

PRELIMINARY INSTRUCTION

Assault w/intent to Murder
Lesser Included Offense

Assault with a Deadly Weapon
Offer basis

Defense of Obedience to Orders
Manifestly Illegal
Illegal
Knowledge

Aid & Abetting
Personality Defect
Expert Witness

Closing Instructions

PRELIMINARY INSTRUCTIONS

Gentlemen of the court, when this court closes to deliberate and vote on the findings, each of you must resolve the ultimate issue of guilt or innocence in accordance with the law and the evidence admitted in court. It is my duty to instruct you on the law. It is your duty as members of the court to determine the facts of the case, apply the law to these facts, and determine the guilt or innocence of the accused. You must bear in mind that under the law the accused is presumed to be innocent of the charges against him. Neither the fact the charges have been preferred against the accused nor the fact that such charges have been referred to this court is any evidence of guilt. You have just heard a lengthy and excellent statement of the facts by counsel for both sides as they view the facts, but you must bear in mind the arguments of counsel are not evidence. Argument is made by each side to help you in understanding and weighing the evidence and should be regarded by you as such. However, you are not required to give their statements any further credence or attach to them any more importance than your own recollections than the evidence compels. During my instructions, I propose to comment upon the testimony and other evidence in order to provide you with a meaningful submission of the issues in this case rather than a mere recitation of abstract legal concepts. However, such comments as I may make will not constitute evidence. It is your own independent recollection of the evidence that you must rely upon in determining the facts of the case. Additionally, counsel in argument may have referred to instructions on the law which they believe will be given. However, any such references by counsel do not constitute instructions on the law, which may only be given by me in my judicial capacity as I am charged with the independent responsibility of being the sole source of the law in this case.

ASSAULT TO MURDER

I now call your attention to the charge and its specification. As you know the accused is charged with the offense of assault with intent to commit murder upon an unknown number of unidentified civilian Vietnamese men, women and children,

not less than six, in violation of Article 134 of the Uniform Code of Military Justice. In order to convict the accused of the offense as charged you must be satisfied by legal and competent evidence beyond a reasonable doubt of the following five elements of that offense:

- 1) You must be satisfied beyond a reasonable doubt that at My Lai 4, Quang Ngai Province, Republic of Viet Nam, on or about 16 March 1968, the accused offered to do bodily harm to an unknown number of unidentified civilian Vietnamese men, women and children, not less than six, whose names are unknown.
- 2) You must be satisfied beyond a reasonable doubt that he committed this assault by firing his weapon, allegedly a M-16, at these unidentified civilian Vietnamese persons.
- 3) You must be satisfied beyond a reasonable doubt that the act of firing his weapon was with unlawful force or violence and that the firing of the weapon was without any lawful justification or excuse.
- 4) You must be satisfied beyond a reasonable doubt that at the time the accused allegedly fired his M-16 at the unidentified civilian Vietnamese persons the accused intended to commit murder, and finally
- 5) You must be satisfied beyond a reasonable doubt that under the circumstances the conduct of the accused in firing his weapon at the unidentified Vietnamese persons was to the prejudice of good order and discipline in the Armed Forces or was of a nature to bring discredit upon the Armed Forces. As to the offense here charged, namely assault with intent to commit murder, it is not essential to prove that the offense of murder was in fact, committed, that is that the unidentified Vietnamese men, women and children were, in fact, unlawfully killed. However, the specific intent of the accused to commit the offense of murder is a necessary element of the offense charged, and the prosecution must establish the existence of this specific intent beyond a reasonable doubt. The court is further advised that an assault is an offer with unlawful force or violence to do bodily harm to another, whether or

'not the offer is consummated. An act of force or violence is unlawful if done without legal justification or excuse. I have used the term offer to do bodily harm. You are advised that an offer to do bodily harm is an intentional act which foreseeably puts another in reasonable apprehension that force will immediately be applied to his person. There must be an apparent present ability to bring about bodily harm. The act must be without the lawful consent of the person affected. The court is further advised that the elements of the allegedly intended offense of murder are as follows:

