

TC: Mr. Berzine, stand up, please. Do you see him now?

THE WITNESS: Yes, sir.

Q Well, now, having seen that man does it refresh your recollection that on Sunday, this past Sunday, in connection with -- withdrawn. You were asked everything you knew this past Sunday, were you not, about this march, about the discipline of the platoon, about your views, about Sergeant McKeon and about the conduct of the platoon on the march and in the water, were you not?

A Yes, sir.

Q Well, having seen this man, does it refresh your recollection; that is, as recently as last Sunday, in connection with when you started to swim, you said that it was after the panic started?

A No, sir.

Q When was the first time that you ever told anyone and if so, who, that it was your best recollection that you had started to swim in water over your head before the cries for help and of panic?

A I don't remember, sir.

Q Did you tell anyone that before last night?

A Yes, sir.

Q Who?

A I believe Captain Haden.

Q When did you tell it to him for the first time before last night?

A I don't remember, sir.

Q You have no recollection of that at all?

A No, sir.

Q What position were you in -- withdrawn. Do you know a private who is a fellow recruit of yours by the name of Private Drown?

A Drown?

Q Drown.

A Yes, sir, I know Private Drown.

Q Where were you in relationship to Private Drown in that water?

A When we first went in the water, sir?

Q All right, well, start with when you first went in the water.

A I was ahead of him, sir.

Q About how far ahead?

A About three men in front of him, sir.

Q Three men? And the men were separated approximately at arm-length distance?

A About that, sir.

Q And that was when you first went in? Where were you with respect to Private Drown when the cries for panic were heard?

A I was back in the second squad.

Q Behind him?

A Yes, sir, I guess it was behind him, I didn't see him any more, sir.

Q Well, you started out three men ahead of him, as I understand you?

A Yes, sir.

Q Did you follow a route which paralleled the bank going upstream?

A Yes, sir.

Q I don't want you to be nervous, just relax, please, Private. And how far out from the bank do you say you were as you went upstream?

A I don't know, sir, about five feet, maybe six feet.

Q It was muddy and water, is that right?

A Yes, sir.

Q And in going upstream how deep was the water on you with respect to some given point on your body?

A About waist high, I would say, sir.

Q Going upstream?

A Yes, sir, I'd say about waist high.

Q Now, all this time were you about approximately three men ahead of Private Drown?

A Yes, sir.

Q Then did you make a left turn?

A Yes, sir.

Q And did you then make another left turn so that you were walking downstream?

A Yes, sir.

Q And when you were walking downstream were you walking substantially parallel to your line of march upstream?

A Yes, sir.

Q You will have to talk up, Private.

A Excuse me, sir.

Q That's what I meant. You will have to talk out. What was your answer to the question?

A Yes, sir; sir.

Q Thank you. How far would you say that the downstream line of march was from the upstream line of march?

A I couldn't say, sir.

Q What is your best estimate about it, if you could make a reasonable estimate? If you can't say so.

A I couldn't make a reasonable estimate.

Q Could you estimate how far you were in marching downstream from the bank, the bank from which you would come?

A No, sir.

Q You can't tell us that either? All right. Well, now, did this water gradually deepen so that as you marched along first the water was up to your waist, then to your chest, or armpits, and then to your neck and then to your chin and then to your mouth, nose, eyes and head?

A No, sir.

Q Tell us about it, tell us what it was that you say -- withdrawn. Tell what the condition of the water was right before you went over your head?

A About chest high, sir.

Q Then you took one step, did you?

A Well, I was maybe -- I was -- I was away from the platoon a little, sir, about a step or two away from the side of the platoon.

Q On the right?

A Yes, sir.

Q Out closer to the -- that is, in the direction of the middle of the creek as distinguished from the shore?

A Yes, sir.

Q And your estimate is that you were only one or two steps away from the platoon?

A Yes, sir.

Q All right, but at that point, even at that point you say the water was up to your waist?

A No, chest, sir.

Q Chest. All right, then, did you take one step and go over your head?

A Took about two steps and went over my head.

Q What happened to the first step?

A I was veering away a little and starting to come back.

Q What was the height of the water if you remember as you took that first step? Where did it come to?

A I can't remember sir.

