

52ND MILITARY JUDGE COURSE

MOTIONS

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52ND MILITARY JUDGE COURSE

MOTIONS

Outline of Instruction

I. INTRODUCTION.

II. REFERENCES.

- A. R.C.M. 905. Motions generally.
- B. R.C.M. 906. Motions for appropriate relief.
- C. R.C.M. 907. Motions to dismiss.
- D. R.C.M. 915. Mistrial.
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- K. Appendix: Motions Waiver Checklist.

III. MOTIONS GENERALLY. R.C.M. 905.

- A. Definition.
 - 1. A motion is a request to the judge for *particular relief*.
 - 2. Based on *specific grounds* (rule or case law).
 - 3. *Notice* should be given to the judge and opposing counsel.

4. Litigated at an *Article 39(a) session*, usually after arraignment, before a plea is entered. (Other than with respect to privileges, military judge not bound by the rules of evidence, MRE 104(a)).

B. Preparation - Offer of proof.

1. *United States v. Hodge*, 26 M.J. 596 (A.C.M.R. 1988), *aff'd*, 29 M.J. 304 (C.M.A. 1989). An offer of proof should be specific and should include the names and addresses of witnesses and a summary of expected testimony.
2. *United States v. Stubbs*, 23 M.J. 188 (C.M.A. 1987), *cert. denied*, 484 U.S. 846 (1987). “[T]rial judges should not let the litigants lapse into a procedure whereby the moving party will state the motion and then launch right into argument without presenting any proof but buttressing his/her argument with the assertion that so and so would testify as indicated, if called. The other party then counters with his/her own argument and offers of proof ... Do not let counsel stray into stating what someone would say if they were called. Force them to call the witness, provide valid real and documentary evidence or provide a stipulation. Sticking to proper procedure will save you time and grief and provide a solid record.” 23 M.J. at 195.
3. *United States v. Alexander*, 32 M.J. 664, (A.F.C.M.R. 1991), *aff'd*, 34 M.J. 121 (C.M.A. 1992). Court notes that “counsel based much of their argument on offers of proof; although opposing counsel frequently disagreed with the proffers, no additional *evidence* was tendered.” Counsel and judges must be careful to establish a proper factual basis for evidentiary rulings. 32 M. J. at 667 n.3.

C. Notice.

1. Emphasis on prior notice to counsel and the military judge.
2. R.C.M. 905(i). Written motions shall be served on all parties. When? Exceptions?

3. Local judiciary rules. *United States v. Williams*, 23 M.J. 362 (C.M.A. 1987). A local rule is invalid if it conflicts with the Manual for Courts-Martial.

D. Timeliness.

1. Motions which should be made prior to the plea (or else they are waived). R.C.M. 905.
 - a) Defects in the charges and specifications.
 - b) Defects in preferral, forwarding, and referral.
 - c) Suppression of evidence.
 - d) Discovery and witness production.
 - e) Severance of charges, specifications, or accused.
 - f) Individual Military Counsel (IMC) requests.
2. Motions which should be made before final adjournment (or else waived).
 - a) Continuance. R.C.M. 906(b)(1).
 - b) Speedy trial. R.C.M. 907(b)(2)(A). Note: If speedy trial right alleges an Article 10 violation, a plea of guilty does not waive appellate review of this issue. Additionally, failure to raise an Article 10 motion prior to plea may not result in forfeiture of the issue for purposes of appeal. *See United States v. Mizgala*, 61 M.J. 122, 127 (2005) (stating that a speedy trial right under Article 10 should not be subject to rules of “waiver and forfeiture associated with guilty pleas”).
 - c) Release from pretrial confinement. R.C.M. 906(b)(8).
 - d) Statute of limitations. R.C.M. 907(b)(2)(B).

- e) Former jeopardy. R.C.M. 907(b)(2)(c).
 - f) Grant of immunity. R.C.M. 907(b)(2)(D).
3. Motions which may be made at any time, including appellate review.
- a) Lack of jurisdiction over accused or offense. R.C.M. 905(e).
 - b) Failure to allege an offense. R.C.M. 905(e).
 - c) Improperly convened court.
 - d) Unlawful command influence. *But see United States v. Weasler*, 43 M.J. 15 (1995) Pretrial agreement initiated by accused waived any objection to UCI on appeal. Waiver of UCI in accusatory phase, as distinguished from adjudicative stage, is permissible.

