HOLDINGS OPINIONS AND REVIEWS

BOARD OF REVIEW

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

SOUTH WEST PACIFIC AREA (A)

PACIFIC (P)

VOLUME 1 B.R. (A-P)

CM A 55 - CM A 1142

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OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D. C.

Judge Advocate General's Department

Holdings Opinions and Reviews

B O A R D O F R E V I E W

Branch Office of The Judge Advocate General

SOUTH WEST PACIFIC AREA (A)
PACIFIC (P)

Volume 1 B.R. (A-P)

including

CM A 55 - CM A 1142

(1942-1944)

Office of The Judge Advocate General

Washington : 1946

F O R E W O R D

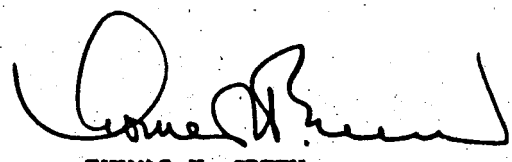
By direction of the President, pursuant to Article of War 50½, the Branch Office of The Judge Advocate General with the United States Army Forces in the South West Pacific Area was established 11 July 1942, and until 25 September 1944 was also empowered to serve the United States Army Forces in the South Pacific Area; on 30 June 1945, this office was redesignated the Branch Office of The Judge Advocate General with United States Army Forces in the Pacific. Concurrently with its establishment, the Secretary of War by direction of the President vested in the Theater Commander confirming authority under Article of War 48 and the powers set forth in Articles of War 49 and 50. From its inception until its inactivation 15 February 1946, Colonel (later Brigadier General) Ernest H. Burt, U.S. Army, was the Assistant Judge Advocate General in charge.

The present collection contains (to the best information available at the time of publication) all the holdings, opinions and reviews of the Board of Review of this Branch Office. There is also included the 1st Indorsement of the Assistant Judge Advocate General in cases where he differed with the Board of Review, in cases of legal insufficiency in whole or in part, or where addressed to the Theater Commander. A note indicating final disposition with GCMO reference appears at the end of cases ordered executed by the Theater Commander. "Short holdings," which find the record of trial legally sufficient to support the findings of guilty and the sentence, without any discussion of the facts or arguments, are not included. In the CONTENTS of each volume, there is indicated, opposite the original A or P number of each case, the CM number allocated to the case in the JAGO when the record of trial was received.

Similar collections of the Board of Review materials are being made for each of the several Branch Offices which operated in overseas theaters. This includes the Branch Offices of The Judge Advocate General which were established to serve the Army Forces in the European Theater of Operations, in the Mediterranean Theater (originally North African Theater) of Operations, in the India-Burma (originally China-Burma-India) Theater, in the South West Pacific Area, in the Pacific Ocean Areas, and the Pacific. An Index and Tables covering these

materials will be added as soon as practicable. The volumes of materials from the foreign Boards of Review will constitute a companion series to the compilation of Holdings, Opinions and Reviews of the Boards of Review sitting in Washington, D.C. Together these will make conveniently accessible the most comprehensive source of research materials on military justice in the zone of the interior and in combat areas.

1 June 1946



THOMAS H. GREEN
Major General
The Judge Advocate General

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WAR DEPARTMENT
Services of Supply
In the Branch Office of The Judge Advocate General
Melbourne, Victoria

November 13, 1942.

Board of Review

CM A 55

UNITED STATES v. Private First Class William H. Wheeler, (36154595), Headquarters Company, 2nd Battalion, 126th Infantry.	Trial by G.C.M., convened at Camp Tambourine, Queensland, Australia, September 13, 1942. Dishonorable discharge, total forfeitures, and confinement for two years. Execution suspended except for forfeiture of $28.50 per month for six months.

HOLDING by the BOARD OF REVIEW
CONNALLY, ROBERTS, and MURPHY
Judge Advocates.

1. The record of trial in the case of the soldier named above, having been examined in the Branch Office of The Judge Advocate General and there found legally insufficient to support the findings of guilty and the sentence, has been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General, Melbourne, Victoria.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private First Class William H. Wheeler, Headquarters Company 2nd Battalion, One Hundred and Twenty Sixth Infantry, did at the Blue Grotto in Adelaide, South Australia on or about July 18, 1942 feloniously take, steal, and carry away lawful money of Australia, value about £120, (or$387.36 in currency of the United States) the property of Private First Class Robert D. Feidler, Headquarters Company, 2nd Battalion, One Hundred and Twenty Sixth Infantry.

Accused pleaded not guilty to, and was found guilty of, the charge and specification. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years. The reviewing authority approved the sentence and suspended its execution except for the forfeiture of $28.50 per month for six months. The sentence was published in General Court-Martial Orders No. 22, Headquarters, 32nd Infantry Division, September 24, 1942.

3. The evidence shows that on Saturday, July 18, 1942, the accused and Corporal Ballard left their camp on pass and went to Adelaide, Australia. Accused borrowed £ 5 from Sergeant Fionda before leaving camp (R. 29). Arriving in Adelaide, they went to the Earl of Aberdeen Hotel and remained there until 4:00 P.M. They then went to Hotel Langham on Gouger Street where Corporal Ballard left accused drinking with a woman. (R. 17). Prior to Corporal Ballard's departure accused asked him where he could find a gambling game. Ballard referred him to "the hotel keeper". (F. Buttery, manager, deposed that no gambling was allowed in the hotel(Pros. Ex. A)). Ballard stated he later returned and found accused still sitting at the table with the same woman. Ballard again left the hotel at 4:45 P.M. and

saw no more of accused until 8:45 P.M. at the Embassy. Accused was then with a different woman, (R. 17); at 9:45 he took her home and rejoined Ballard's party at 10:00 P.M. They remained at the Embassy until 11:00 o'clock, and then went to the Blue Grotto night club, taking a table in a back room (R. 19-53). Sometime between 11 and 12 o'clock, Private Feidler and Sergeants Fionda and Fischer arrived at the Blue Grotto (R. 15-27). These three were all drinking, each paying his share (R. 27). Private Feidler was observed to have a large roll of money in his front trousers' pocket, which he stated amounted to approximately £130 (R. 8). Sergeant Fionda saw this roll of money, and thought it was about £120 "because he was in a crap game when Feidler won it" (R. 28).

Thirty minutes after his arrival, Feidler was drunk and "sleeping on the table" (R. 28). Some military police arrived, so Fionda and another took Feidler to the back room, wherein were Ballard and the accused. About 1:00 A.M. Fionda returned to find Feidler lying on the floor of the kitchen, which adjoined the back room. The accused approached, and he, Fionda, and the cook tried without success to revive Feidler with black coffee (R. 29). Fionda departed, leaving the accused with Feidler (R. 29, 55). The accused was absent from his table on this occasion for twenty or thirty minutes (R. 19, 20). Feidler remembered nothing of events until about 2:00 A.M., when he found himself outside calling a cab. He had no money, and no knowledge of what had become of it, but thought someone had "rolled me for it" (R. 9). He told Private Biksacky of his missing money about 10:30 A.M. Sunday (R. 9).

The accused and Ballard left the night club about 4:00 A.M., and returned to their hotel room. Before retiring the accused placed his wallet under his pillow, remarking that he didn't trust the hotels and would hate to lose his purse (R. 22). At that time Ballard had spent eight of the eleven pounds with which he left camp (R. 21), having paid the hotel bill, admissions to the Embassy, and for other items. The accused had paid for some whiskey and setups (R. 25). The accused and Ballard were together Sunday until 2:00 P.M. At 7:00 P.M. Corporal Foelker met the accused and they ate together, the accused paying. Foelker saw the accused had "quite a bit of money", several five pound notes (R. 36-38). The accused remarked that "Tony" (Feidler) had lost his money (R. 37). After dinner they went to a theater, where Feidler was observed in a balcony (R. 36). Feidler and the accused talked after the show; they returned, with the others, to camp that night on the same train (R. 37).

On Monday morning, June 20, Feidler saw accused display £7 and heard him say that was all he had left from the weekend in Adelaide (R. 10). On July 21, 1942, accused paid Corporal Wyer the equivalent of $25.00, which he had borrowed from him while in camp in Louisiana (Ex. B). On July 20, accused sold a watch to Private Allen for £7 (R. 44); Allen saw approximately £38 in accused's pocket book, which accused stated he won in a poker game in Adelaide. (R. 45). On the same day Private Bowers, at the instigation of Feidler, asked the accused to repay a prior loan of five pounds (R. 40). The accused paid Bowers, who informed Feidler. The latter became suspicious "of the fact that accused acted rather nervous when he saw me watching him" (R. 11). He followed accused to his shelter tent, grabbed some money that the accused was counting, and took it to the first sergeant. It amounted to about £38 (R. 11-14). Accused's tent was then searched and £50 in five pound notes was found buried about ½ to 3 inches deep in the sand under the accused's bed. (Pros. Ex. C). The double shelter tent where this money was found was occupied by accused, Corporal Ballard and two other men. Upon being questioned by Captain Smith accused said he had won £40 playing poker (R. 47). He denied knowledge of the £50 that had been found under his bed (R. 50).

Accused testified under oath that he left the Langham Hotel about 4:20 P.M. July 20, 1942 (R. 52a) and returned about 4:45 or 5:00 P.M. He then went upstairs with two others to play poker. There were three soldiers and two civilians in the game (R. 56). At this sitting he won £13, which with £9 he brought to town, made a total of £22 in his possession that night (R. 56).

He rejoined Corporal Ballard about 8:30 P.M. at the Embassy, but left about 9:30 P.M. "to take his girl home", returning at 10:00 P.M. About 11:30 they went to the Blue Grotto. There they secured a table in a back room (R. 53). Accused saw Sergeants Fionda and Fischer bring Private Feidler to this back room and seat him at a table with two other men from the company. Feidler "passed out" (R. 54), and was taken to the other "back room" adjoining the kitchen (Defense Ex. 1), by these two men who then returned, "picked up their girls and left" (R. 54). Accused left his table and met Sergeant Fionda in the passage way where they found Private Feidler lying on the floor. They picked him up, put him in a chair, and called the cook, who came in with black coffee and ice (R. 54). Feidler would not drink the coffee. The cook "started slapping his face but it did not do any good so they laid him down on the floor and stretched him out" (R. 55). Fionda left to see "how Sergeant Fischer was making out" and accused returned to his table. The cook remained there at all times; three young men who were waiting on tables, waitresses and others passed through this room (R. 55), which constituted the only passage way between the kitchen and the dance hall. When Corporal Ballard returned to the table occupied by himself and accused he remarked that Sergeant Fischer had "passed out" and that he and Fionda put Fischer with Feidler. (R. 55). The next day (Sunday) accused again played poker at the Hotel Langham and won "about £30 or £40 to the good for the two days" (R. 56). He arrived back in camp with approximately £47. On Monday he again gambled and lost £2, but on Tuesday won £5 (R. 57). He had no knowledge of £50 found under his bed (R. 58).

