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UNITED STATES

-v-

1LT. WILLIAM L. CALLEY

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MEMORANDUM IN SUPPORT OF WITNESS'S RIGHT TO INVOKE TESTIMONIAL PRIVILEGE

1Lt. William Calley is presently on trial for his alleged participation in the events which occured in My Lai(4), Republic of Vietnam, in March, 1968. Varnado Simpson has been subpoenaed to appear at said trial as a witness for the defendant.

The attorneys for the defendant have stated that they intend to question Mr. Simpson only with regard to his alleged presence at a company briefing given the day before the troops went into My Lai. We may consider, solely for the purposes of this brief, that Mr. Simpson will only be asked what was said to the troops by Captain Medina at that briefing.

This memorandum will consider the right of the witness to refuse to answer any question in a proceeding wherein the answer may tend to incriminate him. The right of a witness to refuse to answer a question after being offered immunity from prosecution will not be fully discussed herein, for the government has not offered the same to the witness.

In addition to a discussion of the witness's right to invoke the privilege against self incrimination, this memorandum will discuss (a) the invalidity of an order of the court to answer a question after a claim of the privilege even though immunity would attach if the witness did answer; and (b) the question of whether there has been a waiver of the right by the witness because of an alleged statement given to army investigators.

The witness invokes his right to remain silent under the Fifth Amendment which declares in part that

> "No person . . . shall be compelled in any criminal case to be a witness against himself,"

Article 31(a) of the UCMJ, 10 U.S.C.A. § 831(a) also provides:

> "No person subject to this chapter may compel any person to incriminate himself or to answer any question which may tend to incriminate him".*

In Counselman v. Hitchcock, 142 U.S. 547, 585, (1892), the Supreme Court stated as follows:

> " . . . the manifest purpose of the constitutional provisions, . . . is to prohibit the compelling of testimony of a self-criminating kind from a party or a witness . . ."

and that a

> " . . . liberal construction . . . must be placed upon constitutional provisions for the protection of personal rights . . . ."

In Hoffman v. United States, 341 U.S. 479, 486, (1951), the Supreme Court set forth the standards to be applied when the privilege is invoked as follows:

> "The privilege afforded not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed for a federal crime."

link in chain

The Court went on to say that the mere invoking of the privilege does not automatically exonerate the witness from answering. However, the witness may not be compelled to answer unless "it clearly appears to the court that he (the witness) is clearly mistaken" in his assertion of the privilege. 341 U.S. at 486

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* Title 2 of the Organized Crime Control Act of 1970, 18 U.S.C.A. § 6002, provides that when a witness invokes the privilege, he may be compelled to answer under penalty of contempt if he is offered a grant of immunity. As noted above, such a grant has not been offered to the witness herein and thus this section does not apply.

The Hoffman Court further held that the witness need not explain, in depth, to the court the reason why his answer would incriminate him, stating:

> "However, if the witness upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to protect. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result". 341 U.S. at 486-7.

In order for the Court to compel the witness to answer, Hoffman holds that it must be " . . .'perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answers cannot possibly have such tendency' to incriminate." 341 U.S. at 488. See also Malloy v. Hogan, 378 U.S. 1 (1964).

The above rules have been adopted by the United States Court of Military Appeals. Thus, in U.S.v. Taylor, 5 USCMA 178, 17 C.M.R. 178, (1954) ~~that~~ the Court held that where a witness is suspected of an offense, he may not be compelled to give any testimony at all concerning said offense.

If the witness invokes his Fifth Amendment and Article 31(a) rights, the military judge may not compel an answer to the question unless it appears perfectly clear that the answer will in no way possible tend to incriminate him. U. S. v. Taylor, supra.

In order to validly assert the privilege, the witness, in addition to the criteria set forth above, need only show the court that he has a "reasonable fear of prosecution". U. S. v. Murphy, 7 USCMA 32, 37, 21 C.M.R. 158, 193 (1956).

Thus, it is clear that in order for the privilege to be validly asserted the witness must (a) have a reasonable fear of prosecution of some kind and (b) the testimony for which the privilege is asserted would if given "tend to incriminate" him.

A. Reasonable Fear of Prosecution.

With regard to the question of possible prosecution, it is clear at this time that the witness, Varnado Simpson is suspected of committing a crime or crimes at My Lai in March, 1968. Although the witness is no longer in the armed forces, he is nevertheless potentially subject to prosecution.

It is common knowledge that government officials in both the Department of Justice and the Department of the Army are presently considering methods to try ex-servicemen for connection with the incidents at My Lai. Under consideration is Article 18 UCMJ, 10 U.S.C.A. § 818 which confers jurisdiction for general court-martials "to try any person who by the law of war is subject to trial by military tribunal". Furthermore, Article 21 of the Code, 10 U.S.C.A. § 821 provides "military commissions, provost courts, or other military tribunals" have "concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals." Although the theories stated herein are by no means the only possible situations under which the witness here may be subject to prosecution, they certainly satisfy the requirement of possible jeopardy.

(b) Would an Answer to the Question Tend to Incriminate.

The defense desires the witness to testify as to the nature of the orders given by Captain Medina the day before the troops went into My Lai. The avowed purpose of eliciting this testimony is to show the court that the defendant merely carried out orders. In the event that the evidence at the trial shows that the defendant was acting under orders, that fact may well be a defense to the acts for which he is being prosecuted. Should the witness later be subjected to prosecution for his alleged involvement at My Lai, the same defense may be open to him. Thus, there can be no question that an answer to a question as to what he heard Captain Medina say at the briefing may well incriminate

him. Thus, under the Hoffman case, unless the trial court finds that it is not "evident from the implications of the question, in the setting" referred to herein that an answer to the question would in no way be dangerous to the witness, the privilege must be sustained.