E. Waiver.

- 1. Failure to comply with timeliness requirements is generally considered a waiver.
- 2. *Unless* the military judge finds *good cause* to consider the untimely motion. R.C.M. 905(e).

United States v. Coffin, 25 M.J. 32 (C.M.A. 1987). Mil.R.Evid. 311(d)(2) “should be liberally construed in favor of permitting an accused the right to be heard *fully* in his defense.” 25 M.J. at 34.

F. Burden of Proof

- 1. Who has the burden?
 - a) The moving party,
 - b) *Except*, the Government has the burden of proof for:

- (1) Jurisdiction.
- (2) Speedy trial.
- (3) Statute of limitations.
- (4) Suppression motions: confessions, evidence, identifications.
- (5) Unlawful command influence.

2. What is the standard?

- a) Preponderance of evidence.
- b) Clear and convincing evidence standard for consent searches (Mil.R.Evid. 314); subterfuge inspections (three triggers for higher standard) (Mil.R.Evid. 313); and, “untainted” identifications (Mil.R.Evid. 321).
- c) Command influence. When defense raises an issue of UCI at trial by some evidence sufficient to render a reasonable conclusion in favor of the allegation, burden shifts to the Government to prove, beyond a reasonable doubt (*U.S. v. Biagase* 50 M.J. 143 (1999)) that command influence did not occur. If the Government is unable to do so, then the trial court (or the appellate court) must be satisfied beyond a reasonable doubt that the findings and sentence were unaffected. *See United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986), *cert. denied*, 479 U.S. 1085 (1987) (reviewing court may not affirm the findings and sentence unless it is persuaded **beyond a reasonable doubt** that the findings and sentence have not been affected by the existence of unlawful command influence).

G. Motion *in limine* (Mil.R.Evid. 906(b)(13)).

1. Definition.

- a) A preliminary ruling on the admissibility of evidence made outside the presence of members.
 - b) A motion to suppress evidence other than confessions, seizures, or identifications.
2. Procedure. Government or defense may make a motion *in limine*.
3. Rulings. The decision when to rule on a motion *in limine* is left to the discretion of the military judge. Discussion to R.C.M. 906(b)(13). Judicial economy and judicial accuracy constitute “good cause” which, under R.C.M. 905(d), allows a military judge to defer ruling on an *in limine* motion until presentation of the merits.
- a) *See, e.g., United States v. Helweg*, 32 M.J. 129 (C.M.A. 1991)(separate litigation of motion would have replicated large segments of a trial on the merits and in the judge-alone format, the judge is not required to hear the case twice).
 - b) *See also United States v. Cannon*, 33 M.J. 376 (C.M.A. 1991) (it is appropriate to defer ruling on the admissibility of evidence until such time as it becomes an issue).
4. Common uses of a motion *in limine*.
- a) Admissibility of uncharged misconduct. *See, e.g., United States v. Thompson*, 30 M.J. 99 (C.M.A. 1990). Defense moved *in limine* to suppress a sworn statement accused made one year before charged offenses wherein accused admitted to bad checks, extramarital affair and financial problems. Trial counsel intended to use statement as evidence of scheme or plan under M.R.E. 404(b).
 - b) Motions to keep out Mil.R.Evid. 413/414 evidence should be made *in limine*.
 - c) Admissibility of prior conviction for impeachment.

- d) Admissibility of impeachment evidence as to credibility.
- e) Admissibility of witness's out-of-court statements.
- f) Admissibility of a victim's sexual behavior or predisposition under Mil.R.Evid. 412(b).
- g) Motions to suppress evidence.
- h) Preemptive strike by the government to exclude anticipated favorable defense evidence. Examples:
 - (1) *United States v. Huet-Vaughn*, 43 M.J. 105 (1995). The Government made 2 motions *in limine* and prevented the accused, an Army physician, from presenting evidence of motives and reasons for refusing to support Desert Shield and views on unlawfulness of the war on charge of desertion with intent to avoid hazardous duty.
 - (2) *United States v. West*, 27 M.J. 223 (C.M.A. 1988). The Government's motion *in limine* limited the defendant's testimony on his request for a polygraph and for sodium pentothal.
 - (3) *United States v. Rivera*, 24 M.J. 156 (C.M.A. 1987). Defense failure to make an offer of proof does not constitute appellate waiver where Government makes a preemptive strike to exclude evidence and evidentiary issue is apparent from the record.
- i) Preservation for appellate review of issue raised by motion *in limine*.
 - (1) The accused must testify to preserve review of a denied motion *in limine* on the admissibility of accused's prior conviction. *United States v. Sutton*, 31 M.J. 11 (C.M.A. 1990). This holding reverses prior military practice and adopts the U.S. Supreme Court ruling in *Luce v. United States*, 469 U.S. 38