Q At least you said it was within two steps from chest-high level and you were over your head?

A Yes, sir.

Q And this, you say, was somewhat to the right of the platoon and more in the direction toward the center of the creek?

A Yes, sir.

Q Did you see Sergeant McKeon?

A No, sir.

Q At any time?

A No, sir.

Q Did you see him go into the -- come off the embankment?

A Yes, sir.

Q So you knew he was -- withdrawn. He was the first man in, was he not?

A Yes, sir.

Q You knew that it was intended that the platoon was to follow him, isn't that so?

A Yes, sir.

Q Well, all right, what did you do when this panic ensued?

A I stood still.

Q Did you remain standing still for any appreciable length of time?

A About three or four minutes.

Q Then what did you do?

A I went up on the shore.

Q Are you a swimmer?

A Yes, sir.

Q Would you describe -- withdrawn. You've gone to college, haven't you, Private Brennan?

A Yes, sir.

Q How far had you gone? Had you finished, concluded your college career?

A No, sir.

Q What year were you in?

A I was -- quit college at the end of the second year, the second half-year semester, I went about a year and a half.

Q In other words, you were in your sophomore year?

A Yes, sir.

Q Suppose you describe for the court, as well as you can, calling on your recollection, of what it was that happened that so many men have described here as being panic? What did you see and hear and observe, quite apart from your own feelings. We will get to that in a moment.

A I believe we were going -- they were following a line, following somebody.

Q I'm not asking who they were following, I want to know when you heard the cry for help, you say panic broke out?

A Yes, sir.

Q Just tell us what it was that you saw or heard or felt that leads you to use that word, "that panic broke out."

A When the cries for help were first heard, sir, everybody naturally stopped where they were in the water and they broke up in little groups and stood still and --

Q Take it easy, Private, just take your time, relax a little bit.

A -- and then I heard cries of help coming from somewhere on my right where I was. I wasn't up at the head of the column no more, I heard cries of help coming from the right somewhere.

Q Further out towards the center of the creek, I take it?

A That would be a little to the right of the head of the column, where the head of the column should have been.

Q Yes. Well, in any event, did you hear then not only cries but were you aware of the fact that people were being pulled under by others?

A No, sir.

Q Did you know that some men had men grabbing onto the back of their belts in frenzy?

A No, sir.

Q You didn't observe that?

A No, sir.

Q Did you hear quite a considerable amount of threshing about?

A I don't remember, sir.

Q In other words, you haven't got a single accurate memory but your own instincts tell you that panic had broken out?

A Yes, sir.

Q Has this matter been a considerable -- has this matter been discussed with you on leaves at home and with other people who are friendly to you when on leave?

A No, sir.

Q Haven't talked about this incident at all?

A I talked about it, but it hasn't -- I read newspaper articles. It hasn't affected me that much, sir.

Q Hasn't affected you how much, sir?

A Well, it won't change my -- they can write one thing and it won't change my ideas of what happened. They can write one story and make altogether opposite of what happened.

Q I see. In other words, as I understand it, you are saying it's your feeling, right or wrong, whatever influences that have -- would normally suggest things to people, like what they read or heard, that hasn't affected you?

A No, sir.

Q How old are you, Private?

A Twenty years old, sir.

Q I see. Now, have you had occasion to reflect in the past many months and up to today on what the state of the platoon was on that day and for sometime before with respect to its discipline and its seriousness of purpose and its eagerness?

A Yes, sir.

Q And what was it in your view?

A About the discipline? I say the discipline was good, sir.

Q And you regarded the platoon and the members in it as being serious of purpose in their training, did you?

A Most -- the majority of them, sir.

Q And did you feel that, so far as you reflect on it now -- you have met a lot of other Marines from other platoons -- you thought the platoon had come along to the position where it was responding with the tradition of good, basic Marines, did you?

A Yes, sir.

Q What did you think of Sergeant McKeon as a drill instructor?

A I thought he was a good drill instructor, sir.

Q Did you regard -- did you have any feeling, any observation to make as to whether he was patient and took time and effort in attempting to instruct the members of the platoon?

A He was a very patient man, yes, sir.

