and offering no additional instructions—waived Appellant’s claim that the military judge erred by failing to instruct *sua sponte* on the defense of ineptitude. We find that, under this Court’s precedent in *United States v. Davis*, 79 M.J. 329 (C.A.A.F. 2020), Appellant’s affirmative responses waived *all* objections to the military judge’s findings instructions, including instructions that are within a military judge’s *sua sponte* duties. We therefore affirm the decision of the AFCCA.

### **I. Background**

In early 2023, Appellant, a staff sergeant (E-5), was assigned to be the Community Health Noncommissioned Officer in Charge (NCOIC) of Community Health at Tyndall Air Force Base, Florida. A few months later, Appellant’s supervisor, a technical sergeant (E-6), returned from maternity leave and took over Appellant’s role as the NCOIC of Community Health. Appellant became the NCOIC of the Food and Public Facility Sanitation, a division within Community Health. In her new role, Appellant’s responsibilities included inspecting food facilities and filing inspection reports in various electronic and hard copy filing systems.

After Appellant’s supervisor returned, she identified multiple missing reports and improperly closed inspections in Appellant’s files. To address the missing reports, the supervisor emailed Appellant asking her to update the files. Appellant felt “badger[ed]” and “micromanaged” by her supervisor and admitted to her flight chief that the conflict with her supervisor was the reason Appellant was not completing her work. Appellant asked her leadership to remove her supervisor from the unit. As a result of her conduct, the Government charged Appellant with three specifications of negligent dereliction of duty in violation of Article 92, UCMJ, and two specifications of making false official statements in violation of Article 107, UCMJ.

At Appellant’s court-martial, after the presentation of evidence, the military judge called an Article 39(a) session

and asked both parties to review his findings instructions. The military judge and counsel engaged in the following colloquy:

[Military Judge]: Does either side have any objection to [the draft] instructions? Trial Counsel?

[Government Counsel]: No, Your Honor.

[Military Judge]: Defense Counsel?

[Trial Defense Counsel]: No, sir.

[Military Judge]: What other instructions do the parties request? Trial Counsel?

[Government Counsel]: None, sir.

[Trial Defense Counsel]: No additional instructions, sir.

The military judge then recessed the court for thirty minutes to provide the parties an opportunity to “fully review” the instructions. After the recess, the military judge and counsel engaged in the following exchange:

[Military Judge]: . . . Counsel, have you all had an opportunity to fully review [the findings instructions]? Trial counsel?

[Government Counsel]: Yes, Your Honor.

[Trial Defense Counsel]: Yes, Your Honor.

[Military Judge]: Any objections to [the findings instructions]? Trial Counsel?

[Government Counsel]: No, Your Honor.

[Military Judge]: Defense Counsel?

[Trial Defense Counsel]: No, Your Honor.

The military judge proceeded to instruct the panel members with no objections from either party.

A panel with enlisted representation sitting as a general court-martial convicted Appellant, contrary to her pleas, of two specifications of dereliction of duty in violation of Article 92, UCMJ.<sup>4</sup> The panel acquitted Appellant of all

---

<sup>4</sup> The panel convicted Appellant for “fail[ure] to update facility folders on the office shared drive,” (Charge I, Specification 2),

other offenses, and the military judge sentenced Appellant to a reprimand. The convening authority took no action on the findings or the sentence and issued the language of the reprimand.

On appeal before the AFCCA, Appellant argued that the military judge erred by failing to instruct the members on the defense of ineptitude. Because trial defense counsel had presented evidence that Appellant’s declining mental health affected her performance, Appellant argued that: (1) the ineptitude defense was reasonably raised; (2) ineptitude is an affirmative defense of dereliction of duty; and (3) the military judge therefore had a sua sponte duty to instruct on it. Appellant further argued that any purported waiver was not done intelligently, because trial defense counsel did not know that ineptitude was a valid defense.