(1984). *See also United States v. Gee*, 39 M.J. 311 (C.M.A. 1994)(character testimony) and *United States v. Williams*, 43 M.J. 348 (1995).

- (2) *United States v. Sheridan*, 43 M.J. 682 (A.F. Ct. Crim. App. 1995). Counsel do not have to repeat objections during trial if they first obtain unconditional, unfavorable rulings from the military judge in out-of-court sessions. *See* Mil.R.Evid. 103(a); R.C.M. 801(e)(1)(A); R.C.M. 906(b)(13). However, a preliminary, tentative ruling may require a subsequent objection to preserve issue for appeal. *United States v. Jones*, 43 M.J. 708 (A.F. Ct. Crim. App. 1995).

5. Time. Rulings are generally made at the earliest possible time unless the military judge, for good cause, defers ruling until later in the trial. Written motions may be disposed of before arraignment and without an Article 39(a) session. A party may request oral argument or an evidentiary hearing concerning disposition of the motion. R.C.M. 905(h).
6. Essential findings. R.C.M. 905(d). Where factual issues are involved, the military judge *shall* state essential findings on the record.
7. Reconsideration. R.C.M. 905(f). The military judge on his or her own, or at the request of either party, may reconsider any ruling not amounting to a finding of not guilty any time before authentication of the record. Read in conjunction with R.C.M. 917(f). Motion for a Finding of Not Guilty. Reconsideration of a granted motion for a finding of not guilty is not permitted.

H. Appeal of Rulings.

1. Defense: extraordinary writs.
2. Government appeals: R.C.M. 908.

I. Effect of a Guilty Plea.

1. *General rule:* guilty plea waives all issues which are not jurisdictional or do not deprive an accused of due process.
Waived by guilty plea:
 - a) Suppression of evidence, confessions, identifications.
 - (1) *See, e.g., United States v. Cooper*, 32 M.J. 83 (C.M.A. 1991)(accused who pleaded guilty without condition or restriction to offense of adultery did not preserve for appellate review his motion to suppress items seized in an illegal search by pleading not guilty to rape of the same victim at the same place and time).
 - (2) *See, e.g., United States v. Hinojosa*, 33 M.J. 353 (C.M.A. 1991). Accused's motion to suppress statements to CID was denied. Accused then entered guilty pleas to some of the offenses and not guilty to the remaining offenses. The government, however, elected to present no evidence on the contested allegations and those specifications were dismissed. Accused's guilty pleas foreclosed any appellate relief from the unsuccessful suppression motion.
 - b) Pretrial processing defects.
2. *Not waived by guilty plea:*
 - a) Jurisdiction. *United States v. Conklan*, 41 M.J. 800, 805 (Army Ct. Crim. App. 1995)(accused may not bargain away "non-frivolous, good faith claims of lack of jurisdiction and transactional immunity.")
 - b) Article 10 violation. *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005).
 - c) Failure to allege an offense.

- d) Unlawful command influence. *But see United States v. Weasler*, 43 M.J. 15 (C.A.A.F. 1995) (condition in PTA waiving command influence motion, originating from defense, does not violate public policy).
 - e) Post-trial defects.
3. Another Exception. *United States v. Lippoldt*, 34 M.J. 523 (A.F.C.M.R. 1991). Prior to entry of plea, defense moved to require the prosecution to elect to proceed on either conspiracy to possess marijuana or distribution of same marijuana as an aider or abettor. Military judge wanted the pleas entered as a basis for development of the facts so that he could decide the motion. No waiver.
4. **Conditional Guilty Plea.** R.C.M. 910(a)(2). Will *not* waive pretrial motions made a part of the conditional guilty plea.

IV. MOTIONS FOR APPROPRIATE RELIEF. R.C.M. 906.

A. General.

A motion for appropriate relief is a request for a ruling to cure a defect which deprives a party of a right or hinders a party from preparing or presenting its case.