At the conclusion of the accused's testimony the prosecution recalled Captain Blanchard H. Smith, who testified as follows (R. 66-67):

> "Q. I would like to ask you a few more questions as to Wheeler: He has been in your company a long while. First of all, what kind of a soldier has he been?
>
> A. I took my command around the middle of February, and he was mess sergeant at that time, that was prior to moving to Devens. At that time I was new in the company. I called him in several times on small misdemeanours, more-or-less like about preparations, etc. that he made in the kitchen preparatory to our move. Being new there I didn't like to make any changes right then, but after being in Devens his actions made it necessary to break him to a private, due to his inefficiency. Since that time he had complained of physical disability and upon checking with the doctors the doctors said he had nothing there, just more or less a matter of his mind, one would say.
>
> Q. What sort of a service rating would you give him as a private rather than a mess sergeant?
>
> A. As a private his rating would be still unsatisfactory. He is not what you would call a good soldier at all.
>
> Q. Could you give any specific instances where he had not been truthful to you?
>
> A. Well, just a few are repeated. I questioned him about his preparations as to moving in the kitchen, and he says they are all prepared, little things like that, nothing that you could really put your fingers on. He said he would be all prepared and there would be stages of unpreparedness there, which shows he was just saying he was prepared whereas he wasn't. In the kitchen at Devens he would tell me they would do things, and I would walk into the mess hall or kitchen and find them undone.
>
> Q. In other words, you think his word isn't very good?
>
> A. As far as I am concerned, I couldn't take his word.

Q. You say you have been in since February, that is about eight months' experience?

A. He was transferred from my company to Headquarters, 2nd Battalion approximately one month ago.

Q. Then approximately seven months. Why was he transferred?

A. They needed a cook, Headquarters Company, and the Commanding Officer asked for him.

Q. But you made no objections to letting him go?

A. No objections, no, sir."

In his prior testimony the same witness had stated (R. 48):

" I knew that he continuously borrowed money from the other men in the company and was usually broke; other times money was missing under suspicious circumstances * * * ". [Interrupted by defense objection which was sustained]

4. It is well established that all of the elements of an offense, including the corpus delicti, may be proved by circumstantial evidence (16 Corpus Juris 766). It is equally well established that mere conjecture, or suspicion, does not warrant conviction (id at 779). "Where the only competent evidence is circumstantial, it must, in order to be sufficient to support conviction, be of such nature as to exclude every reasonable hypothesis except that of accused's guilt." (Dig. Op. JAG, 1912-1940, sec. 395(9)).

The evidence indicates that a sum of money left the possession of the complainant while his mental and physical faculties were so impaired from alcohol as, in all probability, to preclude his own willful or negligent disposition. The evidence further indicates that the accused assumed to protect the complainant and thereafter the accused's financial status was noticeably improved. From these circumstances it is possible to infer that money was stolen from the complainant by the accused. Weighed against the accused's sworn explanation of the money in his possession, including his disclaimer of the fifty pounds found under his bed, and considering the possibility that the complainant dispossessed himself, and the opportunities to others of taking the money, the inference of guilt, even if legally sufficient to support the finding, is not of such strength as to command conviction. However, in the opinion of the Board of Review, it is unnecessary precisely to determine the legal sufficiency of the competent evidence; the numerous errors and irregularities apparent in the record vitiate the proceedings.

5. Paragraph 112b, Manual for Courts-Martial, 1928, states:

"A fundamental rule is that the prosecution may not evidence the doing of an act by showing the accused's bad moral character or former misdeeds as a basis for an inference of guilt. This forbids any reference to his bad character in any form, either by general repute or by personal opinions of individuals who know him, and any reference in the evidence to former specific offenses or other acts of misconduct, whether he has or has not ever been tried and convicted of their commission.

"There are certain exceptions to this rule, among them the following:

"The accused may introduce evidence of his own good character, including evidence of his military record and standing in order to show the probability of his innocence, and if he does so the prosectuion may introduce evidence in rebuttal.

"If the accused takes the stand as a witness, his reputation for truth and veracity may be shown * * * ".

In cross-examination of Sergeant Foelker, a witness for the prosecution, the defense asked (R. 38):

"Do you know if the defendant has ever been in trouble before?",

to which the witness replied:

"No, sir, I don't believe so."

The prosecution thereafter pursued the same tactics (R. 46), culminating in the remarks of Captain Smith, heretofore set out (supra, par. 3, p.3,4). It probably was the theory of the prosecution that the defendant, through his cross-examination of Sergeant Foelker, had put his general character, and military record and standing, in issue. Certainly the question was broad in its implications; "trouble" might include many events in a soldier's life, personal and official, that bear upon both character and military efficiency. Aware of such possibilities, the defense opened the inquiry and cannot later complain of evidence rebutting the favorable impression first created. Accordingly, so much of the testimony of Captain Smith as bears upon the general character and military efficiency of the accused was competent and properly admitted in evidence.

6. Where impeachment of a witness, including an accused, is undertaken on the ground of general lack of veracity, the evidence must be limited to his general reputation for truth and veracity in the community.

"* * * Personal opinion as to character is not admissible, except that a witness may, after testifying that he knows the reputation of the person in question as to truth and veracity in the community in which he resides or pursues his ordinary profession or business, and that such reputation is bad, be further asked whether or not from his knowledge of such reputation he would believe the person in question on oath * * * ". (M.C.M., 1928, par. 124b).

The prosecution directly contravened this rule in asking Captain Smith, "Could you give any specific instances where he had not been truthful to you?", and "* * * you think his word isn't very good?". The answers thereto by his former commanding officer greatly diminished the accused's credibility; they were calculated to, and must have, influenced the court to reject the accused's testimony. Other testimony of this and several different witnesses to the effect that the accused was continuously borrowing money, and was "broke" (R. 33, 36, 37, 41, 48, 50), further evince the intention of the prosecution to bolster its case through reference to personal habits and traits of the accused.

Additional instances of improper action on the part of the prosecution are to be found in the remarks of the officer cross-examining the accused:

"Q. You didn't tell her that you had 116 Pounds there?

A. I didn't have it - I had about 22 pounds.

Q. That seemed to be the idea of Miss Childs. She told one of the other boys of it later * * * " [interrupted by defense objection which was sustained (R. 62)] * * *

Q. Corporal Foelker testified that you told him before the show, while you were down eating, and now you are denying that like you are denying everything else?" (R. 64).

7. The effect of these errors can best be judged in the light of decided cases (Dig. Ops. JAG, 1912-1940, sec. 395(7)):

> "Upon trial for an offense resulting from unnatural practice the evidence was conflicting and while sufficient to support the court's findings of guilty was not of such strength as to command conviction. Testimony indicating accused's previous participation in a theft was improperly admitted, and on argument the trial judge advocate, who was also the accuser, accused's company commander, and a witness for the prosecution, erroneously related to the court, most of whose members were junior to him, alleged occurrences not in evidence reflecting on accused's character and discipline, asserted accused's bad character, and urged his conviction as a means of ridding the organization of him. The erroneous testimony and argument of the trial judge advocate in view of the circumstances, was prejudicial; and the record was held not legally sufficient to supporting the findings of guilty. C.M. 182775 (1928)."
>
> * * *
>
> "Where upon trial for housebreaking and larceny (A.W. 93) the admissible evidence, although circumstantial, could have supported a valid conviction but was far from compelling and the court made numerous errors in the admission of evidence and otherwise, it was held, that in view of the nature of the proof nothing unfair to accused should have been received in evidence and that the testimony as to other offenses, suspicion, and inadmissible matters so received may have influenced the court to find accused guilty. The several errors were held to have prejudiced the substantial rights of accused. C.M. 210404 (1938)."

In the opinion of the Board, these precedents are controlling in the instant case. The evidence is not of such quantity or quality as practically to compel a conviction. The admission therefore, of substantial illegal evidence, and the improper actions of the prosecution, could not but have injuriously affected the substantial rights of the accused.

8. For the reasons stated the Board of Review holds that the record is legally insufficient to support the findings and sentence.

William Tennyson, Jr., Judge Advocate.
Lt. Colonel, J.A.G.D.

Harlan J. Colwell, Judge Advocate.
Lt. Colonel, J.A.G.D.

James O'Murphey, Judge Advocate.
Major, J.A.G.D.

WAR DEPARTMENT

SERVICES OF SUPPLY

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

MELBOURNE, VICTORIA

A.P.O. 924,
13 November, 1942.

SUBJECT: Record of trial by general court-martial of Private First Class William H. Wheeler, Headquarters Company, 2nd Battalion, 126th Infantry.

TO: Commander-in-Chief, Southwest Pacific Area.

Inclosed is the record of trial described above and the holding of the Board of Review in this office that the record of trial is legally insufficient to support the findings and sentence. I concur in that holding and recommend that the findings and sentence be vacated.

A form of action effectuating this recommendation is inclosed for your convenience in the event that you concur in the action recommended.

ERNEST H. BURT,
Colonel, J.A.G.D.,
Assistant Judge Advocate General.

4 Incls:
Incl. 1- Action Sheet,
Incl. 2-Draft of G.C.M.O.
Incl. 3- Holding of Board of Review.
Incl. 4- Record of trial (2 vol's).

(Findings and sentence vacated. GCMO 2, USAFSWPA, 19 Nov 1942)

WAR DEPARTMENT
Services of Supply
In the Branch Office of The Judge Advocate General
Melbourne, Victoria

Board of Review 26 October, 1942.

CM 73

UNITED STATES v. Private Edward J. Leonski, (32007434) Headquarters Company, 52nd Signal Battalion.	)))))))	Trial by G.C.M., convened at Melbourne, Victoria, Australia, 10 June, 1942. To be hang by the neck until dead.

HOLDING by the BOARD OF REVIEW
RONEY, CONNALLY, and MURPHY,
Judge Advocates

1. The Board of Review has examined the record of trial in the case of the soldier named above and submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria.

2. The accused was tried upon the following charge and specifications:

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private Edward J. Leonski, 32007434, Headquarters Company, 52nd Signal Battalion, did, at Melbourne, Victoria, on or about May 18, 1942, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Gladys Lilian Hosking, a human being, by strangling her with his hands.

Specification 2: In that Private Edward J. Leonski, 32007434, Headquarters Company, 52nd Signal Battalion, did, at Melbourne, Victoria, on or about May 9, 1942, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Pauline Buchan Thompson, a human being, by strangling her with his hands.

Specification 3: In that Private Edward J. Leonski, 32007434, Headquarters Company, 52nd Signal Battalion, did, at Melbourne, Victoria, on or about May 3, 1942, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Ivy Violet McLeod, a human being, by strangling her with his hands.

