UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM _____**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Onetera G. NELSON	)	**DOCKETING**
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	

On 22 July 2024, this court received a notice of direct appeal from Appellant in the above-styled case, pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1)(A).

As of the date of this notice, the court has not yet received a record of trial in Appellant's case.

Accordingly, it is by the court on this 22d day of July, 2024,

ORDERED:

The case in the above-styled matter is referred to Panel 2.

It is further ordered:

The Government will forward a copy of the record of trial to the court forthwith.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5), **ONETERA G. NELSON,** United States Air Force, *Appellant.*	)	**NOTICE OF DIRECT APPEAL PURSUANT TO ARTICLE 66(b)(1)(A), UCMJ** No. ACM SXXXXX 22 July 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

On 16–17 January 2024, a special court-martial consisting of officer and enlisted members at Tyndall Air Force Base, Florida, convicted Staff Sergeant (SSgt) Onetera Nelson, contrary to her pleas, of one charge and two specifications of dereliction of duty in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892. R. at 315. The military judge sentenced SSgt Nelson to be reprimanded. R. at 336. The Convening Authority took no action on the findings or the sentence. Convening Authority Decision on Action, 13 February 2024.

On 6 May 2024, the Government purportedly sent SSgt Nelson the required notice by mail of her right to appeal within 90 days. Pursuant to Article 66(b)(1)(A), UCMJ, SSgt Nelson files her notice of direct appeal with this Court.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, 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: frederick.johnson.11@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 on 22 July 2024.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, 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: frederick.johnson.11@us.af.mil

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 24042**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Onetera G. NELSON	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 1 October 2024, counsel for Appellant submitted a Motion for Enlargement of Time (First) requesting an additional 60 days to submit Appellant's assignments of error. The Government opposes the motion. From the date of docketing to when this enlargement would end, 141 days will have elapsed.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure.

Accordingly, it is by the court on this 3d day of October, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (First) is **GRANTED**. Appellant shall file any assignments of error not later than **10 December 2024.**

Counsel should not rely on any subsequent requests for enlargement of time being granted. Each request will be considered on its merits.

Appellant's counsel is advised that any subsequent motions for enlargement of time shall include, in addition to matters required under this court's Rules of Practice and Procedure, statements as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was provided an update of the status of counsel's progress on Appellant's case, (3) whether Appellant was advised of the request for an enlargement of time, and (4) whether Appellant agrees with the request for an enlargement of time. Counsel is not required to re-address item (1) in each subsequent motion for enlargement of time if counsel previously replied in the affirmative.

Counsel may request, and the court may order *sua sponte*, a status conference to facilitate timely processing of this appeal.

Appellant's counsel is further advised that any future requests for enlargements of time that, if granted, would expire more than 360 days after docketing, will not be granted absent exceptional circumstances.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **ONETERA G. NELSON,** United States Air Force, *Appellant.*	)	No. ACM 24042
	)	1 October 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a first enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **10 December 2024**. The record of trial was docketed with this Court on 22 July 2024. The Government forwarded the record of trial to this Court on 12 August 2024. From the date of docketing to the present date, 71 days have elapsed. On the date requested, 141 days will have elapsed.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested first enlargement of time.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, 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: frederick.johnson.11@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 on 1 October 2024.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, 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: frederick.johnson.11@us.af.mil

2 October 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ONETERA G. NELSON, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24042 Panel No. 2

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 2 October 2024.

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **ONETERA G. NELSON,** United States Air Force, *Appellant.*	)	No. ACM 24042
	)	2 December 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a second enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **9 January 2025**. The record of trial was docketed with this Court on 22 July 2024. The Government forwarded the record of trial to this Court on 12 August 2024. From the date of docketing to the present date, 133 days have elapsed. On the date requested, 171 days will have elapsed.

On 16–17 January 2024, a special court-martial consisting of officer and enlisted members at Tyndall Air Force Base, Florida, found Appellant guilty, contrary to her pleas, of one charge and two specifications of dereliction of duty in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892. R. at 315, Record of Trial (ROT) Vol. 1, Entry of Judgment, 21 February 2024 (EOJ). The military judge sentenced Appellant to be reprimanded. R. at 336; EOJ. The convening authority took no action on the findings or the sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. SSgt Onetera G. Nelson*, 13 February 2024.

The record of trial is three volumes consisting of 15 prosecution exhibits, one defense exhibit, and 17 appellate exhibits; the transcript is 336 pages. Appellant is not currently confined.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised of her right to a timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested second enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, 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: frederick.johnson.11@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 on 2 December 2024.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, 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: frederick.johnson.11@us.af.mil

3 December 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ONETERA G. NELSON, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24042 Panel No. 2

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 3 December 2024.

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **ONETERA G. NELSON,** United States Air Force, *Appellant.*	)	No. ACM 24042
	)	2 January 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a third enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **8 February 2025**. The record of trial was docketed with this Court on 22 July 2024. The Government forwarded the record of trial to this Court on 12 August 2024. From the date of docketing to the present date, 164 days have elapsed. On the date requested, 201 days will have elapsed.

On 16–17 January 2024, a special court-martial consisting of officer and enlisted members at Tyndall Air Force Base, Florida, found Appellant guilty, contrary to her pleas, of one charge and two specifications of dereliction of duty in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892. R. at 315, Record of Trial (ROT) Vol. 1, Entry of Judgment, 21 February 2024 (EOJ). The military judge sentenced Appellant to be reprimanded. R. at 336; EOJ. The convening authority took no action on the findings or the sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. SSgt Onetera G. Nelson*, 13 February 2024.

The record of trial is three volumes consisting of 15 prosecution exhibits, one defense exhibit, and 17 appellate exhibits; the transcript is 336 pages. Appellant is not currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 29 clients; 17 clients are pending initial AOEs before this Court. Additionally, one client has a pending brief before the United States Court of Appeals for the Armed Forces (CAAF).[1] Nine matters currently have priority over this case:

1) *United States v. Taylor*, ACM 40371, USCA Dkt. No. 24-0234/AF – The record of trial is six volumes consisting of six prosecution exhibits, one court exhibit, 12 defense exhibits, and 36 appellate exhibits; the transcript is 396 pages. Undersigned counsel has drafted a grant brief to the CAAF in this case.
2) *United States v. Burkhardt-Bauder*, ACM 24011 – The record of trial is eight volumes consisting of five prosecution exhibits, 19 defense exhibits, 53 appellate exhibits, and one court exhibit; the transcript is 957 pages. Undersigned counsel has reviewed approximately 15 percent of the record of trial in this case.
3) *United States v. Haymond*, ACM 40588 – The record of trial is seven volumes consisting of five prosecution exhibits, seven defense exhibits, 42 appellate exhibits,

[1] Since the filing of Appellant's last request for an enlargement of time, counsel completed his review of the five-volume record of trial and prepared and filed a 17-page AOE in *U.S. v. Henderson*, ACM 40419; prepared and filed a 35-page grant brief to the CAAF in *U.S. v. Navarro Aguirre*, ACM 40354, USCA Dkt. No. 24-0146/AF; prepared and submitted a two-page bullet background paper in response to the Government's request for The Judge Advocate General to certify the record to the CAAF in *U.S. v. Patterson*, ACM 40426; prepared and filed a motion to withdraw from appellate review in *U.S. v. Manriquez*, ACM 40527; drafted a 26-page grant brief to the CAAF in *U.S. v. Taylor*, ACM 40371, USCA Dkt. No. 24-0234/AF; reviewed approximately 15 percent of the eight-volume record of trial in *U.S. v. Burkhardt-Bauder*, ACM 24011; and participated in practice oral arguments for three additional cases. Additionally, counsel was on leave on 24–29 December 2024 and was off for the New Year's Day holiday.

and one court exhibit; the transcript is 689 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

4) *United States v. Harnar*, ACM 40559 – The record of trial is three volumes consisting of five prosecution exhibits, 14 defense exhibits, six appellate exhibits, and two court exhibits; the transcript is 106 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

5) *United States v. Driskill*, ACM 39889 (rem) – The record of trial is 14 volumes consisting of 14 prosecution exhibits, four defense exhibits, and 169 appellate exhibits; the transcript is 2,062 pages. Undersigned counsel needs to conduct additional review of the record to prepare a brief on remand in this case.

