

or not the attempt is consummated.

An assault can only be committed upon someone who is alive. If you should find the accused shot into the ditch, and if you should find that at the time he did so, the people in the ditch were not alive, then the accused could not have assaulted or attempted to assault them.

An act of force or violence is unlawful if done without legal justification or excuse.

An "attempt to do bodily harm" is an overt act which amounts to more than mere preparation, and is done with apparent present ability to do bodily harm to another.

In order to assist you in determining whether or not the necessary element of intent was present, you are advised that the elements of the allegedly intended offense of murder are as follows:

- (a) That 30, more or less, Vietnamese Nationals are dead;
- (b) That their death resulted from the act or acts of the accused in shooting at them with an M-16 rifle at or near a ditch in the eastern section of My Lai (4), Song My Village, Quang Ngai Province, Republic of Vietnam, on or about 16 March 1968 between 0830 hours and 1230 hours;

- (c) That the killing of the 30, more or less, Vietnamese Nationals by the accused was unlawful, and

- (d) That at the time of the killing the accused had a specific intent to kill 30, more or less, Vietnamese Nationals.

The court is further advised that the killing of a human being is unlawful when done without legal justification or excuse.

I have advised you that specific intent to kill is an essential element of the offense of assault with intent to commit murder. Intent ordinarily cannot be proved by direct evidence, unless, for

example, the accused has been overheard to make a statement of his intent. You are advised that the accused's intent may be proved by circumstantial evidence, that is, by facts and circumstances from which you may, according to the common experience of mankind, reasonably infer the existence of an intent. Thus, it may be justifiably inferred that the accused intended the natural and probable consequences of any act purposely done by him. In this regard, you must consider all relevant facts and circumstances.

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 rise to the inference, as well as other evidence in the case.

The drawing of such an inference is permissive merely and not mandatory, and whether it should be drawn at all and the weight to be given to it if it is drawn are matters for your exclusive determination.

In connection with the last element of this offense, you are further advised that "to the prejudice of good order and discipline" refers only to acts directly prejudicial to good order and discipline, and not to acts which are prejudicial only in a remote or indirect sense. An irregular or improper act on the part of a member of the military service can scarcely be conceived which may not be regarded in some indirect or remote sense as prejudicing discipline.

Article 134 does not contemplate such distant effects, and is confined to cases in which the prejudice is reasonably direct and palpable. "Discredit" as used in Article 134 means "to injure the reputation of." It refers to conduct which has a tendency to bring the service into disrepute, or which tends to lower it in public esteem.

The court is further advised that the intent to kill need not exist for any particular time before the act causing the death, or have previously existed at all. It is sufficient that it existed at the time of the act of the accused which caused the death.

The court is advised that in order to convict the accused of the offense of assault with intent to commit murder, a showing that the accused merely intended to inflict great bodily harm will not suffice. The prosecution must prove beyond reasonable doubt that the accused specifically intended to kill 30, more or less, Vietnamese Nationals.

Gentlemen, there are no lesser included offenses of the offense charged. If you do not find the accused guilty beyond reasonable doubt of the offense charged, you must acquit him.

Several years ago when Congress was considering the legislation which ultimately became the Uniform Code of Military Justice, it decided to include in that legislation a specific requirement that in each and every case you gentlemen, as members of the court, be reminded of certain legal principles before you close to deliberate. It is generally accepted that these principles are the cornerstone of the criminal courts in this country, and they are very important. However, like all principles they are merely words printed on a piece of paper unless and until a group of individuals such as yourselves breathe life and vitality into them by applying them in a particular case.

Now, these principles are as follows:

First of all, each of you must presume this accused person to be innocent of this offense unless and until his guilt is established to your satisfaction beyond a reasonable doubt by the evidence introduced before you. Any member of the court who is not satisfied beyond a reasonable doubt as to the guilt of the accused must resolve this doubt in his favor and vote him not guilty. At this time, gentlemen, again I inform you that there are no lesser findings in issue in this case.

