IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES *Appellee* v. **DYLLIN V. ROBERTS** Senior Airman (E-4) U.S. Air Force *Appellant*	**BRIEF OF THE NATIONAL INSTITUTE OF MILITARY JUSTICE AS AMICUS CURIAE** Crim. App. Dkt. No. ACM 40608 USCA Dkt. No. 26-0044/AF

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Issue Presented

Does waiver or plain error apply where a military judge fails to provide the members with what Rule for Court-Martial 920(e) identifies as "[r]equired instructions" and the defense counsel neither objects nor requests additional instructions?

Reasons for Granting the Writ

A. Introduction. This Court should grant plenary review to comprehensively review its jurisprudence on instructional error, which "has gone awry." (Appellant's Supplement to the Petition at 7.) At a minimum, it has been inconsistent and contrary to Rule 920(e), RULES FOR COURTS-MARTIAL, MANUAL FOR COURTS-MARTIAL, UNITED STATES, whether in the 2019 or 2024 edition. Appellant presents an opportunity to examine the waiver doctrine, specifically concerning instructions. Amicus agrees, as discussed in its brief in *United States v. Ellis*, USCA Dkt. No. 25-

0197/AR NIMJ *Amicus Curiae* Brief (filed Aug. 30, 2025), *available at* https://tinyurl.com/y8u7bnyx.

Reasonably interpreted, Supreme Court decisions show that instructing the panel is a critical component of ensuring a fair trial for the parties (and victims). *See*, *e.g.*, *Rushen v. Spain*, 464 U.S. 114 (1983). This is the first and only time the panel receives detailed explanations of the law to which the facts it has heard are to be applied, along with the various rules governing how that evidence may be used. Thus, the military judge serves as the guardian of the law, providing accurate and comprehensive instructions. The military judge emphasizes her duty to the panel. "After all evidence is presented, I instruct you on the law, and counsel make their closing arguments, you will close to deliberate." Introductory instructions. ¶ 2-5-5, MILITARY JUDGES' BENCHBOOK, 2.62. "My duty is to instruct you on the law." *Id.* at ¶ 2-5-10.

This Court should evaluate whether failing to give a "required" instruction constitutes a structural error or a waivable error, and if it is waivable, what words or acts are necessary to preserve the error for appeal.

Appellant asks this Court to examine the failure to give R.C.M. 920(e)'s required instructions as a structural error. (Appellant's Supplement to the Petition at 14.) Amicus agrees. Failure to give the instructions in R.C.M. 920(e)(1)-(2), (5)(A)-(B) should be considered a structural error. *See*, *e.g.*, *Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993).

The Supreme Court in *Weaver v. Massachusetts*, 582 U.S. 286, 295-96 (2017), surveys categories of structural error, but the construct is not "rigid." Appellant argues

that a failure to give the instruction at R.C.M. 920(e)(4) is a structural error; amicus agrees. R.C.M. 920(e)(4) is essential to ensuring the panel closely adheres to the law when evaluating the evidence. "Congress did not intend to invest juries in criminal cases with power arbitrarily to disregard the evidence and the principles of law applicable to the case on trial." *Sparf v. United States*, 156 U.S. 51, 63 (1895). The instruction aims to "protect some other interest." *Weaver*, 572 U.S. at 295. The R.C.M. 920(e)(4) instruction was given in *United States v. Schloff*, ARMY 20150724, 2018 CCA LEXIS 350 (A. Ct. Crim. App. Feb. 5, 2018) (sum. disposition). Unlawful influence affected the deliberations. The risk of improper considerations rises when the R.C.M. 92(e)(4) instruction is not given. This instruction is vital for the prosecution and victims. There are many ways irrelevant information could reach the panel, potentially harming the prosecution and victims.

B. Congressional and Presidential intent. Congress has directed that the military judge "shall" instruct the panel on the presumption of innocence, the standard of proof, lesser-included offenses, and the burden of proof. UCMJ art. 51(c), 10 U.S.C. § 851(c). "[S]hall is used in the imperative sense." 10 U.S.C. § 101(g)(1). The President directs that a broader list of "required instructions" in R.C.M. 920(e) shall be given. The President clearly directs that a "failure to object" results in a "forfeiture" of an error. R.C.M. 920(f). An intent is supported by the addition of R.C.M. 920(g), (2024 ed.).

R.C.M. 920(e) benefits an accused by eliminating waiver when assessing instructional errors. The President may give an accused a benefit greater than one in the

Constitution or statute, so long as there is no conflict with a higher authority. UCMJ art. 36(a), 10 U.S.C. § 836(a). In a different context, this Court has upheld such Presidential decisions. *See*, *e.g.*, *United States v. Guess*, 48 M.J. 69, 70-71 (C.A.A.F. 1998); *United States v. Lopez*, 35 M.J. 35, 39 (C.M.A. 1992).

This Court should apply the presumption that the President intentionally chose the language in R.C.M. 920(f) and intended it to be applied as written. "If the [Rule's] language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" *Guess*, 48 M.J. at 71. Compare R.C.M. 905(e) (failure is forfeiture "absent an affirmative waiver.") and R.C.M. 907(b) (designating waivable or forfeited motions). Had waiver of the instructions listed in R.C.M. 920(e) been intended, the President knew how to say that, but he has not.

C. Waiver?

"[N]o magic words'" preserve an error. *United States v. Killion*, 75 M.J. 209, 214 (C.A.A.F. 2016). This court should consider the following approach: "We object" or "We request an instruction on [X]" preserves the error; (2) "No objection" or "Defense has no additional requests," by itself, should be insufficient to establish a waiver; and if there is ambiguity or lack of clarity, this court should consider fashion a "totality of the record" test to determine whether the defense has "made the basis for his position known to the military judge." *United States v. Rich*, 79 M.J. 472, 474 (C.A.AF. 2020); *United States v. Payne*, 73 M.J. 19, 23 (C.A.A.F. 2014).

Conclusion

This Court should reconsider its jurisprudence on R.C.M. 920(e) and (f) and restore its original ruling from *United States v. Taylor*.

Respectfully submitted,

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Certificate of Service

I certify that the foregoing was electronically filed with the Court on December 31, 2025, and a copy was served on Appellant's counsel [dwight.sullivan.1@us.af.mil], and the A.F. Government Trial & Appellate Operations Div. [af.jajg.afloa.filng.workflow@us.af.mil].

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