6) *United States v. Keilberg*, ACM 40601 – The record of trial is four volumes consisting of 13 prosecution exhibits, one defense exhibit, and seven appellate exhibits; the transcript is 118 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

7) *United States v. Banks*, ACM 24057 – The record of trial is seven volumes consisting of ten prosecution exhibits, 16 defense exhibits, and 30 appellate exhibits; the transcript is 985 pages. Undersigned counsel has begun reviewing the record of trial in this case.

8) *United States v. Jackson*, ACM S32780 – The record of trial is five volumes consisting of 12 prosecution exhibits, 13 defense exhibits, five appellate exhibits, and one court exhibit; the transcript is 122 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

9) *United States v. Smith*, ACM 40437 (f rev) – The record of trial is four volumes consisting of seven prosecution exhibits, ten defense exhibits, and 29 appellate exhibits;

the transcript is 338 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised of her right to a timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested third enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, 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: frederick.johnson.11@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 on 2 January 2025.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, 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: frederick.johnson.11@us.af.mil

3 January 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ONETERA G. NELSON, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24042 Panel No. 2

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 3 January 2025.

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **ONETERA G. NELSON,** United States Air Force, *Appellant.*	)	No. ACM 24042
	)	30 January 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a fourth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **10 March 2025**. The record of trial was docketed with this Court on 22 July 2024. The Government forwarded the record of trial to this Court on 12 August 2024. From the date of docketing to the present date, 192 days have elapsed. On the date requested, 231 days will have elapsed. From the date the Court received the record of trial to when this enlargement of time, if granted, would end, 210 days will have elapsed.

On 16–17 January 2024, a special court-martial consisting of officer and enlisted members at Tyndall Air Force Base, Florida, found Appellant guilty, contrary to her pleas, of one charge and two specifications of dereliction of duty in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892. R. at 315, Record of Trial (ROT) Vol. 1, Entry of Judgment, 21 February 2024 (EOJ). The military judge sentenced Appellant to be reprimanded. R. at 336; EOJ. The convening authority took no action on the findings or the sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. SSgt Onetera G. Nelson*, 13 February 2024.

The record of trial is three volumes consisting of 15 prosecution exhibits, one defense exhibit, and 17 appellate exhibits; the transcript is 336 pages. Appellant is not currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 33 clients; 19 clients are pending initial AOEs before this Court. Additionally, one client has an upcoming oral argument before the United States Court of Appeals for the Armed Forces (CAAF).[1] Ten matters currently have priority over this case:

1) *United States v. Henderson*, ACM 40419 – The record of trial is five volumes consisting of ten prosecution exhibits, 21 defense exhibits, two court exhibits, and 25 appellate exhibits; the transcript is 937 pages. Undersigned counsel is drafting a reply to the Government's answer in this case.
2) *United States v. Navarro Aguirre*, ACM 40354, USCA Dkt. No. 24-0146/AF – The record of trial is nine volumes consisting of 14 prosecution exhibits, 16 defense exhibits, one court exhibit, and 47 appellate exhibits; the transcript is 896 pages. Undersigned counsel is preparing to present oral argument as lead counsel before the CAAF in this case on 26 February 2025.
3) *United States v. Burkhardt-Bauder*, ACM 24011 – The record of trial is eight volumes consisting of five prosecution exhibits, 19 defense exhibits, 53 appellate exhibits, and one court exhibit; the transcript is 957 pages. Undersigned counsel has reviewed

[1] Since the filing of Appellant's last request for an enlargement of time, counsel prepared and filed a 26-page grant brief to the CAAF in *U.S. v. Taylor*, ACM 40371, USCA Dkt. No. 24-0234/AF; reviewed approximately 65 percent of the eight-volume record of trial in *U.S. v. Burkhardt-Bauder*, ACM 24011; prepared and filed a 17-page reply brief to the CAAF in *U.S. v. Navarro Aguirre*, ACM 40354, USCA Dkt. No. 24-0146/AF; assisted with preparing and filing a 44-page AOE in *U.S. v. Dawson*, ACM 24041; began reviewing the seven-volume record of trial in *U.S. v. Haymond*, ACM 40588; and participated in practice oral arguments for three additional cases. Additionally, counsel was off for the National Day of Mourning for President Carter's state funeral and the Birthday of Martin Luther King, Jr. holiday.

approximately 80 percent of the record of trial in this case, including all non-sealed materials.

4) *United States v. Haymond*, ACM 40588 – The record of trial is seven volumes consisting of five prosecution exhibits, seven defense exhibits, 42 appellate exhibits, and one court exhibit; the transcript is 689 pages. Undersigned counsel has begun reviewing the record of trial in this case.

5) *United States v. Harnar*, ACM 40559 – The record of trial is three volumes consisting of five prosecution exhibits, 14 defense exhibits, six appellate exhibits, and two court exhibits; the transcript is 106 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

6) *United States v. Driskill*, ACM 39889 (rem) – The record of trial is 14 volumes consisting of 14 prosecution exhibits, four defense exhibits, and 169 appellate exhibits; the transcript is 2,062 pages. Undersigned counsel needs to conduct additional review of the record to prepare a brief on remand in this case.

7) *United States v. Keilberg*, ACM 40601 – The record of trial is four volumes consisting of 13 prosecution exhibits, one defense exhibit, and seven appellate exhibits; the transcript is 118 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

8) *United States v. Banks*, ACM 24057 – The record of trial is seven volumes consisting of ten prosecution exhibits, 16 defense exhibits, and 30 appellate exhibits; the transcript is 985 pages. Undersigned counsel has begun reviewing the record of trial in this case.

9) *United States v. Jackson*, ACM S32780 – The record of trial is five volumes consisting of 12 prosecution exhibits, 13 defense exhibits, five appellate exhibits, and one court

exhibit; the transcript is 122 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

10) *United States v. Smith*, ACM 40437 (f rev) – The record of trial is four volumes consisting of seven prosecution exhibits, ten defense exhibits, and 29 appellate exhibits; the transcript is 338 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised of her right to a timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested fourth enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, 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: frederick.johnson.11@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 on 30 January 2025.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, 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: frederick.johnson.11@us.af.mil

31 January 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ONETERA G. NELSON, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24042 Panel No. 2

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 31 January 2025.

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **ONETERA G. NELSON,** United States Air Force, *Appellant.*	)	No. ACM 24042
	)	3 March 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a fourth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **9 April 2025**. The record of trial was docketed with this Court on 22 July 2024. The Government forwarded the record of trial to this Court on 12 August 2024. From the date of docketing to the present date, 224 days have elapsed. On the date requested, 261 days will have elapsed. From the date the Court received the record of trial to when this enlargement of time, if granted, would end, 240 days will have elapsed.

On 16–17 January 2024, a special court-martial consisting of officer and enlisted members at Tyndall Air Force Base, Florida, found Appellant guilty, contrary to her pleas, of one charge and two specifications of dereliction of duty in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892. R. at 315, Record of Trial (ROT) Vol. 1, Entry of Judgment, 21 February 2024 (EOJ). The military judge sentenced Appellant to be reprimanded. R. at 336; EOJ. The convening authority took no action on the findings or the sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. SSgt Onetera G. Nelson*, 13 February 2024.

The record of trial is three volumes consisting of 15 prosecution exhibits, one defense exhibit, and 17 appellate exhibits; the transcript is 336 pages. Appellant is not currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Undersigned counsel is currently representing 6 clients; 6 clients are pending initial AOEs before this Court. Two matters currently have priority over this case:

1. *Lovell*, No. ACM 40614 – 85 pages – presently on EOT 7. The record has been reviewed and is in the process of being briefed. The record is two volumes, includes 4 prosecution exhibits, 5 appellate exhibits, and 85 pages of transcript. SrA Lovell is confined.