3. Following the arraignment, and before pleading to the general issue, defense counsel, quoting from an "official finding of the court of inquiry appointed by the commanding officer at Camp Pell" to inquire into the death of Gladys Lilian Hosking, in which doubt was expressed as to the sanity of the accused, asked that the procedure of paragraph 35c, Manual for Courts-Martial, be followed and "that a commission of medical officers be appointed to report as to the mental condition of the accused". The motion was granted (R. 8), and the court remained adjourned from June 10 to July 13, 1942. Upon reconvening, members of the medical board testified (R. 10-16) as to their appointment and their examination of the accused, the board's conclusion being that the accused was sane at the time of examination (R. 11) and on the dates the crimes were allegedly committed (R. 12). In accordance with defense requests, further consideration of the full sanity issue was postponed, whereupon the court ruled tentatively that the accused was not then, nor at the times of the crimes, suffering from any mental disease or defect (R. 17).

The accused then pleaded not guilty to the charge and each specification. After denying motions for findings of not guilty of each specification (R. 304-309), the court found the accused guilty of all specifications and of the charge and sentenced him to be hanged by the neck until dead. This sentence was approved, and confirmed, and the record of trial forwarded for action under the provisions of Article of War 50½.

4. The evidence for the prosecution consists in general of testimony and exhibits establishing the corpus delicti of each of the crimes alleged, and tending in some circumstances to connect the accused therewith, together with incriminating admissions and confessions of the accused. This evidence has been extracted and marshalled according to the crime to which it pertains. For convenience and clarity it will be presented separately for each specification, subjoined by the Board of Review's conclusions as to its legal sufficiency. Included within the general issue of each specification but so interrelated as to be applicable to all, are matters involving the admissibility of the accused's confessions, and his mental condition. Consideration thereof has been saved from the initial conclusions as to each specification, subsequent independant treatment being accorded the two questions.

5. Evidence as to Specification 1 may be restated as follows:

Gladys Lilian Hosking, 35-40 years of age, was employed in the Chemistry School, University of Melbourne (R. 28). Shortly after 6:30 P.M., May 18, 1942, she left her place of employment and walked toward Royal Parade, otherwise known as Sydney Road (R. 29-30). Miss Hosking resided at "Marembe", located at 140 Park Street, close to the intersection of Royal Parade, or Sydney Road, and Gatehouse Street (R. 27, 29, 31). This neighbourhood, more particularly shown on a map prepared to scale by H.N. Shea, licensed surveyor (Pros. Ex. 1, R. 31), is bounded on the west of Gatehouse Street by Royal Park, wherein, along the northern portion, is located Camp Pell. There are no residences or walks on that side of Gatehouse Street adjoining the Park, but a grassy stretch runs parallel to the street, and is separated from the Park proper by an iron fence with a single bar three feet above the ground (R. 31-32). Some fifty feet within the Park, a series of slit trenches have been prepared, which extend intermittently along Gatehouse Street for several blocks.

About 7:00 A.M., May 19, 1942, Albert Edward Whiteway, a butcher, while driving a horse drawn vehicle north on Gatehouse Street, noticed an open umbrella on the grassy stretch West of the street. Further observation disclosed a body lying in the soil that had been removed from a slit trench, approximately fifteen yards inside the fence. Whiteway summoned an Australian soldier, Private Donald Wallace McLeod, whom he directed to call the police (R. 37). The body was found to be that of a woman; it was lying face down with the buttocks and thighs bare. Yellow clay was smeared over the body and clothing (R. 38, 38b). Near the open umbrella were a pair of gloves, a black velvet hat, and two magazines. Detective Sergeant Sidney H. McGuffie, Melbourne Police, examined the body about 8:00 A.M. (R. 64), which he described as lying on its face. "The stockings and shoes were on. The skirt was pulled up around the waist. The other garments had been pulled down from the neck. The blouse had been torn off and her underskirt was pulled down from the shoulders. Her overcoat was lying near the body". (R. 65). This witness identified certain apparel and effects found on the body, or in the vicinity (Pros. Ex. 8-26, R. 65-70) and stated that photographs made by Police Photographer Arthur C. De La Rue of the body (Pros. Ex. 2-4, R. 63) and effects (Pros. Ex. 5-7, R. 63) correctly portrayed conditions at the scene of discovery (R. 66, 68a, 69).

Detective George W. Murray, Victorian Police (R. 103) removed the body to the morgue, where it was identified by John Gray (R. 27-28) as that of Gladys Lilian Hosking, whom he had known for five years. Post-mortem examination was made by Dr. Crawford H. Mollison (R. 34-37), who found "the body was that of a youngish looking woman, five feet in height; it was slightly

built, the clothes were pulled down from the shoulders and up from the legs, so that the breasts and genitals were exposed, and were twisted around the middle of the body. The face and body were coated with yellow mud, the stockings were covered with mud, the shoes were on the feet, the body was rigid and there was post-mortem straining of the back of the neck and shoulders. Blood had been coming from the right nostril, the tongue was between the teeth, the face was livid, the eyes prominent, and the hands and fingers were stained with mud. The heart contained dark fluid blood and there was slight atheroma of the aorta, otherwise it was normal. On reflecting the skin of the neck marked bruising was found on the left side of the thyroid cartilage of the larynx, there was also bruising in the front and on the right side below the hyoid bone, which was not fractured. There was marked haemorrhage inside the larynx and bloody mucus in the windpipe, also small haemorrhages on the epiglottis; the lungs were very congested. The liver was congested * * * The kidneys * * * were congested. There was a small piece of yellow mud inside the vagina; some of the whitish secretion at the top of the vagina was examined for spertamatozoa without result. The skull did not show any injury; there was a small bruise in the scalp on the top of the head. The brain was congested." (R. 34-35). "Death was due to strangulation (throttling) * * * by pressure on the throat * * * " (R. 37).

From mid-day until about 6:15 P.M., May 18, 1942, the accused, Private Edward J. Leonski, was in the lounge of the Parkville Hotel, Royal Parade and Morrah Street (see Pros. Ex. 1) drinking with the manager, Arthur Fry (R. 39), and one Rupert Burns. Fry noticed the accused and Burns leave together about 6:10 P.M.; he had not observed the accused closely after 5:15 P.M. but at that time thought him sober. The accused had been a customer of this lounge for some two weeks where he had been observed to mix drinks and to walk on his hands after drinking (R. 42). Herbert A. Everett, the barman of this lounge, knew the accused as a customer and served him drinks on the afternoon of May 18th. He estimated the accused drank 25 beers up to 5:30 P.M., and thereafter 5 whiskeys of ordinary one-ounce size (R. 46-47). Burns came in about 1:00 P.M., on this date, and drank only beer, and in less quantity than the accused. Burns was "quite merry at 6:15 P.M." (R. 45). The accused was not boisterous or rowdy and did not appear drunk (R. 45). He was dressed in uniform with a "short storm jacket," and a cloth cap without a visor (R. 44).

Rupert J.P. Burns, driver of a milk cart, states he left the hotel about 6:30 P.M., with the accused, whom he took to the Burns family residence at 71 Royal Parade, about 100 yards distant (R. 51). He had observed the accused before but became acquainted only that afternoon; they had planned to attend a movie that night. Since the accused had already "had sandwiches and a tin of peaches in the hotel" (R. 51), Burns left him in his bedroom while he went for supper; when he returned 20 minutes later, or about 7:10 P.M., the accused had departed. The accused "was not what you call real drunk. He was as happy as I was". (R. 52). "He had a light khaki suit on and a field jacket"; also a shirt, tie, and light overseas cap (R. 50).

About 7:00 P.M., May 18, Private Francis L. Hanson, 301st Coast Artillery, was walking down Sydney Road towards Gatehouse Street (R. 54a), when he observed a man and woman walking north on Sydney Road (R. 54d). About in the center of this intersection he spoke to the man (R. 54c). It was a stormy night, but there was a light close by. The woman appeared about 5 feet in height and looked young; she wore dark clothes and a dark coat. The man was dressed in American uniform, woolen O.D. trousers, a raincoat and an overseas cap with what looked to be purple piping (R. 54a). He was about five feet nine inches, well built, and "was carrying himself proud and did not slush himself like most of us do". (R. 54b). He carried an umbrella in his left hand (R. 54a), which covered himself and the woman (R. 54c). This witness a few days later at the morgue identified the body of the woman he thus described (R. 54a, 54c). Neither in a line-up during the investigation, nor in the court room, could he identify the man. "I saw this man, the accused. He has the build and the nose but has not the voice and he is lighter

than the complexion that I have in mind of the man I saw with the woman." (R. 54b). The man spoke "very broken English" (R. 55).

Private Malcolm R. Walsh, Military Police Company, Camp Pell, on the night of May 18, 1942, was guarding a line of trucks that were parked on the West side of Gatehouse Street, adjacent to Royal Park. He observed a woman and an American soldier walking together; they were crossing Gatehouse Street going in the direction of the Park. "After I had seen him, I went back along the line of trucks, where I saw an Australian Corporal and asked him what time it was. He said "8:15" (R. 62). The woman wore a dark coat and carried an umbrella. The soldier was about six feet in height; of medium build, and wore O.D. trousers and a field jacket (R. 61). "I do not think I would be able to /identify the soldier/; I did not see his face" (R. 67). The couple was in Gatehouse Street, "As far down as where the slit trenches were". (R. 62).

Private Noel Seymour, 33rd Infantry Training Battalion, Australian Imperial Forces, was on picket duty, guarding the trucks parked on Gatehouse Street, from 3:00 to 11:00 P.M., May 18, 1942. About 9:00 P.M. ("If I gave a time I would only be guessing * * * I said about 9, I was not sure. I don't carry a clock". (R. 96)) he was standing on the grass between the road and the fence when a person came from underneath the fence into Gatehouse Street, about 200 yards distant from the intersection with Royal Parade. "He passed in between the trucks, and I went around and shone my torch on him. I put it on his face. I recognized him as an American, and he was covered in mud * * * I could not describe him, as he was covered in much mud, and I do not know much about the uniforms and what the type is, but he wore one of those forage caps like our Air Force caps." (R. 93). He was covered with yellow mud "All down his front - what I could see. It was on his tie as well * * * It was right down to his feet." (R. 94). "First of all, he said to me 'Where do I catch a tram to Royal Park? I said 'Where in the hell have you been?' He said 'I fell over in a pool of mud going across the park'. Then he said 'My girl is nice. I thought I could drink, but she drank me under'. I then said 'Do you live in Camp Pell?' He said, 'Yes, over in the street near the Zoo, in Area 1.' I then directed him where to go from where he came across the park"(R. 94). The witness pointed out the accused in court as this man he described, stating he definitely identified him as he had likewise done on two prior occasions during the investigation at Camp Pell (R. 93, 94a, 95).