That the purpose of the act of the accused in firing his weapon was to bring about the death of an unknown number of unidentified Vietnamese men, women and children, not less than six; that the proposed deaths were to result from the act of the accused in firing his weapon, that is his M-16, at the unidentified Vietnamese persons in a clearing in the center portion of the village of My Lai 4 in the vicinity of a small hut on the 16th of March 1968. That the proposed killing of the unidentified Vietnamese persons by the accused was unlawful and that the alleged act of firing the weapon was done with the specific intent to kill the unidentified Vietnamese persons unlawfully, that is, to kill without justification or excuse. You will note that I have repeatedly referred to the element of the specific intent to kill. As you Gentlemen must be aware, while the intent to kill cannot be implied as a matter of law, it may be inferred from facts and circumstances of the alleged assault such as the use of a deadly weapon in a manner indicating an intention to kill, or an act of violence which ordinarily would be calculated to produce death. In determining whether or not the intent to kill should be inferred, the trier of the facts, that is, you Gentlemen, may properly consider the character of the weapon employed and the way it is used; the manner of the assault and the violence attendant thereon; the state of feeling existing between the parties at and anterior to the alleged shooting; statements of the accused; and all other facts and circumstances tending to reveal the accused's state of mind. It is not essential that the intent

should have existed for any particular length of time before the alleged assault, as such an intent may be conceived in a moment. The weight, if any, to be given an inference of the accused's intent must, of course, depend upon the circumstances attending the proved facts which give rights to the inference, as well as all the other evidence in the case. The burden is upon the government to prove beyond a reasonable doubt that the accused did have an unlawful intent to kill. It is for you to make the determination from all the evidence presented.

LESSER INCLUDED OFFENSE

I call the attention of the court to the testimony of Dr. Reichenburg who testified that in his opinion, the accused could not form the intent to commit murder, nor commit the crime of murder. I have advised you that in order to convict the accused of the offense charged, you must be satisfied beyond a reasonable doubt, in addition to the other elements of that offense, that the accused had the specific intent to commit the offense of murder as I have defined that offense.

In view of the testimony of Dr. Reichenburg, you are advised that the offense of assault with a dangerous weapon is a lesser included offense of the offense set forth in the Specification and Charge.

If you find the accused not guilty of the offense alleged, you should next turn to a consideration of the lesser included offense of assault with a dangerous weapon, in violation of Article 128 of the Uniform Code of Military Justice.

In order to find the accused guilty of this lesser included offense you must be satisfied by legal and competent evidence beyond a reasonable doubt of the following five elements of that offense:

- 1) That at the hamlet of My Lai 4, Quang Ngai Province, Republic of Viet Nam, on or about 16 March 1968, the accused offered to do bodily harm to an unknown number

of unidentified civilian Vietnamese men, women, and children, not less than six, whose names are unknown;

- 2) That he did so by firing at them with his weapon
- 3) That the accused did so with a certain weapon, namely, an M-16 rifle
- 4) That the offer was done with unlawful force or violence; and
- 5) That such weapon was used in a manner likely to produce grievous bodily harm.

I recall to your attention that an assault is an offer, with unlawful force or violence, to do bodily harm to another, whether or not the offer is consummated. An act of force or violence is unlawful if done without legal justification or excuse. An offer to do bodily harm is an intentional act which foreseeably puts another in reasonable apprehension that force will immediately be applied to his person. There must be an apparent present ability to bring about bodily harm. The act must be without the lawful consent of the person affected.

Bodily harm means any physical injury to the person of another, however, slight. However, by grievous bodily harm is meant serious bodily injury. Grievous bodily harm does not include minor injuries, such as a black eye or a bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs and other serious bodily injuries.

An assault in which a dangerous weapon or other means or force likely to produce death or grievous bodily harm is employed as an aggravated assault. A weapon is dangerous when used in such a manner that it is likely to produce death or grievous bodily harm. A weapon is likely to produce death or grievous bodily harm when the natural and probable consequence of its particular use would be death or grievous bodily harm. It is not necessary, however, that death or grievous bodily harm be actually inflicted.