B. Continuances. Some common grounds:

- 1. Witness unavailable. Continuance requested. *See, e.g., United States v. Mow*, 22 M.J. 906 (N.M.C.M.R. 1986); *United States v. Maresca*, 28 M.J. 328 (C.M.A. 1989).
- 2. Obtaining civilian counsel.
 - a) Three tries you're out.
 - b) *United States v. Thomas*, 22 M.J. 57 (C.M.A. 1986) (Military judge did not abuse discretion in refusing the accused a fourth continuance to permit attendance of

civilian counsel where judge had gone to great lengths to accommodate accused's wishes and where civilian counsel failed to make even a written appearance.)

c) *Compare United States v. Wilson*, 28 M.J. 1054 (N.M.C.M.R. 1989) (Judge abused discretion in denying civilian counsel's **only** request for delay after he had made a personal appearance and could not try case earlier due to "existing professional obligations.")

3. Illness of counsel, judge, witness, member.
4. Order of trial of related cases.
5. Insufficient opportunity to prepare. *United States v. Galinato*, 28 M.J. 1049 (N.M.C.M.R. 1989) (After military judge denied request for delay, defense counsel went "on strike" and refused to participate in case. Held: Accused denied assistance of counsel.)

C. Motions Concerning Charges and Specifications. R.C.M. 307; 906.

1. Amend charges or specifications. R.C.M. 603, 906(b)(4).
2. Bill of particulars. R.C.M. 906(b)(6).
3. Multiplicity. R.C.M. 307, 906(b)(12), 907(b)(3)(B), 1003(c)(1)(c).
4. Sever duplicitous specifications. R.C.M. 307, 906(b)(5).
5. Sever offenses, *but* only to prevent manifest injustice. R.C.M. 906(b)(10). In *United States v. Giles*, 59 M.J. 374 (2004), the CAAF held that a military judge abused his discretion in denying the appellant's motion for severance of new perjury charges on a rehearing of an earlier drug-related attempt offense. In order to prove the perjury charge, the Government had to prove a materiality element, which required evidence of the earlier conviction. The CAAF stated that the MJ's ruling caused actual prejudice to the accused and prevented a fair trial.

- D. Defective Article 32 Investigation or Pretrial Advice. R.C.M. 405, 406.
- E. Discovery. R.C.M. 701, 914.
- F. Witness Production. R.C.M. 703, 1001.
- G. Individual Military Counsel or Detailed Counsel Request. R.C.M. 506.
- H. Pretrial Restraint. R.C.M. 305.
- I. Mentally Incompetent to Stand Trial. R.C.M. 706; 909; 916.
- J. Change Location of Trial. R.C.M. 906(b)(11).
- K. Sever Accused. R.C.M. 307; 906(b)(9).
- L. Reopen Case. R.C.M. 913(c)(5). *United States v. Fisiorek*, 43 M.J. 244 (1995).
- M. Miscellaneous. *See, e.g., United States v. Stubbs*, 23 M.J. 188 (C.M.A. 1986), *cert. denied*, 484 U.S. 846 (1987). Defense moved to recuse entire prosecution office because of prior contact between one prosecutor and accused on a legal assistance matter.

V. MOTIONS TO SUPPRESS.

- A. General.

A motion to suppress is based on an alleged constitutional violation.

- B. Procedure. Mil.R.Evid. 304(d)[pretrial statements], 311(d)[search & seizure], 321(c)[eyewitness identification].
 - 1. Disclosure by the Government.
 - 2. Notice of motion by defense.

3. Specific grounds for objection.
 - a) *United States v. Miller*, 31 M.J. 247 (C.M.A. 1990). Motion to suppress statement under Mil.R.Evid. 304(d)(2)(A) must be made prior to plea. Absent motion, no burden on prosecution to prove admissibility; no requirement for specific findings by MJ; and, no duty to conduct a voluntariness hearing.
 - b) *United States v. Vaughters*, 42 M.J. 564 (A.F. Ct. Crim. App. 1995) *aff'd*, 44 M.J. 377 (C.A.A.F. 1996). Accused challenged admissibility solely on technical *Edwards* violations. On appeal, asserts AFOSI also coerced confession by threatening to tell neighbors and alleged drug dealers that he had informed on them. As motion to suppress did not raise coercion issue, court held accused had forfeited or “waived” issue on appeal.
4. General Rule: Burden on the prosecution by a preponderance. *United States v. Shover*, 45 M.J. 119 (C.A.A.F. 1996)(clear and convincing standard under Mil.R.Evid 313(b) if purpose of inspection is to discover contraband *and* is directed immediately following report of specific offense; specific individuals are selected, or persons examined are subject to substantially different intrusions; if none of the three factors are present, burden is by a preponderance).
5. Essential findings of fact, prior to plea.
6. Guilty plea waives, except conditional guilty plea.

