

v.

**MOTION TO DISMISS
FOR LACK OF JURISDICTION**

1. He is charged with assault with intent to commit murder and false swearing, in violation of Article 134, U.C.M.J. Defendant's ETS date was 2400 hours, 12 January 1970. On 8 January 1970, he was charged with three violations of the Uniform Code of Military Justice while permanently assigned to Fort Lewis, Washington. On 14 January 1970, defendant demanded immediate separation from the service effective the date as agreed upon by the contract of enlistment entered into between the defendant and the United States Army. On 27 February 1970, accused arrived at Fort McPherson, Georgia, pursuant to PCS orders, for the convenience of the Government in consolidating all My Lai related cases. On 9 March 1970, an additional charge was preferred against the accused. On 4 September 1970, two of the original three charges were dismissed. On 17 September 1970, one original and the additional charge were referred to this General Court-Martial for trial.

2. By subjecting the defendant to trial by court-martial, the Government is depriving him of his equal rights under the 5th, 6th, and 9th Amendments of the Constitution of the United States, by denying him: indictment by a grand jury; trial by jury; trial before a Court constituted under Article 3 of the Constitution of the United States;

the right to a fair trial, a unanimous jury verdict to convict.

Accordingly, that portion of the Uniform Code of Military Justice and Manual for Courts-Martial, 1969 (Revised Edition) which allegedly provides a basis for jurisdiction over the defendant, is unconstitutional and thus void as it applies to the accused.

3. Further, the defendant is not subject to the jurisdiction of any court-martial because he was not placed in jeopardy before the expiration of his initial term of service. As he was not placed in jeopardy and as two of the three charges originated against him were dismissed and the one remaining charge not referred to trial with the additional charge until almost eight months after his original ETS date, he was a civilian at the time of referral and thus, is being denied the same and equal protection of the law. Accordingly, those provisions of the MCM which allow retention of a soldier beyond his initial term of military service for the purpose of possible trial by court-martial are unconstitutional and void. In the alternative, where a defendant is retained beyond his initial term of service, but has not been placed in jeopardy or had his case referred to trial so that a court-martial has, in fact, obtained jurisdiction over him, such resulting military status is basically for purposes of continuing investigation and possible trial, and constitutes a form of involuntary servitude in direct violation of the 13th Amendment to the Constitution of the United States.

4. As to the additional Charge and Specification, this Court lacks jurisdiction. Paragraph 11d, MCM, 1969 (Revised Edition) states:

"...Jurisdiction having attached by commencement of action with a view to trial--as by apprehension, arrest, confinement, or filing of charges---continues for all purposes of trial, sentence and punishment."
(emphasis added)

Assuming arguendo, that a soldier can be held past his enlistment termination date for trial when charges have been filed; paragraph 11d, itself, limits the purpose of this extension to the finalization of an action started. To subject this defendant to the jurisdiction of this Court would contradict the language and spirit of this limited extension of

jurisdiction. The only purpose of this paragraph is to allow a military court to complete the judicial process once begun while the defendant is in a military status. The facts and information which formed the basis of the additional charge against the defendant were known to the Army at the time the original charges were preferred. However, it was not until two months after his ETS date and the PCS of the accused that the additional charge was preferred. Therefore, the Army delayed too long in preferring the additional charge and jurisdiction was lost as to any offenses allegedly committed prior to defendant's ETS date. A reasonable interpretation of the pertinent recent provisions of the Manual together with case law support the proposition of so limiting courts-martial jurisdiction.

WHEREFORE, the defendant, for the reasons above stated, moves the Court to dismiss all charges and specifications alleged against him herein.


Respectfully submitted,


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and

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By


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