DEFENSE OF OBEDIENCE TO ORDERS

Gentlemen, evidence has been introduced that either Captain Medina at a briefing on 15 March 1968, or some other authority higher than the accused as the 2d Platoon was moving into the hamlet of My Lai 4 on the morning of 16 March 1968, or both of these authorities, gave an order to kill all living things in the village of My Lai 4, to include all inhabitants and all animals, as well as to burn the buildings, pollute the water and destroy the crops.

You are advised that under the existing law of war, the armed forces of the belligerent parties (in the case of the undeclared war in the Republic of Viet Nam, this would be the forces of the Republic of Viet Nam and their allies, in opposition to the Viet Cong and their allies); restating, that under existing law, the armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture both (that is combatants and non-combatants) have the right to be treated as prisoners of war.

Further you are advised that the existing law of war establishes that should any doubt arise as to whether persons, having committed any belligerent acts and having fallen into the hands of the enemy, doubt as to whether in this case they were or might be NVA, VC, NVA or VC suspects or sympathizers, if any of these persons falling into the hands of U.S. Forces, after having committed any belligerent acts, such persons shall enjoy the protection of the Geneva conventions until such time as their status has been determined by a competent tribunal.

Further you are advised that the existing law of war forbids any unlawful act by agents of the detaining power causing the death of a prisoner.

The existing law of war also provides, as pertinent to this case, that such persons under definite suspicion of hostile activities to the security of a party to the

to the conflict shall nevertheless be treated with humanity.

You are hereby advised that, under the facts standing before this court, that order, from whatever source, if in fact there was such an order, was unlawful.

However, the determination by the military judge that, as a matter of law, that order was illegal, does not resolve the issue here presented by the evidence for your consideration, that is, whether or not the accused, Sgt Hutto, was justified in his actions because he acted in obedience to orders. You must resolve from the evidence and the law whether or not the order as allegedly given was manifestly illegal on its face, or if you are not satisfied beyond a reasonable doubt that the alleged order was manifestly illegal on its face, whether or not the order, even though illegal, as I have ruled it was, was known to the accused, Sgt Hutto to be illegal or that by carrying out the alleged order Sgt Hutto knew he was committing an illegal and criminal act.

In determining the issue of obedience to orders, you are further advised that an enlisted member, the same as any other member of the United States Army is not and may not be considered, short of insanity, an automaton, but may be inferred to be a reasoning agent who is under a duty to exercise moral judgement in obeying the orders of a superior officer.

Considering the just recited principles of law, you are advised that an order is lawful if it relates to military duty and is one which does not exceed the authority of the superior giving such order, or in other words, is an order which the superior is authorized to give the accused. It is unlawful if it directs the commission of a crime under United States law or under the law of war. For example under the Hague Regulations of 1907, it is forbidden to deny quarter. This means that it is unlawful to attack enemy personnel who have laid down their arms or are otherwise unarmed

and manifest an intent to surrender. As applied to this case an order to attack and kill armed enemy personnel in battle is lawful. But it is unlawful to order the killing of enemy troops who have laid down their arms, or belligerents who are unarmed where either category indicates an intent to surrender or are passively in the control of U.S. troops are prisoners, offering no resistance.

As I previously indicated, my ruling that the order issued by Captain Medina or other higher authority was unlawful does not in itself determine whether or not the accused is criminally responsible for acts done in compliance with that order. Acts of a subordinate in compliance with his supposed duty or orders are justifiable or excusable and impose no criminal liability, unless the superior's order is manifestly unlawful or unless the accused knew the order to be unlawful or that by carrying out the order the accused knew he was committing an illegal and criminal act.

In this regard, an order is "manifestly unlawful, if under the same or similar circumstances, a person of ordinary sense and understanding would know it to be unlawful. I have stated under the same or similar circumstances I intend here to summarize evidence offered by both sides as indicative of the circumstances under which the incident occurred. However, it is not my recollection of the circumstances that governs your determination, but it is your own independent recollection of the evidence that you must rely upon in determining the facts of the case.

