

D R A F T

UNITED STATES

v

GERALD A. SMITH
PRIVATE
U. S. ARMY

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) MOTION FOR APPROPRIATE RELIEF
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Comes now the accused through counsel and moves for the negation of the involuntary change of venue forced upon him by the United States Army and that the case be returned to the Americal Division, Chu Lai, Republic of Vietnam, for further disposition for the following reasons:

STATEMENT OF THE FACTS

On 16 March 1968, the accused was a member of Company C, 1st Battalion, 20th Infantry, Americal Division in the Republic of South Vietnam. On that day pursuant to authorized orders, the accused and his unit participated in a combat assault on the hamlet of My Lai (4). Although there was evidence that during and immediately subsequent to the assault, alleged excesses were committed by members of C Company and that a large number of noncombatants had been killed, and although senior officers in the Americal Division were aware of these facts, all information pertaining to the incident were suppressed. No action was initiated as is provided by the Uniform Code of Military Justice and the Manual for Courts-Martial, 1951, to determine whether disciplinary or other action should be taken against the accused or any other individual. Consequently, the matter was never raised and the witnesses and other individuals involved in the incident at My Lai (4) were allowed to go their separate ways, some returning to civilian life and others remaining in the Army being assigned to various Army posts throughout the world. Now, over two years later, these individuals against whom allegations have been made, and who still remain in the Army, have been assembled at Fort McPherson, Georgia (with the exception of one case at Fort Hood, Texas and one at Fort Benning, Georgia), for disciplinary action.

ARGUMENT

A. Under the ordinary course of events, if any alleged misconduct had occurred in or near My Lai (4), disciplinary proceedings concerning such misconduct would have taken place within the command to which the accused was then assigned, namely, the Americal Division, located at Chu Lai, Republic of South Vietnam. See paragraphs 29b, 30h, 31, et. seq., Manual for Courts-Martial, 1951. If it were deemed necessary to resort to judicial proceedings, members of a court would have been drawn from this command. Paragraph 36, Manual for Courts-Martial, 1951. In any event, for practical reasons, if no other, members of a court would have been drawn from the general area in which the alleged offenses took place. Such a court would have been peculiarly appropriate to hear the case, as individuals who make up the command involved in this section of Vietnam would have been in a situation to be aware of the singular nature of the circumstances of the area concerned, to include its renowned hostility; the fact that it was reputed to be heavily booby trapped and mined; that it had been controlled by the Viet Cong for a number of years; that there had been numerous American casualties in this area over the past several months prior to the operation in issue; and the nature of Task Force Barker, to which the accused's unit was attached, its assigned mission, and the orders given its members. Furthermore, it was for similar reasons that the founders of our Republic thought it necessary to provide in the United States Constitution that, "The Trial of all Crimes except in cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said crimes have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by ^{LAW} ~~Law~~ have directed." This right is further recognized by the Sixth Amendment to the Constitution, which provides that, "In all criminal prosecutions, the accused shall enjoy the right to a speed and public trial, by an impartial jury of the State and district wherein the crime shall have been committed..."

B. The single reason why an investigation of this alleged incident, and resulting disciplinary action, if any were deemed necessary, were not undertaken ^{in Vietnam over two years ago} ~~is because~~ ^{that} as the Peers-MacCrate Inquiry has amply demonstrated, senior officers in the Americal Division were successful in suppressing information that would have indicated that some type of misconduct had taken place at

My Lai (4). Of course, as was further revealed by this report, in spite of numerous official regulations pertaining to the timely reporting and investigation of civilian combat casualties and alleged war atrocities, unofficial Army policy in the Republic of South Vietnam, as carried out by senior Army officers, sanctioned the suppression of information concerning this type of activity. Had it not been for this suppression, the accused's case would have been disposed of within the Americal Division in the Republic of South Vietnam.

By suppressing this information until such time as the accused was reassigned to the Continental United States, the Army has deprived the accused of the

opportunity to have his case disposed of by individuals ^{who were familiar} ~~with the discipline and the manner of that particular area,~~ ~~circumstances surrounding the alleged misconduct.~~ While an accused does not ~~with the peculiarities of encompassing the area in question.~~ have this right initially in a judicial proceeding, the Government does not

have the right to deprive him of such an opportunity, i.e., if fortuitous cir-

cumstances should provide an accused with a forum aware of the ^{peculiar} nature of the ~~circ-~~

~~area in question~~ ~~cumstances surrounding an alleged incident of misconduct,~~ the Government has no right to force him to accept an involuntary change of venue.

Because of the lengthy period of delay since the commission of the alleged offenses, it is impossible to obtain a jury at any place which could give the accused the fair ~~trial~~ trial that he would have received had the trial been held in the Republic of South Vietnam within a reasonable time after the alleged incident at My Lai (4). However, a jury composed of individuals who are now assigned to that area could come much closer to affording the accused the fair and impartial trial, guaranteed to him by the Constitution of the United States, since Court members from the Americal Division would be familiar with the My Lai (4) area and could better understand the mental and psychological pressures which ~~that~~ soldiers in combat in that area face.

C. The defense fully realizes that normally the question of change of venue is one which is solely within the discretion of the Military Judge, and that there must be shown to be a general atmosphere of prejudice against the accused so as to make it impossible for him to receive a fair and impartial trial in order for a motion for change of venue to be granted. However, this principle does not apply in this case in that the accused is entitled as a matter of right to have the involuntary change of venue effectuated by the Army negated. Convenience to the Army should not be considered ~~a~~ in a matter so important as this.