You must remember that the burden of proof to establish the guilt of the accused beyond a reasonable doubt is upon the government. We do not bring an accused person into this courtroom and force him to

assume the risk of being adjudged a criminal unless he is able to satisfy you that he is innocent, or even to raise a reasonable doubt of his guilt. Any accused person has the legal and the moral right to walk out of the courtroom a free man unless the government has been able to carry its burden.

Now, this does not mean that in reaching your findings you are narrowly and artificially restricted to considering as evidence of guilt only that evidence which has been presented to you labeled as prosecution evidence. In reaching your findings, it is your duty to consider all of the evidence that has been presented to you, regardless of its particular source;

Second, there is no rule of law dealing with the weight to be given circumstantial evidence or direct evidence. The law does recognize a distinction between the two types of evidence, but merely for purposes of convenience. Direct evidence of a given fact would be the testimony of somebody who saw that act occur. Circumstantial evidence is evidence which is one step removed from a fact in issue. It is evidence from which you are asked to infer the existence of a fact at issue. There is no rule of law that says direct evidence, in and of itself, is better than circumstantial evidence, or vice versa.

In a given case a member of the court might find circumstantial evidence before him more persuasive than direct evidence to the contrary, or another member at the same time might feel just the opposite. You are the sole judges of the weight to be given the evidence before you. You might find that the circumstantial evidence in a given case was such that it left you with a reasonable doubt that the accused is guilty. If so, fine. This is your responsibility -- no one else's.

I would like to point out to you that in appraising circumstantial evidence, you basically have a two-step process -- first, you must decide how persuasive you find the testimony of the witness furnishing

the circumstantial evidence. If you accept his testimony as credible, and accept his testimony as true, you then - the second step - have to decide whether or not you will draw the desired inference. You may believe all of the witnesses and yet not believe the evidence is strong enough and persuasive enough, in your opinion to eliminate beyond a reasonable doubt that the inferred fact has not been established.

In other words, gentlemen, reasonable doubt can arise from an insufficiency of proof of the circumstances testified to by the witnesses or from the strength of the inferences to be drawn from those circumstances, even if you find that they have been established.

I have mentioned that you gentlemen must decide whether or not you believe an individual witness. It is completely within your power to accept or reject the testimony of any witness, in whole or in part. Of course, it is expected that you will act logically; that you will not reject the testimony of a witness without reason, but this is your sole responsibility and not that of anyone else.

Determining the credibility of witnesses is extremely difficult. There is no doubt about it. Man has not yet been able to invent any magic litmus paper for detecting the acid of untruth. You are expected to use your reasoning ability. I would suggest that in determining the weight and value to be given any testimony, you carefully scrutinize the testimony; carefully consider the circumstances under which a witness testified; carefully consider everything before you which, in your opinion, logically sheds any light on the issue of determining whether a witness is worthy of belief. Consider each witness' intelligence, the acuteness of his powers of observation, the accuracy and retentiveness of his memory, his apparent candor, his appearance and deportment, his friendships and prejudices, his character as to truth and veracity. Consider also any relation each witness may bear to either side of the

case, the manner in which each witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence. You should consider the probability of each witness' statements, the opportunity the witness had to observe and to be informed as to the matters respecting which he gave testimony, and the inclination of the witness to speak the truth or otherwise as to the matters within his knowledge.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause you to discredit such testimony. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or unimportant detail, and whether the discrepancy results from innocent error or willful falsehood.

Where conflict or inconsistency appears it is your function to resolve it and to determine where the truth lies. It is not necessarily the number of witnesses called in support of a particular issue which is determinative of that issue, but it is the force, effect and convincing character of the testimony given which will be your guide in weighing and giving due credit to this testimony. The rules discussed above for determining the weight and value to be attached to testimony of witnesses apply with equal force to the testimony given by the accused.

In determining the credibility of witnesses, you may also consider that Mr. Charles Sledge, Mr. Dennis Conti, ~~and~~ Mr. Gregory Olsen, Mr. Elmer Glen Haywood, Mr. Charles Hall, and Mr. Robert Maples made certain statements prior to trial that may be inconsistent with their testimony at this trial.