Q Did you have a feeling that, quite apart from instruction in the business of becoming a basic Marine, he was always interested personally in the welfare of the men of Platoon 71?

A Yes, sir.

Q On this particular march were you aware of the fact that there was a considerable amount -- withdrawn. Was there a considerable amount of some kidding and wisecracking going on?

A Yes, sir.

Q Was there some joking and laughing by members of the platoon?

A Yes, sir.

Q And did this extend even to the point when they were in the water?

A Yes, sir.

DC: That's all, sir.

TC: Any questions by the Law Officer?

LO: No questions.

TC: Any questions by the court?

PRES: No questions by the court.

DC: Would you, sir, permit me just one other question or two, and you sir?

LO: All right.

DC: I call for the production of this man's original statement.

CROSS-EXAMINATION (cont'd)

Questions by defense counsel:

Q Private Brennan?

A Yes sir.

Q I am not shouting at you now, but I haven't got a mike, and I want to make myself heard.

A Yes sir.

Q Are these 3 pages in your handwriting and both the first two initialed by you and the last one signed by you?

A Yes sir, these are mine.

DC: I ask this be marked for identification only, not in evidence.

LO: It is so marked.

DC: Would you please mark this Defendant's Exhibit F for identification?

The document referred to was marked Defense Exhibit F for identification.

DC: I have nothing further from this witness, sir.

The witness was duly warned, excused, and withdrew from the courtroom.

TC: I address a question to counsel, and I would like it clarified for the record. Does counsel for the defense consider at this time that Defense Exhibit F for identification is in evidence for any purpose?

DC: I do not. I simply identified the paper through a witness which he says to be his statement in his writing.

TC: Then the contents thereof are not in evidence.



DC: They are not at this time.

TC: Call Private Moran.

Private \_\_\_\_\_ was called as a witness for the prosecution, was duly sworn, and testified as follows:

DIRECT EXAMINATION

Questions by trial counsel:

Q Would you state your name and rank?

A Private

Q Armed Force?

A Marine Corps.

Q Organization?

A Casual Company, H & S Battalion.

Q Do you know the accused, and if so would you state his name?

A Sgt. Matthew McKeon.

Q Were you a member of Platoon 71?

A Yes sir.

Q I am directing your attention to 8 April 1956 that Sunday evening did you go on a night March with that platoon?

A Yes sir.

Q Did you see the accused, Staff Sgt. McKeon, that night?

A During the whole night, sir?

Q On that march?

A Yes sir.

Q What was his position or capacity?

A Pardon me.

Q What was his capacity there at that time?

A That night he was in charge of us.

Q He was your duty drill instructor?

A Yes sir.

Q Now, directing your attention to the time you were in the water what was the deepest that you were ever in that water?

A Over my head, sir.

Q Were you marching along with anybody at that time?

A No sir, I was alone.

Q Would you tell the court and I am drawing attention to the time you went over your head there or just prior, what happened?

A Well, the water got deeper and kind of took me out over my head and I fought my way up to the top and I saw Thompson, Pvt. Thompson, and he kept going under.

Q Was Thompson one of the boys who were lost on that march?

A Yes sir.

Q All right.

A And I didn't know he was in trouble because he didn't call for help, but then he looked like he was in trouble, and I went over to him myself and another man from the platoon and we took him to safety.

Q Was he marching somewhere near to you?

A Well, he was at the time.

Q He was at that time?

A Yes sir.

Q And prior to the time you went under did you see him?

A No sir, I didn't. I wasn't looking for him.

Q But he was the first one you saw when you came up?

A Yes sir.

Q And was he near to where you stepped off or where you went in over your head?

A He might have been 8 or 10 feet.

Q Now prior to this time and while you were in the water did you see Sgt. McKeon?

A In the water?

Q Yes?

A No, I didn't sir.

Q Did you see him any time while you were in the water that night?

A Yes sir.

Q Was this before or after Thompson went down?

A Before.

Q And what was he doing at that time?

A When I saw him he was leading the platoon and everybody was just joking at the time when I saw him.

Q Was it any time prior to the time you went under water? Did you see Sgt. McKeon swimming or floating?

A Yes sir, I believe he was just paddling on his back.

Q Was this in front of the column or in front of the platoon?