Private Marcel A. Jasinski, Company B, 52nd Signal Battalion, was in the latrine, located diagonally off Leonard Street, in Area 1, Camp Pell, on May 18, 1942. About 8:30 P.M. (R. 56) the accused, Leonski, entered. "Well, this chap came in, and he was all covered with mud from his chest down. It was loose mud, and a sort of a yellowish clay, and I remember distinctly that he had an extra heavy blob which seemed to be fastened on his left knee - yellow clay * * * He came in and I said to him 'Where the hell have you been?' He said 'I fell in the mud coming in.' I said 'Well, you ought to go in and shower off before it gets hard.' He said, 'No, I feel tired and I am going to bed.' With that he sort of turned round and went out."(R. 57). The accused did not use the toilet facilities. He did not stagger but seemed to have been drinking and spoke very slowly, "As if in a sort of daze." He was dressed in an O.D. field jacket and a pair of O.D. trousers. No blood was observed on his clothing (R. 59). About 9:00 or 9:15 P.M., May 18, 1942, Private First Class Pat. J. Forino, 52nd Signal Battalion, entered the tent which he, the accused, and two others occupied in Camp Pell. The accused was asleep on his cot, lying on his back with his shoulders and chest bare. It being cold, Forino covered the accused; at the time he smelled alcohol on the accused's breath and thought him drunk (R. 101). He did not observe the accused's clothing at that time; but on the following day noticed that a pair of accused's shoes were wet, and had yellow clay on the soles.

On May 20, 1942, Detective Sergeant McGuffie examined a tent and cot at Camp Pell, which the accused later acknowledged he occupied (R. 71). He

observed that the cot (R. 72), had two yellow mud stains on the angle iron (shown in photograph, Pros. Ex. 27, R. 72). On the outside right flap of the tent, there was an area fairly heavily stained with yellow mud; on the roof of the tent immediately above the cot there were similar yellow mud stains. A bed comforter also revealed yellow mud stains (Pros. Ex. 28, R. 73). The police then took possession of certain clothing and effects, each of which the accused identified as his property (Pros. Ex. 29, R. 74, field jacket; Pros. Ex. 30, R. 74, shoes; Pros. Ex. 31, R. 74, bath towel stained with yellow mud (R. 77); Pros. Ex. 32, R. 75, overseas cap; Pros. Ex. 33, R. 75, O.D. trousers; Pros. Ex. 34, R. 75, sun tan trousers; Pros. Ex. 35, R. 75a, under-shirt; Pros. Ex. 36, R. 75a, scrubbing brush; Pros. Ex.37, R. 75a, drawers; Pros. Ex. 38, R. 75b, bundle of papers, stained with yellow mud). On May 21, 1942, the accused was interviewed by Detective McGuffie as to these articles and as to his activities on May 18, 1942. The field jacket, shoes, cap, under-shirt, and O.D. trousers were wet; the accused stated he washed them on Tuesday (May 19), because the jacket, trousers and shoes were muddy, the others normally dirty (R. 77). When questioned as to the yellow mud the accused said he got it around camp, and mentioned the kitchen area, but was unable to point out the place; finally he said he must have fallen while coming in from Leonard Street (R. 77). He accused Private Carlson of being responsible for the mud on the bed, comforter, and tent, saying Carlson was drunk and muddy the preceding Sunday, and laid on the bed. (A defense witness, Private Julian T. W. Tiller, later tends to confirm this statement, testifying that about May 15th he saw Carlson muddy the accused's quilt; however "It was dark mud like it was in front of the tent there." (R. 313-314). In rebuttal Private Moncrief recalled helping the accused move the drunken Carlson from the accused's bed to another; Carlson's feet were muddy, so they had placed a shelter half under them (R. 352-353)).

The accused related to Sergeant McGuffie that he was drinking in the Parkville Hotel on May 18th, and told of visiting at the home of Burns, which he later pointed out to the officers. When shown the place where Miss Hosking's body was found he stated he did not remember being there, that when he drank he often did not recall where he had been. He said he was "feeling good" the night of May 18th, that he went to bed "about quarter to eight" (R. 79,80). After some further conversation as to his responsibility for his acts Detective McGuffie warned the accused of his rights (R. 78), but elicited no further statement from him.

Second Lieutenant Walter W. Blandin, 52nd Signal Battalion, was present at Camp Pell when photographs were made of the yellow mud stains on the roof and flap of the accused's tent, as well as a photograph of the tent area (Pros. Ex. 27, 39, 40, R. 109, 110). On the morning of May 20th, this witness noticed a field jacket and a pair of O.D. trousers hanging on a line running from the tent of the accused. Both articles were wet. The trousers were marked "Leonski, Headquarters, 52", and were identified as the same trousers as those before the court (Pros. Ex. 33, R. 110). He observed that the area around the tent camp was muddy at that time; around the accused's tent the mud was dark, but at one place in the company street there was observable a little yellow clay.

Charles A. Taylor, medico-legal chemist for Victoria (R. 113-114), on May 20th, 1942, went to the scene of discovery of the Hosking body, where he took a sample of soil which apparently had been dug from an air raid trench. In that area there was black top-soil six inches deep (Pros. Ex. 41, R. 115), a dark chocolate sub-soil of eighteen inches (Pros. Ex. 42, R. 115), followed by a mustard yellow strata (Pros. Ex. 41, R. 115). The excavators of the trench had thrown this yellow clay over the soil first removed, and the rain spread it evenly over an area approximately four by three yards. The witness had examined the Hosking clothing, and effects (Pros. Ex. 8-20) and removed from the coat and skirt yellow caked mud (Pros. Ex. 44, 45, R. 116). He also had viewed the cot, tent roof and flap, and clothing and effects of the accused which bore yellow mud stains. From the cot a sample of the mud was removed (Pros. Ex. 46, R. 117). From the shoes of the accused (Pros. Ex. 30) yellow mud was found on the soles, in the

eyelets, along the stitching, and inside the tongue, which had remained after washing. Microscopic comparison of the clay from the shoes, cot, tent, and that from the situs of the body showed similarity of color and constitution (R. 118), including the sand and ironstone impurities (Pros. Ex. 47, R. 118). Chemical analysis gave like results. Moistening of mud from the comforter produced the same mustard yellow color (Pros. Ex. 48, R. 110). "There is a curious thing about the mud, the smear, the color I call mustard yellow, but when the mud dries it is several shades darker than the actual appearance of the mud, but if you wet it and smear it across a surface you get that brighter yellow shade." (R. 117). On May 20th, 1942, a wet field jacket (Pros. Ex. 29) and a wet pair of trousers (Pros. Ex. 33) had been examined. The wet field jacket revealed "a faint stain of yellow on the left sleeve near the opening.* * * This yellow clay shows up more clearly when it is wet because the khaki fabric goes darker and the yellow stands out rather better against it," (R. 119). The trousers were practically free from yellow clay, but among the loose cotton fibres inside the pocket were found a few grains of sand and ironstone ressembling those from the samples of clay. A cardboard Turf cigarette packet, a water bottle, and a Melbourne Herald newspaper, dated May 18th, likewise were found to bear mustard yellow stains similar to that produced by the clay in question. This yellow strata underlies Royal Park at varying depths, but does not appear on the surface unless it has been dug up. "The mud at the scene of the crime was an even layer at least 4 feet by 3 feet over a sloping bank of that bright mustard yellow. The other areas that I examined a pipe had been put in. It was 20 yards in length and two or three yards wide, a passage, showing dark brown, light brown, cocoa colored and yellow spots of mud. In no place was there a surface layer more than two feet wide of that particular mud." (R. 121). Near a latrine such mud had been dug out but in smaller quantities. "The surface soil at the scene of the crime was one even sheet of that yellow muck, that mustard yellow mud, but the soil near the latrine was what I would call a patchwork quilt, a bit of black, a bit of dark brown, some gray, some yellow, and all in a piece a little bigger than your fist, but a little yellow outcrops near the post where it had been piled up. The soil was a mixture of at least three and probably five layers, but the yellow mud at the scene of the crime continual rain had washed it over like a coating of paint and it was evenly yellow * * * although I say there was small patches of this yellow mud near the latrine you could not get an even yellow staining like on the coat and shirt without getting patches of black and brown and gray in it." (R. 124). The clothes of the deceased contained no such colored patches, nor in the opinion of this witness, could the mud on the clothing of the accused have been obtained from this latrine area.

Detective Frederick J. Adam (R. 266), First Lieutenant William W. Johnson (R. 271), Captain Wayne C. Bailey (R. 269), and Captain Clyde E. Servis (R.261) testified to a confession made by the accused on May 22, 1942, which was reduced to writing by Captain Servis, and sworn to and subscribed by the accused before Captain Bailey (Pros. Ex. 85, R. 271). Therein the accused related:

> "On Monday night, 18th May 1942, I was drinking beer in the Parkville Hotel. When the pub closed I went to the home of a friend with him, and I lay on the bed for about 30 minutes. Then I got up and went out. I walked up the street. On the corner I met a girl. It was a small girl. She had on a dark coat. She was carrying an umbrella. It was raining and I asked her to let me walk along with her. She said "Alright". We walked along the street. We came to her house. I asked her to walk on with me and show me the way to the camp. She said "Alright". We came to a very dark part of the street. She stopped and said "There's the camp over there." She had a lovely voice. I wanted that voice. She was leaving to go to her house and I did not want her to go. I grabbed her by the throat. I choked her. I choked her. She didn't even make a sound. She was so soft. I thought "What have I done". "I will have to get her away from here." I then got her to a fence. I pushed her under-

neath. I got over and pulled her by the armpits underneath it. I carried her a short distance and fell in the mud. She made funny noises, a sort of a gurgling sound. I thought I must stop that sound, so I tried to pull her dress over her face. I became frightened and started to run away. Then I met a soldier. He asked me where I was going, I told him "Royal Park". He said "Where do you live?" I said "Area 1, near the zoo." He said "Go this way." I walked a long time and after a while I came to my latrine and walked in and some soldier asked me "Where have you been?" I told him I had fallen in the mud. I then went to my tent. I took my muddy clothes off and got in to bed. The next morning I awoke and saw the muddy clothes. I thought to myself "My God, Where have I been?" "What have I done. I then got up and washed the muddy clothes."