The AFCCA affirmed Appellant’s conviction. *United States v. Nelson*, No. ACM 24042, 2025 CCA LEXIS 483, at \*10-11, 2025 WL 2993424, at \*4 (A.F. Ct. Crim. App. Oct. 24, 2025) (unpublished). The lower court held that under *Davis*, 79 M.J. at 331, trial defense counsel’s repeated response of no objections and failure to request additional instructions was an affirmative waiver of *any* objection to the findings instructions. 2025 CCA LEXIS 483, at \*10, 2025 WL 2993424, at \*4. The AFCCA acknowledged that its holding directly contradicts the recent decision of the United States Army Court of Criminal Appeals (ACCA) in *United States v. Coley*, No. ARMY 20220231, 2024 CCA LEXIS 127, 2024 WL 1341003 (A. Ct. Crim. App. Mar. 13, 2024) (unpublished), *aff’d on other grounds*, 86 M.J. 134 (C.A.A.F. 2025), which held that *Davis* does not apply to affirmative defense instructions that a military judge is required to raise sua sponte. 2025 CCA LEXIS 483, at \*8-9, 2025 WL 2993424, at \*3.

We granted review of the following issue:

---

and “fail[ure to . . . mark[] five inspections as complete” (Charge I, Specification 3).

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

*United States v. Nelson*, 87 M.J. 66 (C.A.A.F. 2026) (order granting review).

## **II. Standard of Review**

This Court reviews whether a military judge failed to give a mandatory instruction de novo. *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007). We also review whether an accused has waived an issue de novo. *United States v. Malone*, 86 M.J. 297, 301 (C.A.A.F. 2026).

## **III. Discussion**

The President defines an affirmative defense (also known as a special defense) as one which, “although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly or partially, criminal responsibility for those acts.” R.C.M. 916(a). Relatedly, R.C.M. 920(e)(3) requires military judges to instruct the members on any affirmative defense that is “in issue” in the case. 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.” R.C.M. 920(e) Discussion. Under this standard, an accused is entitled to an instruction on an affirmative defense when “‘there exists evidence sufficient for a reasonable jury to find in [the accused’s] favor.’” *United States v. Schumacher*, 70 M.J. 387, 389 (C.A.A.F. 2011) (alteration in original) (quoting *Mathews v. United States*, 485 U.S. 58, 63 (1988)).

In the context of findings instructions:

A mere failure to object to an instruction or to omission of an instruction before the members close to deliberate constitutes forfeiture. But, when counsel affirmatively decline[s] to object and offer[s] no additional instructions, counsel expressly and unequivocally acquiesce[s] to the

military judge’s instructions, and his actions thus constitute waiver. While we review forfeited issues for plain error, we cannot review waived issues at all because a valid waiver leaves no error for us to correct on appeal.

*United States v. Rich*, 79 M.J. 472, 475-76 (C.A.A.F. 2020) (alterations in original) (footnote omitted) (internal quotation marks omitted) (citations omitted).

An express waiver is an “intentional relinquishment or abandonment of a known right” and occurs through “affirmative action by the accused or accused’s counsel.” *Malone*, 86 M.J. at 301 (internal quotation marks omitted) (quoting *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009)). Such affirmative action may occur “when a trial defense counsel states that there is ‘no objection’ to a proposed course of legal action” or when a party seeks “[n]o changes” to a military judge’s instructions. *Id.* at 301-02 (quoting *Davis*, 79 M.J. at 330-32). Whether there has been an “intelligent waiver . . . must depend, in each case, upon the particular facts and circumstances surrounding that case.” *Id.* at 302 (alteration in original) (internal quotation marks omitted) (quoting *United States v. Elespuru*, 73 M.J. 326, 328 (C.A.A.F. 2014)).

### **A. Ineptitude**

As relevant here, the Government charged Appellant with three specifications of negligent dereliction of duty, in violation of Article 92, UCMJ.<sup>5</sup> The President has articulated the following three elements for this offense: (1) that the accused had certain duties; (2) that the accused knew or reasonably should have known of the duties; and (3) that the accused was derelict in the performance of those duties through neglect. *MCM* pt. IV, para. 18.b.(3). In the explanation for this offense, the President makes the following statement:

---

<sup>5</sup> Article 92(3), UCMJ, states that any servicemember who “is derelict in the performance of his duties . . . shall be punished as a court-martial may direct.”

