

THIS OPINION IS ABRIDGED DUE TO SPACE LIMITATIONS ON WEB SITE

**UNITED STATES v First Lieutenant WILLIAM L. CALLEY, JR., 262-72-6405,
U.S. Army, Headquarters and Headquarters Company, The School Brigade, U.S.
Army Infantry School, Fort Benning, Georgia 31905**

CM 426402

UNITED STATES ARMY COURT OF MILITARY REVIEW

46 C.M.R. 1131; 1973 CMR LEXIS 843

February 16, 1973

PRIOR HISTORY: [**1] General Court-Martial Convened by Hq U.S. Army Infantry Center and Fort Benning. ACTION by Hq, Third United States Army (R. W. Kennedy, Military Judge).

Sentence adjudged 31 March 1971. Approved sentence: Dismissal, confinement at hard labor for twenty years and forfeiture of all pay and allowances.

COUNSEL: Appearances: Appellate counsel for the Accused: George W. Latimer, Esq., CPT J. Houston Gordon, JAGC, CPT Richard M. Evans, JAGC. Appellate Counsel for the United States: CPT Marvin D. Deitchler, JAGC, CPT Robert C. Roth, Jr., JAGC, CPT Merle F. Wilberding, JAGC, LTC Ronald H. Holdaway, JAGC.

JUDGES: ALLEY, Judge; Senior Judge VINET and Judge CLAUSE concur.

OPINION BY: ALLEY

OPINION

[*1138] OPINION AND ACTION ON PETITION FOR NEW TRIAL

ALLEY, Judge:

In much publicized proceedings, appellant was convicted by general court-martial of three specifications of premeditated murder and one of assault with intent to commit murder in violation of Articles 118 and 134, Uniform Code of Military Justice, 10 USC §§ 918 and 934, respectively. He was sentenced to dismissal, forfeiture of all pay and allowances, and confinement at hard labor for life. The convening authority approved dismissal [**2] and the forfeitures, but reduced the period of confinement to twenty years. The offenses were committed by First Lieutenant William L. Calley when

he was performing as a platoon leader during an air-mobile operation in the subhamlet of My Lai (4) in Song My village, Quang Ngai Province, Republic of South Vietnam, on 16 March 1968. Although all charges could have been laid as war crimes, they were prosecuted under the UCMJ. See paragraph 507b, Field Manual 27-10, The Law of Land Warfare (1956).

Appellate defense counsel have presented thirty-one assignments of error and a petition for new trial. For clarity our opinion will consolidate those assignments which warrant discussion under the broad headings of jurisdiction, publicity, command influence, composition of the court-martial, sufficiency of the evidence, discovery and subpoenas, and petition for new trial.

I -- JURISDICTION

Appellant's initial assignment of error is that the court-martial which tried and convicted him lacked jurisdiction over his person. Alternatively and conjunctively it is argued that Lieutenant Calley was not amenable to military jurisdiction on 25 November 1969, the date trial commenced, because: [**3] one, he was irregularly ordered to active duty without his consent; two, he was retained on active duty beyond 6 September 1969, his scheduled separation date, without his consent; and three, provisions in the Manual for Courts-Martial purporting to provide for continuing jurisdiction over him are invalid.

After completing officer candidate school appellant was appointed, under 10 USC §§ 591, 593, as a reserve second lieutenant for an indefinite term, effective 7 September 1967. Accordingly, he was ordered to active duty pursuant to 10 USC § 672(d), which provides:

"At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or "retain him on active duty, with the consent of that member. How-

After challenges for cause had reduced the number of originally detailed court members to five, the military judge [**79] noted that the likely exercise of peremptory challenges would result in an absence of the statutory quorum, Article 16(1) (A), UCMJ, 10 USC § 816(1) (A), and told counsel:

"What I would propose is that an arrangement be made to obtain some more people for this afternoon and what I will do is give you each a peremptory challenge from this batch and as we get the new, I will give you each a peremptory challenge from it, if that's agreeable, which I think is more than what the law entitled you. In fact, I know it is."

