

DEPARTMENT OF THE ARMY
HEADQUARTERS, THIRD UNITED STATES ARMY
Fort McPherson, Georgia 30330

AJAJA HUTTO, Charles E.
435-76-7322

SUBJECT: Disposition of Court-Martial Charges

4 SEP 1970

Commanding General
Third United States Army
Fort McPherson, Georgia 30330

1. The attached charges and allied papers in the case of Sergeant E-5 Charles E. Hutto, Headquarters Company, US Army Garrison, Fort McPherson, Georgia, have been received in this office for consideration and advice in accordance with Article 34, Uniform Code of Military Justice and Paragraph 35b, Manual for Courts-Martial, United States, 1969 (Revised Edition).

2. SUMMARY OF CHARGES:

<u>Charge</u>	<u>Art, UCMJ</u>	<u>Spec</u>	<u>Dist of Offense</u>	<u>Max Punishment Auth</u>
I	120		Rape of unknown Vietnamese female person on 16 March 1968 on My Lai (4), Quang Ngai Province, Republic of Vietnam	Death, (treated as capital) DD, TF, Imprisonment for life, ELEG, (treated as non-capital)
II	118		Premeditated murder of an unknown Vietnamese person on 16 March 1968, My Lai (4), Quang Ngai Province, Republic of Vietnam	Death or imprisonment for life as a court-martial may direct (treated as capital) Imprisonment for life (treated as non-capital)
III	134		Assault with intent to commit murder upon an unknown number of unidentified Vietnamese persons, not less than six, on 16 March 1968, My Lai (4), Quang Ngai Province, Republic of Vietnam	DD, TF, CHL 20 years, ELEG
Additional Charge	134		On 17 November 1969, unlawfully and wrongfully subscribing under oath to a false statement, believing it not to be true	DD, TF, CHL 3 years, ELEG

3. PERSONAL DATA CONCERNING ACCUSED:

- Data of birth: 17 December 1948
- Creditable military service: Approximately 3 years, 7 months
- GT score: 86

- d. Pay per month: \$355.50
- e. Marital status: Married
- f. Contribution to family or quarters allowance: None
- g. Dependents: One
- h. Previous convictions: None
- i. Physical profile: 111 111 A

4. SUMMARY OF THE EVIDENCE:

a. Background:

The evidence adduced at the Article 32 Investigation indicates that on 16 March 1968, Company C, 1st Battalion, 20th Infantry, 11th Light Infantry Brigade, Americal Division conducted an assault in the area of the village of My Lai (4), Quang Ngai Province, Republic of South Vietnam, and that the accused, as a member of a machine gun team in the 2d platoon, participated in the operation. Upon landing for the assault, the first and second platoons formed on line with the 1st platoon to the south and the 2d platoon on the northern side, and they began moving through the village of My Lai (4). There is little, if any, evidence to indicate that the accused's unit encountered hostile fire, either upon landing or while proceeding through the village.

Captain Eugene M. Kotouc, HQ Troop Command, US Army Garrison, Fort Carson, Colorado testified at the Article 32 Investigation that he was the intelligence officer for Task Force Barker, the organization which initiated the operation in the area of My Lai (4). Captain Kotouc stated that his intelligence sources showed that the 48th Vietcong Battalion, with an estimated strength of 300-350 well-armed, well-trained and fairly well-motivated Vietcong soldiers, was operating in the vicinity and supposedly had its headquarters at My Lai (4). He further stated that it was anticipated that contact would be made with that unit on 16 March 1968 and it was his opinion that the order to conduct the operation had emanated from a high level, since My Lai (4) was out of the area of operations of the unit which participated in Task Force Barker and coordination for helicopter and artillery support was necessary. First Sergeant Jay A. Buchanan, Company C, 3rd Battalion, 1st Brigade, USATCI, Fort Bragg, North Carolina stated at the Article 32 Investigation that on 16 March 1968 he was the platoon sergeant of the 2d platoon of Company C, 1st Battalion, 20th Infantry, 11th Light Infantry Brigade, Americal Division and that he first heard of the operation at My Lai (4) in a briefing conducted by the company commander for all members of the company on 15 March 1968. According to First Sergeant Buchanan's testimony, the members of the company were told that the 48th Vietcong Battalion was the enemy in the area and that they would be outnumbered 2 to 1. They were further instructed that the village of My Lai (4) would be defended and they anticipated a "stiff fire fight." There was further evidence adduced at the Article 32 Investigation that the members of the company were told that this would be their opportunity to "get even" for the casualties they had suffered from sniper fire in the area, and there is some evidence that in his briefing the company commander indicated to the members of the unit that everyone in the village was to be killed.