*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.

*Id.* para. 18.c.(3)(d).

Relying primarily on this definition and the definition of “affirmative defense” provided in R.C.M. 916, the Government argues that ineptitude is not an affirmative defense. Because ineptitude negates the third element of the offense—whether the accused was derelict in the performance of her duties through neglect—the Government argues that an accused who is inept cannot also be derelict. For example, the recruit who trains earnestly but still fails to qualify with his rifle is not derelict in the performance of his duties. An affirmative defense, in the Government’s view, is one by which the accused concedes that the evidence proves all the elements of the offense but offers a legally sufficient justification that prevents criminal liability from attaching.

Appellant counters that ineptitude is an affirmative defense. She argues that ineptitude explains an accused servicemember’s negligent dereliction of duties rather than negates it. But even if the Court disagrees and concludes that ineptitude is not an affirmative defense, Appellant argues that this Court eliminated any legal distinction between substantive defenses—i.e., defenses that disprove elements of the offense—and affirmative defenses in *Willenbring v. Neurauter*, 48 M.J. 152, 176 (C.A.A.F. 1998). Appellant argues that after *Willenbring*, substantive defenses are just a subcategory of the broader category of affirmative defenses. Thus, R.C.M. 920(e)(3)’s mandate for military judges to instruct the members on all affirmative defenses that are “in issue” applies equally to all defenses, including the defense of ineptitude.

Solely for the purpose of deciding this case, we assume—without deciding—that the defense of ineptitude is an affirmative defense that was reasonably raised by Appellant during her court-martial. Accordingly, we further assume that the military judge had a sua sponte duty under R.C.M. 920(e)(3) to instruct the members on the defense of ineptitude.

### **B. *Davis* and Mandatory Instructions**

To resolve this case, we must first determine whether this Court’s decision in *Davis* applies to instructions that military judges have a sua sponte duty to provide, including instructions on reasonably raised affirmative defenses. The ACCA and AFCCA have come to different conclusions on this question.

In *Coley*, the ACCA declined to apply *Davis*. 2024 CCA LEXIS 127, at \*10, 2024 WL 1341003, at \*3. It reasoned that because *Coley* involved an affirmative defense instruction, it fell outside the issue presented to this Court in *Davis*. *Id.* at \*10-11, 2024 WL 1341003, at \*3. The ACCA viewed the critical question not as whether the appellant waived the issue, but instead as whether the military judge failed in his sua sponte duty to provide the affirmative defense instruction to the panel. *Id.* at \*11, 2024 WL 1341003, at \*4.

In the present case, the AFCCA disagreed with the ACCA’s application of *Davis*. The AFCCA reasoned that R.C.M. 920(e), which lists the required instructions a military judge must provide to panel members, does not distinguish between instructions arising from a military judge’s sua sponte duties and other instructions. *Nelson*, 2025 CCA LEXIS 483, at \*8, 2025 WL 2993424, at \*3. Instead, the AFCCA concluded that required instructions “should be given regardless of whether they are properly requested by a party or given by a military judge, sua sponte.” *Id.*, 2025 WL 2993424, at \*3. The AFCCA further reasoned that an instruction on an affirmative defense is no more mandatory than an instruction on the elements of an offense, which this Court held was waived in *Davis*. *Id.* at \*8-9,

2025 WL 2993424, at \*3. If mandatory instructions on an element of an offense can be waived, the AFCCA concluded that instructions on reasonably raised affirmative defenses can also be waived, and that trial defense counsel’s failure to object or offer additional findings instructions qualified as waiver under *Davis*. *Id.* at \*10, 2025 WL 2993424 at \*4.

We agree with the AFCCA and find that *Davis* applies to all findings instructions. In *Davis*, because the appellant did not merely fail to object but “affirmatively declined to object to the military judge’s instructions and offered no additional instructions,” the Court concluded that the appellant had “‘expressly and unequivocally acquiesc[ed]’ to the military judge’s instructions.” 79 M.J. at 332 (quoting *United States v. Smith*, 2 C.M.A. 440, 442, 9 C.M.R. 70, 72 (1953)). Accordingly, the appellant had “waived *all* objections to the instructions, including in regard to the elements of the offense.” *Id.* (emphasis added). This Court’s express use of the word “all” rebuts Appellant’s argument that *Davis* only applies to certain types of instructions.

