

### Discussion

Arraignment is complete when the accused is called upon to plead; the entry of pleas is not part of the arraignment.

When authorized by regulations of the Secretary concerned, the arraignment should be conducted at an Article 39(a) session when a military judge has been detailed. The accused may not be arraigned at a conference under R.C.M. 802.

Once the accused has been arraigned, no additional charges against that accused may be referred to that court-martial for trial with the previously referred charges. *See* R.C.M. 601(e)(2).

The defense should be asked whether it has any motions to make before pleas are entered. Some motions ordinarily must be made before a plea is entered. *See* R.C.M. 905(b).

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### Rule 905. Motions generally

(a) *Definitions and form.* A motion is an application to the military judge for particular relief. Motions may be oral or, at the discretion of the military judge, written. A motion shall state the grounds upon which it is made and shall set forth the ruling or relief sought. The substance of a motion, not its form or designation, shall control.

### Discussion

Motions may be motions to suppress [(*see* R.C.M. 905(b)(3))]; motions for appropriate relief (*see* R.C.M. 906); motions to dismiss (*see* R.C.M. 907); or motions for findings of not guilty (*see* R.C.M. 917).

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(b) *Pretrial motions.* Any defense, objection, or request which is capable of determination without the trial of the general issue of guilt may be raised before trial. The following must be raised before a plea is entered:

(1) Defenses or objections based on defects (other than jurisdictional defects) in the preferral, forwarding, investigation, or referral of charges;

### Discussion

Such nonjurisdictional defects include unsworn charges, inadequate Article 32 investigation, and inadequate pretrial advice. *See* R.C.M. 307; 401–407; 601–604.

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(2) Defenses or objections based on defects in the charges and specifications (other than any failure to show jurisdiction or to charge an offense, which

objections shall be resolved by the military judge at any time during the pendency of the proceedings);

### Discussion

*See* R.C.M. 307; 906(b)(3).

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(3) Motions to suppress evidence;

### Discussion

Mil. R. Evid. 304(d), 311(d), and 321(c) deal with the admissibility of confessions and admissions, evidence obtained from unlawful searches and seizures, and eyewitness identification, respectively. Questions concerning the admissibility of evidence on other grounds may be raised by objection at trial or by motions *in limine*. *See* R.C.M. 906(b)(13); Mil. R. Evid. 103(c); 104(a) and (c).

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(4) Motions for discovery under R.C.M. 701 or for production of witnesses or evidence;

### Discussion

*See* also R.C.M. 703; 1001(e).

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(5) Motions for severance of charges or accused; or

### Discussion

*See* R.C.M. 812; 906(b)(9) and (10).

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(6) Objections based on denial of request for individual military counsel or for retention of detailed defense counsel when individual military counsel has been granted.

### Discussion

*See* R.C.M. 506(b); 906(b)(2).

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(c) *Burden of proof.*

(1) *Standard.* Unless otherwise provided in this Manual, the burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence.

### Discussion

See Mil. R. Evid. 104(a) concerning the applicability of the Military Rules of Evidence to certain preliminary questions.

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(2) *Assignment.*

(A) Except as otherwise provided in this Manual the burden of persuasion on any factual issue the resolution of which is necessary to decide a motion shall be on the moving party.

### Discussion

See, for example, subsection (c)(2)(B) of this rule, R.C.M. 908 and Mil. R. Evid. 304(e), 311(e), and 321(d) for provisions specifically assigning the burden of proof.

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(B) In the case of a motion to dismiss for lack of jurisdiction, denial of the right to speedy trial under R.C.M. 707, or the running of the statute of limitations, the burden of persuasion shall be upon the prosecution.

(d) *Ruling on motions.* A motion made before pleas are entered shall be determined before pleas are entered unless, if otherwise not prohibited by this Manual, the military judge for good cause orders that determination be deferred until trial of the general issue or after findings, but no such determination shall be deferred if a party's right to review or appeal is adversely affected. Where factual issues are involved in determining a motion, the military judge shall state the essential findings on the record.