Seven more officers were detailed to serve. Again, challenges for cause brought the number of court members close to a quorum, prompting the following:

"MJ: All right now, on your peremptory challenges, as I understand it, the agreement with counsel was that as each new panel of jurors were brought in, you would each have a right to peremptorily challenge one of those. That was the agreement between counsel, was it not?"

"TC: Yes, sir.

"IC (Mr. Latimer): Yes, sir.

"MJ: Now, I know that there is no provision in our military system to provide for that. However, this is the way we'll proceed"

Both trial and defense counsel exercised a peremptory challenge [**80] and nine more officers were detailed as members. Upon completion of the *voir dire* and challenges for cause from the final group, another colloquy occurred:

"MJ: . . . Now, we had a discussion about how this peremptory challenge would work.

[*1163] "TC: I believe I could state by agreement with counsel, if it's permissible with the court.

"IC: You go ahead and state it, because I have no reason to suspect that you won't state it accurately, and we have agreed.

"TC: We have agreed that the [remaining] peremptory challenge will apply to everyone who has been selected"

The Government and the defense then each exercised a peremptory challenge against one of the originally detailed court members.

Granting more than one peremptory challenge to each side was unauthorized and erroneous. Article 41(b), UCMJ, supra; paragraph 62e, *Manual*, supra. Cf. *United States v Hamill*, 23 CMR 827 (AFBR), *pet. de-*

nied, 7 USCMA 803, 23 CMR 421 (1957); *United States v Hoods*, 23 CMR 750 (AFBR 1956), *pet. denied*, 7 USCMA 801, 23 CMR 421 (1957). The number of peremptory challenges is not within the discretion of the trial judge.

However, we perceive no jurisdictional infirmity [**81] in the composition of the court-martial such as occurs when court-martial falls below its statutorily required number of members, *United States v Schmidt*, 1 CMR 498 (NBR 1951), or when a bench trial is conducted without a proper written request for trial by military judge alone, *United States v Dean*, 20 USCMA 212, 43 CMR 52 (1970), or when enlisted members sit without having been personally requested in writing, *United States v White*, 21 USCMA 583, 45 CMR 357 (1972). The peremptory challenge error may be tested for prejudice, *United States v Gruelick*, 50 BR 121, 155 (1944), and we find none.

The procedure of granting each side one peremptory challenge for each of the three lists of detailed members was employed only after consultation with and agreement by trial defense counsel, who were not merely informed of this novel procedure, but were told from the bench that it was not authorized by the statute. Nevertheless, they agreed to the extra peremptory challenges and even joined in a modification to the arrangement initially proposed by the military judge. It would be over-solicitous to find prejudicial error on appeal. Under the circumstances of this case, the doctrine of waiver [**82] may be applied.

Federal precedent buttresses our finding of a waiver. *Rule 24(b) of the Federal Rules of Criminal Procedure*, promulgated pursuant to 18 USC § 3771, provides for certain numbers of peremptory challenges in various kinds of cases. In *United States v Potts*, 420 F2d 964 (4th Cir), *cert denied*, 398 US 941 (1970), the allowing of two additional peremptory challenges to the Government and the defendant in a felony case was held non-prejudicial where the procedure was agreed upon by counsel and there was no doubt of the impartiality of the serving jurors. A felony conviction following trial in which unlimited peremptory challenges were given to both sides was sustained on appeal in *New England Enterprises, Inc. v United States*, 400 F2d 58 (1st Cir, 1968), *cert denied*, 393 US 1036 (1969). The experienced defense counsel had made no objection at trial. Similarly, what occurred below was harmless. The court-martial which remained after the excess challenges was competent to try the appellant.

V -- SUFFICIENCY OF THE EVIDENCE

A. *The Evidence*. On 16 March 1968 Lieutenant Calley was the 1st platoon leader in C Company, 1st Battalion, 20th Infantry, 11th Light [**83] Infantry Bri-

gade, as he had been since he arrived in the Republic of Vietnam in December 1967. The 11th Brigade was assigned to the Americal Division, itself only formally activated in October 1967.

