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R.C.M. 905(e)'s New, Incomprehensible Standard

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Many military appeals involve issues the appellant failed to raise at trial. Determining whether the issue is subject to appellate review, and if so, under what standard, is often difficult and provokes much disagreement. One particularly contentious area concerns Rule for Courts-Martial (R.C.M.) 905, which requires certain motions, defenses, and objections to be raised before pleas are entered and the consequences of failing to do so.[1] Changes to the military rules, effective 1 January 2019, establishes a novel affirmative waiver standard for failing to timely object under R.C.M. 905 that makes no sense, is inconsistent with other rules, and will lead to further confusion. This article examines the historical context of R.C.M. 905, its newly enacted standard, and recommends changes to conform more closely to federal civilian practice.

BACKGROUND

The Constitution of the United States granted Congress the authority "[t]o make Rules for the Government and Regulation of the land and naval Forces."[2] Congress delegated authority to the President in Article 36(a), Uniform Code of Military Justice (UCMJ), to prescribe trial procedures and rules of evidence "by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not…be contrary to or inconsistent with [the UCMJ]."[3]

Consistent with the congressional mandate in Article 36(a), the history of court-martial practice over the almost seventy years since enactment of the UCMJ has been one

of slow evolution in adopting the standards and procedures of federal criminal practice. On 12 March 1980, President Carter signed an executive order promulgating the Military Rules of Evidence.[4] These rules adopted both the form and much of the substance of the Federal Rules of Evidence.[5]

The project to draft the Military Rules of Evidence demonstrated the value of a comprehensive examination of the *Manual for Courts-Martial*, as a whole. Consequently, the Department of Defense General Counsel directed that the Manual be revised.[6] The stated goals for the revision included that it conform to federal practice to the extent possible and that it switch in form from narrative paragraphs to rules.[7] In 1984, President Reagan promulgated the Rules for Courts-Martial (R.C.M.), as Part II of the totally revamped *Manual*, in 1984.[8]

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FEDERAL RULE OF CRIMINAL PROCEDURE 12

R.C.M. 905 was an attempt to conform military practice to Federal Rule of Criminal Procedure 12.[9] Rule 12 required the parties to raise before trial motions, defenses, and objections, falling within certain specified, general categories before trial: (A) defects in the institution of the prosecution; (B) defects in the indictment or information (other than jurisdictional challenges, including the failure to charge an offense); (C) to suppress evidence; (D) for severance of charges or defendants; or (E) for discovery.[10] The failure to timely raise these motions, defenses, and objections constituted waiver, although the court could grant relief from the waiver for good cause shown.[11]

For the most part, the federal circuit courts of appeals recognized the plain language of Rule 12. The failure to raise one of the listed defenses, motions, or objections was to be treated as if the party had waived the issue.[12]

In 2002, the "language of Rule 12 [was] amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules."[13] The restyling discarded the passive voice, providing instead that a party "waives" the listed defense or objection by not timely filing. Despite the revision, "the Committee intend[ed] to make no change in the current law regarding waivers of motions or defenses."[14]

Regardless of the Advisory Committee's clear intentions, the change caused one panel of the U.S. Court of Appeals for the Sixth Circuit to reconsider its position on the application of Rule 12. The court noted that the term "waiver" is normally associated with a knowing and intelligent abandonment of rights, "If a defendant, out of neglect, fails to move to suppress evidence in the district court, that conduct is more akin to a forfeiture than a waiver."[15] So, the court reviewed for plain error.[16] Other courts, however, consistent with the Advisory Committee's intentions, continued to hold that the failure to raise the issue amounted to waiver or barred the petitioner from raising the issue on appeal.[17]

In 2014, Fed. R. Crim. P. 12 was substantially revised and restyled again. The Advisory Committee specified some of the motions, defenses, and objections that must be raised before trial within the previously drawn general categories[18] but limited the requirement to file before trial to those in which "the basis for the motion is then reasonably available."[19] The revisions also attempted to dispel confusion caused by applying the concept of waiver to issues that had not been knowingly and intentionally abandoned: "If a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely. But a court may consider the defense, objection, or request if the party shows good cause."[20]

> New paragraph (c)(3) governs the review of untimely claims, previously addressed in Rule 12(e). Rule 12(e) provided that a party "waives" a defense not raised within the time set under Rule 12(c). Although the term waiver in the context of a crimi-

nal case ordinarily refers to the intentional relinquishment of a known right, Rule 12(e) has never required any determination that a party who failed to make a timely motion intended to relinquish a defense, objection, or request that was not raised in a timely fashion. Accordingly, to avoid possible confusion the Committee decided not to employ the term "waiver" in new paragraph (c)(3).