b. Charge I and it's Specification:

Private Dean Fields, Jr., a former member of C/1/20 and now stationed at Fort Hood, Texas, testified at the Article 32 Investigation that after the unit had swept through the village of My Lai (4) on 16 March 1968, he saw the accused along with several other soldiers and a Vietnamese female in a hut. He stated that as he peered through the doorway of the hut, he

could see the girl wearing pajama type clothing, with the bottoms pulled down, being held on the ground by a soldier he could not identify. According to Fields' statement, the accused was standing in the hut with his penis exposed and it appeared that he was trying to attain an erection. Fields testified that he did not see the accused attain an erection and did not see him get on top of the girl. Nor could he remember what position the accused's was in when he departed the hut. Testimony elicited by the defense counsel at the Article 32 Investigation indicated that Fields' had made a previous statement on 13 January 1970 in which he said that he was the KTO for Lieutenant Calley, platoon leader of the 1st platoon of C/1/20, when in fact, he was the KTO for Lieutenant Brooks, platoon leader of the 2d platoon, as Fields' subsequent statement of 27 January 1970 indicates. Testimony was also elicited that in his previous statement of 13 January 1970 Fields' stated that he saw two Puerto Ricans on the east side of the village attempting to have intercourse with a Vietnamese female of about 18 years of age. After admitting that he had been hit in the head with a brick when he was younger and that he had suffered high fevers from malaria which he contracted in Vietnam, Fields admitted that in testifying before the so-called "Peers Investigation" two days later on 15 January 1970, he stated that he had been told by two Puerto Ricans that they had raped a girl at My Lai (4). In addition, Fields admitted that he had testified before the Peers Investigation that after a sweep had been made through the village, he remembered a soldier by the name of Jolly and another named soldier other than the accused having intercourse with a girl in a hut about in the middle of My Lai (4). The girl was supposedly being held by Jolly while the other soldier had intercourse with the girl, despite her protestations and resistance. Fields further testified at the Peers Investigation that he did not remember any other persons involved in this incident and did not remember any other rapes committed that day at My Lai (4). In a subsequent statement on 1 April 1970, Fields' related that he did not witness Jolly and the other named soldier rape a female at My Lai (4) on 16 March 1968, and that he did not recall making such a statement when he testified before the Peers Investigation. Instead, he states in his 1 April 1970 statement that the accused and another unidentified soldier were in a hut in the village with a Vietnamese female and that he saw the accused "in the saddle" while another soldier was helping the accused hold the girl down. As will be noted, this statement varies not only from Fields' previous statements but also from the testimony which he gave before the Article 32 investigating officer.

In a sworn statement considered by the Article 32 investigating officer Mr. Varnado Simpson, a former member of C/1/20 and now a civilian, stated that he saw the accused and 4 other soldiers, none of whom were named in Private Fields' statements, enter a hut and "rape a 17 or 18 year old girl." In his testimony at the Article 32 Investigation, First Sergeant Buchanan stated that Simpson was a member of his platoon, and "was an individual who required constant counseling, was chewed out often, resented authority and had to be corrected frequently." He also testified that Simpson did not get along well with other members of his squad and that he would not "put much faith in his testimony even under oath." Private First Class Gertrude Ann Jamison, Headquarters Company, Third US Army, testified at the Article 32 Investigation that she went to the same junior high and high schools as Varnado Simpson and lived in the same general area as Mr. Simpson. She stated that Simpson sought attention and was boastful, although he was a clean cut individual. She further stated that because of Simpson's boastfulness she would not believe him under oath. Also to be noted is the fact that in his statement Simpson places a soldier by the name of Rucker at the scene of the alleged rape on 16 March 1968. Rucker has subsequently been identified as Gustavo Rotger, who was killed in action on 1 March 1968, prior to the date of the alleged rape.