A Yes sir, in front of the column.

Q Were you attempting to follow along in the platoon's tracks?

A Yes sir.

Q And at the time when you went under the water were you still attempting to follow along in the platoon's tracks?

A I wasn't in the column. I was just going along. I wasn't trying to. Just going anywhere.

Q Were you following the general direction of the head of the column?

A Yes sir.

Q Did you hear any orders while you were in the water, any orders from Sgt. McKeon?

A No sir.

Q Did you hear any orders from anyone telling you to stay in column?

A Well, I believe that word was passed back to stay close up just as we were getting in the water.

Q Just as you went in the water?

A Yes sir.

Q Did you hear anything else while you were in the water?

A No sir, I didn't.

Q Did Sgt. McKeon ever give you that order personally?

A No sir.

Q Now, when you went on that march were you carrying flashlights?

A No sir.

Q Did you have towels around your neck?

A No sir.

Q Did you ever have any instruction while you were in Boot Camp in swimming with your boots and clothes on?

A No sir.

Q Now, was it after you came up out of the water, I mean after you went over your head that you heard a commotion or shouts?

A I didn't hear the shouting until after we got started to swimming with Thompson.

Q It was after you had gone under the water and grabbed Thompson then you heard the shouting?

A Yes sir.

TC: You may inquire, sir.

#### CROSS-EXAMINATION

Questions by defense counsel:

Q Private Moran, when you came behind the butts, you walked across the bottom ground, and the short grass, is that true?

A Yes.

Q And you came to a small bank?

A Yes sir.

Q You stepped off the small bank about how high was the bank?

A From the bank into the water?

Q Right?

A I believe it was above my knees.

Q Into the water. Did you move along parallel to the bank?

A Yes sir.

Q After you went in what direction did you go, was that to your right?

A To my right.

Q And as you moved along the bank how deep did the water rise on you?

A Well, it didn't go much over my waist. Not while we were along the bank.

Q You walked along parallel to the bank?

A Yes sir.

Q About how far did you walk along parallel to the bank?  
A I couldn't say in feet. It was about three fourths the length of the column.

Q The length of the column of the platoon?

A Yes sir.

Q Which was traveling in a column of two's?

A More or less.

Q How many men were in the platoon?

A I think there was about 75 there.

Q And after you had traveled that distance you made a turn and you started back in the same direction that you had come?

A Yes sir.

Q And how deep was the water at that time?

A Oh, it was about up to my knees.

Q And then at that time you moved away from the platoon somewhere?

A Well, after we passed the point where we had come in, after we passed where we entered we went down past that, then that is why I got all mixed up.

Q Now, you mentioned Pvt. Thompson. Did you go to him when he was in trouble?

A Yes sir.

Q And it was at that time that you were over your head?

A Yes sir.

Q And Pvt. Thompson was where? Where was Pvt. Thompson in relation to you when you noticed that he was in trouble?

A He was between myself and the front of the platoon.

Q And where were you at that time? Were you in the ranks or had you drifted away from the platoon?

A I was out down further. Down past the rest of them.

Q Were you out further towards the center of the creek towards the other side?

A I think so.

Q And about how far away from you was Thompson?

A About 8 or 10 feet, I think.

Q Was this the only platoon you were in in boot camp?

A Pardon me.

Q How many platoons were you in in boot camp?

A I was just in that one.

Q How long had you been in the platoon by the time you were out at the rifle range?

A I think we were on the rifle range about two weeks, but I don't know how long the other fellows was.

Q Do you know how long you had been in prior to the time you had been on the rifle range?

A No sir.

Q Do you know Sgt. McKeon?

A Yes sir.

Q Was Sgt. McKeon one of your drill instructors?

A Yes sir.

Q Was he one of your drill instructors during the entire time up until you were at the rifle range?

A Yes sir.

Q Did Sgt. McKeon spend a good deal of time with you as a member of the platoon?

A Yes sir.

Q And you had an opportunity to observe him?

A Yes sir.

Q Day in and day out, and for many hours during each day?

A Yes sir.

Q Now, in this observation of Sgt. McKeon, and during these many, many hours during each day were you able to observe whether the sergeant was a patient or an impatient man, or whether he was considerate, or whether he applied himself to his tasks as a drill instructor?

