

UNITED STATES)

v.)

GERALD A. SMITH
PRIVATE

UNITED STATES ARMY)

) MOTION FOR APPROPRIATE RELIEF

IN the above styled case, a General Court-Martial convened by Court-Martial Convening Order Number 27, Headquarters, Third United States Army, Fort McPherson, Georgia, dated 22 June 1970, comes now the accused through counsel and prays that a writ in the nature of mandamus or such other relief as may be appropriate, be issued to the General Court-Martial Convening Authority in this case, compelling him to take necessary action to provide the defense with at least two qualified military criminal investigators in the grade of warrant officer or higher, who are members of the Criminal Investigation Division of the Military Police Corps; or, in the alternative, to take necessary action to provide adequate funds, under the provisions of paragraph 116, Manual for Courts-Martial 1969 (Revised Edition), with which accused can employ in his behalf a qualified private detective agency. The requested personnel are necessary to serve under the operational control and in confidence with the accused and counsel in order to conduct essential independent investigations regarding the incident that allegedly occurred at My Lai (4), Republic of South Vietnam, on 16 March 1968, and out of which the present charge against the accused arose.

I

A. The United States has, for over a year, employed the investigative sources of the Department of the Army Inspector General and the Provost Marshal General's Criminal Investigation Division to interview witnesses, obtain statements in this case, and obtain photographs and other documentary evidence. Substantial amounts of government funds have been made available for the investigation and prosecution of this case, and other cases arising out of the same alleged incident. The agents that have been gathering evidence are employed by the agency engaged in the prosecution of this case.

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i.e., the United States Army, and conduct their investigations, either overtly or covertly with a view toward eventual prosecution. It is suggested that evidence favorable to the defense is seldom pursued to the same extent as evidence favorable to the government.

B. The accused receives less than \$200 a month from the Army, supports a wife and four-year-old child out of that, and has no independent source of income whatsoever. In short, he is indigent and unable to employ private investigative assistance to conduct the independent investigations necessary in his own behalf.

C. Due process of law as required by the Fifth Amendment to the United States Constitution would appear to demand that equal treatment be accorded the prosecution and the defense in a criminal case..

The Deputy General Counsel of the United States Army has stated that "The Department of the Army is no less committed than Congress to the principle that the indigency of an accused should not be allowed to deny him the means for preparing an adequate defense."

II

On 30 June 1970, the defense submitted a request to the convening authority for such investigative assistance. On 21 July 1970, the request was returned without consideration of the merits of the request. The basis for this action was that since the case had been referred to a court-martial with a detailed military judge, the request should properly be presented to the military judge.

III

While there are few witnesses noted on page one of the charge sheet in this case, the defense has been furnished with statements taken from approximately 350 witnesses by the Peers-MacCrate Inquiry, approximately 321 statements of civilian witnesses and 111 statements of Vietnamese witnesses taken by agents of the Criminal Investigation Division, and approximately 20 statements taken by agents of the Inspector General of the United States Army. While several witnesses have made different

statements to the different agencies mentioned, all pertain to the alleged incident at My Lai (4) and all potentially concern the defense in this case. While it is undisputed that some of these individuals will have no direct bearing on this case, it is possible that some will contribute materially to the defense.

IV

WHEREFORE, The accused prays that this Court issue a writ in the nature of mandamus or such other relief as may be appropriate, compelling the General Court-Martial Convening Authority in this case, Lieutenant General Albert O. Connor, to take necessary action to provide the defense with the investigative assistance as detailed supra, or alternatively, with the funds with which to employ the private investigative assistance as detailed supra, such being necessary to enable the accused and counsel to prepare an adequate and proper defense, and such being required to insure equal protection of the law inherent in military due process.

Respectfully submitted,

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