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SUMMARY OF RECALL TESTIMONY

WITNESS: KOTOUC, Eugene M. CPT

DATE OF TESTIMONY: 9 February 1970

PLACE OF TESTIMONY: Pentagon

WITNESS SUSPECTED OF: Failure to obey general regulations, dereliction of duty, participation in the planning of an operation in violation of the laws of war, suppression of information, conspiracy to suppress information, misprision of felonies, accessory after the fact of certain felonies and violations of the laws of war, murder, maiming, and aggravated assault with intent to inflict grievous bodily harm.

COUNSEL: William R. MACDONALD, CPT, JAGC, Robert T. ALLEN, 1LT, QMC, selected military counsel, stationed at Fort Carson, Colorado.

DUTY ASSIGNMENT ON 16 MARCH 1968: S2, Task Force Barker.

After having been warned of the offenses of which he was suspected, the witness chose to answer no questions and made no statement.

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(The hearing reconvened at 1818 hours, 9
February 1970.)

IO: The hearing will come to order.

RCDR: The following persons are present: LTG PEERS, MR WEST, MR MACCRATE, MR WALSH, COL MILLER, COL FRANKLIN, COL ARMSTRONG, LTC BAUER, and MAJ LYNN.

Sir, the hearing recalls Captain Eugene M. KOTOUC.

(CPT KOTOUC was recalled as witness, reminded that he was under oath, and he testified as follows:)

Are you represented by counsel?

A. I am.

RCDR: Would counsel please state their name, rank, Social Security number, organization, and station?

CPT MACDONALD: Yes, sir. I am Captain William R. MACDONALD, Judge Advocate General Corps. I am presently stationed at Headquarters and Headquarters Company, U.S. Army Garrison, Fort Carson, Colorado.

LT ALLEN: Lieutenant Robert T. ALLEN, First Lieutenant, Social Security number , member of 43d General Support Group, Fort Carson, Colorado.

IO: Captain KOTOUC, since you last appeared before this inquiry in early December, we have had an opportunity to interrogate a large number of witnesses. At the present time, from the start of the investigation up to the moment, it will be in the neighborhood of about 350. In addition, we have collected a large number of documents pertaining to the operation of Task Force Barker, pertaining to the reporting and investigation of the incident, and other related documents. We've also been to South Vietnam and have been on the ground in the area which is commonly referred to as My Lai (4), and have personally walked through the village, and had an opportunity to see the site of the operation by C/1/20 first hand. While we were in South Vietnam, we also

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had an opportunity to talk to quite a large group of Vietnamese, a total of approximately 30, including several of the individuals who worked in close connection with Task Force Barker. People of Son Tinh district, personnel Quang Ngai Province, 2d ARVN Division, and several other Vietnamese including three of the interpreters including your own, Sergeant HIEN, also Sergeant MINH, and Sergeant PHU. So, we do have a much better picture of what transpired in South Vietnam, in Son My Village area, in the time frame of 16-17 March 1968. Our purpose here is to call you back, having this information to fill in some of the gaps, and to ask you some questions concerning some of the previous testimony.

A. Yes, sir.

Q. Do you have any questions at this time? I'll add one thing that I might say. I don't know whether you've met all the people at this table or not. Have you met Mr. MACCRATE?

A. Yes, sir.

Q. Mr. WALSH, Mr. WEST, Colonel FRANKLIN, Colonel MILLER, you've met all of these individuals. We also have Colonel BAUER here. All of the people in military uniform are in the same category, having been designated as assistants by General WESTMORELAND, the Chief of Staff of the United States Army. Before Colonel MILLER addresses you and provides you instructions, do you have any questions you'd like to ask at this time?

A. No, sir. I'd like to be pardoned, I have a terrible cold, and I can't hear a thing.

COL MILLER: Captain, I'm aware that you are having a hard time hearing today. If at any time you don't hear me, please let me know and I'll speak up. When you appeared and testified at this investigation on 6 December of last year, you were accompanied by Lieutenant ALLEN as your counsel.

A. Yes, sir.

Q. You now have also Captain MACDONALD. Captain, you are a lawyer admitted to practice law in the state of Colorado?

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CPT MACDONALD: Maryland.