A That is right. He was very patient with the men in the platoon. He spent a lot of time with the men that he needed to spend time with, and he was doing things for the ones that could not get along as well as the rest of us. He was trying to help them catch up to the top man in the platoon.

Q Now, after you had graduated from boot camp you went up to Camp Lejeune?

A Yes sir.

Q And you received other training?

A Yes sir.

Q Now in the light of this other training and greater amount of experience which, of course, is a relative thing, you had, as you view Platoon 71 now as it was immediately prior to and on the 8th of April, do you have any opinion as to whether or not it was a disciplined platoon or undisciplined platoon or what?

A Well, it was not a disciplined platoon when we were on this island, but it seemed when we were in Camp Lejuene, and the men from 71 were spread out through a company of about 200 men they seemed to show up very well.

Q However, up to that time they had not been disciplined. How was its spirit, good, fair, or poor? Was there some lack prior to that time?

A Before the accident?

Q Yes?

A There was a lack of spirit, and discipline, also.

DC: Thank you.

TC: Does the Law Officer have any questions?

LO: I have no questions.

TC: Does the court have any questions?

PRESIDENT: The court has a few questions.

#### EXAMINATION BY THE COURT

Questions by member of court:

Q When the major asked if the Thompson you went to help was the one who drowned, you said yes he was, is that correct?

A Yes sir.

Q And then you mentioned that you and another Marine pulled him to safety?

A Yes sir.

Q How do you explain that, that he drowned at a later time?

A Well, sir, we brought him up about up to his waist and then we asked him if he was all right, but he didn't say anything, but we assumed he was all right, and now I imagine he was in shock or

something, and he might have gone back in again thinking it was the way to the shore, but he was all right when we left him.

Q All right, with reference to the direction that you were walking at the time you got in to deep water where was Sgt. McKeon?

A Well, He was at the head of the column.

Q Was that in front of you, to the right of you, back of you or where?

A Well, it was to my right.

Q We understood you to say that you were slightly ahead of and to the right of the column at one time? Is that right?

A I wasn't ahead of the column at any time, sir,

Q You were always behind Sgt. McKeon?

A Yes sir.

PRESIDENT: Very well. Thank you.



CROSS-EXAMINATION (CONT'D)

Questions by defense counsel:

Q Don't you recall saying that when you struck out for Private Thompson you were ahead of and to the right and more toward the middle of the creek than the column?

A Yes, sir.

Q That is what I understood the president to ask you.

A I wasn't ahead of the column. The column had turned and I was ahead of the men in back of me and ahead of the men in front of me.

Q You were ahead of the men in back of you and ahead of the men in front of you? Just take your time and let's unravel this story. You must concede it's a little difficult for us to understand how you were ahead of the men in front of you. Will you try to explain what you mean?

A Sir, the column had just made the movement to the right and had come around and they were going back for the third time.

Q For the third time?

A Yes, sir.

Q What you are telling us, if I understand it -- if I am mistaken you stop me and say that's not what you mean -- understand?

A Yes, sir.

Q You had come to the creek, gone off the bank and gone into the water, and it was a mud bottom?

A Yes, sir.

Q You made a right turn and walked along parallel to the shore for a certain distance; is that correct?

A Yes, sir.

Q And how far away were you from the shore as you walked parallel to it?

A Right next to it.

Q Then you made some kind of a semicircular or hairpin turn; is that correct?

A Yes, sir.

Q Both movements being to the left; is that right?

A Yes, sir.

Q Now, when you got in that position were you going downstream in a course that was substantially parallel to the course you had come along?

A Yes, sir.

Q Was it at that point that you circled out?

A As I understood it, I was walking and coming back again.

Q You were out in front and closing a circle?

A The column went down to the left after they went up to the right, and then I thought it came around back again and circled out again.

DC: That's all.

#### REDIRECT EXAMINATION

Questions by trial counsel:

Q Just one thing. You went over your head before you started swimming for Thompson?

A Yes, sir.

#### RECROSS-EXAMINATION

Questions by defense counsel:

Q When you went over your head it was in connection with going out to help Thompson, wasn't it?