6. The foregoing evidence conclusively proves that the deceased came to her death at the time and place alleged. That she died, not from natural causes, but from strangling, resulting from pressure on the throat, is undisputed. The sex and stature of the deceased, the conditions obtaining at the scene of discovery, and the nature of the injuries inflicted, indicate the commission of an unlawful homicide. Such evidence sufficiently proves the corpus delicti to permit the introduction, if otherwise competent, of the accused's confession (M.C.M. Par. 114; Dig. Ops. JAG, 1912-1940, sec. 395 (11)). There is, moreover, substantial evidence aliunde the confession tending to connect the accused with the crime. He left the house at 71 Royal Parade, so far as it can be ascertained, shortly before 7:00 P.M.; the deceased was in the immediate vicinity at that time, enroute to her home. A woman meeting the deceased's description and an American soldier were seen under an umbrella about 7:00 P.M.; they were then in the intersection some two blocks from the residence the accused had left, and some one hundred feet from the residence of the deceased. This witness does not identify the accused, but later saw the body of the same woman at the morgue, which though not otherwise shown, was probably that of the deceased. Another American soldier saw a woman and a soldier with an umbrella somewhere between the intersection described by the preceding witness and the scene of discovery of the body. By hearsay he fixed the time as 8:15 P.M. The accused is not recognized by this witness, but the woman's height and clothing conform to those of the deceased. An Australian soldier positively identifies the accused as the soldier whom he saw in the general vicinity described by the two prior witnesses; the accused emerged from the Park near the place where the body was later discovered. The time was "guessed" as 9:00 P.M. The accused was then covered with yellow mud; and was directed to his camp where an acquaintance saw him in the latrine at 8:30 P.M. and also remarked the yellow mud that covered his field jacket and O.D. trousers. About 9:00 P.M. he was found asleep on his cot in his assigned tent. Two days later an officer saw the accused's wet O.D. trousers and field jacket hanging on a line; on the same day a detective observed yellow mud stains on the accused's cot, bed comforter, the tent roof over the cot, and the flap of the tent entrance. An expert chemist examined the soil where the body was found, the clay from the clothing of the deceased, the shoes, field jacket and O.D. trousers of the accused, and the stains on his cot, tent and other articles, and pronounced them similar in color and constitution. From the testimony of this expert, the logical inference is that the yellow mud on the clothing of the deceased and the accused could have come only from the slit trenches near one of which the deceased's body was found.

This evidence, if not sufficient alone to connect the accused with the crime, serves to amplify, interpret, and corroborate his formal statement of his own activities. Nor is there reason to question the correctness of the confession. He spoke slowly (R. 268), and hesitated at times as though thinking (R. 288); to his hearers he gave an impression of truthfulness (R. 281). When the manuscript was read back to him he made a correction (R. 26), and when he had signed he remarked "That is my life." (R. 285). There remains no reasonable doubt but that the accused committed the homicide.

There is considerable evidence as to the amount of alcohol consumed by the accused on the preceding afternoon. Estimates indicate 25-30 glasses of beer, followed by five one-ounce whiskeys. However, the accused had acquired a reputation for his drinking ability, so that this quantity, taken over a period of five hours, does not appear unduly to have affected him. His companion says they were not drunk, as do the bar attendants. The accused recalled his actions, even to the extent of taking the police authorities back to the residence he had visited. Disregarding for the moment the conclusion of the medical board on this issue, there is not sufficient evidence to induce belief that the accused was so drunk as to be unable to entertain the quality of malice inherent in murder.

Assuming, subject to later consideration, that the confession was competent, and that the accused was mentally responsible for his acts on May 18, 1942, it is then the opinion of the Board of Review that with respect to Specification 1 the motion of the defense for a finding of not guilty was properly denied, and the record is legally sufficient to support the finding of guilty.

7. The evidence pertaining to Specification 2 consists of the following:

Constable Leslie K. Thompson, stationed at Bendigo, last saw his wife Pauline Buchan Thompson, alive about 5:40 P.M., May 8, 1942, at the Spencer Street Railway Station, Melbourne (R. 129). She had come to the station to bid goodbye to her husband and adopted son who were returning to Bendigo. The couple had been married since 1934, but since November, 1941, Mrs. Thompson, who was 31 years of age, had resided at 13 Spring Street, Melbourne, in which city she was employed. When last seen she was carrying a handbag which her husband assumed contained money inasmuch as she offered him a £1 note to purchase an overcoat for the boy (R. 130). On the following day, May 9, 1942, Constable Thompson identified the body of his wife in the Melbourne City Morgue.

Henry E. McGowan, a privately employed night-watchman, was making his rounds between Russell, Flinders and Spring Streets, and Flinders Lane, Melbourne, in the early morning of May 9, 1942. About 4:15 A.M., he observed a woman's handbag lying in a circular alley or lane, sometimes known as Corporation Lane (R. 134-135), which runs off Flinders Lane, circles a building, and then returns to Flinders Lane. It was dark and the watchman was using a torch; the bag was open, and lying near the building line; its contents were scattered within an area of a few feet (R. 135). Among other articles (Pros. Ex. 50, R. 143) there were cosmetics, toilet articles, receipts, photographs, addresses, and an identity card of Pauline Buchan Thompson, Bendigo (R. 135-143). There was also a collection of green and red beads, some broken, others loose from their string, both within and without the bag (R. 138). There was no money in or about the bag (R. 144). McGowan took the bag and other articles to a garage, where he checked the contents and left them with an employee (R. 144) while he continued his rounds. As he passed No. 13 Spring Street (Pros. Ex 51, R. 150a) soon after 5:00 A.M., he chanced to see the body of a woman lying on a short flight of steps which led from the walk to the doorway. "She was lying with her legs wide apart, her head slightly on one side. The eyes were closed, and the first impression I got was that the woman had fallen down the steps, but when I made a cursory examination, it was obvious that the woman was either badly injured or she was dead. I immediately rang the police. She was practically naked. There was a little clothing around the middle of the stomach. She was naked, I would say, down to her navel and up to her navel. There was just a little clothing across the center of the stomach." (R. 133-134).

Dr. Alan B. McCutcheon examined the body at the scene of discovery about 6:10 A.M., and testified, "The body was lying on its back with the legs extended and widely abducted. It was almost nude, the lower part of chest and abdomen being roughly covered by the dress. The chest was exposed above this and a light under-garment had been pulled down and was just showing under the covering dress. The left shoe was on the foot and the stocking torn and pulled down to the ankle. The right shoe was lying near the body and the right stocking pulled down to the lower part of the leg. The coat and fur necklet were lying below the body on the steps. Some blood had issued from

the vagina and was lying on the steps underneath. There were one or two small breaches of skin in the legs which were beginning to show staining. There were marks round the neck as of some handling but the face was not congested and did not present the appearance of her having been strangled " * * * (R. 150).

Constable Edmund R. Birch, examined the site of the body and noticed certain red, blue, and green beads; later he saw similar beads at the place where the handbag was found.

Detective Melville V. Boyd described the condition of the body at the scene of discovery, as shown in a police photograph (Pros. Ex. 66, R., 164), and identified certain clothing and effects of the deceased taken from the body and the immediate vicinity (Pros. Ex. 53-65, R. 156-162). He accompanied the body to the morgue (R. 155), where post-mortem examination by Dr. Crawford H. Mollison revealed:

> "The body was that of a stoutly built youngish woman, five feet six inches in height. It was mostly naked, the skirt, singlet and pants had been rolled together around the abdomen, exposing the breasts and genitals. The corset was around the right ankle, the stockings had been pulled down. There was a shoe on the left foot only, the coat was by the side of the right leg. A menstrual cloth was attached by one end to the singlet. The skin of the eyelids and forehead appeared to be mottled, the pupils were dilated, there were small abrasions and scratches on the front and sides of the neck, a small abrasion on the left side of the chest, abrasion with bruising on the front of the right leg four inches above the ankle and a small abrasion over the ankle joint.
>
> On reflecting the skin of the neck three bruises were found in the muscles of the left side of the neck and one on the right side under the lower jaw. The heart was in good condition; it contained dark fluid blood.
>
> The lungs were pale, they were not distended, there were some isolated patches of congestion; the air passages were clear. The liver was congested. The spleen was normal. The stomach contained some greenish fluid with a faint smell of peppermint; the intestines were normal. The kidneys were congested, their capsules peeled well.
>
> Some blood had been running from the vagina down between the buttocks; there were no marks of violence about the genitals. Some pinkish mucus was taken from the vagina and examined for spermatozoa but without result. The brain was congested. Death was due to inhibition (paralysis) of the heart from pressure on the neck." (R. 146).

In the opinion of this doctor, the cause of death, "was not quite what we call strangulation but it was due to pressure on the nerves of the neck causing the paralysis of the heart * * * it could be called throttling."(R. 147). To cause such bruises to both sides of the neck, "would require considerable pressure * * * by fingers." (R. 147). There was no evidence of actual or attempted sexual intercourse.

Miss Esther Greta Sylvia Grunden knew the deceased as Pauline O'Brien, her maiden name. About 11:15 P.M., Friday night (May 9, 1942, was inadvertently supplied the witness as the date in question; it appears that May 8, 1942 was the date of the events she related (R. 167)) Miss Grunden saw the deceased Thompson (nee O'Brien) with an American soldier in the lounge of the Astoria

Hotel, located on Collins Place (see Pros. Ex. 51). They were seated near the west wall of the lounge. She was drinking gin-squash, but was not drunk. The witness remained in the hotel about half an hour, during which, for a few minutes, she repaired to the ladies' room, accompanied by the deceased. The soldier had his back to the witness, she could not identify him. He was wearing a field jacket, and was rather stocky, with fair complexion. He created no commotion. The deceased was observed at one time waving her hand, which contained two shillings, as though offering to pay for a round of drinks; whether she did so pay was not observed by the witness. The deceased was wearing a dark coat, identified as that before the court (Pros. Ex. 62, R. 170).

Joseph Hunter was among those present in the Astoria lounge Friday night, May 8, 1942. He had one drink between 11:00 and 11:30 P.M., and noticed a woman, dressed in a black coat, and an American soldier sitting along the west wall. He did not see the face of the soldier and could not identify him (R. 177), but did hear the soldier make one remark to some other people, "Well, the lady ought to know me, she has been looking at me long enough." (R. 177).

Alfred W. Bliss, barman of the Astoria Hotel, served an American soldier and a woman who were seated at a table near the west wall of the lounge on the evening of May 8, 1942. They came in between 9:00 and 10:00 P.M. She was wearing a dark hat and coat, identified as Prosecution's Exhibits 60 and 62 (R. 180). The soldier was wearing some sort of military coat, and a cap without a visor. He seemed about five feet six or eight inches tall, with a pleasant face; the witness could not identify him. The couple drank some eight to twelve gin-squashes between them; the woman paid 2 shillings for one round, the soldier paid for the others. They left about 11:15 P.M. The witness later saw the woman's body at the morgue.

Private Justin James Jones, 201st Coast Artillery, knew the deceased Pauline Buchan Thompson. He had an appointment to meet her at the Merton Hospitality Center on Friday evening, May 8, (R. 172). However, he was thirty minutes late and did not see her. He thereupon went to her address in Spring Street, where he had visited her room on three prior occasions. She did not answer, so he returned to Camp Pell.