New paragraph 12(c)(3) retains the existing standard for untimely claims. The party seeking relief must show "good cause" for failure to raise a claim by the deadline, a flexible standard that requires consideration of all interests in the particular case.[21]

From the Advisory Committee Notes, it is clear that Rule 12(b)(3) is a timing rule; it is neither a waiver nor a plain error rule. It is not a waiver rule for two reasons: (1) the objections are treated as waived without a showing that the accused knowingly and intelligently abandoned the rights involved; and (2) an accused is entitled to raise a defense or objection outside the prescribed time limit for good cause shown. If the untimely objection were actually waived, any error would be extinguished and, thus, there would be no remedy available to the accused even if the accused could establish good cause for not timely raising it.[22] It is not a plain error rule because the plain language of the Advisory Committee Notes, which are relevant evidence of the drafters' intent,[23] establish that unless the accused is able to show good cause for not timely raising the issue, it may not be considered by the court.

> Over the years, while Rule 12 was revised and restyled, R.C.M. 905 remained basically the same.

RULE FOR COURTS-MARTIAL 905

With minor modifications to account for the different terminology in military practice, R.C.M. 905(b) as promulgated in 1984 embraced Rule 12's general categories of motions, defenses, and objections that must be raised before entry of pleas, as follows:

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

(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);

(3) Motions to suppress evidence;

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

(5) Denial of request for individual military counsel or for retention of detailed defense counsel when individual military counsel has been granted.

The remedy for failing to timely file was also based on the remedy that was applied in federal courts under Rule 12: "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."[24]

Over the years, while Rule 12 was revised and restyled, R.C.M. 905 remained basically the same. The President did not adopt the 2014 changes to Rule 12. Of course, R.C.M. 905(e) does not suggest that to apply waiver to the failure to object the accused had to knowingly and intelligently abandon the issue. Rather, the plain language of the rule demonstrates an intention merely to treat the issue as if it had been waived.

Although use of the term "shall constitute waiver" has caused some difficulty, the objective of R.C.M. 905(e) makes sense. "The rationale behind waiver is 'to eliminate the expense to the parties and the public of rehearing an

issue that could have been dealt with by a timely objection or motion at trial' by the one party best positioned to make that happen—the party in need of relief."[25]

All of the categories listed in R.C.M. 905(b) are matters known to or discoverable by the accused and his counsel before trial. The accused and his counsel have time to research these issues and timely enter objections before entering pleas. If an accused has good cause for failing to meet the timing requirement— e.g., if the prosecution failed to provide timely discovery—then the court may permit the accused to raise the issue after the entry of pleas.

In 2014, the Federal Rules Advisory Committee made a special effort to more specifically define the issues that must be raised before trial. The drafters of the new R.C.M. 905 made no such effort….

Admittedly, the Court of Appeals for the Armed Forces (CAAF) has been somewhat confused by the term "shall constitute waiver," as used in R.C.M. 905(e). It has interpreted the term to mean:

(1) waiver, but searched to see if the appellant had been prejudiced;[26]
(2) waiver, but declined to enforce the waiver because the Government had not cited to the rule in its brief;[27]
(3) waiver, but actually reviewed for plain error;[28]
(4) waiver.[29]

Most recently, in *United States v. Hardy*,[30] the CAAF determined that the "shall constitute waiver" language in R.C.M. 905(e) means what it says: An accused waives, rather than forfeits absent plain error, a R.C.M. 905(b) motion he fails to timely raise. But the Court noted that the amendments to R.C.M. 905(e) scheduled to take effect on 1 January 2019 would change the standard.[31]

THE NEW R.C.M. 905

In 2014, the Federal Rules Advisory Committee made a special effort to more specifically define the issues that must be raised before trial.[32] The drafters of the new R.C.M. 905 made no such effort and the general categories remain vague without further explanation. Although the President must conform military rules to federal principles only "so far as he considers practicable,"[33] there does not appear to be any military reason why it would not be feasible to adopt the changes to Rule 12 in R.C.M. 905.

As noted by the CAAF in Hardy, R.C.M. 905(e) was amended and restyled in the new Rules for Courts-Martial, effective on 1 January 2019.