There has been evidence offered tending to indicate that during the months from November 1967 til March 16, 1968, Company C of the 1st of the 20th Infantry had encountered the enemy, suffering casualties but without a face to face encounter. Sniper fire, booby traps and mines apparently controlled by enemy forces operating out of the "Pinksville" area which included the Hamlet of My Lai 4, had inflicted injuries and death upon the members of Company C. Because the Pinksville area was

an area denied to American forces prior to March 16, 1968, the American forces were denied the satisfaction of a face to face encounter in force with the enemy. On March 15, 1968, a memorial service was held for C Company personnel killed in the recent past and immediately after that service, all company personnel were briefed on an operation to be conducted on the following day in the My Lai 4 area, a free fire zone and an area previously denied to C Company. At this briefing, an order either stated or clearly implied that this operation would finally allow C Company personnel to get even with their harrassors. On the morning of the operation, artillery fire and gun ships prepped the area intending to clear the landing zone and adjacent areas of resistance. When the troops of C Company landed in the LZ, they formed on line and on order moved forward into the village laying down a suppressive fire. The members of C Company were informed prior to the operation that all civilians and other non-combatants had been warned and it was stated that civilians had cleared the village. The members of C Company were also informed that My Lai 4 was the operating headquarters of the 48th WC Battalion and that there also might be additional supporting units. They were informed that the occupying enemy force was well motivated, well armed and might out number American forces. They were further informed that My Lai 4 was a fortified hamlet with well defined and prepared trenches, bunkers, tunnels and other similar fortification. The evidence also tends to indicate that a heavy engagement was expected with losses of American personnel to be expected. There is further evidence tending to indicate that upon entering the village, there was a fairly heavy volume of weapons fire, habitations were burning and civilians of both sexes and all ages were seen in the hamlet. In addition, there is evidence tending to indicate that at least in the early part of the mission, gun ships were firing in the area. The hamlet was very smoky, densely wooded and bamboo. That it was common knowledge that the enemy more often than not was crackling in addition to the firing of weapons.

wore no distinctive uniform and that women and children often actively assisted the Viet Cong and North Vietnamese Army soldiers and inflicted injuries and death upon American personnel. Also that the members of Company C had received no training in those circumstances when an order was to be disobeyed but had been trained that they must obey all lawful orders

The evidence also indicates that the order was considered by some to be different from past operation orders. That soldiers in Viet Nam are required to undergo some degree of training in the Geneva conventions and follow the rules of engagement when in combat in free fire zones. The evidence tends to show that upon landing in the area to the west of My Lai 4 and the 1st and 2d Platoon forming on line, that no hostile fire was detected. Upon approaching and entering the village, still no hostile fire was encountered. That no casualties resulted during the operation in My Lai 4 as a direct result of enemy-originated fire. That when the members of the accused's platoon entered the village many civilians were observed in the village though no civilians other than NVA, VC or VC and NVA sympathizers had been anticipated. These civilians were composed of males and females of all ages from old persons to children and babes in arm. That these persons were in some instances running about but in other instances were standing passive and still in groups. There is evidence that these persons were offering no resistance and seemed friendly and that no persons in the village were observed to be armed. There is also evidence tending to indicate that there were American soldiers who declined to fire upon the Vietnamese persons. You should consider all these facts and any others I may not have mentioned that you recall as pertains to a person of ordinary sense and understanding who under the same or similar circumstances would know that the order was illegal.

To place this instruction in proper context, you must apply this situation and this understanding particularly to that place and point of time where the evidence tends to show that several soldiers allegedly were on line at a point in the north central

sector of the village and came upon a group of more or less from 5 - 6 to 15 Vietnamese persons in a clearing near a hut comprised of males, females, children and infants. That these persons were unarmed, acting in a friendly manner and offered no resistance to the American soldiers. That after a brief pause, one soldier called to clear the area to the rear of the group preparatory to opening fire. That immediately thereafter, the group of soldiers opened fire.