### Discussion

When trial cannot proceed further as the result of dismissal or other rulings on motions, the court-martial should adjourn and a record of the proceedings should be prepared for the convening authority. See R.C.M. 908(b)(4) regarding automatic stay of certain rulings and orders subject to appeal under that rule. Notwithstanding the dismissal of some specifications, trial may proceed in the normal manner as long as one or more charges and specifications remain. The promulgating orders should reflect the action taken by the court-martial on each charge and specification, including any which were dismissed by the military judge on a motion. See R.C.M. 1114.

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(e) *Effect of failure to raise defenses or objections.* Failure by a party to raise defenses or objections or to make motions or requests which must be made

before pleas are entered under subsection (b) of this rule shall constitute waiver. The military judge for good cause shown may grant relief from the waiver. Other motions, requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is adjourned for that case and, unless otherwise provided in this Manual, failure to do so shall constitute waiver.

### Discussion

See also R.C.M. 910(j) concerning matters waived by a plea of guilty.

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(f) *Reconsideration.* On request of any party or *sua sponte*, the military judge may, prior to authentication of the record of trial, reconsider any ruling, other than one amounting to a finding of not guilty, made by the military judge.

### Discussion

Subsection (f) permits the military judge to reconsider any ruling that affects the legal sufficiency of any finding of guilt or the sentence. See R.C.M. 917(d) for the standard to be used to determine the legal sufficiency of evidence. See also R.C.M. 1102 concerning procedures for post-trial reconsideration. Different standards may apply depending on the nature of the ruling. See *United States v. Scuff*, 29 M.J. 60 (C.M.A. 1989).

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(g) *Effect of final determinations.* Any matter put in issue and finally determined by a court-martial, reviewing authority, or appellate court which had jurisdiction to determine the matter may not be disputed by the United States in any other court-martial of the same accused, except that, when the offenses charged at one court-martial did not arise out of the same transaction as those charged at the court-martial at which the determination was made, a determination of law and the application of law to the facts may be disputed by the United States. This rule also shall apply to matters which were put in issue and finally determined in any other judicial proceeding in which the accused and the United States or a Federal governmental unit were parties.

### Discussion

See also R.C.M. 907(b)(2)(C). Whether a matter has been finally determined in another judicial proceeding with jurisdiction to decide it, and whether such determination binds the United States in another proceeding are interlocutory questions. See

R.C.M. 801(e). It does not matter whether the earlier proceeding ended in an acquittal, conviction, or otherwise, as long as the determination is final. Except for a ruling which is, or amounts to, a finding of not guilty, a ruling ordinarily is not final until action on the court-martial is completed. *See* Article 76; R.C.M. 1209. The accused is not bound in a court-martial by rulings in another court-martial. *But see* Article 3(b); R.C.M. 202.

The determination must have been made by a court-martial, reviewing authority, or appellate court, or by another judicial body, such as a United States court. A pretrial determination by a convening authority is not a final determination under this rule, although some decisions by a convening authority may bind the Government under other rules. *See*, for example, R.C.M. 601, 604, 704, 705.

The United States is bound by a final determination by a court of competent jurisdiction even if the earlier determination is erroneous, except when the offenses charged at the second proceeding arose out of a different transaction from those charged at the first and the ruling at the first proceeding was based on an incorrect determination of law.

A final determination in one case may be the basis for a motion to dismiss or a motion for appropriate relief in another case, depending on the circumstances. The nature of the earlier determination and the grounds for it will determine its effect in other proceedings.

Examples:

(1) The military judge dismissed a charge for lack of personal jurisdiction, on grounds that the accused was only 16 years old at the time of enlistment and when the offenses occurred. At a second court-martial of the same accused for a different offense, the determination in the first case would require dismissal of the new charge unless the prosecution could show that since that determination the accused had effected a valid enlistment or constructive enlistment. *See* R.C.M. 202. Note, however, that if the initial ruling had been based on an error of law (for example, if the military judge had ruled the enlistment invalid because the accused was 18 at the time of enlistment) this would not require dismissal in the second court-martial for a different offense.