2. *Hymel*, No. ACM 40627 – 634 pages – presently on EOT 6. The record has not been reviewed. The record of trial consists of five volumes. There are five prosecution exhibits, eight defense exhibits, and 18 appellate exhibits. Capt Hymel is not currently confined.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised of her right to a timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time for good cause shown.

Respectfully submitted,

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 on 3 March 2025.

Respectfully submitted,

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

5 March 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) ONETERA G. NELSON, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME No. ACM 24042 Before Panel No. 2

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 5 March 2025.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **ONETERA G. NELSON,** United States Air Force, *Appellant.*	)	No. ACM 24042
	)	24 March 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a sixth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **9 May 2025**. The record of trial was docketed with this Court on 22 July 2024. The Government forwarded the record of trial to this Court on 12 August 2024. From the date of docketing to the present date, 245 days have elapsed. On the date requested, 291 days will have elapsed. From the date the Court received the record of trial to when this enlargement of time, if granted, would end, 270 days will have elapsed.

On 16–17 January 2024, a special court-martial consisting of officer and enlisted members at Tyndall Air Force Base, Florida, found Appellant guilty, contrary to her pleas, of one charge and two specifications of dereliction of duty in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892. R. at 315, Record of Trial (ROT) Vol. 1, Entry of Judgment, 21 February 2024 (EOJ). The military judge sentenced Appellant to be reprimanded. R. at 336; EOJ. The convening authority took no action on the findings or the sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. SSgt Onetera G. Nelson*, 13 February 2024.

The record of trial is three volumes consisting of 15 prosecution exhibits, one defense exhibit, and 17 appellate exhibits; the transcript is 336 pages. Appellant is not currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Undersigned counsel is currently representing 6 clients; 5 clients are pending initial AOEs before this Court. The record has not yet been reviewed. One matter currently has priority over this case:

1. *Hymel*, No. ACM 40627 – 634 pages – presently on EOT 7. The record has been reviewed and potential issues are being researched. The record of trial consists of five volumes. There are five prosecution exhibits, eight defense exhibits, and 18 appellate exhibits. Capt Hymel is not currently confined.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised of the right to a timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time for good cause shown.

Respectfully submitted,

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 on 24 March 2025.

Respectfully submitted,

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 2
Staff Sergeant (E-5) **ONETERA G. NELSON,** United States Air Force, *Appellant.*	)	No. ACM 24042
	)	24 March 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]

KATE E. LEE, Maj, USAF
Appellate Government Counsel
Government Trial & Appellate Operations
1500 W. Perimeter Road, Suite 1190
Joint Base Andrews, MD
DSN: 612-4809

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 24 March 2025.

KATE E. LEE, Maj, USAF
Appellate Government Counsel
Government Trial & Appellate Operations
1500 W. Perimeter Road, Suite 1190
Joint Base Andrews, MD
DSN: 612-4809

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**APPELLANT'S MOTION FOR ENLARGMENT OF TIME (SEVENTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5), **ONETERA G. NELSON**, UNITED STATES AIR FORCE, *Appellant*.	)	No. ACM 24042 28 April 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a sixth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **8 June 2025**. The record of trial was docketed with this Court on 22 July 2024. The Government forwarded the record of trial to this Court on 12 August 2024. From the date of docketing to the present date, 280 days have elapsed. On the date requested, 321 days will have elapsed. From the date the Court received the record of trial to when this enlargement of time, if granted, would end, 300 days will have elapsed.

On 16–17 January 2024, a special court-martial consisting of officer and enlisted members at Tyndall Air Force Base, Florida, found Appellant guilty, contrary to her pleas, of one charge and two specifications of dereliction of duty in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892. R. at 315, Record of Trial (ROT) Vol. 1, Entry of Judgment, 21 February 2024 (EOJ). The military judge sentenced Appellant to be reprimanded. R. at 336; EOJ. The convening authority took no action on the findings or the sentence. ROT Vol. 1,

Convening Authority Decision on Action – *United States v. SSgt Onetera G. Nelson*, 13 February 2024.

The record of trial is three volumes consisting of 15 prosecution exhibits, one defense exhibit, and 17 appellate exhibits; the transcript is 336 pages. Appellant is not currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Undersigned counsel is currently representing 6 clients; 5 clients are pending initial AOEs before this Court. The record has not yet been reviewed. One matter currently has priority over this case:

1. *Hymel*, No. ACM 40627 – 634 pages – presently on EOT 8. The record has been reviewed and the Assignment of Errors has been drafted. The record of trial consists of five volumes. There are five prosecution exhibits, eight defense exhibits, and 18 appellate exhibits. Capt Hymel is not currently confined.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised of the right to a timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time for good cause shown.

Respectfully submitted,

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 on 28 April 2025.

Respectfully submitted,

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **ONETERA G. NELSON,** United States Air Force, *Appellant.*	)	No. ACM 24042
	)	28 April 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 300 days in length. Appellant's nearly year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18 month standard for this Court to issue a decision, which only leaves about 8 months combined for the United States and this Court to perform their separate responsibilities. It appears that Appellant's counsel has not yet begun reviewing the record of trial at this late stage of the appellate process.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 28 April 2025.

VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNTED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	ASSIGNMENT OF ERRORS
	)	
Appellee,	)	Before Panel No. 2
	)	
v.	)	ACM 24042
	)	
Staff Sergeant (E-5)	)	
ONETERA G. NELSON,	)	15 May 2025
United States Air Force,	)	
	)	
Appellant.	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

Assignment of Error

THE DEFENSE OF INEPTITUDE WAS REASONABLY RAISED BY THE EVIDENCE. DESPITE THIS, THE MILITARY JUDGE FAILED TO INSTRUCT THE MEMBERS ON THE DEFENSE. WAS THE PREJUDICE RESULTING FROM THE MILITARY JUDGE'S FAILURE TO INSTRUCT ON THE DEFENSE OF INEPTITUDE HARMLESS BEYOND A REASONABLE DOUBT?

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 of those duties in that she negligently failed to complete the inspection folders for the month of June 2023	NG	NG

			as instructed by 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 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 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.	NG	NG

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.

Statement of Facts

In early 2023, Appellant was the 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. 103-04, and 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 (DOEHRS IH) as well as in hard copy folders. Tr. at 105, 146-47, and 161.

Although Appellant was the Community Health NCOIC, when Technical Sergeant (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 TSgt DM who was TSgt DH's first-level supervisor and Appellant's second-level supervisor. Tr. at 103 and 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. Tr. at 110. 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. 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 the 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.

Argument

THE MILITARY JUDGE'S FAILURE TO INSTRUCT ON THE DEFESNE OF INEPTITUDE WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

Standard of Review

"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

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." *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000). 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*.

A. 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*.

Ineptitude is a defense to the offense of dereliction of duty under Article 92. *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 CMA 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. Merrian-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 120. Thus, the nature of the defense of ineptitude centers on the fitness and ability of an accused.

B. 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 DG. *See* Tr. at 120, 125-27. The defense specifically crossed TSgt DG 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. 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 the theory of ineptitude through to 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.

C. 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.

"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*.

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 set aside her convictions for specifications two and three of Charge I.

Respectfully submitted,

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 on 15 May 2025.

Respectfully submitted,

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**CONSENT MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **ONETERA G. NELSON** United States Air Force, *Appellant.*	)	No. ACM 24042 6 June 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(5), the United States respectfully requests a seven-day enlargement of time, to respond in the above captioned case. This case was initially docketed with the Court on 22 July 2024. This Court ordered the government to "forward a copy of the record of the trial to the [C]ourt forthwith" (*Order*, dated 22 July 2024). The record of trial and a complete verbatim transcript were delivered to this Court on 12 August 2024. Appellant filed her initial brief with this Court on 15 May 2025. The government's response is currently due on 14 June 2025. This is the United States' first request for an enlargement of time. As of the date of this request, 320 days have elapsed since initial docketing. If the enlargement of time is granted the United States' response will be due on 21 June 2025, and 335 days will have elapsed since initial docketing. Prior to filing her assignments of error, Appellant requested and received seven enlargements of time. Undersigned counsel has conferred with Appellant's appellate defense counsel, and the defense consents to the enlargement of time.