As I have indicated, in considering this evidence, you are instructed that an order is manifestly unlawful, if, under the same or similar circumstances, a person of ordinary sense and understanding would know it to be unlawful. If you are satisfied beyond a reasonable doubt that the order allegedly given in this case was manifestly unlawful, then obedience of that order is no defense. The burden is upon the government to establish the guilt of the accused by legal and competent evidence beyond a reasonable doubt. Consequently, unless you find beyond a reasonable doubt that the order given to the accused in this case was manifestly unlawful as I have defined that term, you must acquit the accused unless you find beyond a reasonable doubt that the accused had actual knowledge that the order was unlawful or that obedience of that order would result in the commission of an illegal and criminal act.

The fact that the law of war has been violated pursuant to an order of a superior authority, does not deprive the act in question of its character as a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not have been expected to know that the act ordered was unlawful.

In considering the question whether a superior order constitutes a valid defense, the court must take into consideration the fact that obedience to lawful military orders is the sworn duty of every member of the armed forces; that the soldier cannot be expected in conditions of war discipline to weigh scrupulously the legal

merits or the orders received and that certain rules of warfare may be controversial.

Thus a subordinate is not criminally liable for acts done in obedience of an unlawful order which is not manifestly unlawful on its face, unless the subordinate has actual knowledge of the unlawfulness of the order or the unlawfulness of its demands. In the absence of such knowledge the subordinate must be considered duty bound to obey the order and he cannot properly be held criminally accountable for acts done in obedience to what he supposed to be a lawful order.

Again I repeat, if you are not satisfied beyond a reasonable doubt that the order was manifestly unlawful, as I have defined that term, you must acquit the accused of the specification and charge which alleges acts done in compliance with that order, unless you are satisfied beyond a reasonable doubt that the accused had actual knowledge that the order was unlawful or that obedience of that order would result in the commission of a criminal act.

In the latter part of this instruction I have referred to knowledge or lack of knowledge on part of the accused. In this regard, knowledge on the part of the accused, like any other fact may be proved by circumstantial evidence, that is, by evidence of facts from which it may be justifiably inferred that the accused had such knowledge. In this regard you may consider all relevant facts and circumstances that have been presented to you during the course of this trial. I will again call to your attention the summary of evidence pertaining to the tactical situation and pressures upon the soldiers of C Company prior to and during the incident at My Lai 4. These factors are significant in a consideration of the knowledge of the accused as to the legality of the order only insofar as you are satisfied that he was aware of these facts, a determination you should make based upon your own training, experience and common sense. I will not again recite that summarization. In addition to these facts you should consider evidence that indicates that the accused was participating in his first search and destroy mission, as such; that he was a naive young man of

approximately 20 years of age, that he has an intelligence quotient of 111, which places him in the high average to bright normal; that he quit school in the eighth grade, that he had been trained to obey orders, that Captain Medina was a strict disciplinarian and held in high regard by members of his command, that other soldiers in his presence fired weapons in addition to the accused at the group of Vietnamese; that he understood from Captain Medina's briefing that everything in the village was communist but did not recall Captain Medina saying to kill all the people in the village or to burn the village. That he didn't recall anything different or unusual about the briefing except it was the first search and destroy mission of the unit; that he recalled Captain Medina said it was a chance to get even with the VC for some of the casualties that the company had already had; that his impression was that everybody in the village was to be shot; that upon arrival at the landing zone he remembered gun ships firing but he did not know the targets; that as he approached the village he was just firing for recon and not at anything in particular. As the squad got to the outskirts of the village an order was given to destroy all the food, kill all the animals and kill all the people; that he saw Vietnamese running for cover and trying to hide when the company opened upon the villagers and began to kill them; that the accused characterized this shooting by stating "It was murder." That he was shooting into houses, shooting at people running or people just standing and doing nothing; that the accused exchanged his M-60 for a M-16 because he wasn't happy about shooting all the people anyway; that they didn't collect any people and didn't try to capture anyone; that he didn't agree with all the killing but he was doing it because he had been told to do it; that while he didn't approve of all the killings, he did because he was ordered to do it; that he thought all the people were shot because Captain Medina had told them that all the villagers were communist.