> 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 *forfeits the defenses or objections absent an affirmative waiver*. The military judge for good cause shown may permit a party to raise a defense or objection or make a motion or request outside of the timelines permitted under subsection (b) of this rule.[34]

This new standard for failing to timely object—forfeits absent an affirmative waiver—is novel, makes no sense, and demonstrates a significant misunderstanding of basic legal concepts.

The term "forfeits" refers to losing "a right, privilege, or property because of a crime, breach of obligation, or neglect of duty."[35] Under the new standard, then, a party unable to show good cause abandons any claim of error unless he affirmatively waives the error. Of course, if he affirmatively waives the error, he also abandons it. But R.C.M. 905(b) concerns the failure to timely raise an issue, and for the accused to have affirmatively waived the issue, someone must have raised it before trial, thus nullifying the applicability of R.C.M. 905(e)(1) to the issue in its entirety.

Perhaps the drafters meant that courts should review the failure to timely file for plain error. If so, there is a time-honored way to express it: "forfeit absent plain error"—the party abandons or relinquishes any claim of error unless he can "establish an error which 'must not only be both obvious and substantial, it must also have had an unfair prejudicial impact on the jury's deliberations.'"[36]

But plain error is not the appropriate standard for reviewing the failure of counsel to make timely pretrial motions and objections. The waiver provision of R.C.M. 905(e) was based on Rule 12, the purpose of which rule is to encourage parties to litigate efficiently and develop factual records on which appellate courts are able to review allegations of error:

> If [Rule 12's] time limits are followed, inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and the parties have gone to the burden and expense of a trial. If defendants were allowed to flout its time limitations, on the other hand, there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial. Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult.[37]

"Plain error" is a doctrine for trial errors—those errors made in the heat of litigation which an attorney might overlook. Plain error is simply not appropriate for issues of which the accused is on notice and has time to research and prepare to object.

Applying plain error presents other difficulties. First, it is inconsistent with several rules of evidence. R.C.M. 905(b)(3) and (e) would apply plain error to an accused's failure to timely move to suppress evidence while, consistent with federal practice, an accused's failure to object or move to suppress any confessions or admissions,[38] searches and seizures,[39] and eyewitness identifications[40] "shall constitute waiver." Under the general/specific canon of statutory construction,[41] motions to suppress confessions and admissions, searches and seizures, and eyewitness identification would apply a different standard from other motions to suppress. There does not appear to be a valid basis for treating motions to suppress in different ways.

The 2019 amendment to R.C.M. 905(e) is flawed and should be revised.

Second, appellate courts in the military justice system have shown an inability to apply the plain error standard of review consistently. The CAAF has asserted that the military plain error rule has a higher threshold than does the federal rule.[42] Yet in many cases, the plain error review they employ is little different from providing de novo review, as if the accused had preserved the issue for appeal by timely objecting.[43] Rule 12 now takes the appropriate approach. It recognizes that the failure to timely raise certain issues is actually a time bar, not an issue to be reviewed for waiver or plain error. If the party has good reason for not timely raising the issue, then the court can consider it.

GUIDELINES

What follows is excerpts from the current R.C.M. with modifications to assist readers in understanding the author's recommendations. The modifications follow a basic format:

- Language in regular text is the current language in the R.C.M.
- Language ~~lined out~~ is text the author recommends is deleted
- Language in **red** is text the author recommends is added

RECOMMENDATIONS

The 2019 amendment to R.C.M. 905(e) is flawed and should be revised. In the process, the President should also revise R.C.M. 905(b) to adapt the 2014 amendments made to Rule 12 to military practice to clarify which specific motions, defenses, and objections must be made before pleas are entered.

R.C.M. 905(b) should be amended, as follows:

(b) 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 if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits:

(1) ~~Defenses or objections based on defects (other than jurisdictional defects) in the preferral, forwarding, or referral of charges, or in the preliminary hearing~~ A defect in instituting the prosecution, including:

(A) improper venue;
(B) prereferral delay;
(C) a violation of the constitutional right to a speedy trial;
(D) selective or vindictive prosecution;
(E) an error in the preliminary hearing; and
(F) an error in the pretrial advice;

(2) ~~Defense 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);~~ A defect in the charge sheet, including:

(A) joining two or more offenses in the same specification (duplicity);
(B) charging the same offense in more than one specification (multiplicity);
(C) lack of specificity;
(D) improper joinder; and
(E) failure to state an offense;[44]

(3) ~~Motions to suppress~~ [S]uppression of evidence;

(4) ~~Motions for~~ [D]iscovery under R.C.M. 701 or the production of witnesses or evidence;

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

(6) ~~Objections based on~~ [D]enial of request for individual military counsel or for retention of detailed defense counsel when individual military counsel has been granted.