There is good cause for the enlargement of time in this case. The Appellate Government Division was recently assigned a legal intern for Summer 2025. As part of his internship, the Appellate Government Division wishes to provide the intern with the opportunity to write a brief under JAJG attorney supervision to foster his professional development. In reviewing the issue presented in the above-titled case's assignment of error, this case appears to be a prime candidate to allow the intern that opportunity. But the intern joined the office on 2 June 2025 and was unable to start work on this case prior to that point. Since his arrival, he has reviewed the complete record of trial and Appellant's assignment of error. He has also conducted thorough legal research on the issue and has begun drafting the government's responsive brief.

A short enlargement of time is necessary to provide the legal intern with adequate time to draft and further research the legal issues raised by Appellant. To date, the intern has read the over three hundred page transcript and the three volume record of trial, conducted initial legal research, and begun initial drafting of the government's response. The additional time will also allow the intern to appropriately address the three components of the assignment of error presented by Appellant. Moreover, the additional time will allow extra time for supervisory review. There are no other Appellate Government counsel who would be able to file a brief sooner because they are also assigned briefs with similar due dates to this. In light of the above, a seven-day enlargement of time would be reasonable to allow the legal intern to prepare a through and responsive brief and to secure supervisory review.

WHEREFORE, the United States respectfully requests this Honorable Court grant this motion for an enlargement of time.

[redacted]

TYLER L. WASHBURN, Maj USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

[redacted]

MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 6 June 2025.

[redacted]

TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**UNITED STATES' ANSWER TO ASSIGNMENT OF ERROR**
Appellee,	)	
	)	
v.	)	
	)	No. ACM 24042
Staff Sergeant (E-5)	)	
ONETERA G. NELSON	)	Before Panel No. 2
United States Air Force	)	
Appellant.	)	23 June 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

ISSUE PRESENTED

THE DEFENSE OF INEPTITUDE WAS REASONABLY RAISED BY THE EVIDENCE. DESPITE THIS, THE MILITARY JUDGE FAILED TO INSTRUCT THE MEMBERS ON THE DEFENSE. WAS THE PREJUDICE RESULTING FROM THE MILITARY JUDGE'S FAILURE TO INSTRUCT ON THE DEFENSE OF INEPTITUDE HARMLESS BEYOND A REASONABLE DOUBT?

STATEMENT OF THE CASE

On 16-17 January 2024, a Special Court-Martial convened at Tyndall AFB, Florida. Appellant rejected an offer of nonjudicial punishment, opposed a motion for a summary court-martial, and charges were preferred and referred to a special court-martial. (*1st Indorsement to the Charge Sheet*, 30 October 2023, ROT, Vol. 1.) Appellant elected to be tried by a mixed panel of officers and enlisted members. (R. at 12.) Appellant entered pleas of not guilty. (R. at 14.) Contrary to her pleas, the panel found Appellant guilty of one charge and two specifications of dereliction of duty, in violation of Article 92, UCMJ. (*Entry of Judgment*, 21 February 2023, ROT, Vol. 1; R. at 315.) The specifications Appellant was found guilty of are as follows:

> Who should have known of her duties at or near Tyndall AFB, FL, 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 TSgt [DH], as it was her duty to do.
>
> Who should have known of her duties at or near Tyndall AFB, FL, 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 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.

(*Entry of Judgment*, 21 February 2023, ROT, Vol. 1.) Appellant was acquitted of one specification of dereliction of duty in violation of Article 92, UCMJ, and one charge and two specifications of false official statement in violation of Article 107, UCMJ. (R. at 315.) After electing to be sentenced by military judge alone, the military judge sentenced Appellant to a reprimand. (R. at 317, 336.) The convening authority took no action on the findings or sentence. (*Convening Authority Decision on Action*, 13 February 2024, ROT, Vol. 1.)

STATEMENT OF FACTS

Request for Mental Examination

On 3 November 2023, prior to Appellant's court-martial, trial defense counsel submitted a motion for appropriate relief requesting that the military judge order a mental examination of Appellant under Rules for Court-Martial 706(b)(2) and 906(b)(14). (App. Ex. III.) In the motion, 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 offered no objection to the examination and the military judge granted the motion. (App. Ex. IV, V.) On 3 January 2024, a sanity board convened to address the questions posed by the military judge, pursuant to the guidelines of R.C.M 706(c)(2), about the mental state of Appellant and determined the following answers to the questions:

a. At the time of the alleged criminal conduct, did SSgt Nelson 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 SSgt Nelson, 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 SSgt Nelson 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**

(App. Ex. X.)

Appellant failed to complete assigned tasks from her direct supervisor

At trial, Technical Sergeant (TSgt) DH, Appellant's direct supervisor at the time of the offenses, testified to the following facts. (R. at 159.) Prior to 1 June 2023, while TSgt DH was on maternity leave, Appellant took over TSgt DH's role as the Community Health Non-Commissioned Officer in Charge (NCOIC). (R. at 161.) On 1 June 2023, TSgt DH returned from maternity leave and took over as the Community Health NCOIC. (R. at 160.) As a result, Appellant became the NCOIC of the Food and Public Facility Sanitation unit. (Id.) The responsibilities as a Food and Public Facility Sanitation NCOIC was a valuable role to the mission at Public Health Flight at Tyndall AFB, but included less day-to-day responsibilities. (R. at 129.) In this role, TSgt DH was Appellant's supervisor. (R. at 160-61.) Over the course of that supervisory role, TSgt DH instructed Appellant to: (1) update the facility folders with

inspection reports on the office shared drive; and (2) to not mark inspections as complete on the Defense Occupational and Environmental Health Readiness System ("DOEHRS IH") until TSgt DH had a chance to review. (R. at 163-64, 172.) Appellant was experienced in these tasks and therefore was capable of performing such tasks. (R. at 163-64.) TSgt DH testified that Appellant failed to do both tasks. (R. at 164-65, 170, 173-74.)

TSgt DH's testimony further explained Appellant's failure to complete her assigned tasks, as well as Appellant's response to TSgt DH's attempts to assist her. TSgt DH became aware that Appellant failed to update the facility folders and marked inspections as complete without TSgt DH's review. (R. at 167.) As a result, TSgt DH went to great lengths to communicate and support Appellant through "morning huddles," multiple email threads and phone calls. (R. at 167-68.) 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." (R. at 167-68.) And when TSgt DH "asked to see [the work product], [TSgt DH] would be told no" and "shooed away . . . on multiple occasions" by Appellant. (R. at 167-68.)

TSgt DM, Appellant's second-level supervisor, testified that in mid-July 2023, Appellant, TSgt DH, and himself met to discuss Appellant's performance issues. (R. at 110.) At that meeting, TSgt DM asked Appellant if "Sergeant [DH] [is] the reason why [Appellant] is not doing her work." (R. at 111.) In response, 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]." (R. at 111, 201.) TSgt DH testified that at this meeting Appellant requested if there was a way to "get [TSgt DH] out of the element. (R. at 201.) This request was denied, and as a result Appellant asked to be moved out of the unit and out of the military. (R. at 201.) In response TSgt DM gave Appellant names of

organizations to reach out to, but emphasized that "as long as she's under the umbrella of Public Health," TSgt DH would be her supervisor (Id.)

TSgt DH testified that her leadership, including the squadron commander was aware of Appellant's problems with failing to complete tasks. (R. at 186.) TSgt DH explained that this was not her "coming down" on Appellant, but rather following up with Appellant about her tasks. (Id.) As a response, TSgt DH mentioned that Appellant slammed doors on TSgt DH. (Id.) TSgt DH was not aware that Appellant had a mental health disorder, but was aware that she had been to the mental health clinic before. (R. at 193.)