Again, gentlemen, perhaps I have not recalled all the evidence pertaining to the

accused's age, education, experience, training and opportunity to know relevant facts. I caution you not to rely upon my summarization of this evidence but your own independent recollection of the evidence.

The weight, if any, to be given an inference of the accused's knowledge, must of course, depend upon the circumstances attending the proved facts which give rise to the inference, as well as all the other evidence in the case. It is for you to make this determination.

The burden is upon the prosecution to establish the guilt of the accused by legal and competent evidence beyond a reasonable doubt. Consequently, you must acquit the accused of any offense committed in obedience to an unlawful order unless you are satisfied by the legal and competent evidence beyond a reasonable doubt either that

(a) The order was manifestly unlawful; that is, that a person of ordinary sense and understanding under the same or similar circumstances would know it to be unlawful, or that

(b) The accused knew at the time of his act, that the order given him to kill all the inhabitants, kill the animals, destroy the food, but particularly to kill all the inhabitants, was unlawful under the circumstances or that obedience of that order would result in the commission of a criminal act.

UNCHARGED MISCONDUCT

Gentlemen, during this case and during my instructions there have been many references to Vietnamese persons being killed in the hamlet of My Lai 4. As you know, the accused is not charged with any unlawful homicides, but with the offense of assault with intent to murder a very particular group of persons at a particular point and time.

I again caution you and admonish you that references to other Vietnamese persons being shot or killed was admitted by me for a very limited consideration. Such evidence may be considered only for the limited purpose of its tendency, if any, to prove knowledge on the part of the accused that the order to kill all the inhabitants was unlawful.

I wish to emphasize that such evidence may be considered for no other purpose whatsoever. You may not infer from such evidence that the accused has an evil disposition or criminal propensity and that he, therefore, committed the offense alleged.

CORROBORATION OF CONFESSION

With reference to Prosecution Exhibit I, a pretrial statement of the accused, the court is advised that a pretrial statement of the accused cannot be considered as evidence against him on the question of guilt or innocence unless independent evidence, either direct or circumstantial, has been introduced which corroborates the essential facts admitted sufficiently to justify an inference of their truth. In other words, you cannot consider a pretrial statement attributed to the accused unless there is substantial independent evidence of facts or circumstances which tend to establish the trustworthiness of such statement. If the independent evidence raises an inference of the truth of some, but not all, of the essential facts admitted, then Prosecution Exhibit I, the pretrial statement of the accused, may be considered as evidence against the accused only with respect to those essential facts stated in the statement which are so corroborated by independent evidence. The independent evidence need not of itself be sufficient to establish beyond reasonable doubt the truth of facts stated in the pretrial statement, but in order to satisfy the requirement of corroboration it must be sufficient to justify an inference of the truth of the facts admitted. However, although the requirement of corroboration is satisfied, the accused cannot be convicted unless the pretrial statement, Prosecution Exhibit I, together with the corroborating and any other evidence, is

sufficient to convince the court of the guilt of the accused beyond a reasonable doubt.

AIDING AND ABETTING

You are advised that any person who commits an offense is a principal. Likewise, any person who aids or abets the commission of an offense is also a principal and equally guilty of the offense. To constitute one an aider or abettor, and hence guilty as a principal, he must share the criminal intent or purpose of the active perpetrator of the crime and must aid, encourage, or incite the active perpetrator to commit it. In order for an accused to be found guilty on the theory of aiding or abetting, the proof must show that the alleged aider or abettor did in some way associate himself with the venture, that he participated in it as something he wished to bring about, and that he sought by his action to make it successful.

If there is a concert of purpose to do a criminal act, and such act is done by one of the parties, all probable results that could be expected from the act are chargeable to all parties concerned; but in order to make one liable as a principal in such a case, the offense committed must be embraced by the common venture or it must be an offense likely to result as a natural and probable consequence of the offense directly intended.