(2) The accused was tried in United States district court for assault on a Federal officer. The accused defended solely on the basis of alibi and was acquitted. The accused is then charged in a court-martial with assault on a different person at the same time and place as the assault on a Federal officer was alleged to have occurred. The acquittal of the accused in Federal district court would bar conviction of the accused in the court-martial. In cases of this nature, the facts of the first trial must be examined to determine whether the finding of the first trial is logically inconsistent with guilt in the second case.

(3) At a court-martial for larceny, the military judge excluded evidence of a statement made by the accused relating to the larceny and other uncharged offenses because the statement was obtained by coercion. At a second court-martial for an unrelated offense, the statement excluded at the first trial would be inadmissible, based on the earlier ruling, if the first case had become final. If the earlier ruling had been based on an incorrect interpretation of law, however, the issue of admissibility could be litigated anew at the second proceeding.

(4) At a court-martial for absence without authority, the charge and specification were dismissed for failure to state an

offense. At a later court-martial for the same offense, the earlier dismissal would be grounds for dismissing the same charge and specification, but would not bar further proceedings on a new specification not containing the same defect as the original specification.

(h) *Written motions.* Written motions may be submitted to the military judge after referral and when appropriate they may be supported by affidavits, with service and opportunity to reply to the opposing party. Such motions may be disposed of before arraignment and without a session. Upon request, either party is entitled to an Article 39(a) session to present oral argument or have an evidentiary hearing concerning the disposition of written motions.

(i) *Service.* Written motions shall be served on all other parties. Unless otherwise directed by the military judge, the service shall be made upon counsel for each party.

(j) *Application to convening authority.* Except as otherwise provided in this Manual, any matters which may be resolved upon motion without trial of the general issue of guilt may be submitted by a party to the convening authority before trial for decision. Submission of such matter to the convening authority is not, except as otherwise provided in this Manual, required, and is, in any event, without prejudice to the renewal of the issue by timely motion before the military judge.

(k) *Production of statements on motion to suppress.* Except as provided in this subsection, R.C.M. 914 shall apply at a hearing on a motion to suppress evidence under subsection (b)(3) of this rule. For purposes of this subsection, a law enforcement officer shall be deemed a witness called by the Government, and upon a claim of privilege the military judge shall excise portions of the statement containing privileged matter.

### **Rule 906. Motions for appropriate relief**

(a) *In 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 for trial or presenting its case.

(b) *Grounds for appropriate relief.* The following may be requested by motion for appropriate relief. This list is not exclusive.

(1) *Continuances.* A continuance may be granted only by the military judge.

### Discussion

The military judge should, upon a showing of reasonable cause, grant a continuance to any party for as long and as often as is just. Article 40. Whether a request for a continuance should be granted is a matter within the discretion of the military judge. Reasons for a continuance may include: insufficient opportunity to prepare for trial; unavailability of an essential witness; the interest of Government in the order of trial of related cases; and illness of an accused, counsel, military judge, or member. *See also* R.C.M. 602; 803.

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(2) Record of denial of individual military counsel or of denial of request to retain detailed counsel when a request for individual military counsel was granted. If a request for military counsel was denied, which denial was upheld on appeal (if available) or if a request to retain detailed counsel was denied when the accused is represented by individual military counsel, and if the accused so requests, the military judge shall ensure that a record of the matter is included in the record of trial, and may make findings. The trial counsel may request a continuance to inform the convening authority of those findings. The military judge may not dismiss the charges or otherwise effectively prevent further proceedings based on this issue. However, the military judge may grant reasonable continuances until the requested military counsel can be made available if the unavailability results from temporary conditions or if the decision of unavailability is in the process of review in administrative channels.

(3) Correction of defects in the Article 32 investigation or pretrial advice.

### Discussion

*See* R.C.M. 405; 406. If the motion is granted, the military judge should ordinarily grant a continuance so the defect may be corrected.

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(4) *Amendment of charges or specifications.* A charge or specifications. A charge or specification may not be amended over the accused's objection unless the amendment is minor within the meaning of R.C.M. 603(a).

### Discussion

*See also* R.C.M. 307.