Findings Instructions

Immediately following the presentation of witnesses by the trial counsel and defense counsel, the military judge offered the Government and Appellant the opportunity to object or request modification of the findings instructions on multiple occasions. (R. at 263-64, 266, 268.) First the military judge talked to both parties after reading the draft instructions and offered both sides the following:

> 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.

(R. at 263-64.) Next, the military judge gave the parties a 30-minute recess to further review and print the draft instructions. (R. at 267.) And finally, after the recess and the draft instructions

were entered as Appellate Exhibit XIV, the military judge provided one last opportunity for changes before its reading to 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.

(R. at 268.) None of the draft instructions outlined the affirmative defense of ineptitude. The Manual for Courts-Martial United States part IV para. 18.c.(3)(d) (2024 ed.) (MCM) listed the affirmative defense of ineptitude for dereliction of duties as follows:

> 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 the weapon.

Still, trial defense counsel did not raise the defense of ineptitude while discussing findings instructions.

Appellant's theory of the case did not raise the defense of ineptitude

Appellant raises the defense of ineptitude for the first time in this appeal. (App. Br. at 1.) While references to mental health challenges and evaluations were made during trial, at no point during the trial did the defense raise or argue any affirmative defenses, let alone the defense of

ineptitude. For instance, Appellant in her testimony said that her commander ordered a command-directed evaluation (CDE), which resulted in at least six follow-up appointments and therefore not present for duty. (R. at 246.) 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 attributed her mental health struggles to ineptitude. (R. at 99.) In closing argument, trial defense counsel made a comment that TSgt DH should have known that Appellant was suffering with mental health issues. (R. at 293.) Nevertheless, the crux of the defense's theory of the case was that TSgt DH burdened Appellant with a heavy task load that Appellant was trying to accomplish, and that TSgt DH should have worked on her leadership role and assisted Appellant in getting tasks completed. (R. at 293-94.) Notably, in closing arguments, trial defense counsel alluded to Appellant's aptitude:

> We also heard [TSgt DH] and [TSgt DM] tell you that the tasks ordered to be completed were simple. If they were so simple, why was she the only one doing them? Did we hear any evidence of what [TSgt DH] actually does?

(R. at 293.) Appellant's aptitude was also supported by her testimony in which she testified that in a different assignment, she could complete her tasks. (R. at 249.)

ARGUMENT

APPELLANT AFFIRMATIVELY WAIVED HER RIGHT TO AN INSTRUCTION ON THE AFFIRMATIVE DEFENSE OF INEPTITUDE. EVEN IF APPELLANT DID NOT WAIVE THE ISSUE, THE MILITARY JUDGE DID NOT ERR WHEN HE DID NOT SUA SPONTE INSTRUCT THE MEMBERS ON INEPTITUDE.

Standard of Review

Waiver

Whether an appellant has waived an issue is a legal question that this Court reviews de novo. United States v. Davis, 79 M.J. 329, 331 (C.A.A.F. 2020). "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 the Court to correct on appeal. United States v. Campos, 67 M.J. 330, 332 (C.A.A.F. 2009). 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). 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 United States v. Barnes, 39 M.J. 230, 233 (C.M.A. 1994)). The affirmative waiving of a special defense need not be an overt answer on whether to include the given instruction and can rather be demonstrated through the totality of the actions of the defense throughout trial. *See* Gutierrez, 64 M.J. at 376-77 ("This [C]ourt has recognized that there are no magic words to establish affirmative waiver"). "In making waiver determinations, [this Court] looks to the record to see if the statements signify that there was a "purposeful decision" at play. Id. (quoting United States v. Smith, 50 M.J. 451, 456 (C.A.A.F. 1999)).

Whether findings instruction were "reasonably raised by the evidence" at trial is a question of law that this Court reviews de novo. R.C.M. 920(e)(3); United States v. Davis, 76 M.J. 224, 229 (C.A.A.F. 2017).

Plain Error

When an accused fails to preserve an "instructional error by an adequate objection or request, [this Court] test[s] for plain error." Id. Johnson v. United States, 520 U.S. 461, 468-69

(1997) (reviewing instructional error for "plain error" where no objection was made at trial); *see also* United States v. Pope, 69 M.J. 328, 333 (C.A.A.F. 2011). "Plain error requires [an appellant to prove] (1) error, (2) the error was clear or obvious, [and] (3) the error prejudiced the accused's substantial rights." United States v. Easterly, 79 M.J. 325, 327 (C.A.A.F. 2020) (citing United States v. Grier, 53 M.J. 30, 34 (C.A.A.F. 2000)).

Law and Analysis

Appellant waived any instruction on the affirmative defense of ineptitude. Even if this Court finds that Appellant forfeited the instruction rather than affirmatively waived the instruction, Appellant's claim still fails because the evidence presented at trial did not raise the affirmative defense of ineptitude. As a result, the military judge did not err in omitting the instruction on ineptitude. In sum, Appellant failed to meet his burden of demonstrating plain error. Thus, this Court should deny Appellant's assignment of error.

A. Appellant affirmatively waived her right to an instruction on the affirmative defense of ineptitude.

Appellant waived any instruction on the affirmative defense of ineptitude and therefore this Court should not review Appellant's assignment of error. When an accused has "no objection," that generally "constitutes an affirmative waiver of the right or admission at issue." Swift, 76 M.J. at 217. Here, the military judge asked the defense if they wanted any additional instructions and trial defense counsel stated, "No additional instructions Sir." (R. at 263-64.) After taking a 30 minute recess to review the final version of instructions, the military judge asked the parties if they had any objections. (R. at 268.) When asked, trial defense counsel said, "No, Your Honor." (Id.) Thus, trial defense counsel affirmative waived the instruction.

Appellant also made a "purposeful decision" to not include a defense of ineptitude, or any affirmative defense. Smith, 50 M.J. at 456. The MCM states that ineptitude negates

dereliction. MCM pt. IV para. 18.c.(3)(d). Still, trial defense counsel, when faced with multiple opportunities to request affirmative defenses instructions, such as ineptitude, declined to request such an instruction. This was a purposeful decision to waive this defense, which was further demonstrated by defense's theory of the case that put blame on TSgt DH's leadership rather than Appellant's ineptitude. For these reasons, this Court should find that Appellant waived the issue.

B. Even if this Court finds no affirmative waiver, there was no plain error.

In the event this Court finds that Appellant forfeited the instruction rather than affirmatively waived it, Appellant's claim still fails. In cases of an omission of a required instruction not preserved by the defense, this Court reviews for plain error. Davis, 76 M.J. at 229. Under a plain error review, the Appellant bears the burden of proving: "(1) error, (2) the error was clear or obvious, [and] (3) the error prejudiced [her] substantial rights." Easterly, 79 M.J. at 327. Here, there was no plain error for three reasons: (1) the omission of an affirmative defense of ineptitude was not error; (2) given that there was no error, it could hardly be a clear or obvious one; and (3) even if there was clear or obvious error, Appellant suffered no prejudice. Appellant is therefore not entitled to relief.

1. The military judge did not err in omitting to instruct the panel members on ineptitude.

The evidence at trial did not reasonably raise the defense of ineptitude, and therefore the ineptitude instruction was not a required instruction. Ineptitude in Article 92, UCMJ, dereliction of duty cases is associated with good faith and honest efforts to adhere to standards and duties. United States v. Powell, 32 M.J. 117, 120-21 (C.M.A. 1991). In Powell, the court referring to the MCM 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). Every example provided both in Powell and the 2024 Edition of the MCM consider ineptitude to qualify when individuals "earnestly tried" to complete a task, demonstrated "honest effort," or "zealously applied himself" but was still inefficient. (Id.). Powell establishes that ineptitude can apply when genuine efforts have produced faulty results. 32 M.J. at 121. To that end, an ineptitude defense is one that removes the mens rea component of dereliction of duty because at the very least, the intention was a positive one. *See* MCM, pt. IV para. 18.c.(3)(d).

