

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

AJAJA SCHIEL, Kenneth
362-50-6883

SUBJECT: Disposition of Court-Martial Charge

Commanding General
Third United States Army
Fort McPherson, Georgia 30330

1. The attached charge and allied papers in the case of Corporal Kenneth Schiel, 362-50-6883, US Army, Headquarters Company, US Army Garrison, Fort McPherson, Georgia, have been received in this office for consideration and advice in accordance with the provisions of Article 34, Uniform Code of Military Justice, and paragraph 35b, Manual for Courts-Martial, United States, 1969 (Revised Edition).

2. SUMMARY OF CHARGE:

<u>Ch</u>	<u>Art, UCMJ</u>	<u>Spec</u>	<u>Gist of Offense</u>	<u>Max Punishment Auth</u>
	118		Premeditated murder of not less than nine unidentified Vietnamese persons by shooting them with a rifle	Death or imprisonment for life (treated as capital) DD, TF, CHL for life, RLEG, (treated as non-capital)

3. PERSONAL DATA CONCERNING ACCUSED:

- a. Date of birth: 21 July 1947
- b. Creditable military service: Approximately 3 years, 8 months
Approximately 8 months in USAR
- c. GT score: 114
- d. Pay per month (basic): \$306.60
- e. Marital status: Single
- f. Contribution to family or quarters allowance: None
- g. Dependents: None
- h. Previous Convictions: None
- i. Physical profile: 111 111 A

4. SUMMARY OF THE EVIDENCE:

During the Article 32 Investigation, the Article 32 investigating officer considered the oral testimony and prior sworn statements of a number of witnesses.

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The evidence indicates that on or about 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 the squad leader of the second squad of the second platoon participated in the assault.

After landing, the first and second platoons formed on line, with the second platoon to the north and the first platoon to the south, and began moving through the village. The evidence indicates that the accused's unit encountered little, if any, resistance either upon landing or while proceeding through the village.

Mr. Dennis Bunning, a former member of C/1/20 and now a civilian, testified telephonically at the Article 32 Investigation that he knew the accused for approximately ten months, both before and after the 16 March 1968, My Lai (4) operation. Mr. Bunning stated that a short time into the mission he was proceeding on line at the extreme northern edge of the village and that approximately half-way through the village he saw the accused along with four or five other American soldiers standing in a clearing near a small hut in front of which were approximately nine Vietnamese. Mr. Bunning stated that as he moved forward the accused passed from his sight for four or five seconds due to a hedgerow which blocked his view. Then, through a break in the hedgerow, he observed the accused again, roughly in the center of the group of American soldiers, some 40 to 60 feet away from where he was standing. In a prior sworn statement (adopted by him in his telephonic testimony to the Article 32 investigating officer) Mr. Bunning stated that Corporal Schiel repeated, "I don't want to shoot them," and then, "but I have to because we were ordered to," before the shooting started. He did not hear the accused order the soldiers to shoot, did not detect any overt movement by Corporal Schiel which would indicate that he was shooting, saw no smoke coming from his weapon, and did not see him pull the trigger of his rifle. Mr. Bunning stated that he could not actually say that the accused fired his weapon during the alleged incident, but had concluded that he did. He stated that the soldiers were armed with M-16 rifles, except one had an M-60 machine gun, and most fired their weapons from a waist high position. He heard both M-16 and M-60 fire which he could distinguish, saw bullets striking the group of Vietnamese, and saw them fall to the ground. He heard no individual shots after the M-16 and M-60 bursts were fired into the Vietnamese and did not then go up and examine the bodies but presumed them to be dead because no noise came from them. Mr. Bunning additionally stated that the entire incident, from the time Corporal Schiel started to speak until the firing ceased, covered only about two seconds.

In a sworn statement at the Article 32 Investigation, Corporal Schiel denied participating in the incident described by Mr. Bunning. Corporal Schiel did state, however, that he saw an incident similar to that described by Mr. Bunning. At the time, he and his squad were on the northwest portion of the skirmish line. They passed through the area of hedgerows and a small hut as a group of American soldiers armed with M-16 rifles and M-60 machine guns fired into a group of Vietnamese. Corporal Schiel admitted that a person observing from a distance could have concluded that he was in the center of the group of soldiers firing into the Vietnamese, but denied participating in such firing or doing anything to indicate that he was firing at that time. In a sworn statement dated 3 November 1969 and in a clarifying statement made on 25 February 1970, Corporal Schiel stated that the members of C/1/20 had been briefed by their company commander on 15 March 1968 regarding the pending assault on My Lai (4). According to Corporal Schiel, the company commander had stated that prior missions in the area had always resulted in losses being suffered, heavy resistance was anticipated, the village had been warned of the impending assault and every living thing was to be killed

since only Viet Cong would remain in the village. Evidence adduced at the Article 32 Investigation indicates that other members of C/1/20 also anticipated heavy Viet Cong resistance during the 16 March 1968 My Lai (4) assault and understood their orders to be to wipe out the village, based on the company commander's briefing.

Two other witnesses appeared at the Article 32 Investigation, but refused to testify on advice of counsel. Their prior sworn statements were considered by the investigating officer. In one of these, Private Max D. Hutson, also an accused in the My Lai (4) incident, identified Corporal Schiel as a participant in the shooting of a group of men, women, and, perhaps, some children, near a hooch in the southeastern portion of the village of My Lai (4). In the other, Sergeant Charles E. Hutto, another accused in the My Lai (4) incident, stated that a number of American soldiers, including 3 or 4 riflemen from the 2d platoon, shot a group of 10 or 15 men, women and children near a hut in the center of the village.