R.C.M. 905(e) should be changed as follows:

(e) Effect of failure to raise defenses or objections. Deadline for a pretrial motion; Consequences of failing to timely file.

(1) Setting the deadline. The court may set a reasonable deadline for the parties to make pretrial motions and schedule hearings on such motions. If the court does not set one, the deadline is before the accused enters pleas.

(2) Extending or resetting the deadline. At any time before trial, the court may extend or reset the deadline for pretrial motions.

(3) Consequences of not making a timely motion under R.C.M. 905(b). ~~(1) 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 forfeits the defenses or objections absent an affirmative waiver. The military judge for good cause shown may permit a party to raise a defense or objection or make a motion or request outside of the timelines permitted under subsection (b) of this rule.~~ If a party does not meet the deadline for raising an R.C.M. 905(b) motion, defense, or objection,

it is untimely. A court is barred from considering such untimely filed motions, defenses, or objections absent the party showing good cause.

(4) 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. Failure to raise such other motions, requests, defenses, or objections, shall constitute forfeiture, absent ~~an affirmative waiver~~ plain error.

CONCLUSION

There is no compelling military reason for not adapting the 2014 amendments to Rule 12 to military practice. In adapting Rule 12(c), however, R.C.M. 905(e) should clarify that courts are barred from considering untimely motions, defenses, or objections absent good cause.

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ENDNOTES

[1] Manual for Courts-Martial, United States, R.C.M. 905(b) and (e) (2016) [hereinafter MCM].

[2] U.S. Const. art. I, § 8, cl. 14.

[3] 10 U.S.C. § 836(a) (2012).

[4] Exec. Order No. 12,198, 45 Fed. Reg. 16,932 (Mar. 12, 1980).

[5] *See* MCM, *supra* note 1, Mil. R. Evid. analysis, at 22-1.

[6] *Id.*, R.C.M. analysis, at A21-1 (2016).

[7] *Id.*

[8] Exec. Order No. 12,473, 49 Fed. Reg. 17,152 (Apr. 13, 1984), as amended by Exec. Order No. 12,484, 49 Fed. Reg. 28,825 (July 13, 1984).

[9] *See* MCM, *supra* note 1, R.C.M. 905 analysis, at A21-52.

[10] Fed. R. Crim. P. 12(b).

[11] Fed. R. Crim. P. 12(f), Advisory Committee Notes on Rules—1974 Amendments. As part of a general restyling of the rules, this provision was later revised and moved to Fed. R. Crim. P. 12(e). *See* Fed. R. Crim. P. 12, Advisory Committee Notes on Rules—2002 Amendments. In 2014, it was revised again and moved to Fed. R. Crim. P. 12(c). *See* id., 2014 Amendments.

[12] *See*, e.g., United States v. Marshall, 176 F.3d 485 (9th Cir. 1999); United States v. Marrero, 991 F.2d 786 (1st Cir. 1993) (per curiam); United States v. Haas, 986 F.2d 503 (8th Cir. 1993); United States v. Worthington, 698 F.2d 820, 824 (6th Cir. 1983); *but see* United States v. Masters, 976 F.2d 728 (4th Cir. 1992) ("Failure to raise this objection constitutes a waiver of the objection unless the defendant shows actual prejudice.").

[13] Fed. R. Crim. P. 12, *supra* note 11, 2002 Amendments.

[14] *Id.*

[15] United States v. Johnson, 415 F.3d 728, 730 (7th Cir. 2005) (citing United States v. Clarke, 227 F.3d 974, 880–81 (7th Cir. 2000)).

[16] *Id.*

[17] *See*, e.g., United States v. Ponzo, 853 F.3d 558, 574 (1st Cir. 2017), *cert. denied*, 138 S. Ct. 980 (2018); United States v. Augustine, 742 F.3d 1258, 1265 (10th Cir. 2014); United States v. Garcia, 488 F. App'x 804, 809 (5th Cir. 2012); United States v. Ledezma-Dominguez, 471 F. App'x 880 (11th Cir. 2012) (per curiam); United States v. Gonzalez, 472 F. App'x 132, 135 (3d Cir. 2012) ("waived (i.e., completely barred)").