The accused made a sworn statement at the Article 32 Investigation in regard to this charge only. He stated that he did not have sexual intercourse with a Vietnamese girl on 16 March 1968 and that he did not rape a Vietnamese girl on that day or any other day. Furthermore, prior to and during the Article 32 proceeding, the accused voluntarily submitted to three polygraph (lie detector) examinations, two before a military examiner and one before a civilian examiner. Both the military and civilian examiners concluded that the accused was truthful when he denied engaging in acts of sexual intercourse at My Lai (4) on 16 March 1968. In a previous statement made by the accused on 17 November 1969 he denied raping and shooting a girl as described in the statement of Vanarde Simpson. He further stated that he did not recall seeing anyone do this, although in a subsequent statement on 18 November 1969 he stated that he witnessed what appeared to be the raping of a girl by a soldier named Jolly and another named soldier. However, he again denied having sexual intercourse with this girl or any other girl in My Lai (4).

c. Charge II and it's Specification:

In his sworn statement considered by the Article 32 investigating officer, Vanarde Simpson stated that after the accused and four other soldiers entered a hut and raped a 17 or 18 year old girl, they fired into the girl with their weapons until she was dead. Simpson related that all the soldiers including the accused, had intercourse with the girl and that they all fired into her. According to Simpson's statement, when the firing was completed, the girl's face was blown away and "her brains were just everywhere." As previously noted both First Sergeant Buchanan and Private First Class Gertrude Jamison impugned the creditability of Vanarde Simpson in their testimony before the Article 32 investigating officer.

d. Charge III and it's Specification:

In a sworn statement considered by the Article 32 investigating officer John R. Mower, a former member of C/1/20 and now a civilian stated that on the day of the operation at My Lai (4), he was one of the three members of the accused's machine gun team. He further stated that when they were nearly to the eastern edge of the village, the third member of the machine gun team, who was actually carrying the machine gun, fired into a group of about 6 persons, consisting of middle age men and women. According to Mower's statement, these people were not all killed by the machine gun fire, and he and the accused each shot one or two of the persons who appeared to be still alive with a .45 caliber pistol and an M-16 rifle. He stated that these people were shot because they were considered Vietcong as a result of a briefing given to them by their company commander the previous evening in which he stated that everything in the village was to be considered Vietcong and was to be killed.

In a sworn statement made by the accused on 17 November 1969, he states that somewhere in the vicinity of half-way through the village he, along with a number of other American soldiers, came upon a group of 10-15 men, women and children standing in a clearing near a small hut. The accused's statement indicates that he along with the other soldiers present began firing into the group. Another member of his machine gun team "opened up" with an M-60 machine gun and after this individual had stopped firing, the accused stated that he and Mower each shot one or two of the people. Mower was using a .45 caliber pistol and he was using an M-16 rifle. He stated that these people were killed because they were all considered communist as a result of statements made by his company commander to the effect that everybody in the village was to be killed. When asked whether this was the same incident described in the sworn statement of John Mower, he replied in the affirmative.

Private Max Hutson, who is also under charges arising out of the My Lai (4) operation, elected to remain silent when called to testify at the Article 32 Investigation. The investigating officer considered his sworn statement dated 28 October 1969. Private Hutson names the accused as one of a number of soldiers present when a group of Vietnamese persons were fired upon. According to Hutson's statement, this incident occurred on the south-eastern edge of the village after the unit had swept through the village. Private Hutson stated that he did not see Mower and the accused "finishing off" any Vietnamese with .45 caliber pistols and that he only saw them use machine guns. It should be noted that he does not name Mower as being present at the scene. Therefore, this may not be the same incident described by Mower and the accused. It should also be noted that Private Hutson may not be available to testify at any trial which may be directed with respect to the charges against the accused.

c. The Additional Charge and it's Specification:

On 17 November 1969, the accused made a sworn statement to Billy H. Thompson, a member of the Criminal Investigation Division and a person authorized to administer oaths under Article 136(b)(4) of the Uniform Code of Military Justice. In making this statement the accused was asked whether he knew any reason why Vanardo Simpson would make a statement implicating him in a rape. The accused replied: "Maybe he thought he saw me there if it happened, but if it happened, I was not there. I don't know anything about a girl being raped." Subsequently, on 18 November 1969, the accused made another statement before Billy H. Thompson of the Criminal Investigation Division in which he stated that he witnessed a rape of a girl by a soldier named Jelly and another named soldier. Furthermore, in his testimony Vanardo Simpson claims to have seen the accused at the scene of an alleged rape.