VI. MOTIONS TO DISMISS. R.C.M. 907.

- A. General. A motion to dismiss is a request that the trial judge terminate the proceedings as to those charges and specifications without a trial on the merits.
- B. Nonwaivable Grounds. Can be raised anytime, including appellate review.
 1. Lack of Jurisdiction.

2. Failure to Allege an Offense.
 3. Unlawful Command Influence.
 4. Improperly Convened Court.
- C. Waivable Grounds. Must be raised before final adjournment of trial.
1. Speedy Trial. *But see United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005)(stating that court will not apply forfeiture of Article 10 issues).
 2. Statute of Limitations.
 - a) Unlimited - capital offenses, AWOL in time of war.
 - b) Five years - all other offenses.
 - c) Two years - Article 15 nonjudicial punishment.
 3. Former Jeopardy.
 4. Presidential Pardon.
 5. Grant of Immunity.
 6. Constructive Condonation of Desertion.
 7. Prior Article 15 Punishment for same, *minor* offense. *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989). Prior Article 15 punishment for *serious* offense does not bar subsequent trial for same offense, but the accused must be given complete sentence credit for any punishment resulting from the Article 15 proceeding. *United States v. Edwards*, 42 M.J. 381 (C.A.A.F. 1995). The military judge may apply the required credit in fashioning a sentence.
- D. Permissible Grounds. *May* be dismissed upon timely motion by the accused.

1. Misleading Specification.
 2. Multiplicity.
- E. Other Grounds.
1. Vindictive or Selective Prosecution.
 2. Constitutional Challenges.
 - a) Equal protection.
 - b) First Amendment.
 - c) Privacy rights. *Unger v. Ziemiak*, 27 M.J. 349 (C.M.A. 1989). Direct observation of urine collection during urinalysis is not *per se* an unreasonable invasion of privacy.
 - d) Lack of notice.
 - e) *Ex post facto* laws.

VII. MISTRIAL. R.C.M. 915.

A. General

1. A drastic remedy. The judge should declare a mistrial only when “*manifestly necessary* in the interest of justice” due to circumstances which “cast substantial doubt upon the fairness or impartiality of the trial.” *United States v. Waldron*, 36 C.M.R. 126, 129 (C.M.A. 1966). *United States v. Brooks*, 42 M.J. 484 (1995)(MJ should not have declared mistrial based on his improper inquiry into members’ deliberative process).
 - a) *See, e.g., United States v. King*, 32 M.J. 709 (A.C.M.R. 1991), *rev’d on other grounds*, 35 M.J. 337 (C.M.A. 1992). Mistrial not required even though trial counsel improperly communicated to civilian psychologist who was defense representative. Factors considered by the court: the

psychologist would have eventually asked for the background information provided by the trial counsel; any advantage to the trial counsel from the information was minimal; and there was no bad faith on the part of the trial counsel.

- b) *But see United States v. Diaz*, 59 M.J. 79 (C.A.A.F. 2003), in which the CAAF held that a military judge abused his discretion in denying a motion for a mistrial when two witnesses --one of them an expert -- testified they believed death of appellant's daughter was a homicide and appellant was the perpetrator. The combined prejudicial impact of the testimony could not be overcome by a curative instruction, particularly since the testimony went to the two main issues of the case: the cause of the death and the identity of the perpetrator.

2. Effect. A declaration of a mistrial shall have the effect of withdrawing the affected charges and specifications from the court-martial.