Specifically, Mr. Sledge testified before the Peers Committee on 8 January 1970 that he BELIEVED that it was Sergeant Mitchell at the ditch, whereas during the course of this trial Mr. Sledge testified that he was POSITIVE he saw Sergeant Mitchell at the ditch. (Before the

same committee on 8 January 1970, Mr. Sledge also testified, in regard to questions as to who was at the ditch, that "Meadlo might have been there, but I don't remember." During the course of this trial Mr. Sledge testified that he did not recall who was at the ditch besides Staff Sergeant Mitchell, Lieutenant Calley and himself. Mr. Sledge also made a statement to the Criminal Investigator, Mr. Feher, on 1 September 1969, in Sardis, Mississippi, that Lieutenant Calley had ORDERED Staff Sergeant Mitchell to push the people into the ditch. During the course of this trial Mr. Sledge testified that he heard NO ORDERS given at the ditch. (In the same statement to Criminal Investigator Feher, he stated he did not know how many magazines Staff Sergeant Mitchell used. During the course of this trial Mr. Sledge testified that Staff Sergeant Mitchell had used two magazines. In a statement to Rennard Doines on 16 March 1968, at My Lai (4), Republic of Vietnam, Mr. Sledge stated that Lieutenant Calley, Wood, and Meadlo shot the people at the ditch. During the course of this trial Mr. Sledge testified he did not remember making such a statement to Rennard Doines, whereas during the course of this trial Mr. Doines testified that Sledge told him that John Wood, Meadlo and Lieutenant Calley had killed the people in the ditch.)

Mr. Dennis Irving Conti made certain statements prior to trial that may be inconsistent with his testimony at this trial; specifically, during a conversation with Mr. Olsen, Mr. Turner and Mr. Sledge at Ware Hall on 13 October 1970, at Fort Hood, Texas, he stated that Sergeant Mitchell tried to get him killed in the field, and that he did not care if they hung him now, and if he saw Sergeant Mitchell on the street, he would spit in his face, whereas during the course of this trial Mr. Conti testified he did not remember/making such statements and denied

(NO) Mr. Gregory T. Olson made certain statements prior to trial that may be inconsistent with his testimony at this trial. Specifically, Mr. Olsen testified on 2 December 1969 at the Article 32 investigation that he BELIEVED Lieutenant Calley was at the ditch as he approached,

whereas during the course of this trial Mr. Olsen testified that he REMEMBERED seeing Lieutenant Calley at the ditch at the time he

crossed. Mr. Olsen also testified at the same Article 32 investigation *"Coming directly across the ditch, no of sight to get from my mind of the ditch I remember seeing him walk toward the ditch, whereas during the course of this trial he testified that he DID."* that he DID NOT SEE Staff Sergeant Mitchell cross the ditch, whereas during the course of this trial he testified that he DID.

Mr. Glen Haywood made certain statements prior to trial that may be inconsistent with his testimony at this trial; specifically, Mr. Haywood told Criminal Investigation Agent Buglio, on 12 January 1970, in Baytown, Texas, when asked, "Did you see a helicopter land at My Lai (4)?" -- "Yes. I do not know where it was, but I saw an H-23 land, the pilot get out and walk toward the village. He might have been down five or ten minutes. I did not see what he did, nor did I see him speak to anyone." Similarly, when testifying before a body known as the Peers Committee in January of 1970, he answered, "Yes, I saw a bubble helicopter with two machine guns on it. All I know is the pilot got out or somebody came over. I'm not sure. I didn't watch it that close. I went somewhere and it went out of my eyesight," whereas during the course of this trial Mr. Haywood testified that a helicopter landed and that the pilot talked to Lieutenant Calley and that thereafter Sergeant Mitchell talked to Lieutenant Calley. Mr. Haywood also testified before the Peers Committee in response to the question, "Did you hear about other groups of people being shot?" -- "No, I didn't hear of any. I saw a group of men being shot. I didn't actually see them. I saw them rolling in the ditch shot," whereas during the course of this trial Mr. Haywood testified, "I saw a group of people shot at a ditch by Dennis Conti and Paul Meadlo."