5. DISCUSSION:

a. Charge I and it's Specification:

The elements of proof of the offense of rape in violation of Article 120 of the Uniform Code of Military Justice are (1) that the accused had sexual intercourse with a certain female not his wife; and (2) that the act was done by force and without her consent. It is not necessary that victim of a rape be identified by name so long as the specification sufficiently identifies the offense alleged. In his most recent statement at the Article 32 Investigation, Private Fields claims to have seen the accused in a hut with a Vietnamese female wearing pajama type clothing who was lying down. According to Fields' statement the accused had his penis exposed, but did not get on top of the girl or take any further steps toward having intercourse with her. When Fields left the hut, the accused was apparently still standing there and Fields admitted that he did not see the accused rape the girl. In light of the number of prior inconsistent statements which Private Fields' has made and the fact that he has suffered head injuries and high fevers resulting from malaria, it would appear that his testimony is of questionable creditability and reliability and should be weighed accordingly in your consideration of this charge. In his sworn statement, Vanardo Simpson makes a conclusory statement that the accused raped a Vietnamese female. However, in addition to the fact that his credibility was brought into question by the testimony of two witnesses and the fact that he placed an individual at the scene of the crime who was not alive on the date that the crime was alleged to have occurred, the results of the polygraph examinations which the accused has undergone and the accused's own denial of guilt of this charge indicate that Simpson's testimony is probably unreliable. Therefore, it appears that there is insufficient competent evidence to warrant referral of this charge to trial.

b.

b. Charge II and it's Specification:

The elements of proof of premeditated murder in violation of Article 118 of the Uniform Code of Military Justice are (1) that the victim named or described is dead; (2) that his death resulted from the unlawful act or omission of the accused, as alleged; and (3) that the accused had a premeditated design to kill. It is not necessary that the victim of a murder be identified by name so long as the specification sufficiently identifies the offense alleged. The only evidence produced at the Article 32 Investigation relevant to this charge is the sworn statement of Varnado Simpson which indicates that the accused along with several other soldiers raped and shot to death a Vietnamese female. As previously noted, the creditability and reliability of Simpson's statement is questionable, and this is especially true in light of his apparently erroneous allegation that the accused participated in a rape on 16 March 1968. Therefore, there appears to be insufficient, competent evidence to warrant referral of this charge to trial.

c. Charge III and it's Specification:

The elements of proof of assault with intent to commit murder in violation of Article 134 of the Uniform Code of Military Justice are (1) that the accused assaulted a certain person, as alleged; (2) that the accused at the time of the assault had a specific intent to kill as required for murder, as alleged; and (3) that, under the circumstances, the conduct of the accused 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. It is not necessary that the victim or victims of an assault be identified by name so long as the specification sufficiently identifies the offense alleged. The evidence adduced at the Article 32 Investigation indicates that the accused along with John R. Mower and several other members of the second platoon participated in the shooting of at least six unidentified Vietnamese persons. According to the accused's statement, these individuals were merely standing around offering no resistance, when the accused and the other soldiers present "opened up" on them. A specific intent to kill on the part of the accused would appear to be indicated by his statement that after the initial shooting had stopped he and Mower each shot one or two individuals, who apparently appeared to be still alive. By very nature, the conduct of the accused appears to have been to the prejudice of good order and discipline in the armed forces and is the type of conduct which would bring discredit upon the armed forces. Therefore, there appears to be sufficient, competent evidence to warrant referral of this charge to trial.

d. Additional Charge and it's Specification:

The elements of proof of the offense of false swearing in violation of Article 134 of the Uniform Code of Military Justice are (1) that the accused took an oath or its equivalent, as alleged; (2) that the oath was administered to the accused in a matter in which an oath was required or authorized by law; (3) that the oath was administered by a person having authority to do so; (4) that upon his oath the accused made or subscribed a certain statement, as alleged; (5) that the statement was false; (6) that the accused did not believe the statement to be true; and (7) that, under the circumstances, the conduct of the accused 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. The evidence adduced at the Article 32 Investigation indicates that the accused made two sworn statements dated 17 November 1969 and 18 November 1969, that an oath was properly administered in connection with each of these statements and that the person who administered the oaths was authorized by law to do so. In his statement of 17 November 1969 the accused stated that he was not at the scene of a rape and did not know anything about a girl being raped. It appears that this statement was false, in that, in his statement of 18 November 1969 the accused describes a rape being committed and admits being present at the scene of the alleged offense.

The basic inconsistency of the statements, the relatively short period of time between the making of the statements and other circumstantial evidence indicate that the accused did not believe the statement in question to be true. The giving of false statements under oath would appear to be conduct to the prejudice of good order and discipline in the armed forces and may be an act of such a nature as to bring discredit upon the armed forces.