An amendment may be appropriate when a specification is unclear, redundant, inartfully drafted, misnames an accused, or is laid under the wrong article. A specification may be amended by striking surplusage, or substituting or adding new language. Surplusage may include irrelevant or redundant details or aggravating circumstances which are not necessary to enhance the maximum authorized punishment or to explain the essential facts of the offense. When a specification is amended after the accused has entered a plea to it, the accused should be asked to plead anew to the amended specification. A bill of particulars (*see* subsection (b)(6) of this rule) may also be used when a specification is indefinite or ambiguous.

If a specification, although stating an offense, is so defective that the accused appears to have been misled, the accused should be given a continuance upon request, or, in an appropriate case (*see* R.C.M. 907(b)(3)), the specification may be dismissed.

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(5) Severance of a duplicitous specification into two or more specifications.

### Discussion

Each specification may state only one offense. R.C.M. 307(c)(4). A duplicitous specification is one which alleges two or more separate offenses. Lesser included offenses (*see* Part IV, paragraph 2) are not separate, nor is a continuing offense involving several separate acts. The sole remedy for a duplicitous specification is severance of the specification into two or more specifications, each of which alleges a separate offense contained in the duplicitous specification. However, if the duplicitousness is combined with or results in other defects, such as misleading the accused, other remedies may be appropriate. *See* subsection (b)(3) of this rule. *See also* R.C.M. 907(B)(3).

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(6) *Bill of particulars.* A bill of particulars may be amended at any time, subject to such conditions as justice permits.

### Discussion

The purposes of a bill of particulars are to inform the accused of the nature of the charge with sufficient precision to enable the accused to prepare for trial, to avoid or minimize the danger of surprise at the time of trial, and to enable the accused to plead the acquittal or conviction in bar of another prosecution for the same offense when the specification itself is too vague and indefinite for such purposes.

A bill of particulars should not be used to conduct discovery of the Government's theory of a case, to force detailed disclosure of acts underlying a charge, or to restrict the Government's proof at trial.

A bill of particulars need not be sworn because it is not part

of the specification. A bill of particulars cannot be used to repair a specification which is otherwise not legally sufficient.

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(7) Discovery and production of evidence and witnesses.

**Discussion**

See R.C.M. 701 concerning discovery. See R.C.M. 703, 914 and 1001(e) concerning production of evidence and witnesses.

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(8) Relief from pretrial confinement in violation of R.C.M. 305.

**Discussion**

See R.C.M. 305(j).

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(9) Severance of multiple accused, if it appears that an accused or the Government is prejudiced by a joint or common trial. In a common trial, a severance shall be granted whenever any accused, other than the moving accused, faces charges unrelated to those charged against the moving accused.

**Discussion**

A motion for severance is a request that one or more accused against whom charges have been referred to a joint or common trial be tried separately. Such a request should be liberally considered in a common trial, and should be granted if good cause is shown. For example, a severance is ordinarily appropriate when: the moving party wishes to use the testimony of one or more of the coaccused or the spouse of a coaccused; a defense of a coaccused is antagonistic to the moving party; or evidence as to any other accused will improperly prejudice the moving accused.

If a severance is granted by the military judge, the military judge will decide which accused will be tried first. See R.C.M. 801(a)(1). In the case of joint charges, the military judge will direct an appropriate amendment of the charges and specifications.

See also R.C.M. 307(c)(5); 601(e)(3); 604; 812.

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(10) Severance of offenses, but only to prevent manifest injustice.

**Discussion**

Ordinarily, all known charges should be tried at a single court-martial. Joinder of minor and major offenses, or of unrelated offenses is not alone a sufficient ground to sever offenses.

For example, when an essential witness as to one offense is unavailable, it might be appropriate to sever that offense to prevent violation of the accused's right to a speedy trial.

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(11) *Change of place of trial.* The place of trial may be changed when necessary to prevent prejudice to the rights of the accused or for the convenience of the Government if the rights of the accused are not prejudiced thereby.

**Discussion**

A change of the place of trial may be necessary when there exists in the place where the court-martial is pending so great a prejudice against the accused that the accused cannot obtain a fair and impartial trial there, or to obtain compulsory process over an essential witness.