Charles A. Taylor, medico-legal chemist, examined the steps of 13 Spring Street on May 9, 1942, making samples of blood therefrom, which he tested for male seminal fluid, with negative results (R. 183b). On May 25, 1942, he examined a pair of uniform suntan trousers marked "Edward, 52nd Signallers" (Pros. Ex. 34), and a pair of drawers (Pros. Ex. 37). The trousers had blood-stains from the bottoms of both legs to the knees; "The blood was partly removed more so from the outside than the inside. Blood-stains existed on the inside of the cloth. I removed a small amount of blood from one of the inside stains and found the blood was human blood. There was also on the lining inside the fly level with the fourth button down from the top a blood-stain." (R. 184). The underpants were similarly marked, "At the junction of the fly in front there is a blood-stain of about 2" by 3" across. That blood was human blood". (R. 184). So far as the witness knew no test would reveal whether the blood on the garments and that at 13 Spring Street were from the same source (R. 185).

Private Anthony J. Gallo, Headquarters Company, 52nd Signal Battalion, testified at length of his relations with the accused, and of admissions and confessions which accused had made to him (R. 240-257). On the night of May 9, 1942, about 7:00 P.M. Gallo saw the accused in the latter's tent at Camp Pell. The accused appeared to be drunk (R. 241) and said he was going out; Gallo asked what was the matter and why he did not go to bed. Thereupon the accused stated, "I killed, Gallo, I killed" (R. 241). He was crying, and insisting upon going to town. The witness decided to accompany him so they caught a tram (R. 241). During the ride accused talked "about this murder * * * the second one * * * he told me he had no idea where he committed the crime * * * he insisted on my buying a paper, so he could find out about

this second murder." (R. 242). Having bought the paper, the accused wanted to eat; they went to a cafeteria where the accused had tea and sandwiches while Gallo searched for an account of the crime (R. 242). "When I found the article I showed it to him, and after about a minute of reading he said, 'Doorstep, doorstep, that is the one * * *' I do not think we commented any further on it. He kept reading about it. Maybe this is the time when he noticed that the paper said she was not criminally assaulted. He said that he had intercourse with her." (R. 243). After seeing the paper of the Thompson murder the accused "seemed to be sure that was the one. There was a picture in there * * * The only detail he gave me about it before he read the paper was that he left the body on a doorstep." (R. 256). Leaving the cafeteria, they walked to a milk bar. "During the trip there, we talked * * * There were a lot of things he said * * * we said a lot of things about this murder. He said that he did the whole two of them. That was when he told me that he did the whole two of them. - the first [presumably McLeod murder, May 3, 1942, Specification 3] and the second." (R. 243). He said something about strangling them, and with reference to the Thompson case said, "he was sure of not being caught, except for finger prints on her purse, which he had tried very hard to rub off." (R. 244). He had two packages of Australian cigarettes, "He told me that he had taken two small packs from the woman, plus a pound and a half, and he showed me a pound." (R. 244). "I do not know why, but he said he hoped that he had brought some indisputable token from this second person to prove to me that he had really done it." (R. 245). "I said, 'Why not give yourself up?' He said, 'Don't be silly.' I said, 'You could say you were temporarily insane', and he said, 'I could, couldn't I?'" (R. 245). Inside the milk bar the accused asked for the paper so he could read about Spring Street. "He made a joke about it. He said something about 'spring that sprung'" (R. 246). "That night of May 9th, 1942, he told me that he wondered why he should pick on these people older than himself." (R. 251). This topic of conversation was pursued at intervals until after the third murder of May 18, 1942, Gallo entertaining doubts of the accused's story, and worries as to his own responsibility. At times Gallo himself feared the accused, who compared himself to a Werewolf, and to Jekyll and Hyde - "two personalities" (R. 248). Gallo was told he only could be trusted, that the accused was depending upon his generosity "not to let him down." (R. 249), but after the third (Hosking) murder Gallo finally made report of his information (R. 252).

Detective Sergeant McGuffie, after warning the accused of his rights, on May 21, 1942, questioned him as to a Herald newspaper dated May 5, 1942 (Pros. Ex. 84, R. 258) which was found under the mattress of accused's bed. The accused then acknowledged conversations he had had with Gallo in which he had admitted one or two murders (R. 258). When read Gallo's statement by McGuffie, the accused said, "I contradict the part where the spring had sprung." (R. 258). He explained buying the newspaper "to keep up with the murders and tell Gallo." On May 23, 1942, after he had confessed to other officers, the accused made further statements to this witness. Questioned as to the remark attributed to him in the Astoria Lounge, "She ought to know me, she has been looking at me long enough", he answered, "I did say something like that." (R. 287). The accused also related that the deceased Thompson "told me she had to meet Joey Jones that night but he did not turn up." (R. 287). He further remarked "Fancy me a murderer. I guess that girl Thompson was the hardest, She was strong, and, Oh Boy, could she drink gin-squashes." (R. 287).

1st Lieutenant William W. Johnston, and Captain Bailey testified to a confession of the accused which was reduced to writing by Lieutenant Johnston and signed and sworn to by the accused before Captain Bailey (R. 271, 273, 274, 285). Therein the accused stated (Pros. Ex. 85, R. 275):

> "I remember now, about the girl who was killed in Spring Street. I met her in a resturant. She was waiting for an order. I asked her if I could sit with her. She smiled and said "Alright". I told her I would rather have something stronger to drink. She told me she knew of a place. We walked

around a bit, it was raining and we stood indoors. We met a soldier who showed us a place to go and get a drink. We were sitting at a table drinking. I bought a few drinks. There was a girl sitting at a table in the corner looking at me. I was looking at her. My girl wanted to shout. I told her when I went broke, I would let her shout. She did shout. She was singing in my ear. She looked into my eyes and it sounded as though she was just singing for me. She was drinking gin squash. I tasted it, but it was too mild. She said she was not married. We were talking about life, we got along swell together. She asked me if I needed any money. I told her I didn't need any money. We sat around a while and drank. She told me she sang. After I was broke she kept on buying all the drinks. When we left the hotel she picked up her bag. She had a nice voice and she sang as we walked along. We turned a corner, there was nobody around. I didn't see anybody, I just heard her voice. Then we came to the stone steps, they were long steps. I grabbed her --- I grabbed her. I don't know why. I grabbed her around the neck. She stopped singing. I said "Keep singing, keep singing". She fell down. I got mad then and tore at her --- tore at her, I tore her apart. There was someone coming across the street. I hid behind a stonewall. I was terrified. My heart was pounding a mile a minute. I couldn't bear to look at her. I saw her purse. I turned left and I ran into an alley. I looked into her purse. there was a lot of things in it. I couldn't find the money at first. Everything I touched I smudged. I didn't want to leave fingerprints. I finally found the money. There was two and a half pounds. I dropped the purse I saw the money under a light. I went to a corner and took a taxi back to the camp. I went to bed but I did not sleep much. I woke up the next morning with a terrible headache. I looked for a drink straight away. I don't know where I found it. Probably one of the boys had a bottle. They usually do. She would not sing. How could she sing. Me choking her when I wanted her to sing."

8. That Pauline Buchan Thompson died from unnatural causes at the time and place alleged is clear. Although the medical examiner attributes death to throttling, instead of strangling, it resulted from "pressure on the nerves of the neck causing paralysis of the heart". This variance, if any, was not contested, nor is it thought material, throttling and strangling being synonymous in common usuage, and in pleading connoting an assault in the region of the throat. The corpus delicti thus being established, it became proper to introduce the admissions and confessions of the accused wherein he implicates himself, not only to police authorities, but to Gallo. Independent of these confessions there is little positive evidence tending to connect the accused with the crime. Witnesses who saw the deceased with an American soldier on the evening preceding her death cannot identify the accused. The theory of the prosecution that blood found on the trousers and drawers of the accused associate him with the deceased, in view of her menstrual discharge, finds no support among the doctors who examined the body. The accused is reported to have told his friend Gallo that he had connection, but he omits it in his formal statement. The evidence in this respect is therefore at best doubtful. In other particulars the confessions are corroborated by evidence - the rifled handbag of the deceased, the gin squash she consumed and her part payment for same, as well as the failure of her appointment with another soldier. There is a suggestion of defense that the accused was recounting incidents he read in

the news. But the accused voluntarily disclosed incidents before reading a paper, he continued his recital for some ten days without retraction, and he repeated details in his formal confession to investigators. Although he had drunk 4-6 gin squash mixtures, he was not characterized as drunk by any witness, and his actions in looting the handbag of the deceased bear out that conclusion. There is then ample reason for believing that the accused confessed to events of which he had full personal knowledge. Assuming that these acknowledgments were competent as evidence, and that the accused was sane, it is the opinion of the Board of Review that the denial of the motion for a finding of not guilty and the subsequent finding of guilty of Specification 2 are legally sustained by the record.

9. The evidence in support of Specification 3 is as follows:

Ivy Violet McLeod (nee Dargavel), age 39, was married (R. 186), but was known to John P. Thompson, an aircraft worker, as Ivy Dargavel, single (R. 191). She resided on Victoria Parade, Melbourne, where she was employed as a lady's companion; her relations with Thompson, a returned and discharged soldier, apparently were close. About 11:00 P.M., May 2, 1942, she visited him in his room located at 135 Beaconsfield Parade, where she drank a glass of ale and conversed until 1:45 or 1:50 A.M., May 3, 1942. She was dressed in a black dress, black shoes, black overcoat and hat, and carried a zipper-fastened handbag (R. 94). According to Thompson she was sober and happily disposed. "She went because I had to get up early in the morning to attend my work * * * and she said it was unnecessary for me to accompany her to the corner - that she would be O.K."(R. 195). At the corner of Victoria Avenue and Beaconsfield Parade, some two blocks distant from the Thompson address, there was a terminal for the all-night trams which ran to the city each hour after mid-night. There was also a taxi stand near the Bleak House Hotel, situated at this corner (R. 197) (see map, Pros. Ex. 68).

About 6:45 A.M., Sunday, May 3, 1942, Harold Gibson, part time employee of the Bleak House Hotel, left his flat, which is diagonally across Victoria Avenue from the hotel, to go to work. As he crossed the tram tracks on Victoria Avenue he saw an American soldier in a stooping position in the doorway of a shop that is next to the hotel (R. 199). This soldier immediately walked toward the corner and turned left into Beaconsfield Parade. He was dressed in a light colored shirt or jacket, and "a little forage cap"; he was 25-30 feet away, but appeared tall and in good condition. As the soldier disappeared Gibson went to the same doorway and looked in. "When I went over, I saw the woman lying there nude - well, not what you would say nude; but the clothing had been stripped from her, and I touched her on the knee with my foot * * * She never moved * * * "(R. 201). He called the police, and upon their arrival pointed out the body and told them of the soldier he had seen.