3. First consider alternative measures.

- a) *United States v. Balagna*, 33 M.J. 54 (C.M.A. 1991). Witness testimony before panel included reference to accused's submission of Chapter 10 request. The MJ gave *curative instruction* immediately. Defense motion for mistrial was denied. MJ gave second curative instruction during findings. Held no error to deny motion for mistrial.
- b) *United States v. Taylor*, 53 M.J. 195 (C.A.A.F. 2000). Military Judge did not abuse his discretion in denying a defense request for mistrial where trial counsel made several impermissible references to accused's gang affiliation in his opening statement. Curative instruction to members was sufficient, in spite of the fact that during the trial several members asked questions about the accused's gang affiliation.
- c) *United States v. Mobley*, 34 M.J. 527 (A.F.C.M.R. 1991), *aff'd*, 36 M.J. 34 (C.M.A. 1992). Instructions advising

members of accused's right to remain silent; that they could not draw any adverse inference from accused's failure to testify; and, that trial counsel's exposition of the facts was argument and not evidence ameliorated any prejudice caused by trial counsel's comments during closing argument that called attention to the accused's failure to testify.

d) *United States v. Skerrett*, 40 M.J. 331 (C.M.A. 1994)(no mistrial warranted where MJ admonished panel twice to disregard testimony concerning dismissed specification and each member individually assured MJ that excluded testimony would not influence consideration of remaining specifications.

4. Government can usually re-refer charges. *United States v. Mora*, 26 M.J. 122 (C.M.A. 1988). "During the sentencing portion of the trial, however, things began to unravel." When the "dust settled" after the mistrial, "things in the courtroom looked very much the same." 26 M.J. at 123.

B. Retrial barred if mistrial declared after jeopardy attaches and before findings if:

1. Defense objects and judge abuses discretion. *Burt v. Schick*, 23 M.J. 140 (C.M.A. 1986). Trial counsel requested mistrial when defense divulged accomplice's sentence. Granted over defense objection; abuse of discretion, double jeopardy barred retrial.

• - or -

2. Intentional prosecution misconduct induces mistrial. *United States v. DiAngelo*, 31 M.J. 135 (C.M.A. 1990). Trial counsel's cross examination of accused elicited juvenile arrest record. Fact of arrest record had not previously been disclosed to defense despite discovery request. Trial court granted mistrial. CMA holds that conduct of trial counsel did not amount to prosecutorial misconduct and therefore, under R.C.M. 915(c)(2)(B), retrial of the accused was not barred.

C. Defense Motion for Mistrial. Examples of grounds raised in motions for mistrial:

1. Court members' actions.

- a) *United States v. Johnson*, 23 M.J. 327 (C.M.A. 1987). Two motions for mistrial based on a member inadvertently seeing autopsy photos and a Government witness riding with a member.
- b) *United States v. West*, 27 M.J. 223 (C.M.A. 1988). A motion for a mistrial based on an inattentive or sleeping court member.
- c) *United States v. Knight*, 41 M.J. 867 (Army Ct. Crim. App. 1995)(extensive, frequent and member initiated communications with third party intended to gain improper and extrajudicial information relevant to key issues in case warranted mistrial).
- d) *United States v. Hamilton*, 41 M.J. 22 (C.M.A. 1994) (mistrial not required by trial counsel's inadvertent, but improper, social conversation with president of court where no information regarding accused's case was discussed and president was removed for cause).

2. Military judge's actions.

- a) *United States v. Burnett*, 27 M.J. 99 (C.M.A. 1988). "From early in the trial the relations between the military judge and the civilian defense counsel had been less than harmonious." Defense counsel held in contempt. Trial proceeded. Motion for mistrial denied.
- b) *United States v. Donley*, 33 M.J. 44 (C.M.A. 1991). Military judge did not err when he failed, *sua sponte*, to declare a mistrial over a defense objection. During general court-martial for premeditated murder of accused's wife the president of court-martial over-heard sidebar conference during which military judge and counsel discussed

inadmissible hearsay. Military judge offered to declare a mistrial but defense counsel objected.

- c) Noncompliance with discovery rules.

United States v. Palumbo, 27 M.J. 565 (A.C.M.R. 1988), *pet. denied*, 28 M.J. 265 (C.M.A. 1989). Mistrial not necessary as trial judge gave proper curative instructions after the trial counsel elicited statements made by the accused which were not disclosed to the defense before trial and also elicited testimony that the accused had invoked his rights.

VIII. MOTIONS FOR FINDING OF NOT GUILTY. R.C.M. 917.

A. Procedure.

1. *Sua sponte* or defense motion.
2. Defense must specifically state where evidence is insufficient.
3. Opposing counsel shall be given an opportunity to be heard.
4. After the evidence on either side is closed and before findings are announced.