Mr. Charles Hall made certain statements prior to trial that may be inconsistent with his testimony in this trial; specifically, Mr. Hall stated to Mr. Byers, a Criminal Investigation Division Agent, on 24 October 1969, at Columbus, Ohio, "I knew that Sergeant Mitchell finished off the people at the ditch," whereas during the course of this

trial Mr. Hall testified that he did not know who shot the people at the ditch.

Mr. Robert Maples made certain statements prior to trial that may be inconsistent with his testimony in this trial; specifically, when asked by a Mr. Byers on 16 September 1969, if others than Lieutenant Calley were shooting people in a hole or crater, he stated, "Yes, but I don't know who they were. There were either two or three. I do ~~not know~~, I remember that Meadlo was one of the ones firing. He was crying at the time," whereas during the course of this trial he testified that he saw Lieutenant Calley and Paul Meadlo shoot some people at a hole or crater and that they were the only ones there.

You are advised that such prior statements, if you believe them to be inconsistent, and/or if you believe that such inconsistent statements were made, are factors to be considered in evaluating the credibility of the testimony of Mr. Sledge, Mr. Conti, Mr. Olsen, Mr. Haywood, Mr. Hall and Mr. Maples. You are not to consider such prior statements as evidence of the truth of the matter asserted in that prior statement. Rather, in determining the weight to be given to the testimony of Mr. Sledge, Mr. Conti, Mr. Olsen, Mr. Haywood, Mr. Hall and Mr. Maples, you may consider any inconsistency as a factor bearing adversely upon his credibility as a witness at this trial.

I want to remind the court of the fact that witnesses have appeared in this courtroom and before this court and have exercised the right to invoke the privilege against self-incrimination, and also the fact that some of them had their attorneys present. You are reminded that no inference, either favorable or unfavorable, may be drawn from the above facts I have just mentioned, for or against either side. However, you do have evidence before you in the form of former testimony of the witnesses, Meadlo and Boyce, which is admissible in a case like this where a witness does claim the privilege. Although this evidence was

received by way of former testimony, it should receive no less credibility than the testimony of any other witnesses in this case. I remind you that you did have the opportunity to observe the deportment and demeanor and other characteristics of these two individuals while their testimony was being read.

In connection with the testimony of Mr. Sledge and Mr. Conti, witnesses for the prosecution, evidence was received as to their bad character for truth and veracity, and rebuttal evidence of their good character for truth and veracity has been introduced. You are instructed that this evidence is admissible for the purpose of assisting you in determining their worthiness of belief, and the weight to be given their testimony.

In making your determination you may consider all other factors bearing upon the credibility of Mr. Sledge and Mr. Conti, including but not limited to, the acuteness of their powers of observation, the accuracy and retentiveness of their memories, and their general manner in testifying.

Evidence has been introduced to the effect that the witness, Charles Sledge, has been convicted of a crime. The law assumes that a witness who has been convicted of a crime may not be as worthy of belief as a witness who has never been convicted of a crime. The fact of conviction does not disqualify him as a witness but it is brought to your attention so that you may consider it in determining upon his credibility and the weight of his testimony.

You have been given a great deal of information concerning Staff Sergeant Mitchell:

a. The testimony of Mr. Dawson, the accused's former high school teacher and long-time acquaintance, who testified that he had known the accused for over twenty years and that the accused's repuba-

tion in his community for being a moral, well-conducted person, and
and person
law-abiding citizen/of the highest caliber;

b. The testimony of the accused's father, Reverend Mitchell,
that the accused in his own community had always enjoyed the highest
reputation for being a moral person and law-abiding citizen;

c. The testimony of Mr. Livingston and Mr. Kelley that, as
former company commanders of the accused they had regularly observed
the accused in the performance of his military duties; that the accused
had performed his duties in an outstanding fashion; was a dedicated soldier,
and that they both considered the accused to be one of the finest non-
commissioned officers they had served with while they were in the military;
that he was a loyal, obedient and well-disciplined member of the military
service;

d. In addition to the foregoing testimonial evidence, you may
also consider the affidavits from members of the accused's community as
to the accused's excellent reputation for being a moral, law-abiding
citizen whose disposition has always been known to be peaceable. Among
the evidence you must consider are the affidavits from a local physician
in the accused's community, the local sheriff, a District Judge, and
the accused's Congressman.