A No, sir.

Q Weren't there other men crying for help at that time?

A No, sir.

Q Did you hear other men crying for help at any time?

A Yes, sir.

Q In any event, whenever it was that you were over your head, you had an idea that the column had swung around so that you were to the right of that column and further out toward the middle of the creek; is that right?

A Yes, sir.

Q Now it could be, of course, that you had wandered off; isn't that so?

A No, I hadn't wandered off.

Q In any event, the column had changed its course or you had changed your course?

A Yes, sir.

#### REDIRECT EXAMINATION

Questions by trial counsel:

Q Didn't you testify, though, that just prior to the time you went under and Thompson went under the column had taken another right turn?

A Yes, sir.

Q And you said the head of the column was to your right?

A Yes, sir.

Q Do you know whether Sergeant McKeon was still leading the column?

A I didn't see him, but he was there.

Q He had been leading the column?

A Yes, sir.

TC: No further questions.

#### RE-CROSS-EXAMINATION

Questions by defense counsel:

Q I thought before you said that the column had turned in order to get back to the place where they had started from. Is that right?

A Yes, sir.

Q That would be to its left, wouldn't it?

A Yes, sir, only it went past --

Q Then would it --

TC: Just a moment --

Q Would it be a right turn if they were closing the circle and getting back to where they had started from?

TC: May the witness complete the answer he was making?

DC: I withdraw the question. Let's put it concretely. Whatever question is before the witness is withdrawn.

LO: I will let the witness answer the question. He had a question before him and you interrupted him when he was answering the question. I will permit him to complete his answer.

DC: I apologize, sir.

WITNESS: Tell me what the question is, sir.

LO: Will you read the question and let the witness continue with his answer, if he desires to continue with it?

REPORTER: "Question: That would be to his left, wouldn't it?"

"Answer: Yes, sir, only it went past -- "

LO: Continue; went past what? What were you trying to say?

WITNESS: Went to the right first after we went in the water, went back to the left, and then we passed the point where we went in and came back around and went to the right again. That's what I did.

Q You came around past the point, going downstream -- you know what downstream is?

A Yes, sir.

Q Going downstream, you say, you passed the point where you had gone into the water; is that right?

A Yes, sir.

Q And then you turned to the right?

A Yes, sir.

Q To get to the point where you had come into the water?

A No, I didn't know anybody was going out from the water. I thought it was just still more of the march.

Q In turning to your right you were going out into the middle of the creek, weren't you?

A Yes, sir.

Q You say that that is what Sergeant McKeon did that night in leading the column?

A I don't know what he did, sir.

Q That is what you did?

A Yes, sir.

#### REDIRECT EXAMINATION

Questions by trial counsel:

Q But you were following the column?

A Yes, sir.

#### RE CROSS EXAMINATION

Questions by defense counsel:

Q At least that's what you thought?

A Yes, sir.

LO: I have no questions.

PRESIDENT: I have one more.

#### EXAMINATION BY THE COURT

Questions by court member:

Q As you were facing downstream you went into this deep water; was that it?

A Yes, sir.

Q And where was Thompson in relation to you when you saw him, downstream from you or upstream?

A Upstream.

Q He was upstream from you?

A Yes, sir.

Q And further out?

A No, sir, he was about the same point offshore.

PRESIDENT: No further questions by the court.

The witness was duly warned, excused and withdrew from the court-room.

LO: Does the president have any desires as to continuing?

PRESIDENT: What are your desires, Major?

TC: I can either proceed, or we can stop and I can start preparing for tomorrow.

LO: What are your wishes, Mr. Berman?

DC: It is now ten minutes of four and I doubt that anything much would be accomplished in ten minutes. I defer to the wishes of the court.

PRESIDENT: I suggest a recess until nine o'clock in the morning.

Court closed at 1550 hours, 24 July 1956.

TC: Counsel so understands, that the offer has been withdrawn.

Q Doctor, referring now to what is Defense Exhibit G for Identification, I believe you were stating that the sole purpose for which you conducted the series of individual objective tests was for the purpose of arriving at some opinion based upon the results of this series of individual objective tests. Is that correct?

A Yes.

Q And did you have a duty to arrive at such an opinion or finding?