Appellant's primary argument is that her mental health struggles negatively affected her ability to carry out her duties. (App. Br. at 7.) But Appellant cites no authority that equates ineptitude to a mental health diagnosis or mental health issues. Simply put, there is no case law that supports Appellant's proposition that ineptitude was a defense in her case. The R.C.M.'s already outlines a defense for lack of mental responsibility, negating the need for courts to address this specific issue raised by Appellant. R.C.M. 916(k). Further, Appellant's definitions of ineptitude do not connect ineptitude to mental health struggles.[1] As a result, this Court should not find Appellant's arguments persuasive.

Notably, Appellant fails to articulate how she zealously applied herself and showed honest efforts to complete her duties. 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.

[1] Appellant's brief defines ineptitude as the "quality of state of being inept," and inept as the "lacking in fitness or aptitude. (App. Br. at 7 citing Merrian Webster's Collegiate Dictionary.)

(R. at 167-68.) There was no indication of ineptitude or even lack of knowledge. The evidence on the other hand revealed that Appellant did not want to work for TSgt DH. When TSgt DH tried to assist Appellant, Appellant would slam the door on TSgt DH. (R. at 186.) Appellant did not like working for TSgt DH, which is supported by Appellant's request to leave that section in Public Health and her follow-up request to separate from the military. (R. at 201.)

Moreover, TSgt DH assigned tasks that Appellant was experienced in. (R. at 163-64.) The evidence did not raise circumstances in which Appellant was not capable of completing tasks. The facts of this case do not allude to an honest effort or zealous attempts to complete the assigned duties. Appellant's own testimony revealed that she had the aptitude to complete tasks, although in another duty assignment. (R. at 249.) Nonetheless, this admission showed that Appellant had the aptitude to complete tasks required by a Technical Sergeant in the Air Force in the field of Public Health.

In sum, this was not a case of ineptitude where negligent intent can be removed because of Appellant's honest efforts producing faulty results. Instead, this was a case in which Appellant was consciously aware of her capabilities and her duties, but neglected those capabilities and duties in reaction to her shifting assignments once TSgt DH returned from maternity leave. *See* Powell, 32 M.J. at 121.

Also instructive is United States v. Dellarosa, where the appellant was tasked with monitoring the weather conditions, and was found "guilty of dereliction of duty by reason of his negligent failure to accurately record and report weather conditions." 30 M.J. 255, 256 (C.M.A. 1990). In his defense, the appellant argued that because of his long shifts (11 and 12 hours) and his lack of experience, he was not negligent, but inept. The Court of Military Appeals (CMA) ruled that the appellant's "purported inexperience and tiredness were circumstances to consider

in this regard, but they did not legally preclude a finding of negligence." Dellarosa, 30 M.J. at 260. Even when ineptitude was raised at trial, ineptitude was found to not apply in a case in which someone was supposedly overworked, tired, and inexperienced. Id. Thus, the military judge applied the correct standard of negligence in reaching the findings of guilt for dereliction of duty. Id. at 259.

Dellarosa further supports the proposition that ineptitude did not apply at Appellant's court-martial. In Dellarosa, the appellant was tired, inexperienced, and possibly overworked, and still the CMA determined that an ineptitude defense fell short. 30 M.J. at 260. Appellant here was indeed experienced in this line of work as demonstrated by her previous position as the NCOIC of Community Health. And there was no evidence that as the NCOIC of Community Health her duties fell short. Also, there was no evidence that Appellant displayed earnest efforts to fulfil her duties. But rather Appellant had a lack of disregard to take orders from TSgt DH. Thus, it logically follows that Appellant was negligent in the performance of her duties rather than inept.

Even when defining ineptitude most favorable to Appellant by using her own non-legal definition of ineptitude, such as "lacking in fitness or aptitude," her claim still fails. Appellant has not pointed to anything in the record that described her lack of fitness or aptitude as the NCOIC of Community Health. Instead, Appellant in her testimony pointed to having less time to complete the tasks due to having six days of follow-up appointments from the CDE, the quantity of work, and what Appellant described as a constant "badgering" by TSgt DH, which did not equate to ineptitude but rather other difficulties Appellant had in the unit. (R. at 245, 247.) For these reasons, the evidence presented at trial did not reasonably raise the defense of ineptitude. Thus, the military judge did not err in omitting an ineptitude defense instruction.

Given that it was not error, and certainly not clear or obvious error to omit the ineptitude instruction, Appellant fails to meet the first two prongs of the plain error test.

2. Appellant suffered no prejudice.

The final prong of plain error test requires that the error must materially prejudice a substantial right of an accused. Easterly, 79 M.J. at 327.

Appellant is mistaken that any potential error was constitutional. A military judge has the sua sponte authority to give instructions reasonably raised by the evidence. United States v. McDonald, 57 M.J. 18, 20 (C.A.A.F. 2002). When a specific instruction was required, the government must prove that the error was harmless beyond a reasonable doubt. Id. Here, the ineptitude instruction was not required in Appellant's case, as described above, because it was not reasonably raised by the evidence. Thus, the error, if any, was nonconstitutional.

The lack of an ineptitude instruction would have no bearing on the findings because the defense's theory of the case focused on TSgt DH's lack of leadership. (R. at 293-94.) Although Appellant in her testimony discussed mental health issues, none of these issues elevated to the level of lack of mental responsibility or even ineptitude. The defense's theory of the case never alluded to Appellant's lack of capabilities to complete the tasks. In fact, trial defense counsel in closing argument highly suggested that Appellant was well versed in her job and questioned why she was the only one being assigned these tasks. (R. at 293.) Defense's theory of the case never addressed Appellant's ineptitude. And defense never linked her mental health issues to ineptitude. The proper channels to determine mental fitness were explored per the sanity board, and the evaluation was properly conducted, and Appellant did not advance any defense as a result. Nevertheless, the panel members were aware of Appellant's mental health struggles, and

they still found her negligent in the performance of her duties. An instruction on ineptitude would not have changed these findings.

The military judge included instructions on defining duty, negligence, and the dereliction of duty. (App. Ex. XIV.) In those instructions, "Negligently" is defined as an "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." (Id.) The members were directly instructed to consider the "same or similar circumstances" as Appellant. (Id.) The members found a negligent intent, and an ineptitude instruction would be irrelevant. For these reasons, the error, if any, did not prejudice Appellant's substantial rights. Appellant asserted a defense at trial and never discussed ineptitude as part of that defense. Thus, this Court should deny this assignment of error.

CONCLUSION

WHEREFORE, this Court should deny Appellant's claim and affirm the findings and sentence.

[redacted]
JACK C. KOROLOGOS[2]
Appellate Government Extern
Government Trial and
Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

[redacted]
VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

[2] As a civilian extern, Mr. Korologos as a signing, non-attorney was always supervised during the appellate process, and undersigned counsel assumes responsibility for the content of the filing pursuant to this Court's Rules of Practice and Procedure, Rule 14(c).

MATTHEW D. TALCOTT, Col, USAF
Chief
Government Trial and
Appellate Counsel Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

FOR

MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellate Counsel Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 23 June 2025.

[redacted]

VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNTED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	REPLY TO THE GOVERNMENT'S ANSWER
	)	
Appellee,	)	Before Panel No. 2
	)	
v.	)	ACM 24042
	)	
Staff Sergeant (E-5)	)	
ONETERA G. NELSON,	)	30 June 2025
United States Air Force,	)	
	)	
Appellant.	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

Appellant, Staff Sergeant Onetera G. Nelson, by and through undersigned counsel pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this reply to the Government's Answer, dated 23 June 2025. In addition to the arguments in the opening brief, filed on 15 May 2025, Appellant submits the following arguments for the issue listed below.