Furthermore, we agree with the AFCCA that there is no basis for distinguishing between instructions on affirmative defenses and other mandatory instructions. This Court has repeatedly held that affirmative defenses can be waived. *See United States v. Gutierrez*, 64 M.J. 374, 377 (C.A.A.F. 2007) (holding that appellant waived the affirmative defense of mistake of fact to the offense of assault); *United States v. Barnes*, 39 M.J. 230, 233 (C.M.A. 1994) (“A right to an instruction on an affirmative defense which is reasonably raised by the evidence . . . can only be affirmatively waived.”).<sup>6</sup> And as the AFCCA noted below, “[t]he 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

---

<sup>6</sup> Appellant also conceded at oral argument that an accused may waive her right to object to an instructional error that a military judge otherwise has a sua sponte duty to give.

the evidence.” *Nelson*, CCA LEXIS 483, at \*8-9, 2025 WL 2993424, at \*3.

For these reasons, we conclude that the affirmative waiver in *Davis* applies to all instructions, including affirmative defense instructions within a military judge’s sua sponte duty.

### **C. Waiver**

In this case, on three separate occasions, the military judge presented trial defense counsel with an opportunity to object or offer additional findings instructions. Trial defense counsel responded in the negative each time, stating “No, sir,” “No additional instructions, sir,” and “No, Your Honor.” Trial defense counsel’s affirmative statements are indistinguishable from those given by the trial defense counsel in *Davis*—“No changes, sir” and “No, Your Honor”—when asked the same questions by the military judge. 79 M.J. at 331 (internal quotation marks omitted). As the Court concluded in *Davis*, these affirmative responses indicate that trial defense counsel “expressly and unequivocally acquiesc[ed]” to the military judge’s instructions. *Id.* at 332 (internal quotation marks omitted) (citation omitted). Consequently, Appellant affirmatively waived any objection to the military judge’s proposed instructions. *Id.*

Appellant argues that any potential waiver in this case was not done intelligently because trial defense counsel “either did not know or did not understand that, despite raising facts of the defense throughout trial, he was actually presenting the defense of ineptitude.” In other words, Appellant maintains that any waiver was not an affirmative waiver because it was not made knowingly. We find this argument difficult to reconcile with Appellant’s simultaneous argument that “[t]he defense’s entire theory revolved around Appellant’s inability to function at a higher level and accomplish her duties” due to her mental health issues. As Appellant states in her brief, “trial defense consistently presented the theory of ineptitude from a pretrial motion for a mental examination, through voir dire, into the

cross-examination of the Government's witnesses, into direct examination of Appellant herself, and culminating in a closing argument that argued Appellant was inept." Given Appellant's own characterization of her defense, we are not persuaded that Appellant's defense counsel was not aware of the defense of ineptitude.

Given the similarity of these facts to those in *Davis*, we find no factual or legal grounds for concluding that *Davis* does not control the outcome here. Because trial defense counsel affirmatively declined to object to or add to the findings instructions on three separate occasions, Appellant expressly waived and relinquished any claim regarding those instructions.

#### **IV. Judgment**

The judgment of the United States Air Force Court of Criminal Appeals is affirmed.

Judge OHLSON, dissenting.

As will be shown, the defense of “ineptitude” is a “special defense” as provided for under Rule for Courts-Martial (R.C.M.) 916(a).<sup>1</sup> Therefore, pursuant to R.C.M. 920(e)(3), a military judge has a sua sponte duty to instruct panel members on this defense if it is reasonably raised by the evidence adduced at trial—as it was here.<sup>2</sup> This duty is imposed on the military judge by the *MCM*, and thus, is independent of any request for instructions made by trial defense counsel. Accordingly, in cases such as this one where the military judge errs by failing to give the required instruction on ineptitude, it cannot be said that typical waiver principles apply merely because the accused did not ask for such an instruction. Because the majority reaches the opposite conclusion, *Nelson*, \_\_ M.J. at \_\_ (11-12), I respectfully dissent.