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e. You are further advised that, as to the accused's military record, you should consider the testimony of Sergeant Cowan who testified that he served with the accused in Vietnam as the accused's platoon sergeant and that the accused was an excellent noncommissioned officer whom he would like to serve with again.

Now, you may be saying to yourselves: "Well, this is very interesting; no doubt it is highly mitigating, but what does this all have to do with the question of what happened on 16 March 1968, at the Village of My Lai (4), Republic of Vietnam?"

Quote
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for
counsel

Well, I submit, gentlemen, that it can have some bearing upon the issue of what happened over there. If you put your minds to it, I am certain that you will agree that, all other things being equal, a person of good character is less likely to commit a crime than is a person of bad character. For this reason, in any criminal prosecution the defense is permitted to introduce evidence of the accused's good character as tending to show that it is improbable that he committed the offense charged.

Now, the law does not require that you give any particular significance to this evidence, but the law permits it to be introduced; then you must assess it and determine its persuasive value, just as you would any other evidence. Considered and weighed alone, or in conjunction with other evidence in this case, you may find the evidence of the accused's good character sufficient to cause you to retain a reasonable doubt of his guilt and thereby warrant an acquittal. On the other hand, any inference of innocence to be drawn from this character evidence may, in your opinions, be more than offset by other evidence in this case which you believe establishes guilt. It is for you to make the determination.

However, in reaching your findings, it is your duty to consider the evidence of good character that has been introduced. It is also important that you not improperly, in another connection, use this evidence of good character. If a member is convinced beyond a reasonable

doubt, considering all the evidence before you, including the evidence of good character, that the accused is guilty, he should not allow himself to be influenced by a desire to show mercy toward the accused because of his good character.

Your mission in reaching your findings is a fact-finding one, and it is your duty to reach your findings without regard to the consequences of your verdict, and you should not consider the possible consequences of your verdict in reaching your findings.

Reference the first element of the offense charges, that is, that the accused did attempt to do bodily harm to 30, more or less, Vietnamese Nationals, the evidence in this case raises the question of whether the accused was in fact the criminal actor and necessitates your resolving any conflict or uncertainty in testimony on that issue. In this connection, you are reminded of the testimony of Mr. Sledge and Mr. Conti to the effect that Lieutenant Calley and Sergeant Mitchell were firing at a group of people in a ditch on the eastern side of the village of My Lai (4) and the testimony of Mr. Meadlo, Mr. Boyce, Mr. Turner, and Mr. Dursi to the effect that Lieutenant Calley and Mr. Meadlo were the ones firing upon the people in the ditch.

The burden of proof is on the prosecution with reference to every element of the crime charged, and this burden includes the burden of proving beyond reasonable doubt the identity of the accused as the perpetrator of the crime charged.

The court is further advised that it is a well-settled principle of military law that mere presence at the scene of an offense is not sufficient to sustain a criminal conviction and does not make a person a principal to the commission of an offense which might have been committed.