Q. Are you satisfied with these two individuals now as your counsel?

CPT KOTOUC: I am, sir.

Q. At your prior appearance, you were also informed that you were not suspected of any offense subject to this investigation.

General PEERS just told you that we have now talked to many additional witnesses and examined many documents. All of this material has now been considered. As a result of the information now available, I hereby inform you that you are now suspected of having committed several offenses which are in violation of the Uniform Code of Military Justice. These suspected offenses relate to the Task Force Barker operations, including the so-called My Lai incident, of March 1968. We realize that this is a misnomer, but I think you do understand the time to which I am referring. Do you?

A. I understand.

Q. Task Force Barker's operations in the My Lai area on the 16th of March, and these suspected offenses, relate to that time period and immediately afterward. Some of them are directly relevant to the subject of this investigation. I shall, in just a moment, advise you of those things of which you are suspected and also inform you concerning your testimonial rights and your rights to counsel, to representation here. You are suspected of:

(1) Failure to obey a lawful general regulation concerning the reporting and investigation of alleged, or suspected war crimes.

(2) Dereliction of your duties in connection with the Task Force Barker operation of approximately 16-18 March 1968, and your actions related thereto, before, during, and after that operation.

A. What was the charge, sir?

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Q. Dereliction of your duty pertaining to that operation, both in the preparation, execution, and after the operation was over.

(3) With the maiming of a Vietnamese national who was in your custody and control at the time. A lesser included offense of maiming is aggravated assault which, among other things, includes the intentional infliction of grievous bodily harm.

You are also suspected of participation in the planning, the implementation, and the subsequent execution of an operation which had as some of its purposes the unlawful and systematic destruction of private and public property, and the killing of civilians, in violation of the laws of war, including the Geneva Conventions of 1949. The acts of which you are suspected, if established, would constitute violations of the laws of war, and also of the Uniform Code of Military Justice.

You are also suspected of the suppression, and conspiracy to suppress, information concerning the investigation of acts which may have been committed by Task Force Barker troops during this operation into the My Lai area of 16-18 March 1968. Some of these acts which may have been committed by members of the task force include but they are not limited to: unlawful killing or murder of civilians, aggravated assault, rape, arson, and unlawful destruction of property. Those acts, if committed, may be violations of the laws of war, and also grave breaches under the terms of the Geneva Conventions of 1949, and also violations of the Uniform Code of Military Justice.

Action to withhold or to suppress information concerning, and the investigation of, such acts, or a conspiracy to withhold or suppress, may constitute the offense of misprision of felonies, or accessory after the fact, or both, as well as being in violation of existing regulations, Army regulations, directives of higher headquarters, dereliction of duties, and conduct unbecoming an officer.

You are also suspected of the offense of murder of at least one Vietnamese national who was in your care or

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custody. Do you understand these offenses as I have related them, very generally?

A. Generally I understand, yes, sir.

Q. Counsel, do you understand?

CPT MACDONALD: Yes, sir.

LT ALLEN: Yes, sir.

Q. Before we go any further, I want now to move into an explanation of your right to counsel and your right with respect to testimony. You have, of course, the right to remain silent, to not answer any questions whatsoever. Any statement that you do make may be used in evidence against you in a criminal trial. You have the right to consult with counsel, and by counsel I mean a qualified lawyer. You have two of them present today. In addition to military counsel, you may, if you wish, retain civilian counsel at your own expense, and he may be present with you. We would appoint counsel. However I think you are satisfied with the counsel you have now.

A. I believe I am, sir.

Q. You have no further request for military counsel. You can have these counsel with you in this hearing. You can consult with them at any time, and they can consult with you at any time. If you want to have civilian counsel in addition, that is your privilege also. You have had made available to you, for a short time at least, a copy of the prior testimony which you gave before General PEERS in December. Have you had some opportunity to examine that?

CPT MACDONALD: Yes, sir. I have briefly.

Q. Lieutenant?

LT ALLEN: Yes, sir.

Q. If you decide that you wish to answer questions, you may nevertheless decide that there are certain questions

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that you do not want to answer, and you may terminate the questioning by stating you have no further questions that you will answer, at any time. Do you understand your rights as I have gone through them so far?