As the majority explains, Appellant was convicted of violating Article 92(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892(3) (2018). This article punishes anyone who “is derelict in the performance of his [or her] duties.” *Id.* However, the *MCM* “also delineates the defense of ineptitude,” and this Court has “acknowledged [that an ineptitude defense] . . . exist[s] with respect to [a dereliction] offense.” *United States v. Powell*, 32 M.J. 117, 120 (C.M.A. 1991) (first citing *MCM* pt. IV, para. 16.c.(3)(d) (1984 ed.); and then citing *United States v. Kelchner*, 16 C.M.A. 27, 29, 36 C.M.R. 183, 185 (1966)). Indeed, the President has recognized:

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,

---

<sup>1</sup> All references to the R.C.M. are to the *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*) unless otherwise noted.

<sup>2</sup> The majority assumes these points without deciding them. (“Solely for the purpose of deciding this case, we assume—without deciding—that the defense of ineptitude is an affirmative defense that was reasonably raised by Appellant during her court-martial. Accordingly, we further assume that the military judge had a sua sponte duty under R.C.M. 920(e)(3) to instruct the members on the defense of ineptitude.”) *United States v. Nelson*, \_\_ M.J. \_\_, \_\_ (9) (C.A.A.F. 2026).

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, para. 18.b.(3)(d) (2019 ed.).

Importantly, ineptitude is not just a general defense—it is a “special defense.” That is because R.C.M. 916(a) defines special defenses as those “which, although not denying that the accused committed the objective acts constituting the offense charged, den[y], wholly or partially, criminal responsibility for those acts,” and the defense of ineptitude precisely fits this definition.<sup>3</sup>

Having demonstrated that ineptitude is a special defense, R.C.M. 920(e)(3) now comes into play. In pertinent part, this rule states as follows: “*Required instructions.* Instructions on findings *shall* include . . . [a] description of any *special defense* under R.C.M. 916 in issue.” (Second and third emphasis added.) Thus, R.C.M. 920(e)(3) squarely places this mandatory obligation on the military judge.

In the instant case, the defense essentially conceded at trial that Appellant failed to fulfill her duties. However, as Appellant notes in her brief, “trial defense [also] consistently presented the theory of ineptitude from a pretrial motion for a mental examination, through voir dire, into the cross-examination of the Government’s witnesses, into direct examination of Appellant herself, and culminating in a closing argument that argued Appellant was inept.” Although trial defense counsel did not use the term “ineptitude,” the record otherwise supports this characterization of the defense approach at trial.

---

<sup>3</sup> Although ineptitude is not specifically listed in the rule, “R.C.M. 916 provides an illustrative rather than an exhaustive list of defenses.” *United States v. MacDonald*, 73 M.J. 426, 428, 435 (C.A.A.F. 2014) (holding “the military judge had a sua sponte duty to instruct” on involuntary intoxication despite it not being enumerated in R.C.M. 916).

Because Appellant adequately raised the ineptitude special defense at trial, the military judge had a sua sponte duty under R.C.M. 920(e)(3) to instruct the panel members on the defense. However, the military judge failed to do so. He also did not raise the topic with Appellant.<sup>4</sup> Appellant's failure to request the instruction did not absolve the military judge of the duty imposed on him by the *MCM*. In other words, it cannot be said that waiver applies here merely because Appellant did not ask for an instruction that the military judge was already required to give.

The granted issue in this case reads as follows: "Whether the defense counsel's mere failure to object when the military trial judge does not execute his sua sponte duty to instruct on all reasonably raised defenses amounts to an affirmative waiver of the right to have a panel instructed on all reasonably raised defenses." *United States v. Nelson*, 87 M.J. 66 (C.A.A.F. 2026) (order granting review). I believe the correct answer to this query is, "No." In concluding otherwise, the majority relies heavily on *United States v. Davis*, 79 M.J. 329 (C.A.A.F. 2020). *Nelson*, \_\_ M.J. at \_\_, \_\_ (3, 9-12). However, I believe *Davis* and the instant case are distinguishable in a key respect.