The Americal Division was assigned a tactical area of operation along the South China Sea Coast from Quang Ngai Province north into Quang Nam [*1164] Province. That area, approximately 150 kilometers from north to south, was divided among the three constituent brigades, the 11th Brigade receiving the southern-most portion. With the exception of the area in the vicinity of Quang Ngai City, which had been assigned to 2nd Republic of Vietnam Army (ARVN) Division, the 11th Brigade area of operation ran from Duc Pho District north to Binh Son District, and inland for approximately 30 kilometers.

In January 1968, appellant's company; A Company, 3d Battalion, 1st Infantry; and B Company, 4th Battalion, 3d Infantry, were chosen by the brigade commander to compose Task Force Barker. A supporting field artillery battery was organized from the assets of three existing batteries of the brigade's organic field artillery battalion. The Task Force area of operation, designated Muscatine, was [*84] located north of the Song Diem-Diem and east of Highway 1 northward for approximately 12 Kilometers to Binh Son. Its operations were conducted from two fire support bases, Uptight and Dottie (Task Force Barker Head-quarters). (See Appendix A.)

During operations in the southern sector of its area of operation, the units of Task Force Barker drew fire from enemy forces which would withdraw south of the Song Diem-Diem into the area of operations of the 2d ARVN Division. After the Tet offensive in early February 1968 Task Force Barker requested and received authority temporarily to extend its area of operation south of the river into Son My village. Intelligence reports had indicated that the 48th Viet Cong Battalion maintained its base camp in the My Lai (1), or Pinkville, area of Song My. The village reportedly had been controlled by the Viet Cong for twenty years. Prior efforts by friendly forces to enter the area had been sternly resisted. When Task Force Barker made sweeps into Son My later in February, it met only limited success. At the cost of moderate casualties it destroyed some enemy supplies and fortifications, but was unable decisively to engage the main enemy force.

[*85] C Company, appellant's unit, had not experienced much combat prior to 16 March 1968. In its three months of overseas duty, two of which were with Task Force Barker, its operations had consisted of uneventful patrolling, attempted ambushes, providing defense for the fire bases, and providing blocking forces for Task Force missions. The casualties it had sustained

were mainly from mines and booby traps. While moving into a blocking position on 25 February 1968 the company became ensnared in a mine field, suffering two killed and thirteen wounded. Appellant was not on this operation, for he had just returned from a three day in-country rest and recuperation leave. On 14 March 1968, a popular sergeant in the second platoon was killed and three others were wounded by a booby trap.

The next day, Captain Medina, commander of C Company, was notified that his company would engaged in an upcoming offensive action. He was briefed at Task Force headquarters, then called his officers and men together on the evening of 15 March 1968 for a unit briefing. The content of the briefing (a matter of some dispute as will subsequently be discussed) essentially was that the next morning the unit [*86] would engage the 48th VC Battalion, from whom it could expect heavy resistance and by whom it would be outnumbered by more than two to one. C Company was to be inserted by airlift to the west of My Lai (4), sweep through it, and continue toward My Lai (1) or Pinkville (Appendices A and C). There they would be joined in a night defensive position by B Company of the Task Force, which would be conducting a similar operation from south to north into My Lai (1), and by A Company which would be in a blocking position north of the river.

The concept of the operation for C Company was for the 1st and 2nd platoons to sweep rapidly through My [*1165] Lai (4) and the 3rd platoon to follow. The 3rd platoon would thoroughly search the hamlet and destroy all that could be useful to the enemy. A demolition team of engineers was attached to assist in the destruction of enemy bunkers and facilities.

This was to be the unit's first opportunity to engage decisively the elusive enemy they had been pursuing since their arrival in South Vietnam. The men, as is normal in an untried unit, faced the operation with both anticipation and fear, mindful of the recent casualties taken in less perilous [*87] missions.