A Yes, I had to arrive at an opinion regarding the result of the tests.

Q And in this case did you arrive at any opinion?

A Yes.

Q And did you so state in writing on Defense Exhibit G for Identification your opinion?

A Well, yes, I am sure I wrote it down. I do not recollect specifically what I did write. I do recollect at this time my impression of the man, though.

Q I show you Prosecution Exhibit G for identification so you might refresh your memory.

Counsel for the defense showed the exhibit to the witness.

Q Have you refreshed your memory?

A Yes.

Q What was your finding or opinion placed upon this sheet as a result of the series of objective tests?

TC: I object --

LO: Don't answer the question.

TC: I object to that. He's not asking for an opinion, he's asking for the contents of the writing.

LO: Ask for his opinion.

DC: What is your opinion?

WITNESS: Then my opinion does not have to be expressed as the words are placed on that paper, is that correct?

DC: You are asked to express your opinion.

WITNESS: My opinion was that Sergeant McKeon was not clinically intoxicated, drunk or under the influence of alcohol. However, in view of the fact that -- as carried out by the several tests and questions involved on that form -- in view of the fact that his breath was suggestive of alcohol to me, and a point there which maybe I shouldn't bring out -- there's another question there which hasn't been brought out, which I think probably has a significant answer.

Q What is that?

A One with regard to what the patient has had to drink. That's, of course, a question which I put to the Sergeant.

Q What was it?

A As I recall, to the best of my recollection, he answered, "I had a few drinks or a few shots of vodka this afternoon." In view of the fact -- in view of the finding that I had, namely, odor of alcohol, suggestive odor of alcohol on the Sergeant's breath, and the fact that he admitted having had something to drink, I concluded -- which is a moot question -- he may have possibly been under the influence of alcohol to a sub-clinical degree which no one, of course, can determine. Clinically he was not intoxicated.

TC: Since this document is already Defense Exhibit G for identification, I ask that it be re-submitted as Prosecution Exhibit 28 for identification, and I offer it in evidence.

DC: I object to it on the ground that I previously urged.

LO: I will admit it in evidence on the ground that the witness has been examined concerning it, has been examined concerning sobriety and intoxication, has been examined regarding the Bogen's test, re-examined by trial counsel concerning it and that it should definitely be in evidence to clarify all questions put by defense counsel and by the trial counsel, --

DC: That's --

LO: -- that it is pertinent to the issue involved.

DC: Mr. Law Officer, the records of any kind in my view, and I respectfully submit it to your consideration, are admitted to have probative value. The law deals only with those things which are testified to either as facts or in connection with opinions, opinions held with a reasonable degree of certainty. The law does not deal nor place its verdicts on the whole gamut of possibilities. This kind of evidence is known to the law as speculative and conjectural and it may be well to keep in mind that it is necessary to caution the triers of the facts that no verdict can be laid on evidence which is speculative and conjectural and problematical.

LO: It has been fully explained by the witness in its context. It is admitted. Your major argument -- if you have further argument, Mr. Berman, you may make it.

DC: I only suggest that what I have to say I have said, and I invite your attention to it. There's nothing else I care to add.

LO: I think the record and the status of the record on this point is very, very clear.

TC: I ask the reporter to mark this, since it has been admitted, as Prosecution Exhibit 28.

The above-referred to document was received in evidence as Prosecution Exhibit No. 28.

TC: I offer Prosecution Exhibit No. 28 to the court for their possible inspection, if they so desire.

Trial counsel handed the Exhibit to the members of the court.



TC: Doctor, either in your experience as a Medical Officer, or as a layman, do you know whether or not it's possible that certain persons, or do you know whether or not it's a fact that certain persons may or may not build up a tolerance to the ingestion of alcohol?

WITNESS: Well, in my experience it's a debatable point. I can't speak authoritatively on that. In my own opinion I can't give you a conclusion.

TC: Thank you. You don't feel qualified to give that?

WITNESS: No, I do not.

TC: You may inquire.

DC: I defer to the members of the court while they examine the exhibit. May I proceed, Mr. President? Has the court reviewed the exhibit?

PRES: Yes, sir.