5. DISCUSSION:

As is evident from my summary in paragraph 4, above, the only available witness to the alleged murders by Corporal Schiel (other than other accused whose testimony at a trial of Corporal Schiel is conjectural) is Mr. Dennis M. Bunning. His testimony is reasonably strong with respect to the occurrence of an incident of homicide by some American soldiers at My Lai (4) on 16 March 1968. However, while Bunning identifies the accused as a perpetrator at the place of the incident, his testimony does not directly establish that Corporal Schiel participated in the shooting or even that he fired his weapon at the time. It does, however, leave me with an abiding conviction that the accused did participate in the shooting at that time and place. Corporal Schiel's express denial of participation in the alleged incident and his explanation of how an observer might have considered him a member of the group firing into the Vietnamese point up the inadequacies of Mr. Bunning's testimony in convincing reasonable man that Corporal Schiel was an active participant. Even if Private Hutson, who identifies Corporal Schiel as a participant in a group killing, were to testify at trial, he places the incident in an entirely different section of the village and his allegation as to Schiel's involvement in another such incident is not corroborated by any other evidence adduced at the Article 32 Investigation.

In addition to the above evidentiary problems, it appears doubtful that the available testimony is sufficient to establish mens rea on the part of Corporal Schiel, an essential element of the alleged crime. Corporal Schiel as a squad leader had received information that only Viet Cong would be encountered during the 16 March 1968 assault. He expected heavy resistance and foresaw numerous casualties to C/1/20 as had occurred on prior missions in the area. A short time after the assault commenced he encountered a group of Vietnamese who, it is common knowledge, are not identifiable as Viet Cong or as civilians; his almost instantaneous reaction was to fire at this group whom he could reasonably believe to be Viet Cong. Surely a trained soldier in a combat situation is not expected to wait for the enemy to shoot first. Even Mr. Bunning, currently the Government's sole available witness against the accused, repeatedly objected to referring to the alleged Vietnamese victims as civilians during his telephonic testimony to the Article 32 investigating officer. In view of these facts, I do not believe that the available evidence is sufficient to prove that Corporal Schiel had the requisite criminal intent to sustain a conviction if tried and convicted of the alleged homicide.

Since the critical evidentiary issue concerns the Government's ability to prove more than the accused's presence at the scene of the alleged murders, there is no reason to consider alternative referral of the charge to trial of a lesser offense.

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6. PRIOR HISTORY OF THE ACCUSED:

Corporal Schiel is 23 years old, single, and is a high school graduate. He enlisted for three years on 15 October 1966 and served until 4 October 1968 attaining the grade of Sergeant E-5. He was transferred to the inactive reserves for approximately eight months and re-enlisted in the grade of Corporal E-4 on 21 May 1969. During his prior active service, Corporal Schiel served eight months in Hawaii and ten months in Vietnam, where he participated in the Vietnam Counter-offensive Phases II through V and the Tet Counteroffensive. Corporal Schiel has earned the National Defense Service Ribbon, Vietnam Campaign Medal, Vietnam Service Medal, two overseas's bars, the Silver Star, Bronze Star, Combat Infantryman's Badge, Parachute Badge and one Purple Heart. He also has earned an Expert's Badge with the M-16 rifle.

7. CONCLUSION:

From the available facts and the discussion of this case set out in paragraphs 4 and 5, it appears that trial by general court-martial of this accused is an extremely vexing question. It is true that there is some evidence indicated in the Report of Article 32 Investigation justifying reference of the charge to trial. However, there does not appear to be sufficient available evidence to expect a conviction on trial. This is pointed up by the fact that a conviction would have to be based on circumstantial evidence as to Corporal Schiel's direct participation in the shooting, or by his command relation to the group of American soldiers allegedly present. Moreover, as discussed in paragraph 5, there does not appear to be sufficient evidence to prove mens rea on the part of Corporal Schiel under the combat circumstances of the alleged incident. *

8. RECOMMENDATIONS:

- a. Unit Commander: Trial by general court-martial.
- b. Investigating Officer: Trial by general court-martial.
- c. Summary Court-Martial Convening Authority: Trial by general court-martial.

d. I recommend that you direct that the charge and specification against the accused be dismissed. However, if you decline to follow my recommendation and decide to refer this case to trial as charged, you may refer it as capital or non-capital. If you refer the case to trial as capital and the accused is convicted of premeditated murder under the charge and its specification, the maximum punishment that must be adjudged is death or imprisonment for life. If you refer the case to trial as non-capital and the accused is convicted of premeditated murder as charged, the maximum punishment that must be adjudged is imprisonment for life, dishonorable discharge, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade.

SIGNED

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

1. Lack of mens rea
2. circumstantial vs direct evidence

4
Bonzales testified:
① saw group
② saw Schiel there
③ heard Schiel shout over
his head hutch
④ heard firing by group
⑤ got sick at site

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DIRECTION OF CONVENING AUTHORITY:

4 SEP 1970

(Date)

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Approved. Dismissal of the charge against the accused is directed.

Disapproved. Trial by general court-martial is not directed and the charge is returned to the Summary Court-Martial Convening Authority for appropriate disposition.

Disapproved. Trial by general court-martial is directed and that the case be treated as (not capital)(capital).

SIGNED

A. O. CONNOR
Lieutenant General, USA
Commanding