When it is necessary to change the place of trial, the choice of places to which the court-martial will be transferred will be left to the convening authority, as long as the choice is not inconsistent with the ruling of the military judge.

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(12) Determination of multiplicity of offenses for sentencing purposes.

**Discussion**

See R.C.M. 1003 concerning determination of the maximum punishment. See also R.C.M. 907(b)(3)(B) concerning dismissal of charges on grounds of multiplicity.

A ruling on this motion ordinarily should be deferred until after findings are entered.

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(13) Preliminary ruling on admissibility of evidence.

**Discussion**

See Mil. R. Evid. 104(c)

A request for a preliminary ruling on admissibility is a request that certain matters which are ordinarily decided during trial of the general issue be resolved before they arise, outside the presence of members. The purpose of such a motion is to avoid the prejudice which may result from bringing inadmissible matters to the attention of court members.

Whether to rule on an evidentiary question before it arises during trial is a matter within the discretion of the military judge. But see R.C.M. 905(b)(3) and (d); and Mil. R. Evid. 304(e)(2); 311(e)(2); 321(d)(2). Reviewability of preliminary rulings will be controlled by the Supreme Court's decision in *Luce v. United States*, 469 U.S. 38 (1984).

**R.C.M. 906(b)(14)**

(14) Motions relating to mental capacity or responsibility of the accused.

**Discussion**

See R.C.M. 706, 909, and 916(k) regarding procedures and standards concerning the mental capacity or responsibility of the accused.

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**Rule 907. Motions to dismiss**

(a) *In general.* A motion to dismiss is a request to terminate further proceedings as to one or more charges and specifications on grounds capable of resolution without trial of the general issue of guilt.

**Discussion**

Dismissal of a specification terminates the proceeding with respect to that specification unless the decision to dismiss is reconsidered and reversed by the military judge. See R.C.M. 905(f). Dismissal of a specification on grounds stated in subsection (b)(1) or (b)(3)(A) below does not ordinarily bar a later court-martial for the same offense if the grounds for dismissal no longer exist. See also R.C.M. 905(g) and subsection (b)(2) below.

See R.C.M. 916 concerning defenses.

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(b) *Grounds for dismissal.* Grounds for dismissal include the following—

(1) *Nonwaivable grounds.* A charge or specification shall be dismissed at any stage of the proceedings if:

(A) The court-martial lacks jurisdiction to try the accused for the offense; or

**Discussion**

See R.C.M. 201-203.

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(B) The specification fails to state an offense.

**Discussion**

See R.C.M. 307(c)

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(2) *Waivable grounds.* A charge or specification shall be dismissed upon motion made by the accused before the final adjournment of the court-martial in that case if:

(A) Dismissal is required under R.C.M. 707;

(B) The statute of limitations (Article 43) has run, provided that, if it appears that the accused is unaware of the right to assert the statute of limitations in bar of trial, the military judge shall inform the accused of this right;

**Discussion**

Except for certain offenses for which there is no limitation as to time, see Article 43(a), a person charged with an offense under the code may not be tried by court-martial over objection if sworn charges have not been received by the officer exercising summary court-martial jurisdiction over the command within five years. See Article 43(b). This period may be tolled (Article 43(c) and (d)), extended (Article 43(e) and (g)), or suspended (Article 43(f)) under certain circumstances. The prosecution bears the burden of proving that the statute of limitations has been tolled, extended, or suspended if it appears that is has run.

Some offenses are continuing offenses and any period of the offense occurring within the statute of limitations is not barred. Absence without leave, desertion, and fraudulent enlistment are not continuing offenses and are committed, respectively, on the day the person goes absent, deserts, or first receives pay or allowances under the enlistment.

When computing the statute of limitations, periods in which the accused was fleeing from justice or periods when the accused was absent without leave or in desertion are excluded. The military judge must determine by a preponderance, as an interlocutory matter, whether the accused was absent without authority or fleeing from justice. It would not be necessary that the accused be charged with the absence offense. In cases where the accused is charged with both an absence offense and a non-absence offense, but is found not guilty of the absence offense, the military judge would reconsider, by a preponderance, his or her prior determination whether that period of time is excludable.