> **THE DEFENSE OF INEPTITUDE WAS REASONABLY RAISED BY THE EVIDENCE. DESPITE THIS, THE MILITARY JUDGE FAILED TO INSTRUCT THE MEMBERS ON THE DEFENSE. WAS THE PREJUDICE RESULTING FROM THE MILITARY JUDGE'S FAILURE TO INSTRUCT ON THE DEFENSE OF INEPTITUDE HARMLESS BEYOND A REASONABLE DOUBT?**

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

The Government's argument that Appellant affirmatively waived an instruction on the defense of ineptitude is misplaced. Answer at 9. The Government cites to *United States v. Swift* for the proposition that "[w]hen an accused has 'no objection,' that generally 'constitutes an affirmative waiver of the right or admission at issue.'" Answer at 9; 76 M.J. 210, 217 (C.A.A.F. 2017).

Swift has no applicability to the instant case; *Swift* dealt with the admissibility of an uncorroborated confession to which the trial defense counsel did not object. *See* 76 M.J. at 217. Whatever standard may or may not apply in that situation, the standard required to waive an instruction on an affirmative defense is clear. As pointed out in the Assignment of Error (AOE), "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.'" AOE at 6; *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 (C.A.A.F. 1990) (stating, "we find that a demonstration of waiver not amounting to an affirmative declination of counsel is permitted by MRE 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). The Government twice cites the Court of Appeals for the Armed Forces' decision in *United States v. Gutierrez*, 64 M.J. 374 (C.A.A.F. 2007), Answer at 8, but ignores that decision's statements that an accused does not waive the right to a required instruction on an affirmative defense "by failure to request it or by failure to object to its omission." *Gutierrez*, 64 M.J. at 376. The Army Court last year cited *Gutierrez* in ruling that *United States v. Davis*, 79 M.J. 329

(C.A.A.F. 2020), does not apply to affirmative defense instructions. *United States v. Coley*, No. ARMY 20220231, 2024 CCA LEXIS 127, at *9-10 (A. Ct. Crim. App. Mar. 12, 2024), *aff'd on other grounds*, __ M.J. __ No. 24-0184/AR, 2025 CAAF LEXIS 407 (C.A.A.F. May 27, 2025) (mem.). The Army Court also noted that *Gutierrez*'s finding of affirmative waiver is distinguishable where "neither the judge nor defense counsel proposed the affirmative defense instruction that was raised by the evidence." *Id.* at *10 n.8. This, like *Coley*, is just such a case. Here, as in *Coley*, waiver does not apply.

Not only do the particular facts and circumstances of the instant case show that trial defense counsel never *expressly* relinquished an instruction on the defense of ineptitude, there is nothing in the record to suggest that the defense counsel knew that the defense of ineptitude even existed. As pointed out in the AOE, 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. AOE 7-8. 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.

The CAAF similarly addressed a lack of waiver in *United States v. Wells*. 52 M.J. 126 (C.A.A.F. 1999). In *Wells*, the appellant was charged with – and pleaded not guilty to – premeditated murder and was tried by a general court-martial composed of officer and enlisted members. *Id*. at 127. Evidence admitted at findings tended to show the homicide occurred during the heat of passion, which amounted to some evidence that the appellant may have committed the lesser offense of voluntary manslaughter rather than premeditated murder. *Id*. at 130. At the close of findings, the military judge failed to instruct the panel on heat of passion or voluntary manslaughter. *Id*. at 128. As the dissent in *Wells* pointed out, the defense counsel reviewed the

military judge's instructions, never requested the heat of passion or voluntary manslaughter instructions, and told the military judge that he had "no other issues which needed to be raised" regarding the instructions. *Id*. at 133. The appellant was then convicted of the greater offense. *Id*. Despite the defense counsel's failure to request an instruction, and despite the defense counsel saying that he had no objections to the instructions, the CAAF reversed, finding that the military judge had to instruct "on a lesser-included offense 'sua sponte . . . for which there is . . . some evidence which reasonably places the lesser included offense in issue.'" *Id*. at 130 (citation omitted). The *Wells*' defense counsel's acts and omissions are substantially identical to the acts and omissions by the defense counsel in the instant case. Additionally, the judge in *Wells* had a sua sponte duty to instruct, just like the judge in the instant case had a sua sponte duty to instruct. Thus, just like there was no waiver in *Wells*, there is no waiver here.

Even in a situation where trial defense counsel requested an instruction on an affirmative defense, and subsequently withdrew the request, the Court of Military Appeals found no waiver. *United States v. Moore*, 15 M.J. 354, 375 (C.M.A. 1983) (stating, "The withdrawal of the defense request for an instruction on mistake of fact can hardly be considered a waiver, since it was predicated on an inaccurate assurance that the topic would be covered in another portion of the judge's advice to the court members.").

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 discussed in the AOE, given the defense counsel's theory of ineptitude by reason of impairment of mental health, 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. AOE at 7-9.

B. The Government's argument that plain error should be applied is wrong both as to the use of plain error as the standard of review and as to the analysis of plain error as applied to this case.

The Government argues that even if there was no waiver, the case should be reviewed for plain error and be found lacking. Answer at 10-15. For two reasons, this is incorrect.

1. The case should be reviewed by a harmless beyond a reasonable doubt standard, not a plain error standard.

The Government cites to *United States v. Davis* for the proposition that in the context of an unobjected to omission of an instruction on an affirmative defense, the case should be reviewed for plain error. *See* Answer at 10; 76 M.J. 224 (C.A.A.F. 2017). While *Davis* does stand for that proposition, and Appellate acknowledges the Court is bound by that opinion, as discussed below *Davis* was decided incorrectly and this portion of the argument is made for preservation purposes.

The appellant in *Davis* was convicted of a specification of rape contrary to his pleas. *Id*. at 226. On appeal, the appellant argued that evidence reasonably raised the issue of mistake of fact as to consent, and, thus, the trial judge erred in not instructing the panel on the defense of mistake of fact. *Id*. at 227. The CAAF found that because the trial defense counsel did not object to the instructions or request a mistake of fact instruction, the issue was forfeited and the court would, therefore, review the case for plain error only. *Id*. at 229.

In coming to the decision that an instruction on an affirmative defense could be forfeited and reviewed for plain error – rather than preserved due to the trial judge's sua sponte duty to instruct on affirmative defenses and reviewed for harmlessness beyond a reasonable doubt – the CAAF reasoned that the military judge's duty to instruct on a defense does not come from the idea

that the duty is a "sua sponte" duty, but instead comes from the language of Rule for Courts-Martial (R.C.M.) 920(e) that the instruction "shall" be given. *Id*. at 229 n.3. Thus, the logic goes, the language of R.C.M. 920(f), which says that a failure to object to an instruction or the omission of an instruction amounts to a forfeiture of the objection, controls. *Id*. at 229-30. Therefore, the appellant forfeited his objection to the omission of the instruction and the CAAF reviewed for plain error. *Id*. Specifically, the CAAF said,

> But the language of R.C.M. 920(f) . . . and the great weight of our precedent clearly call for plain error review when an appellant fails to request an affirmative defense instruction . . . . There is no principled basis for ignoring R.C.M. 920(f) only in the case of affirmative defense instructions, thereby treating those instructions differently from—or as more important than—elements, lesser included offenses, and other "required" instructions.

Id.

However, there is, in fact, a very "principled basis" for why R.C.M. 920(f) forfeiture does not apply to a defense counsel's failure to request an instruction on an affirmative defense. Despite the CAAF's reasoning that a military judge's duty to instruct flows, not from the concept of a sua sponte duty, but because the R.C.M. requires it, this is not the case; at least, it is not the *whole* case.

As discussed below, while it is correct that R.C.M. 920(e) requires military judges to instruct on affirmative defenses, this duty – which is a sua sponte duty – existed and was recognized by the Court of Military Appeals long before the R.C.M. existed. Because it existed before the R.C.M. existed, the R.C.M. is not, and cannot be, the sole source for a judge's duty to instruct on special defenses even in the absence of a request to do so.