An aider or abettor, although sharing a common purpose with a perpetrator, may have a state of mind less culpable than that of the perpetrator and that required as an element of the offense perpetrated. In such a case, the aider or abettor may be guilty of a lesser offense than that committed by the perpetrator. In this case, the offense of assault with intent to commit murder allegedly committed by the members of the 2d Platoon at the time and place particularly identified, requires a specific intent to murder. As I have previously instructed you, the accused has offered evidence tending to indicate he did not possess such an intent which gave

rise to your consideration of the lesser offense of assault with a dangerous weapon, an offense not including as an essential element the specific intent to murder.

Consequently, if you are satisfied by legal and competent evidence beyond a reasonable doubt that Sgt Hutto aided or abetted the commission of the offense of assault with intent to murder with which he is charged and that he specifically intended to kill the unidentified Vietnamese persons, as alleged, you may find him guilty of that offense even though his bullets may not have hit intended targets.

However, if you are not satisfied beyond a reasonable doubt that Sgt Hutto specifically intended to kill the unidentified Vietnamese persons, as alleged, but are satisfied beyond a reasonable doubt that he is guilty of the lesser included offense of assault with a dangerous weapon, then you may find him guilty of only such lesser included offense.

PERSONALITY DEFECT

Gentlemen, I have been referring to the state of mind of the accused as it may be affected by the testimony of Dr. Reichenburg, the Clinical Psychologist called by the accused. You will recall that Dr. Reichenburg testified in substance that in his professional opinion, because of the psychological makeup of the accused, the accused was unable to commit the offense of murder or to form the specific intent to murder. He characterized the accused as having a personality disorder.

In this regard, you are advised that there is no evidence before the court to indicate that the accused is unable to distinguish right from wrong or that he is unable to adhere to the right. Thus you may infer that the accused is sane. However, you are advised further that in view of Dr. Reichenburg's testimony, an issue has been presented concerning the effect of the accused's personality defect upon his ability to entertain the specific intent to kill. In determining this issue you should consider all relevant facts and circumstances pertaining to this issue. It is the position of the defense that the witness' testimony concerning his examination

indicated the nature of the accused's psychological makeup and the conclusions apparently were based solely on the results of psychological tests administered which disclosed well defined psychological traits. Excluding the accused's personal history and the circumstances of the alleged incident it was Dr. Reichenburg's conclusion that the accused was a good man, a person with constructed personality traits who could be depended upon, a so called "pillar of society", and a person whom he would not expect to commit murder or form the intent to commit murder.

It is the government's contention that regardless of the accused's potential for committing murder or forming the intent to commit murder, that the accused did assault unidentified Vietnamese persons by shooting at them with an M-16 rifle, stating that he did so because he was ordered to kill everybody in the village. Gentlemen, at this point, I am not stating my opinion but simply trying to state the respective positions of the accused and the prosecution.

You are advised that in deciding whether the accused had a specific intent to kill, you must consider evidence tending to show that at the time of the alleged offense, the accused was possessed of a condition characterized as a personality defect which may have caused a lack of mental ability to form a specific intent.

The burden of proof is upon the prosecution to establish the guilt of the accused by legal and competent evidence beyond a reasonable doubt. Unless, in light of all the evidence, including that concerning a condition classified as a personality defect, you are satisfied beyond a reasonable doubt that the accused, at the time of the alleged offense entertained the specific intent to murder, you must find the accused not guilty of the offense as charged.

EXPERT TESTIMONY

In relation to the testimony of Dr. Reichenburg pertaining to the psychological makeup of the accused, you are advised that Dr. Reichenburg is known in law as an

expert witness because he is more qualified and experienced in the field of clinical psychology than ordinary men. You are advised that there is no rule of law requiring you to give controlling significance to his testimony merely because of his qualifications as an expert witness. You should, however, consider with due regard for his qualifications the testimony of this witness and give such weight thereto as in your fair judgement it reasonably deserves in the light of all the circumstances, including your own common knowledge and observations.

CLOSING INSTRUCTIONS