If sworn charges have been received by an officer exercising summary court-martial jurisdiction over the command within the period of the statute, minor amendments (see R.C.M. 603(a)) may be made in the specification after the statute of limitations has run. However, if new charges are drafted or a major amendment made (see R.C.M. 603(d)) after the statute of limitations has run, prosecution is barred. The date of receipt of sworn charges is excluded when computing the appropriate statutory period. The date of the offense is included in the computation of the elapsed time. Article 43(g) allows the government time to reinstate charges dismissed as defective or insufficient for any cause. The government would have up to six months to reinstate the charges if the original period of limitations has expired or will expire within six months of the dismissal.

In some cases, the issue whether the statute of limitations has run will depend on the findings on the general issue of guilt. For example, where the date of an offense is in dispute, a finding by the court-martial that the offense occurred at an earlier time may affect a determination as to the running of the statute of limitations.

When the statute of limitations has run as to a lesser in-

cluded offense, but not as to the charged offense, *see* R.C.M. 920(e)(2) with regard to instructions on the lesser offense.

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(C) The accused has previously been tried by court-martial or federal civilian court for the same offense, provided that:

(i) No court-martial proceeding is a trial in the sense of this rule unless presentation of evidence on the general issue of guilt has begun;

(ii) No court-martial proceeding which has been terminated under R.C.M. 604(b) or R.C.M. 915 shall bar later prosecution for the same offense or offenses, if so provided in those rules;

(iii) No court-martial proceeding in which an accused has been found guilty of any charge or specification is a trial in the sense of this rule until the finding of guilty has become final after review of the case has been fully completed; and

(iv) No court-martial proceeding which lacked jurisdiction to try the accused for the offense is a trial in the sense of this rule.

(D) Prosecution is barred by:

(i) A pardon issued by the President;

### Discussion

A pardon may grant individual or general amnesty.

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(ii) Immunity from prosecution granted by a person authorized to do so;

### Discussion

*See* R.C.M. 704.

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(iii) Constructive condonation of desertion established by unconditional restoration to duty without trial of a deserter by a general court-martial convening authority who knew of the desertion; or

(iv) Prior punishment under Articles 13 or 15 for the same offense, if that offense was minor.

### Discussion

*See* Articles 13 and 15(f). *See* paragraph 1e of Part V for a definition of “minor” offenses.

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(3) *Permissible grounds.* A specification may be dismissed upon timely motion by the accused if:

(A) The specification is so defective that it substantially misled the accused, and the military judge finds that, in the interest of justice, trial should proceed on remaining charges and specifications without undue delay; or

(B) The specification is multiplicitous with another specification, is unnecessary to enable the prosecution to meet the exigencies of proof through trial, review, and appellate action, and should be dismissed in the interest of justice.

### Discussion

A specification is multiplicitous with another if it alleges the same offense, or an offense necessarily included in the other. A specification may also be multiplicitous with another if they describe substantially the same misconduct in two different ways. For example, assault and disorderly conduct may be multiplicitous if the disorderly conduct consists solely of the assault. *See also* R.C.M. 1003(c)(1)(C).

Ordinarily, a specification should not be dismissed for multiplicity before trial unless it clearly alleges the same offense, or one necessarily included therein, as is alleged in another specification. It may be appropriate to dismiss the less serious of any multiplicitous specifications after findings have been reached. Due consideration must be given, however, to possible post-trial or appellate action with regard to the remaining specification.

### Rule 908. Appeal by the United States

(a) *In general.* In a trial by a court-martial over which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal an order or ruling that terminates the proceedings with respect to a charge or specification, or excludes evidence that is substantial proof of a fact material in the proceedings, or directs the disclosure of classified information, or that imposes sanctions for nondisclosure of classified information. The United States may also appeal a refusal by the military judge to issue a protective order sought by the United States to prevent the disclosure of classified information or to enforce such an order that has previously been issued by the appropriate authority.