C Company was transported by helicopter from LZ Dottie about six miles southeast to My Lai (4) in two lifts (Appendix B, Point A). The first lift was completed at approximately 0730 hours; the second lift at 0747 hours. The insertion was preceded by five minutes of preparatory fires of 105 howitzer high explosive rounds and by gunship fire. The insertion, although within 100 meters of the western edge of My Lai (4), was not opposed by hostile fire. In formation with the first and second platoons on line from north to south, the third platoon in reserve and the mortar platoon remaining with the rear to provide support if needed, C Company laid heavy suppressive fires into the subhamlet as the first and second platoons began the assault.

Despite expectations of heavy resistance based upon specific intelligence briefings, C Company moved through My Lai (4) without receiving any fire. The only unit casualty on 16 March 1968 was one self-inflicted wound. No mines or booby traps were detonated. Lead elements of the company had no occasion to call for mortar fires from the weapons platoon; the forward observer with C Company had no occasion to call for any fires from artillery [**88] units in direct support. In My Lai (4), the unit encountered only unarmed, unresisting, frightened old men, women, and children, and not the expected elements of the 48th Viet Cong Battalion. The villagers were found in their homes eating breakfast and beginning their morning chores.

The members of C Company reacted to the unexpected absence of opposition in diverse ways. Some continued the mission as if the enemy was in fact being engaged. Most recognized the difference between actual and expected circumstances, so while continuing with the destruction of foodstuffs, livestock, and buildings, reverted to the unit standing operating procedures on collecting and evacuating Vietnamese. Many soldiers took no action at all, but stood passively by while others destroyed My Lai (4). A few, after witnessing inexplica-

ble acts of violence against defenseless villagers, affirmatively refused to harm them.

No single witness at appellant's trial observed all that transpired at My Lai (4). The testimony of the 92 witnesses was shaded by the lapse of time between 16 March 1968 and the commencement of trial in November 1970. Even in the voluminous record, all that happened is not fully [**89] revealed. One reason for vagueness and confusion in testimony offered by both sides is that the operation itself was confused, having been planned on the basis of faulty intelligence and conducted with inexperienced troops without adequate command control.

With this *caveat* as to the evidence, we come to the events which led to charges against appellant. Twenty out of the twenty-seven persons who were members of Lieutenant Calley's understrength platoon on 16 March 1968 testified at his court-martial.

The first platoon arrived on the first lift about 0730 hours. Its initial task was to provide perimeter defense for the insertion of the remainder of the company. After the company was on the ground and organized for assault, the first platoon moved toward My Lai (4) in formation as follows: ¹⁹

	(SP4 Turner (fire team ldr)
	(PFC Simone (duty not revealed in record)
	(PVT E-2 Stanley (ammo bearer & grenadier)
	(PFC Bergthold (ass't machine gunner)
	(SP4 Maples (machine gunner)
2d Squad	(SSG Bacon (squad ldr)
	(PFC Conti (grenadier and minesweeper)
	(PFC Doines (rifleman)
	(PFC Lloyd (grenadier)
	(SP4 R. Wood (fire team ldr)
	(PFC Kye (rifleman)
	(2LT Calley (plt ldr)
	(SP4 J. Wood (RTO)
Plt Hdq Gp	(SFC Cowan (plt sgt)
	(SP4 Lee (medic)
	(SP4 Sledge (RTO)
	(PFC Mauro (duty not revealed in record)
	(SP4 Boyce (rifleman)
	(SP4 Grzesik (fire team ldr)
	(PFC Meadlo (rifleman)
	(PFC Carter (rifleman/tunnel rat)
1st Squad	(SSG Mitchell (squad ldr)
	(PFC Dursi (rifleman)

	(SP4 Hall (ass't machine gunner))
	(PFC Olsen (machine gunner))
	(PFC Haywood (rifleman))
	(SGT Lagunoy (fire team ldr))

19 **[**90]** This diagram should be viewed with the realization that it only represents a composite from the record which contained inconsistencies as to the position and duty of certain platoon members.