#### RECROSS EXAMINATION

Questions by the defense:

Q Doctor, as I understand it among the other things that you are required to do is to ask someone whether he's had a drink or a few drinks and should you, in your view, get some suggestion of the odor of alcohol you put it down, is that correct?

A Yes.

Q Well, now, what I'm getting at, in this case or any other case, if a man is brought to you under military -- that is, police custody -- and you are asked to run a sobriety test and every test that you run is negative and normal, and your own observations of the man indicate to you that he is normal -- let's take me, for instance, I'm a better specimen in this regard than some others -- every test you run is normal, and every observation that you would make concerning speech or articulateness, coordination, general rapport, orientation of the time and place, all normal, within perfectly normal limits, but if I had told you, "Look, I've had a couple of drinks," and you gathered some suggestion of an odor from my breath, you would have to put down on the form I'm possibly intoxicated?

A No.

Q That's what you did here, isn't it?

A No, not to my knowledge, it certainly isn't the idea I wanted to convey. I just stated my conclusion regarding it.

Q In other words, your conclusion, then and now, in the best opinion you have with the reasonable degree of certainty, is that this man was not intoxicated or under the influence of liquor or anything else on any basis that you could discover, isn't that so?

A Sergeant McKeon was not clinically under the influence of alcohol as far as I could determine.

Q And that is both by testing and by observation, is that correct?

A On my own, yes, that's my testing.

Q Yes. Now, then, go right ahead -- I defer to you, Mr. President.

PRES: You can use it now. We will look at in a minute.

The President of the court handed document to defense counsel.

Q Well, now, he told you that he had had a few drinks. It doesn't seem to appear on here about having a few drinks, but let's assume you recall he told you he had a few drinks.

A I believe it's down at the bottom of the page, if I'm not mistaken.

Q Well, look at it, maybe it is and maybe it isn't. Perhaps you can tell me where you think it is.

Defense counsel showed document to the witness.

Q Well, in any event, -- don't bother about that. I want you to assume he had a few drinks, let's assume he had a few drinks at some point or other, and that as you made this test with a flashlight to see the reaction of his eyes, pupils, to light and accommodation, you thought you received a suggestion of alcohol odor. Now, what I'm asking you is that where the test, clinically, is negative and on the basis of a history of a few drinks, and the suggestion of an odor of alcohol, you have written, "possibly under the influence of alcohol but still is in control of himself." Well, I am asking you, let's take me, would you write the same thing under parallel circumstances?

A If the same thing occurred I would not attempt to be brief in that. I apparently have lost the idea that I wish to convey. I would be more verbose and more specific.

Q Do it now. What is the idea?

A I just have, I think, twice.

Q Tell us again. What is the idea you wish to convey?

A The idea I wish to convey is clinically Sergeant McKeon

was not under the influence of alcohol. He was not drunk, not intoxicated, to any test. Anyway, I could gainfully --

Q That's by examination, observation?

LO: Let him answer.

WITNESS: But in view of the fact he admitted to me having had a few drinks of vodka that afternoon and in view of the fact his breath was suggestive of alcohol to me, I could not say that he wasn't under the influence of alcohol to a sub-clinical degree. If you have one drink of alcohol you are under the influence of alcohol. It may not be clinical or sub -- you can't say whether it's sub-clinical or not, but that's the point I wanted to make.

Q So the point I'm making to you, then, is that since you could not, having a history of a few drinks and a suggestive odor of alcohol, you felt that you were obligated to say, knowing that he had a few drinks, that you could not rule out every possibility, is that correct?

A Yes, to the best of my testing.

Q So that means you would do the same for me under similar circumstances?

A But I would say what I just said on the back of the page --

Q You mean you didn't make your --

A I sacrificed details in order to be brief because that space was limited there.

Q You are certainly pursuing an illusive quest for certainty since you think if a man has a drink or two there is that broad, vague possibility that to some extent he may be under the influence of alcohol, is that correct?

A It's a moot question.

TC: I object, the question is argumenative. The question has been asked and answered three or four times and certainly argu-mentative.

DC: I'm putting it now on a philosophical note. Wouldn't you consider that a pretty --

TC: I object to a philosophical note.

DC: I have nothing else for the doctor.