Dr. Augustus I. Green examined the body in the presence of the police about 8:00 A.M. "The body was lying on its back with the legs flexed under the thighs, that is actually drawn up under the thighs, tucked up under the thighs. The front portion of the woman's body was nude except for some underclothing which was lying around the upper part of the right thigh." (R. 206-207). Rigor mortis had not set in; in this doctor's opinion death occurred from two to five hours before his examination, or between 3:00 and 6:00 A.M. (R. 208).

Detective Sergeant McGuffie identified a police photograph (Pros. Ex. 69, R. 210, 211) as correctly portraying the condition of the body when he saw it at 8:10 A.M., May 3, 1942. He described the clothing and effects of the deceased (Pros. Ex. 70-83, R. 212-215), in particular a black belt (Pros. Ex. 77, R. 213-214) which was knotted around the waist of the body (R. 213).

Identification was made by Leonard J. Dargavel, brother of the deceased (R. 186). Dr. Redford J. Wright-Smith made a post-mortem examination at the City Morgue on May 3, 1942, and reported that "Death was due to fracture of the skull, laceration of the brain and suffocation."(R. 189).

In his opinion "Death was probably helped by the pressure of this injury to the skull and brain. Suffocation was the immediate cause of death * * * caused by this pressure in the region of the windpipe, the thyroid gland; pressure of some sort". (R. 191).

Corporal John J. McPhillips had known the accused Leonski for seventeen months. On Sunday, May 3, 1942, about 10:45 or 11:00 A.M., McPhillips, in company with a Mr. Powell, was in the lounge of the Victoria Hotel, located on Beaconsfield Parade (see Pros. Ex. 68). At that time he saw the accused, who appeared to have been drinking, and loaned him four shillings (R. 218). McPhillips and Powell left the hotel about 12:30 P.M., but returned about 3:30 or 3:45 P.M., when they again saw the accused. He was dressed as before in a suntan uniform, and appeared to be "Feeling kind of good" (R. 219). The accused drank beer with the party. He asked McPhillips for a further loan, and finally received one pound, which he promised would be repaid by Private Gallo who was holding eight pounds for him (R. 220). McPhillips had been in the Bleak House Hotel with a Private Piercy on the prior afternoon of May 2, 1942, but did not see the accused there, or any other place that day (R. 221). Private Piercy and Mr. Powell testified substantially as McPhillips (R. 222-226a).

Private Joseph Sassi worked as a K.P. in the battalion enlisted mess from 6:00 A.M. to 6:00 P.M., Sunday, May 3, 1942. The accused was assigned to like duties. This witness could not recall seeing the accused in the mess that afternoon (R. 227), but states he thinks he was there sometime that morning, though he could not give the time or other details (R. 229a).

1st Lieutenant William W. Johnston (R. 271-284) and Major Harold P. Ballf (R. 285-286) testified to a statement of the accused which was reduced to writing by Lieutenant Johnston, and signed and sworn to by the accused before Major Ballf. Therein the accused recounted:

> "On Saturday, May 2nd, I was drinking in the Bleak House with a number of soldiers. One of these soldiers was McPhillips from my outfit. I borrowed 24 shillings from him. We drank for quite a while. I don't know how many drinks we had. We were drinking beer and scotch. Mac left, I don't remember what time he left. I had been drinking all day. I know I was "high" when I went in to the hotel. I left with an American soldier and a girl. We walked across the street to the beach. There we sat against a wall on the beach front and drank a bottle of beer. The other soldier got up and left, I don't know why he left. I was alone with the girl. We necked a little bit. I did not have any intercourse with that girl. think her name was "Pat". We got up and walked back to the corner across the street. The other soldier was waiting there for us. The three of us stood around and talked while waiting for a tram. When the tram came the soldier and girl got on it and left. My tram seemed a long time in coming. I got to thinking about home and how lonely I was. Then I thought about six Australian civilians who jumped me one time and choked me until I was almost unconscious. I got tired of waiting and started to walk up Victoria Street. I saw a girl standing by a doorway. She smiled. I make some somment about her bag. I took it in my hands and then gave it back to her. The girl moved back into the recess and I must have followed her. I had my arms around her neck. I grabbed her by the neck, the left side. I changed the position of my hands and grabbed her at the front of her throat. I squeezed and she fell rapidly. Her head hit the ground while I still had my hands on her throat. I started to rip and tear her clothes until I came to her belt. I just

couldn't rip that belt. I ripped her clothes below the belt and came back to it. The belt made me mad. While I w as trying to rip her belt I heard footsteps. I picked up my hat which had fallen off; put it on. I turned to my right and walked up Victoria Street. I didn't look back. I don't remember what time or how I got back to camp." (Pros. Ex. 87).

10. This evidence establishes that Ivy Violet McLeod, as charged, died on May 3, 1942, from violent and unnatural causes. Though she had suffered injuries to her head, the immediate cause of death was suffocation from pressure in the region of the windpipe, which, as in the two preceding charges, conforms to the allegation of strangling with the hands. The only evidence independent of the confession tending to connect the accused with the death is the testimony of the discoverer of the body that he saw an American soldier at the scene shortly before 7:00 A.M. That this was the accused does not readily follow. Nor does his statement to Gallo, standing alone, completely implicate him. In the words of Gallo, "He said that he did the whole two of them. That was when he told me that he did the whole two of them - the first and the second." Without further showing that the accused meant he committed the McLeod homicide of May 3rd, any conclusion to that effect is of doubtful propriety. But when the accused formally admits the crime, this earlier spontaneous admission is to a large extent verified, and becomes complementary to the confession. Other corroboration of the confession can be found in the location of the body, the nature of the wounds of the head, and the fact that the deceased's tightly knotted belt was found around her body, as might be expected from the accused's account of his attempt to rip it from her. In some details the confession has no outside support, in one it is directly contradicted. The accused states he was drinking with other soldiers in the hotel next door to the murder scene on the Saturday afternoon prior to the crime; he mentions McPhillips as being present, and loaning him 24 shillings. McPhillips, confirmed by other witnesses, states he was at the hotel that Saturday afternoon, but saw nothing of the accused; it was the day following, Sunday, which would have been a few hours after the crime, and at a hotel two blocks removed from the murder scene, that he drank with the accused and loaned him money. The defense urge the point that this discrepancy resulted from McPhillips changing his story after the accused's confession had been written to conform to expected testimony. Whether McPhillips did make an earlier statement of drinking with the accused on Saturday is not clear, but that the proper date was Sunday, May 3, now seems proved. This inconsistency is hardly sufficient to weaken the evidentiary value of the material portions of the confession. The disputed date is of but remote importance. By the accused's admissions he was in the immediate vicinity of the crime several hours before it was committed; by the testimony of the witnesses he was within two blocks of the situs several hours after the death occurred. The accused in three weeks, and after two further murders, might reasonably forget with whom he had a drink (R. 280) but he is not calculated to forget the basic fact that he strangled a female. This is the gravamen, to which the accused confessed.

If that confession was voluntarily made, and if the accused was sane on the date in question, it is the opinion of the Board of Review that the record is legally sufficient to support the denial of the defense motion of not guilty, and the subsequent findings of guilty of Specification 3.

11. The record is replete with self-criminating statements of the accused. Whether they are properly in evidence, or should have been excluded, is a question of prime importance in view of the dearth of other evidence tending to connect him with the crimes. Some of the accused's answers to preliminary questions in the Hosking case are but admissions against interest, and therefore competent (M.C.M., par. 114). His recitals to Gallo approach full confessions in their acknowledgment of guilt, but spontaneity removes all doubts of their admissibility. It is, however, the accused's statements to military superiors and to police officers that complete the proof against him, and it is these statements that must be received with caution.

The accused was placed in arrest either on Wednesday, May 20, or Thursday, May 21, 1942, by Sergeant Trager, who was thereafter responsible for his safekeeping at Camp Pell. At one stage he was handcuffed to a cot in a tent (R. 343-347), but there is no evidence this restraint was unreasonably continued. On Thursday afternoon the accused and others were placed in a line-up and inspected by witnesses in the Hosking case. Thereafter Detective Sergeant McGuffie informed him he had been identified (R. 78), and queried him as to his activities and the muddy condition of his clothing. The accused was taken to the area of the slit trenches, to the Burns home (R. 78), and was otherwise cross-examined as to his story. Thereupon McGuffie warned him that he was not required to make a statement but if he desired so to do it would be written down for use as evidence (R. 78, 257). Detective Adam and Captain Servis likewise questioned the accused the same afternoon, but the extent is not indicated (R. 260). On the following day, Friday May 22, 1942, about 4:45 P.M., they, with Lieutenant Johnston, resumed the interrogation (R. 261-266, 271). On this occasion, after being told he had been identified, the accused asked how he stood (R. 262). Captain Servis informed him that it was a matter for American military authorities to determine, but that in his opinion the accused would be tried by court-martial (R. 263). He also warned the accused "It is your privilege to talk and to keep quiet. If you see fit to say anything it can be used against you in evidence." (R. 262). After conversation about his life, home, and friends, the accused said "I choked her" (R. 267), and thereupon gave his account of the Hosking assault, which Captain Servis reduced to writing. Lieutenant Johnston then called the accused's attention to the Thompson murder, telling him that he had already made one statement, and perhaps he might be able to clear up the second case, but again warning him of his rights to remain silent (R. 273). When asked if he remembered anyone singing to him the accused replied, "Yes, I remember a woman singing in my ear as she was looking into my eyes". (R. 273). The full statement of the Thompson case followed, which Lieutenant Johnston set out in writing. Questioning continued as to the McLeod case, with the same results, though only a part of the story was told at this sitting, the full account being given on Saturday, May 23, and reduced to writing on Sunday, May 24. These witnesses deny that this questioning was unduly prolonged. The accused's third statement was interrupted and he was taken to the City Watch House for confinement between 9:30 and 10:00 P.M. (R. 282). Though the inquiry began about 4:45 P.M., for at least an hour and a half the accused was free while having sandwiches and coffee (R. 280). Captain Servis heard no threats or promises made the accused (R. 289b, 290). He states there was "a running fire of conversation for more than an hour." (R. 350), and there was talk of whether the accused would be tried by an Australian court or by court-martial (R. 263-265b). The accused asked if he would be represented before a court-martial, and was assured that he would be. In concluding the cross-examination of Captain Servis the defense asked, "Before he signed his confession you said to him 'If you confess you will be given the best available counsel?'", to which the witness replied "That is right." (R. 350a).

