

REPLY TO DEFENSE MOTION FOR
APPROPRIATE RELIEF AND DEMAND
FOR BILL OF PARTICULARS

v

The Charge and its Specifications and the Additional Charge and its Specifications were drafted in compliance with Para. 28, MCM, 1969, (Rev.), and the form of each Specification was taken from App 6, MCM, 1969, (Rev.). Each Charge and Specification contains all the elements of each separate alleged offense. In addition, each Specification clearly sets forth the time and place of the alleged offense, namely "at My Lai 4, Quang Ngai Province, Republic of South Vietnam, on or about 16 March 1968." Further, in accordance with Para. 10, App 6a, MCM, 1969, (Rev.), the victims of the alleged offenses are described as "an unknown number, not less than 30, Oriental human beings, males and females of various ages, whose names are unknown, occupants of the village of My Lai 4"; "an unknown number of Oriental human beings, not less than seventy, males and females of various ages, whose names are unknown, occupants of the village of My Lai 4"; "one Oriental male human being an occupant of the village of My Lai 4, whose name and age is unknown"; and as "one Oriental human being, an occupant of the village of My Lai 4, approximately two years old, whose name and sex is unknown."

My Lai 4, approximately two years later.

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These descriptions are adequate to apprise the accused of who the alleged victims are and to prevent any subsequent prosecution for the offenses alleged. U.S. v HOPF, 5 CMR 12 (1952).

In the Hopf case the Court of Military Appeals held that in an assault case upon a named Korean where the findings of guilty excepted the name of the individual and substituted the words "an unknown" was not a fatal variance. The Court stated

"Omitting the name of the victim, these details as alleged in the specification were sufficient to apprise the accused of the offense with which he was charged. It is extremely doubtful whether, under the circumstances of this type of case in Korea, the assailant will know the name of his victim. That fact is, therefore, of little consequence and it is difficult to see how a failure to name any particular person could have prejudiced the accused in the preparation of his defense." supra at 14.

The Court continued as follows:

"In view of the specificity of proof of the person assaulted, the location and time of the incident, and the nature of the injuries, it is difficult to perceive wherein the accused would have any difficulty through the use of the charge, specification, and record of trial, in preventing a second prosecution for the same offense." supra at 15.

In reply to the specific points set out in the Demand for Particulars further specificity is unnecessary. An exact place or time is not necessary since the village is adequately named and the date of the alleged offense is stated. See U.S. v MEANS, 12 USCMA 290, 30 CMR 290 (1961). The allegations are sufficient to apprise the accused of the nature of the offense and certainly, with the production of evidence on the merits, will enable the accused to prevent any subsequent prosecution for the alleged offenses. As phrased, the specifications would prevent any prosecution that could fit within the present specifications. See U.S. v MAYNAZARIAN, 12 USCMA 484, 31 CMR 70 (1961).

The knowledge gained by the defense as a result of the Article 32 investigation should be considered in whether there is a need to further particularize the specifications, U.S v MEANS, supra. The Article 32 investigation included much evidence that set forth the separate incidents upon which the Charge and Specifications and the Additional Charge and Specifications were based. Both the individual counsel and the military defense counsel were present and participated in the Article 32 investigation. Furthermore, copies of the investigation were given to both the individual and military defense counsel. Furthermore, the defense was also provided with a copy of the Staff Judge Advocate's pretrial advice which contained a discussion of the sufficiency of the evidence presented at the Article 32 investigation as to each of the charges and specifications.

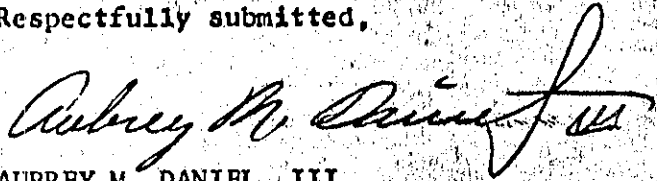
At this time the defense is not entitled to know the theory of the Government as to the participation by the accused in each alleged offense beyond that set out in proper specifications and previously shown in the Article 32 investigation. At this time, the defense is also not entitled to know all the evidence which the Government intends to introduce. These matters are requested in paragraphs (2) and (3) of the Defense Motion for Appropriate Relief and should be denied as beyond the scope of a bill of particulars. MORGAN v U.S., 380 F.2d 686 (1967), cert. den., 390 U.S. 962, reh.den., 390 U.S. 1008; U.S. v BONNETT, 247 F. Supp. 415 (1965).

The victims allegedly murdered in each specification are not included within any other specification, that is to say, each specification constitutes a separate accusation in accordance with Para. 24, MCM, 1969, (Rev.). Each of the four separate accusations will require separate proof, beyond a reasonable doubt, on each element of the

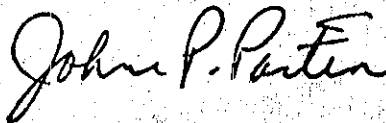
accusation. Para. 74a(3), MCM, 1969, (Rev.).

For the reasons stated herein, the Demand for a Bill of Particulars made by counsel for the accused should be denied.

Respectfully submitted,



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