B. Standard.

1. Deny motion if there is *any* evidence which, together with all reasonable inferences and presumptions, could reasonably tend to establish every element of the offense.
2. The evidence shall be viewed in the light most favorable to the prosecution, without an evaluation of the credibility of witnesses. *See, e.g., United States v. Felix*, 25 M.J. 509 (A.F.C.M.R. 1987). Allegations of deviation from standard operating procedure at a drug-testing lab. Trial judge did not abuse his discretion when he denied the defense motion for a finding of not guilty.

3. Grant motion if the government has introduced no evidence at all of an offense occurring during the charged dates of the offense. In *United States v. Parker*, 59 M.J. 195 (C.A.A.F. 2004), the Government charged the accused with raping a woman in 1995. At trial, the woman testified that the rape had actually occurred in 1993. The Government unsuccessfully moved to amend the charge, but persuaded the military judge give a variance instruction that would permit the members to substitute 1993 for 1995. The CAAF held the military judge erred in denying the defense's R.C.M. 917 motion for the 1995 rape offense; the Government had introduced no evidence of any sexual interaction between the accused and the victim in 1995.

C. Effect.

1. If motion is granted only as to part of a specification, a lesser included offense may remain.
2. If motion is denied, it may be reconsidered at any time before authentication of the Record of Trial. R.C.M. 917(f). *See also United States v. Griffith*, 27 M.J. 42 (C.M.A. 1988). Trial judge stated he had no power to set aside findings of guilty by court members. (He had previously denied a motion for a finding of not guilty due to the lower standard for such motions.) HELD: "We are convinced that, if before authenticating the record of trial, a military judge becomes aware of an error which has prejudiced the rights of the accused—whether this error involves jury misconduct, misleading instructions, or *insufficient evidence*—he may take remedial action." 27 M.J. at 47.
3. If motion is granted, *it may not be reconsidered*.

IX. POST-TRIAL SESSIONS. R.C.M. 1102.

- A. Purpose. Corrective, clean-up the record, fix obvious errors, and inquire into new matters affecting findings or sentence.
- B. Hearing. Article 39(a) session or proceeding in revision directed by the military judge or the convening authority.

C. Time. Military judge - any time before the record is authenticated.
Convening Authority - before initial action or if directed by a reviewing authority. R.C.M. 1102(b)(2) & (d).

D. Grounds

Examples:

1. Investigate alleged court member misconduct. *United States v. Stone*, 26 M.J. 401 (C.M.A. 1988). Post-trial allegations by appellant's father concerning laughter and festive atmosphere within the deliberation room and an improper comment by a court-member made during a recess. A post-trial hearing was not required in this case, but court indicates that it is an appropriate mechanism in such cases.
2. Change plea when alleged cocaine was caffeine. *United States v. Washington*, 23 M.J. 679 (A.C.M.R. 1986), *rev. denied*, 25 M.J. 197 (C.M.A. 1987). Cocaine was caffeine. A post-trial session was appropriate.
3. Lost tapes of the announcement of findings and sentencing proceedings. *United States v. Crowell*, 21 M.J. 760 (N.M.C.M.R. 1985), *rev. denied*, 23 M.J. 281 (C.M.A. 1986). A post-trial session, before authentication of the record, was appropriate to recreate lost verbatim tapes.
4. Newly discovered evidence.
 - a) *United States v. Scuff*, 29 M.J. 60 (C.M.A. 1989). "Article permitting MJ to call court into session without presence of members at any time after referral of charges to court-martial empowers judge to convene post-trial session to consider newly discovered evidence and to take whatever remedial action is appropriate." Until he authenticates the record, the MJ can set aside the findings of guilt and sentence. If the convening authority disagrees with the MJ, the only remedy is to direct trial counsel to move for reconsideration or to initiate government appeal. *See United States v. Meghdadi*, 60 M.J. 438 (C.A.A.F. 2005)

(military judge abused his discretion in denying appellant's motion for a post-trial 39(a) session to inquiry into newly discovered evidence and fraud on the court).

- b) *United States v. Fisiorek*, 43 M.J. 244 (C.A.A.F. 1995)(MJ applied incorrect legal standard in denying accused opportunity to reopen case to present newly discovered evidence).