A. I do, sir.

Q. Would you like to have me explain them any further?

A. I think not, sir.

Q. Captain, lieutenant, do you have any questions at this time?

CPT MACDONALD: No, sir.

LT ALLEN: No, sir.

Q. Since you have counsel, I won't go into that further. My next question is whether you are willing to make any statement or to answer any questions.

CPT MACDONALD: Could we beg your indulgence for a few minutes, General, to discuss a few of these things with Captain KOTOUC? I was only aware of the suspected maiming and the suspected murder investigation. We could slip out in the hall for just a few seconds.

IO: Certainly. The hearing will recess at this time.

(The hearing recessed at 1832 hours, 9 February 1970.)

(The hearing reconvened at 1834 hours, 9 February 1970.)

IO: The hearing will come to order.

RCDR: All persons present when the hearing recessed are again present.

COL MILLER: Captain, have you had an opportunity now to consult with counsel?

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A. Yes, I have.

Q. Are you ready to answer my questions?

A. General PEERS, gentlemen, due to the wide variety of allegations covering an unspecific time and period when I was in Vietnam. I don't, under advice of counsel and in my own mind--I feel it best not to make any statements at this time.

Q. I might just ask, counsel, are you concerned about this covering a wide area or space in time? These are keyed to the incident of 16-18 March in one way or another in all cases.

CPT MACDONALD: Yes, sir. I'm concerned mainly, well, not mainly, but to a degree with dereliction of duty, the failure to obey regulations, to report war crimes. I did think at one time that Captain KOTOUC could give information, but I think with all these suspected offenses that we now have, my advice to him is--and I think it's his right, sir, to do --is to respectfully refuse to answer any questions at this time. I can give him no other advice as a lawyer.

Q. I understand your position. If it's just a question of being a little more specific with respect to the allegations--

CPT MACDONALD: (Interposing) I don't think any more specificity is necessary.

Q. For example the regulation to which we refer is essentially MACV Directive 20-4, which is binding upon all persons subject to MACV who are in Vietnam, including intelligence officers or anyone in combat. Those people are specifically concerned. If you wish to have time to look at the directive, I'd be glad to give you a little time.

CPT MACDONALD: I still believe, now of course, in the final analysis, Captain KOTOUC has to decide what he wants to do. I can only advise him. I do think, because of the seriousness of the offenses, plus the fact of the dereliction of duty--I suppose can be committed at any time over a period of days--that I think it would not be wise for him to talk about this period. I think anything--well, I'll just leave

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it at that. My advice is, I think Lieutenant ALLEN agrees, that he should exercise his right to remain silent.

Q. That's what you wish to do?

CPT KOTOUC: They are my counsel, sir, and I am confident in my own mind that they are competent.

IO: Would you care to answer any, or to hear any, questions and then decide whether or not you would like to respond to them?

CPT KOTOUC: Well again, sir, I have got my counsel, and I have to listen to my counsel, or I might just as well not have them, sir.

IO: All right. Before we recess, I would like to again caution you of the fact that you have been ordered not to discuss your testimony, that which you have heard in this room, with others.

CPT KOTOUC: That's correct, sir. I respect that confidence.

Q. Including any individual, who may have or may appear as a witness before this inquiry.

A. Yes, sir.

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CPT MACDONALD: Excuse me, sir. I just have one question. I came into this business somewhat late. Captain KOTOUC had appeared before you once before when nothing was pending, there were no suspected offenses. I came to Washington 3 weeks ago to appear before a Senate subcommittee--

LT ALLEN: (Interposing) House.

CPT MACDONALD: House subcommittee, I'm sorry. I think the Senate may call us in at some time. I want to know, are there any restrictions if we are recalled before the House of Representatives or the Senate?

IO: I have no right or authority to preclude Captain KOTOUC from testifying before any competent legislative body,

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which would include any of the committees or subcommittees of either the House or the Senate, and if you are so called, your previous testimony, your appearance here this afternoon, would in no way preclude or prevent you from appearing.

CPT KOTOUC: Yes, sir.

CPT MACDONALD: Thank you, sir, that answers my question.

IO: The hearing will recess at this time.

(The hearing recessed at 1840 hours, 9 February 1970.)

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