[18] Fed. R. Crim. P. 12(b)(3), *supra* note 11, 2014 Amendments.

[19] Fed. R. Crim. P. 12(b)(3).

[20] Fed. R. Crim. P. 12(b)(3).

[21] Fed. R. Crim. P. 12(b)(3), *supra* note 11, 2014 Amendments.

[22] *See* United States v. Olano, 507 U.S. 725, 732–733 (1993).

[23] United States v. Vonn, 535 U.S. 55, 64 n.6 (2002).

[24] MCM, *supra* note 1, R.C.M. 905(e).

[25] United States v. Inong, 58 M.J. 460, 464 (C.A.A.F. 2003) (quoting United States v. Huffman, 40 M.J. 225, 229 (C.A.A.F. 1994)).

[26] *See*, *e.g.,* United States v. Murray, 25 M.J. 445, 449 (C.M.A. 1988).

[27] *See* United States v. Bradley, 30 M.J. 310–11 (C.M.A. 1990).

[28] *See, e.g.*, United States v. Chapa, 57 M.J. 140, 142 n.4 (C.A.A.F. 2002); United States v. Godshalk, 44 M.J. 487, 490 (C.A.A.F. 1996); United States v. Carroll, 43 M.J. 487, 488 (C.A.A.F. 1996); United States v. Briggs, 42 M.J. 367, 370 (C.A.A.F. 1996); United States v. Green, 37 M.J. 380, 384 n.2 (C.M.A. 1993).

[29] *See, e.g.,* United States v. Rust, 41 M.J. 472, 480 (C.A.A.F. 1995) (concerning whether trial counsel became an "accuser"); United States v. Corcoran, 40 M.J. 478, 485 (C.M.A. 1994) (regarding defects in the pretrial advice, referral, or post-trial recommendation); United States v. McCants, 39 M.J. 91, 93 (C.M.A. 1994).

[30] 77 M.J. 438, 439–443 (C.A.A.F. 2018).

[31] *Id*. at 439.

[32] For example, under the general category "a defect in instituting the prosecution," Fed. R. Crim. P. 12(b)(3)(A) now lists five separate motions or objections:

(i) improper venue;

(ii) preindictment delay;

(iii) a violation of the constitutional right to speedy trial;

(iv) selective or vindictive prosecution; and

(v) an error in the grand-jury proceeding or preliminary hearing.

[33] UCMJ art. 36(a) (2012). The term "practicable" means "reasonably capable of being accomplished; feasible in a particular situation." Black's Law Dictionary 1361 (10th ed. 2014). Therefore, although the President is granted considerable deference, he or she should adopt federal practices, except where there is compelling military reason for not doing so.

[34] Exec. Order No. 13,825, 83 Fed. Reg. 9889, 9984 (Mar. 8 2018) (amending R.C.M. 905(e)(1)(emphasis added)).

[35] Black's, *supra* note 33, at 765; *see* Webster Third International Dictionary 891 (1986).

[36] United States v. Ruiz, 54 M.J. 138, 143 (C.A.A.F. 2000) (quoting United States v. Fisher, 21 M.J. 327, 328 (C.M.A. 1986)).

[37] United States v. Smith, 866 F.2d 1092, 1097 (9th Cir. 1989) (quoting Davis v. United States, 411 U.S. 233, 241 (1973)).

[38] MCM, *supra* note 1, Mil. R. Evid. 304(f)

[39] *Id.*, Mil. R. Evid. 311(d)(2)(A).

[40] *Id.*, Mil. R. Evid. 321(d)(2).

[41] "If there is a conflict between a general provision and a specific provision, the specific provision prevails." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 183 (2012).

[42] United States v. Powell, 49 M.J. 460, 465 (C.A.A.F. 1998) (discussing differences between UCMJ art. 59(a) and Fed. R. Crim. P. 52(b)).

[43] *See* Major Terri J. Erisman, *Defining the Obvious: Addressing the Use and Scope of Plain Error*, 61 A.F. L. Rev. 41, 64–70 (2008) (noting the CAAF has not always required the appellant to establish each prong of the plain error standard and refused to adopt the fourth prong of the Supreme Court's plain error analysis—that an appellate court should not correct a plain error unless the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings," Johnson v. United States, 520 U.S. 461, 467 (1997)—provides appellants with no great incentive to timely object).

[44] This change would necessitate amending R.C.M. 907(b)(2)(E).