X. CONCLUSION.

XI. APPENDIX

MOTIONS WAIVER CHECKLIST

MOTION

HOW WAIVED

<p>Suppression of Confession or Admission.</p>	<ol style="list-style-type: none"> 1. Failure to raise before submission of plea [after proper disclosure by trial counsel under MRE 304(d)(1)], except for good cause shown, as permitted by the military judge. MRE 304(d)(2)(A). 2. Plea of guilty regardless of whether the motion was raised prior to plea, unless conditional plea. MRE 304(d)(5). 3. When a specific motion or objection has been made, the burden on the prosecution extends only to the grounds upon which the defense moved to suppress the evidence. MRE 304(e).
<p>Suppression of evidence seized from the accused or believed owned by the accused.</p>	<ol style="list-style-type: none"> 1. Failure to raise before submission of plea [after proper disclosure by trial counsel under MRE 311(d)(1)], except for good cause shown, as permitted by the military judge. MRE 311(d)(2). 2. Plea of guilty, regardless of whether the motion was raised prior to plea. MRE. 311(i). 3. When a specific motion or objection has been made, the burden on the prosecution extends only to grounds upon which the defense moved to suppress. MRE 311(e)(3).
<p>Suppression of Eyewitness ID.</p>	<ol style="list-style-type: none"> 1. Failure to raise before submission of plea [after proper disclosure by trial counsel under MRE 321(c)(1)], except for good cause shown, as permitted by the military judge. MRE 321(c)(2)(A). 2. Plea of guilty, regardless of whether the motion was raised prior to plea. MRE 321(g). 3. When a specific motion or objection has been made, the burden on the prosecution extends only to grounds upon which the defense moved to suppress. MRE 321(d).
<p>Defects (other than jurisdiction) in the preferral, forwarding, investigation, or referral of charges.</p>	<p>Failure to raise before plea is entered. R.C.M. 905(b)(1).</p>
<p>Motions for discovery (RCM 701), or for production of witnesses or evidence.</p>	<p>Failure to raise before plea is entered. R.C.M. 905(b)(4).</p>

MOTION**HOW WAIVED**

Defects in Charges or Specs(other than juris. or stating offense).	Failure to raise before plea is entered. R.C.M. 905(b)(2).
Motions for severance of charges or accused.	Failure to raise before plea is entered. R.C.M. 905(b)(5).
Objections to denial of IMC request or for retention of detailed counsel when IMC granted.	Failure to raise before plea is entered. R.C.M. 905(b)(6).
Lack of jurisdiction over accused.	Not Waivable. R.C.M. 907(b)(1)(A).
Command Influence	Generally Not Waivable. But see <i>U.S. v. Weasler</i> , 43 M.J. 15 (1995). (Defense initiated waiver of UCI in accusatory phase for favorable PTA is permissible), and <i>U.S. v. Drayton</i> , 45 M.J. 180 (1996). (Failure to raise accusatory UCI constitutes waiver.)
Failure to State Offense	Not Waivable. RCM 907(b)(1)(B).
Improperly Convened CM (Incorrect Member Subst.)	Not Waivable.
Speedy Trial	1. Waived if not raised before final adjournment. R.C.M. 907(b)(2)(A), and 905(e). 2. Plea of guilty, except as provided in R.C.M. 910(a)(2). R.C.M. 707(e); note: Article 10 issues not waived by GP.
Statute of Limitations	Waived if not raised before final adjournment, provided it appears that the accused is aware of his right to assert the statute, otherwise the judge must inform the accused of the right. R.C.M. 907(b)(2)(B).
Use of Victims Past Sexual Behavior or Predisposition.	Failure to file written motion 5 days before trial. MRE 412(c)(1)(A).
Former Jeopardy	Waived if not raised before final adjournment of the court. R.C.M. 907(b)(2)(C).
Pardon, grant of immunity, condonation of desertion or prior punishment under Articles 13 & 15.	Waived if not raised before final adjournment of the court. R.C.M. 907(b)(2)(D).

NOTE: RCM 910(j) provides that [except for a conditional guilty plea under RCM 910(a)(2)] a plea of guilty which results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt of the offenses to which the plea was made.

RCM 910(a)(2) provides that, with the approval of the military judge and the consent of the government, an accused may enter a conditional plea of guilty, reserving in writing the right, on further review or appeal, to review the adverse determination of any specified pretrial motion.

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