[*1166] This formation quickly became disorganized in the subhamlet. Thick vegetation made it difficult for the troops to see who was near, and for the squad leaders and Lieutenant Calley to maintain visual contact with their men and with each other. However, the principal reason why the formation broke down and leaders lost control was the discovery of unresisting, unarmed old men, women and children instead of the expected enemy. The platoon had not been specifically instructed what to do in this event. No civilian collection point had been designated; and the first platoon was supposed to move through the village quickly, not to return to the rear with detainees.

Some villagers were shot by some members of the first platoon when it first entered the subhamlet. Some members collected groups of Vietnamese, without knowing what to do with them, and others stopped to kill livestock. The platoon assault formation became a meandering troop. Lieutenant Calley started out behind **[**91]** his platoon on the western edge of the subhamlet, but emerged at a ditch on the eastern edge before several members of his platoon (Appendix B, Point C; Appendix D). Sergeant Mitchell similarly lost contact with his squad at one time, leaving most of them to search a small cluster of huts and buildings to the southeast of My Lai (4). Sergeant Bacon testified he never saw his platoon leader or even heard from him as he pushed through the subhamlet. Sergeant Cowan lost contact with Lieutenant Calley soon after they entered the village, did not see him inside the village, and came close to him again only as he exited My Lai (4) on the east.

The Vietnamese who were taken in the first platoon's sweep were herded in two general directions, either toward the southern edge of the hamlet near an intersection of trails or east-early in front of the advancing troops.

In the second squad, Sergeant Bacon detailed men to escort a group of men, women and children villagers down a **[*1167]** trail (to his right or south) to where he thought the platoon leader would be. Private First Class Doines, a rifleman in Bacon's squad, took ten to fifteen

people along a trail running north-south in the **[**92]** middle of the village and left them with Lieutenant Calley. Specialist Four Wood got some people together and sent them toward the right with a guard. Private First Class Kye found about ten old men, women and children in a hootch. They were whisked away to his right by an American soldier. A key witness, Private First Class Conti, stated he encountered Lieutenant Calley on a trail midway through the village. At Lieutenant Calley's direction he rounded up five or six people and put them with a nearby group of thirty to forty, consisting mostly of women and children. At appellant's order he and Private First Class Meadlo, another critical witness, moved these people down the trail and into rice paddies on the southern side of the subhamlet (Appendix B, Point B). Specialist Four Maples searched hootches, gathered some people, and moved them up front as he continued through My Lai (4).

The first squad's contact with the people of My Lai (4) was more significant. Private First Class Meadlo testified that, upon order from Sergeant Mitchell, he collected thirty to forty people near what he remembered as a clearing in the center of the village. Private First Class Dursi recalled **[**93]** that he moved through the village gathering people in a group. He related coming upon PFC Meadlo, who was guarding a group of Vietnamese near some rice paddies next to a trail on the southern side of the village. PFC Dursi later moved his group of fifteen to a ditch on the eastern side. Private First Class Haywood picked up five or six villagers and was told by someone to take the people to Dursi, whom he saw guarding twenty to thirty others on a trail in the south side of the village. A fire team leader in the first squad, Specialist Four Grzesik, stated that he found seven or eight unresisting Vietnamese in a hootch immediately upon entering the village. He left these people with another group of twenty-five farther east in the village, in a small clearing. Specialist Four Boyce rounded up about fifteen people, mostly women and children, and passed them on to someone else. The people assembled in the southern portion of the subhamlet were not the only ones met by the first squad. Specialist Four Hall recalled that thirty to forty people were gathered in front of him, herded easterly through the village, and left at a ditch with Lieutenant Calley, Sergeant Mitchell, and others.

[94]** After the first platoon's movement through My Lai (4), which took from ninety minutes to two hours to cover only a third of a mile, the majority of the pla-