Under the Hoffman case, the witness need show no more than has been presented herein. He need not show precisely why the answer might incriminate him. However, for the purpose of preventing any possible question as to the witness's right to invoke the privilege in the instant case, this memorandum will discuss other theories upon which jeopardy might attach should the witness be compelled to answer.

There is no question but that the witness's alleged presence at the briefing would be one of the first steps that lead up to his alleged direct involvement in My Lai. His testimony, if it showed his presence at the briefing, would unquestionably "furnish a link in the chain of evidence needed for a . . ." prosecution. Hoffman v. United States, supra, 341 U.S. at 486.

In the event that Captain Medina ordered the troops to kill all men, women and children and the witness so heard, several situations could arise that would affect the witness in a later prosecution. First, the troops did not move into My Lai until a day after the briefing. Thus, the witness had a day to think about the order. It might be shown that when he went into My Lai, he had an intent to kill all men, women and children. In a prosecution for murder, premeditation is of course, material to the crime.

Second, if the order was a valid order, as noted above, that might be a defense to any alleged killings that might be attributed to the witness at a later prosecution against him.

Third, if the witness testified as above, but the overwhelming proof was that Captain Medina did not instruct his troops to kill all men, women and children, and the evidence further showed that the witness had killed men, women and children, a conviction might well be said to be a virtual certainty.

What the witness says he heard might well be different from what was said. His state of mind at the time of the briefing would unquestionably be an issue at a subsequent tiral against him and what he heard is evidence of what his state of mind was at the time of the alleged incidents at My Lai.

It is the understanding of counsel that a situation contemplated in the above hypotheticals has already arisen in the case of United States v. Hutto. Upon information and belief, the trial judge has excluded testimony of two psychiatrists with respect to the state of mind of the accused that he was merely acting under orders, stating that it is presently his opinion that the orders of Captain Medina were patently illegal and not a defense to the alleged killings. Thus, even though this Court may disagree with that holding, if in fact it is a holding, such a situation clearly sustains the claim that an answer to the question may tend to incriminate the witness at a later trial against him.

(c) Refusal to Testify After Ordered to do so by the Court.

It has been suggested that because the witness will obtain immunity from subsequent prosecution if the trial judge orders him to testify over his assertion of the privilege, the same may be done. This is clearly erroneous.

In Ellis v. United States, 416 F.2d 791 (U.S. App., D.C., 1969), the Court held that where a witness is compelled to testify over his claim of privilege, he " . . . will be protected under the doctrine of Murphy v. Waterfront Commission, 378 U.S. 52, 84 S.Ct. 1594 (1964)". However, the Court went on to say that "a trial judge cannot reject a witness's claim of privilege merely on the ground that the ruling cannot hurt the witness because it will establish an immunity from subsequent prosecution." 416 F.2d at 796. See Ullman v. United States, 350 U.S. 422 (1956).

(d) The Witness Did Not Waive His Privilege.

It has been suggested that the witness waived his privilege because of an alleged statement given to an army investigator. This memorandum will not consider the conditions under which such statements were made or their authenticity, for the rule is clear that even if the witness gave a sworn statement to an army investigator under the most careful conditions to protect his constitutional rights, nevertheless such a statement would not act as a waiver to the witness's assertion of his privilege at this trial.

In the now famous holding In re Neff, 206 F.2d 149, 152 (3rd Cir., 1953), the Court stated as follows:

> "It is settled by the overwhelming weight of authority that a person who has waived his privilege of silence in one trial or proceeding is not estopped to assert it as to the same matter in a subsequent trial or proceeding. The privilege attaches to the witness in each particular case in which he may be called on to testify, and whether or not he may claim it is to be determined without reference to what he said when testifying as a witness on some other trial; or on a former trial of the same case, and without reference to his declarations at some other time or place."

Indeed, in United States v. Miranti, 253 F.2d. 135, 139 (2d Cir., 1958), the witness had made statements to the FBI. The court properly noted therein that a claim that such statements constituted a waiver of the privilege "would be frivolous." The court went on to give one of the policy reasons for the rule stating that "It can be argued that reiteration of the prior voluntary statement is not incriminating because that statement would be admissible against the witness at trial. But reiteration adds to the credibility of the statement."

In United States v. Goodman, 289 F.2d 256, 259 (4th Cir., 1961), the witness had given Internal Revenue Agents a sworn statement and at the trial refused to answer whether he signed the affidavit and refused to identify his purported signature, claiming the privilege. The government sought to force an answer claiming that the affidavit was a waiver to a later claim that covered the same matter as in the affidavit. The

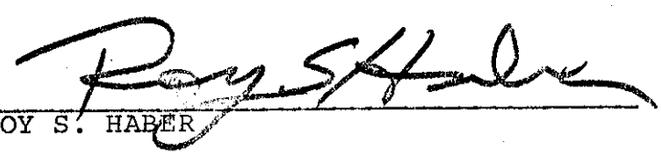
Court stated in unequivocal terms as follows:

> "The Government suggests that Goodman's disclosures to the federal agents in 1950 constituted a waiver of his Fifth Amendment privilege asserted in the Tax Court hearing. This argument is entirely without merit and has been repeatedly rejected by the courts. It has been uniformly held that a prior disclosure to investigating officials cannot constitute a waiver of the privilege with respect to the same matter in a subsequent legal proceeding."

CONCLUSION

The witness is entitled to invoke his privilege against testifying on the grounds that his testimony might tend to incriminate him for (a) there is a possibility that he will be prosecuted; (b) the testimony sought might tend to be incriminatory; (c) although he would be protected if forced to answer, he may not be compelled to do so; and (d) any prior statement given to government investigators is not a waiver of the right.

Respectfully submitted,



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