In *Davis*, the military judge had a sua sponte responsibility to instruct the panel members regarding what the government needed to prove in order to secure a conviction under Article 120c(a)(2), UCMJ, 10 U.S.C. § 920c(a)(2) (2012). The military judge *did* give such an instruction. 79 M.J. at 330. Moreover, "the military judge asked whether the defense had any objections [to this instruction] or requests for additional instructions. . . . [T]he defense counsel answered. 'No changes, sir.'" *Id.* at 331. Then on appeal, the appellant complained about how

---

<sup>4</sup> I do not foreclose the argument that an accused can affirmatively waive an ineptitude instruction if the military judge addresses this issue with the accused and then the accused freely, knowingly, and intelligently asks the military judge *not* to give the instruction to the panel. However, we are not presented with that scenario here.

the military judge's instruction was worded, and we found waiver. *Id.* at 330-32.

In the instant case, however, despite having a sua sponte responsibility to instruct the panel members regarding the special defense of ineptitude, the military judge gave *no* such instruction—at all. Moreover, as noted above, the military judge did *not* discuss this issue with Appellant. For these reasons, our holding in *Davis* neither contemplates nor controls the instant case.

In *United States v. Schumacher*, we noted: “A military judge must instruct members on any affirmative defense that is ‘in issue.’” 70 M.J. 387, 389 (C.A.A.F. 2011) (quoting R.C.M. 920(e)(3)). And in *United States v. Gillenwater*, we held: “If an affirmative defense such as mistake of fact is reasonably in issue, the judge must give an instruction *sua sponte*.” 43 M.J. 10, 13 (C.A.A.F. 1995) (citation omitted). It is *these* precedents that should control here.<sup>5</sup>

In *United States v. Coley*, the United States Army Court of Criminal Appeals (ACCA) astutely recognized that the *Davis* rule of waiver should not apply in cases where the military judge has a sua sponte duty to give instructions on an affirmative defense. No. ARMY 20220231, 2024 CCA LEXIS 127, at \*9-10, 2024 WL 1341003, at \*3 (A. Ct. Crim. App. Mar. 13, 2024) (unpublished). There, as here, the evidence raised an affirmative defense, but the military judge did not provide an affirmative defense instruction nor did the trial defense counsel request one. *Id.* at \*7, 2024 WL 1341003, at \*3. Similarly, there as here, “[trial] defense counsel affirmatively stated they had no objections and specifically declined to request any additional

---

<sup>5</sup> Military judges have the affirmative duty to issue instructions on reasonable doubt and on the presumption of innocence under Article 51(c), UCMJ, 10 U.S.C. § 851(c) (2018). If the military judge fails to give such instructions and an accused fails to raise the issue at trial, will it now be said on appeal that waiver applies? The majority, which holds “the affirmative waiver in *Davis* applies to all instructions,” *Nelson*, \_\_ M.J. at \_\_ (11), would undoubtedly answer this question in the affirmative. Yet, such an unnuanced approach invites the possibility of a miscarriage of justice in a case where the military judge fails to fulfill his or her mandated responsibility.

instructions.” *Id.*, 2024 WL 1341003, at \*3. Despite these facts, the ACCA reasoned:

[W]e find this case distinguishable from the instructional error waived in *Davis*, 79 M.J. 329, because it involves an affirmative defense instruction. . . . [T]he *Davis* court was not presented with appellant’s current argument that this is not an issue of waiver, but rather an issue of whether the military judge failed in his sua sponte duty to provide the affirmative defense instruction to the panel, despite defense counsel’s lack of objections or request for such an instruction. As such, we reject the government’s assertion that this issue is waived.

*Id.* at \*9-10, 2024 WL 1341003, at \*3 (footnotes omitted).

I agree with the ACCA’s analysis in the *Coley* case. Accordingly, I respectfully dissent in the instant case because I would answer the granted issue in the negative and vacate the decision of the United States Air Force Court of Criminal Appeals.