DEFENSE OF ALIBI

The court is advised that the defense of alibi has been raised by the evidence in this case with respect to the offense of assault with intent to commit murder. This evidence tends to show that the defendant could not have committed the offense alleged because he was at another place at the time the alleged offense occurred. In the law this is known as an alibi, and an alibi is a valid defense. In determining this issue, you must consider all relevant facts and circumstances including but not limited to:

- a. The testimony of Mister Sidney Kye that he saw people shooting into ^{the} ditch at the eastern side of the village; that among these people was Lieutenant Calley, but that he did not see Sergeant Mitchell at the ditch at this time;
- b. The testimony of Mister Thomas Turner that he observed Lieutenant Calley and Mr. Paul Meadlo firing on people in a ditch on the eastern side of the village, but that he did not see Sergeant Mitchell until later on that evening;
- c. The testimony of Mister Robert Maples that he saw Lieutenant Calley and Mr. Paul Meadlo firing upon a group of people in a hole on the outer edge of the village, but that he did not see Sergeant Mitchell until that night;
- d. The testimony of Mister Paul Meadlo that he, Lieutenant Calley, Simone, Stanley shot the people in the ditch on the eastern side of the village *at 1400 hours*;
- e. The testimony of Mr. Allen Boyce that he saw Lieutenant Calley and Mr. Meadlo fire upon people in a ditch on the eastern side of the village;
- f. The testimony of Mr. Glen Haywood that while set up on the perimeter on the eastern side of the village, Sergeant Mitchell approached him from the southwest and sat down by him, and that shortly thereafter a bubble helicopter landed back near the ditch where, Mr. Haywood, had crossed earlier;

g. The testimony of Mr. James Dursi that he was present and witnessed Lieutenant Calley and Mr. Paul Meadlo fire upon civilians in a ditch on the eastern side of the village; that he then crossed the ditch, and shortly thereafter saw Sergeant Mitchell;

h. The testimony of Staff Sergeant David Mitchell that he brought a group of people to the eastern edge of the village where a large ditch was located; that Lieutenant Calley asked him to leave some of the members of Sergeant Mitchell's squad to guard these people, and to take the rest of his squad across the ditch to establish a perimeter. Sergeant Mitchell further testified that he crossed the ditch, moving to the northeast where he eventually placed the members of his squad in position. While moving out, he heard firing to his rear. Thereafter, a bubble helicopter landed back by the ditch near where he had previously crossed. Sergeant Mitchell then returned to the ditch where he talked to Lieutenant Calley, who asked him to go back into the village and check it out. Sergeant Mitchell testified that upon crossing the ditch after talking to Lieutenant Calley he observed bodies in the ditch. He further testified that he continued back to the village, that he checked the village out and that he then returned to the ditch, but that at no time did he fire into the ditch or see anyone ~~else~~ else fire into the ditch that day;

i. The testimony of Mr. Charles Sledge that he was positive it was Sergeant Mitchell shooting at the people in the ditch; that at the time he saw Sergeant Mitchell he was nine to ten feet from the accused; it was a clear day, and nothing was obstructing his view;

j. The testimony of Mr. Dennis Conti that he was positive it was Sergeant Mitchell that he saw shooting at the people in the ditch;

k. The testimony of Mr. Gregory Olsen that he was positive it was Sergeant Mitchell standing at the ditch with a rifle in the firing position, adjusting his aim after each shot he heard at the time. At the time he saw Sergeant Mitchell, he was, at the very most, 20 meters from him.

1. The testimony of Mr. Charles Hall that he was positive that he saw Sergeant Mitchell standing at the edge of the ditch on the village side; that he turned over a group of people to Sergeant Mitchell and Lieutenant Calley at that point; that shortly thereafter he heard rapid fire from the general vicinity where he left the people; that after seeing a bubble chopper land he saw Lieutenant Calley and Sergeant Mitchell standing on the eastern side of the ditch talking; that he heard slow, semi-automatic fire from the area in which they were standing.

Alibi, as I have explained that term to you, is a complete defense to the offense of assault with intent to commit murder, because it is obvious that an accused who was not present at the time and place of an alleged offense, could not have committed it.

The burden is on the prosecution to establish the guilt of the accused by legal and competent evidence beyond a reasonable doubt. Consequently, unless you are satisfied beyond reasonable doubt that the accused was present at a ditch on the eastern side of My Lai (4), Republic of Vietnam, at the time the alleged offense took place on 16 March 1968, you must find Staff Sergeant Mitchell not guilty.

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