The 1951 version of the Manual for Courts-Martial contained no requirement that instructions be given on affirmative defenses that were raised by the evidence. *See Manual for Courts-Martial, United States* (1951 ed.) (*MCM*), chap. XIII, ¶ 73. Indeed, paragraph 73 of the

1951 *MCM* only required the law officer to instruct the court on the elements of the offense. *Id*. And, although the 1969 edition of the *MCM codified* the requirement that a judge instruct on reasonably raised affirmative defenses (*See* 1968 rev. ed., chap. XIII, ¶ 73(a)), the actual sua sponte duty to do so was recognized by the Court of Military Appeals at least as far back as 1953. *See United States v. Heims*, 12 C.M.R. 174, 177 (C.M.A. 1953). Indeed, in 1953 the court stated,

> We now direct our attention to the question of whether the law officer here was required -- **in the absence of specific request** -- to furnish the court with appropriate instructions on the affirmative defense of physical incapacity. Assimilating the present problem to our treatment of others involving affirmative defenses and related matters, we do not hesitate to say that such instructions are **required sua sponte** where the presence of physical incapacity is fairly raised by the evidence.

Id. (emphasis added).

Based on this, there can be no doubt that a military judge has a sua sponte duty to instruct on reasonably raised affirmative defenses, and that duty existed – and exists – separate and apart from the duties required by R.C.M. 920(e). Therefore, the forfeiture provision of R.C.M. 920(f) does not control.

Because a military judge has a sua sponte duty to instruct on reasonably raised affirmative defenses that is independent from the duty created by the R.C.M., any error is preserved for appellate review rather than forfeited as the two concepts are logically mutually exclusive. It would make little sense to recognize that a judge *without prompting or suggestion* has a duty to instruct on reasonably raised defenses, but then find that if the judge is not prompted or suggested the judge has no duty. *See United States v. Easterly*, 79 M.J. 325, 328 (C.A.A.F. 2020) (stating, "Sua sponte means 'without prompting or suggestion.'"). And, because the error is preserved, it is reviewed by a harmless beyond a reasonable doubt standard. *United States v. MacDonald*, 73 M.J. 426, 434 (C.A.A.F. 2014); *see also United States v. Barnes*, 39 M.J. 230 (C.M.A. 1994)

(stating, "I agree, as well, with that part of footnote 1 to the majority opinion that the Court of Military Review erred in applying a plain-error analysis to the judge's instructional omission. Plain error is a device for overcoming passive waiver. . . . Since the judge's duty was *sua sponte* and, thus, since passive waiver through failure to request the instruction is not relevant, a plain-error analysis has no proper role in this context.") (Wiss, J., concurring.)

2. Even if Plain Error is the correct standard, there was Plain Error in this case.

Even if plain error is the correct standard, there was plain error in this case. "Under a plain error analysis, the accused 'has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused.'" *United States v. Tunstall*, 72 M.J. 191, 193-94 (C.A.A.F. 2013) (citation omitted).

i. There was error.

Under the caselaw, as well as the R.C.M., a military judge has a duty to instruct on any special defense that is at issue in a case. *See* R.C.M. 920(e)(3); *United States v. Maynulet*, 68 M.J. 374, 376 (C.A.A.F. 2010) (stating, "a military judge has a sua sponte duty to instruct on an affirmative defense if reasonably raised"); *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002) (stating that once an affirmative defense is raised by the evidence the judge must instruct on it even if not requested.); *United States v. New*, 50 M.J. 729, 745 (C.A.A.F. 1999) (stating, "The military judge has an affirmative *sua sponte* duty to instruct on special defenses *reasonably* raised by the evidence even without a specific request by a party."); *United States v. Moore*, 15 M.J. 354, 375 (C.M.A. 1983) (stating, "the military judge has an independent and paramount duty to instruct on any affirmative defense raised by the evidence, regardless of defense theories or requests."); *United States v. Verdi*, 5 M.J. 330, 333 (C.M.A. 1978) (stating, "the military judge must bear the primary responsibility for assuring that the jury is instructed on . . . potential defenses[.]"); *United States v. Sasser*, 29 C.M.R. 314, 316 (C.M.A. 1960) (stating that the judge

"did not fulfill his duty by instructing on the affirmative defense[.]"); *Heims*, 12 C.M.R. at 177 (C.M.A. 1953) (stating, "we do not hesitate to say that such instructions [on affirmative defenses] are required sua sponte where the presence of [the defense] is fairly raised by the evidence.").

This duty is triggered when the defense is "reasonably raised by the evidence." *United States v. Brown*, 43 M.J. 187, 189 (C.A.A.F. 1995). "The test whether a defense is reasonably raised is whether the record contains some evidence to which the military jury may attach credit if it so desires." *Id*. "The defense theory at trial is not dispositive in determining what affirmative defenses have been reasonably raised." *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000). Any doubt whether an instruction should be given should be resolved in favor of the accused. *Id*.

As described at length in in the AOE, the majority of the defense's trial theory centered on Appellant's ineptitude due to her mental health struggles. AOE at 7-9. The theory was presented in the opening statement (Tr. at 99), was developed through the witnesses (Tr. at 125-27, 185-86), was discussed by Appellant when she took the stand (Tr. at 246-47), and was argued in the closing (Tr. at 296).

ii. The error was plain.

The defense of ineptitude to dereliction of duty has existed for at least thirty years. *See United States v. Powell*, 32 M.J. 117, 120 (C.M.A. 1991). The defense is specifically pointed out, and clearly delineated, in the explanation section of the *MCM* discussing Article 92, UCMJ. *See MCM*, pt. IV, ¶ 18c(3)(d). It is not a unique or novel defense.

Additionally, as discussed above, trial defense counsel clearly presented the theory over and over for the members and the military judge. Given the over seventy years of caselaw

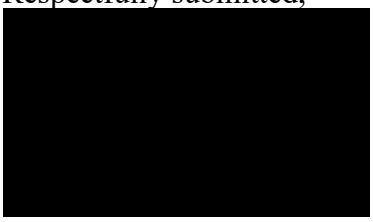
expressing the military judge's duty to instruct on defenses that are reasonably raised, and the clear presentation of the defense by the trial defense counsel, the failure of the military judge to instruct on ineptitude was plain.

iii. The error materially prejudiced the substantial rights of Appellant.

As discussed in the AOE, the trial defense's consistent theory was one of ineptitude. AOE at 9. Appellant's ineptitude due to mental health struggles was so apparent, the trial counsel did not even attempt to counter it. The only piece Appellant needed to complete the puzzle was the military judge's instruction to the members that all the facts and arguments presented by the trial defense counsel were, in fact, a legal defense. The military judge's failure to instruct on the defense materially prejudiced the substantial rights of Appellant.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside her convictions for specifications two and three of Charge I.

Respectfully submitted,

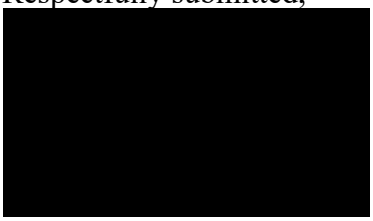


LUKE D. WILSON, Lt Col, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: luke.wilson.14@us.af.mil

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 on 30 June 2025.

Respectfully submitted,



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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 24042**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Onetera G. NELSON	)	**PANEL CHANGE**
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 17th day of July, 2025,

ORDERED:

The record of trial in the above styled matter is withdrawn from Panel 2 and referred to a Special Panel for appellate review.

The Special Panel in this matter shall be constituted as follows:

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
MASON, BRIAN C., Lieutenant Colonel, Appellate Military Judge
MCCALL, KRISTIN K.B., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 24042**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Onetera G. NELSON	)	**PANEL CHANGE**
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 9th day of October, 2025,

ORDERED:

The record of trial in the above styled matter is withdrawn from a Special Panel and referred to Panel 2 for appellate review.

This panel letter supersedes all previous panel assignments.

[redacted]

Chief Commissioner