6. PRIOR HISTORY OF THE ACCUSED:

The accused is twenty-one years of age, married and has an eighth grade education. He enlisted in the Army on 13 January 1967 for a term of three years and completed basic combat training at Fort Polk, Louisiana. The accused has had overseas service in Hawaii during the period 3 March 1967 until 30 November 1967 and in Vietnam from 1 December 1967 until 1 November 1968. While in Vietnam the accused participated in Vietnam Counter Offensive Phase III, the Tet Counter Offensive, Vietnam Counter Offensive Phase IV and Vietnam Counter Offensive Phase V. He has earned the National Defense Service ribbon, the Vietnam Campaign Medal with 60 devices, the Vietnam Service Medal, Combat Infantry Badge and two overseas bars. At the Article 32 Investigation, First Sergeant Buchanan testified that the accused was a member of his unit and was a very quiet person and "a person who tried to do the best of his individual ability." He was never a disciplinary problem, according to First Sergeant Buchanan.

7. EXTENUATION AND MITIGATION:

There was evidence adduced at the Article 32 Investigation that the accused's unit had encountered resistance and suffered casualties in the general vicinity of My Lai (4) prior to the assault on 16 March 1968. There was further evidence that the accused and other members of the unit were briefed by their company commander to "kill everything" in the village, and thus the accused could have believed that he had orders to shoot civilians. Although it appears that obedience to such orders would not be a defense to the offense charged, this circumstance may be considered as a mitigating factor. Also to be considered are the age of the accused and his favorable record in military service.

8. OPINION:

There has been substantial compliance with the provisions of Article 32 of the Uniform Code of Military Justice. The specifications allege offenses under the Uniform Code of Military Justice and, except as otherwise noted in Paragraph 5 above, the allegations of the offenses are warranted by the evidence indicated in the report of investigation. There is no reason to believe that the accused is mentally defective or deranged.

9. RECOMMENDATIONS:

a. Unit Commander: Trial by general court-martial.

b. Investigating Officer: Trial by general court-martial. It should be noted that in his remarks the Article 32 investigating officer questioned the credibility and reliability of Mr. Simpson and Private Fields with respect to their testimony relative to Charge I and Charge II. He concluded that the offense of rape alleged in the specification of Charge I should be reduced to assault with intent to commit rape under Article 134, UCMJ, and recommended referral to trial of Charges II and III and the Additional Charge, as charged.

c. Summary Court-Martial Convening Authority: Trial by general court-martial.

d. I recommend trial by general court-martial on Charge III and the Additional Charge and further recommend that Charges I and II be dismissed on the ground of insufficient evidence. However, if you disagree with my recommendation to dismiss either Charge I or Charge II or both, you have the option to refer this case to trial as capital or non-capital. If you refer Charge II to trial as capital and the accused is convicted of premeditated murder, the only two sentences which may be imposed by a court-martial are death or imprisonment for life. If you refer Charge II to trial as non-capital and the accused is convicted of premeditated murder the only sentence which a court-martial could impose would be imprisonment for life. If you do not decide to refer Charge II to trial, but decide to refer Charge I to trial as capital and the accused is convicted of the offense of rape the maximum punishment which a court-martial could impose would be a dishonorable discharge from the service, forfeiture of all pay and allowances, reduction to the lowest enlisted grade and death. If Charge I is referred as non-capital and Charge II is not referred to trial, the maximum punishment which could be imposed in the event of a conviction for the offense of rape would be any authorized punishment other than death which a court-martial may direct. If, despite my recommendation, you decide to refer to trial either Charge I or Charge II or both, I recommend that in view of the accused's age, his enlisted status and other mitigating factors previously noted, that this case be referred to trial as non-capital.

SIGNED

WILSON FREEMAN
Colonel, JAGC 4 SEP 1970
Army Staff Judge Advocate

✓ Approved. Trial by general court-martial is directed and direct that Charge I and Charge II be dismissed. 4 SEP 1970

Approved. Trial by general court-martial is directed. Direct that Charge I only be dismissed, and that the case be treated as (not capital)(capital).

Approved. Trial by general court-martial is directed. Direct that Charge II only be dismissed, and that the case be treated as (not capital)(capital).

Approved. Trial by general court-martial is directed with respect to all charges, and that the case be treated as (not capital)(capital).

Disapproved. Trial by general court-martial is not directed.

Other.

SIGNED

A. O. CONNOR
Lieutenant General, USA
Commanding