

UNITED STATES

v.

GERALD A. SMITH
PRIVATE
UNITED STATES ARMY

NOTICE TO DEFENDERS

IN the above styled case, a General Court-Martial convened by Court-Martial Commanding Order Number 27, Headquarters, Third United States Army, Fort Monrison, Georgia 30130, dated 22 June 1970, comes now the accused through counsel and moves this Court to dismiss all charges and specifications alleged against him for the following reasons:

I

The accused has been denied procedural due process of law in that there has been an unreasonable delay in the preferring and disposition of charges brought against him as hereinafter set forth.

II

The accused is charged with three specifications of premeditated murder of seven unidentified Vietnamese persons at the village of My Lai (4), Quang N'gai Province, Republic of South Vietnam on 16 March 1969. Further, the accused is charged with committing an indecent assault on an unidentified Vietnamese female on the same date and at the same location. The events from which these charges arose were not properly investigated for over a year. As stated by the Report of the Armed Services, House of Representatives, Ninety-First Congress, Second Session, Under Authority of H. Res. 103, dated July 15, 1970, at pages 4-5, "...the My Lai matter was 'covered up' within the Americal Division and by the District and Province Advisory Teams", and, "responsible officers... failed to make adequate, timely investigation and report of the My Lai allegations."

III

As is apparent, the accused's right to a speedy trial has been denied by the staggering delay of almost two full years from the time the charges are alleged to have happened until they were brought against the accused. The Army cannot disclaim knowledge of what happened, nor can any blame be placed on the accused for this delay. In addition to over two years of "cover-up" by officials within the accused's chain of command, the U. S. Army has caused the delay in processing the case since the accused was formally advised of the charges he was suspected of committing.

IV

Article 10 of the Uniform Code of Military Justice reiterates the Constitutional guarantees of the Sixth Amendment right to speedy trial. Long delays in bringing charges against an accused have often been noted as a reason for granting dismissal of the case. In United States v. Shepherd, 37 CMR 659 (1967), the Board of Review, citing United States v. Williams, 37 CMR 209 (1967), and United States v. Lamphers, 37 CMR 200 (1967), found vexatious delay in bringing charges against the accused. The decision was precursory to the case at hand as the Board stated at page 662:

We are concerned that the higher headquarters involved did not take any action to expedite this case. The Brigade had a judge advocate. The command exercising general court-martial jurisdiction likewise had a full legal staff, stationed in Saigon. The Staff Judge Advocate, in his Review states, "The lack of communication between the USARV Stockade, the unit's rear area detachment and forward elements, plus combat priorities contributed to the delay." While the Brigade Commander, in his letter of transmittal to the charges, explains the failure to comply with some command requirement, the word is silent as to any effort by any person to expedite the charges.

V

Military courts have often stated that the accused is especially prejudiced during long delays prior to charging when an attorney is not appointed to his case during that time. There is a substantial risk that witnesses might either forget the facts of the case or become unavailable.

Also, physical evidence can be misplaced or lost during this period.

See United States v. Parish, 17 USCM 411, 416, 38 CMR 209 (1968).

In the case at hand, the long period of delay has resulted in insurmountable prejudice to the accused. Many witnesses cannot remember the incident alleged, and one possible witness, Jake Smith, cannot be located at all. However, even more important, during the long delay prior to bringing charges against the accused, the War in Vietnam has drastically changed. On 16 March 1968, the Quang N'gai Province was a hotbed of Vietcong Activity, and at that time, American troops had successfully repelled the Tet offensive and were not in a commanding position in South Vietnam. Confusion and terror reigned in many northern provinces of South Vietnam. At the present, however, American troops along with ARVN soldiers have substantial control of most areas of South Vietnam and as a result, the psychology of the infantry has changed in South Vietnam, and perhaps the alleged incident at My Lai (4), while understandable at that time, has now become distasteful and incomprehensible to court members and the military judge hearing the case stateside.

Furthermore, the accused has been prejudiced by being involuntarily retained in the Army past his scheduled date of discharge on 13 January 1970.

VI

For the reasons set forth herein, we respectfully request that all charges and specifications be dismissed.

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