12. Confessions, to be admissible in evidence, must be voluntary. If made as the result of threats or inducements they are inadmissible. That the accused was aware he need not make a statement, but should he do so, it could be used against him, is clear in view of the many warnings he received. The defense suggest that nevertheless he was improperly induced by representations that only by confession could he secure a trial before an American tribunal and the advice and assistance of counsel. That the accused inquired into these matters was not unusual under the circumstances. He was aware of the evidence, including his prior acknowledgment of guilt to Gallo. If trial was indicated, jurisdiction was of interest to him no less than to those over him, but there is no indication that the accused expressed a preference, or was offered a choice of forum as an inducement to confess. The concluding question to Captain Servis, and his answer thereto, suggest that the confessions were signed only in return for promised counsel, but the full testimony of this witness indicates rather that the accused sought and received information that he would be ably represented, and this without regard to whether he confessed.

Finding that the accused was aware of his rights to remain silent, and that he was not induced by threats or promises to acknowledge his guilt, it is the conclusion of the Board of Review that the incriminating statements he made to military superiors and police officials were voluntary, and there was no error in admitting them as evidence.

13. The evidence for the prosecution on the question of the accused's sanity consists of the testimony of Captain Harper (R. 11-12) and First Lieutenant McHugh (R. 14-15), who compromised the medical board, that the accused was sane at the time of their examination, and also on May 3rd, 9th, and 18th, the dates of the alleged crimes. Major Harper stated that on these latter dates the accused was sane but in the opinion of the board was under the influence of alcohol (R. 12). When first offered by the prosecution, the testimony as to sanity on the occasions of the crimes, and the full report of the medical board, were objected to by the defense as premature in that they affected the general issue of guilt or innocence but were grounded only on hearsay information. The court accordingly rejected the full board report, and made a preliminary determination of sanity in order that the trial should proceed, it being understood that each party would later have opportunity to reopen the issue (R. 17).

Having established a prima facie case as to each offense, the report of the medical board was re-offered in evidence and again objected to in "that the report contains statements of fact and that the report is hearsay so far as this defendant is concerned." (R. 289). The objection was overruled by the Law Member who instructed the court that the report was to be received solely as bearing upon the question of sanity of the accused, and not as evidence whether he committed the crimes charged (Pros. Ex. 88, R. 289, 289a). In pertinent part the report concludes (par. 7 Diagnosis):

> "This patient is not insane nor has he ever been insane. There is no evidence of any organic disease of his nervous system. Physical and neurological and laboratory tests were all normal. * * * It is our opinion after careful observation and study that Private Edward J. Leonski, 32007434, is not insane. The data which have been presented fit in with a diagnosis of Psychopathic personality without psychosis."

There is also a statement that the case had been studied and discussed with Major Harold F. Maudsley, who "is in absolute agreement in our evaluation of the problem and the diagnosis of the case."

The cross-examination of Major Harper (R. 290-297) elicited his further opinion of the accused's mental state: "A psychopathic personality is a psychiatric or mental condition which implies an inability on the part of the patient to adjust to the social and entire mental situation in which he finds himself. It does not imply any impairment of the individual's intellect. As a matter of fact, the intellect is normal, or it may be above normal, but because that individual is not able to adjust adequately to his environment, it does not mean that he is insane or that he has shown mental aberrations which are so marked as to cause him to break with reality or to show things which we ordinarily find in an insane individual. * * * An insane person is, to use a common expression, a crazy person. He is an individual who has broken completely with reality. He does not recognize the claims of every-day living such as the normal individual does.* * * The line comes when the individual breaks with reality. By that I mean that there are no hallucinations and illusions and things of that sort which are encountered in the insane individual. The psychopathic personality does not show that." (R. 291). Although the board assumed that the accused committed the crimes alleged, insofar as he himself had related it, the decision of the board rested only partly on that assumption. In the opinion of Major Harper the accused had the potentialities of murder, in view of his psychopathic personality; alcohol had released these potentialities, and under the same conditions, might do so again. "It certainly would be unsafe" for him to be permitted at large without control (R. 292). The statement in the confession of the accused that "She had a lovely voice; I wanted that voice. She was leaving to go to her house, and I did not want her to go. I grabbed her by the throat", did not represent a delusion or

hallucination, but was rather disordered thinking. "That one isolated statement, if we knew nothing else about an individual, would lead one to believe that he was insane, but an individual is not judged insane on the basis of one isolated statement that he might make." (R. 292-293). One particular type of mental illness, manic depressive psychosis, was thought to have rather a definite hereditary effect, but even if the accused's mother was so aflicted, Major Harper's opinion would remain unchanged. (R. 295). "I would say that the psychopathic personality was a very maladjusted or unadjusted individual, and that that maladjustment keeps him from falling in the group of so-called normal individuals or mentally well people; in other words, it does represent a terrific amount of emotional instability, which does not imply insanity." (R. 296).

First Lieutenant McHugh, member of the medical board, testified on cross-examination (R. 297-303) that in his opinion the accused had a "psychopathic personality, and that when under the influence of alcohol, as he claimed he was, for * * * 18 days, many of the emotional conflicts that one finds in the psychopath came to the surface. That often happens with psychopathic personalities." (R. 298). "A psychopathic personality is an individual who could not be considered mentally ill, but who suffers from a great deal of emotional conflict, the causes of which are numerous, and sometimes effect the lives of other individuals, either to a greater or less degree * * * The person who is really insane cannot carry out the duties demanded from him by normal life. He has completely broken from reality in many ways. He cannot earn a normal living; he cannot adjust in a sane or reasonable community - in other words, perform the duties which are expected of him as a law-abiding citizen. He is not responsible for his actions because of the acuteness of the disease from which he is suffering.* * * Sometimes, under a tremendous amount of emotional strain, the psychopath may not be responsible for his actions. However, he is, as a rule, infinitely more conscious of what he is doing than the so-called insane.* * *. (R. 289-299).

The prosecution, with the consent of the defense, introduced a confidential telegram, giving information of the accused's background; therein it was stated his mother had been treated in 1928 for manic depression psychosis, one doctor noting some symptoms of dementia praecox; two of his brothers have police records, one being confined to an institution since 1940, with psychiatric indication that he was poor material for adjustment (Pros. Ex. 89, R. 297). Both Major Harper and Lieutenant McHugh deny that this information in anyway affects their opinion of the accused's sanity (R. 297, 301).

Major Henry Fitzgerald Maudsley, Australian Army, psychiatrist of the Royal Melbourne Hospital, testified for the defense (R. 336-342). At the request of the defense counsel he had examined the accused separately and in conjunction with Major Harper and found him to be a psychiatric personality. "It is not a very easy term to cover in a few words; because a psychiatric personality may embrace any abnormal psychiatric factor in a man's behavior. One uses the term very often in the case of soldiers who have certain difficulties which mean that they are not suited for perhaps a purpose, perhaps quite a simple purpose; perhaps they are not suited for the Army, not because they show any particular trait in their civil life but under certain conditions their abnormalities show up and so they are useless for that particular service. That is the briefest way I can describe the psychiatric personality. It ranges from quite trivial disorders and conduct to the more serious ones."(R. 337). Assuming that the accused was accustomed to drinking large quantities of intoxicants, and had consumed in an afternoon between 25 and 30 glasses of beer, and five ordinary drinks of whiskey, in the opinion of this witness there would be no doubt but that he would be under the influence of the drug, though to what extent would depend on how used he had become to it (R. 340). "* * * Alcohol is a nerve depressant, and layers * * * of mental process are depressed by alcohol thus releasing some form of behavior or some activity that would be inhibited in the normal way" (R. 340). "The effects of alcohol on the psychopathic personality are always * * * different to the effects of alcohol upon a normal person, and the fact that the accused is a psychopath would presume that his behavior would not be that of a normal person under

the influence of a similar amount of alcohol"(R. 341). This witness agreed with the conclusions of the medical board in each particular (R. 341-343), and explained that in the diagnosis of "Psychopathic personality without psychosis", the words "without psychosis" in lay language meant without insanity under normal conditions; a psychopathic personality "might behave in an insane manner under certain conditions." (R. 342).

14. Numerous military witnesses on behalf of the accused gave their observations of his actions, habits, and traits since his induction into service. Private Bartell had seen him drunk in Melbourne on one occasion, when the accused thought it amusing to frighten people by shouting "Boo" behind them. He had seen him drunk around camp, when he appeared to be in a haze; after recovery the accused would not know what had happened (R. 314-317).

Captain Kaufman had been the commanding officer of the accused for about a year while in garrison, on maneuvers, and enroute to Australia. "The man, you would say, was perpetually in trouble. Nothing of a really serious nature. He never seemed to stay out of small and continuous trouble. It seemed to be unintentional most of the time, but he was still in trouble. He was inordinately proud of his strength which he demonstrated all the time." (R. 319). The accused was assigned to K.P. duties; he was drunk more than the average soldier. Once in Australia, the witness found the accused crying drunk and A.W.O.L. in town and brought him back to camp. Later as Summary Court he had tried him for an offense, and at the accused's request, sentenced him to confinement to keep him out of trouble. "Mentally, I do not consider him completely sound. Not being an expert I cannot say he is crazy or unbalanced or anything else, but I do not consider him normal."(R. 321) He had been promoted to and demoted from private first class on several occasions by company commanders, but not by the witness, "Because I considered him unstable. The man was, in my opinion, not reliable, and I had seen the same thing happen before and in spite of the fact that he could do an excessive amount of work you could not depend on him to do it." (R. 321a).

Technician 4th grade Ardito went out drinking with the accused in Melbourne in May, 1942. The accused would grab strange girls and try to kiss them; later he said he did not recall these acts (R. 321c). Private Votaw drank with the accused both in Texas and Australia. The day the unit left Fort Sam Houston for overseas the accused was drunk and crying and several soldiers had to pack his bags for him (R. 323). Technician 4th grade Cooper thought the accused drank more since his arrival in Australia; "he could drink a lot, and it was only lately that you really noticed that he was drunk. That was the difference. Before, he would get drunk, but you would never know he was drunk; but this time he could not walk straight; he was stumbling all over, and walking with his head down most of the time; he did not know where he was going * * * "(R. 330). Technical Sergeant Wiseman found the accused, "very reliable" (R. 331) as a helper in the supply room, but had seen him drunk on two or three occasions in the United States, and several times in Australia. Once when he was drunk in Camp Pell the witness took a bottle from him; "he acted like a man out of his head. He did not seem to know what he was doing."(R. 331). The morning after "he did not seem to know what happened the night before, during the time he was on the drunk." (R. 332). Private Jacobi had seen accused mix whiskey and beer with ketchup and ice cream in one glass and consume it (R. 333). He had never seen the accused "staggering drunk". (R. 334). Private First Class Bonstin saw the accused drunk on the day the unit left Texas. He was crying, and did not want to go. "We had to dress him, take him along, and put all his material and stuff on the truck." (R. 335). As for other occasions -- "I cannot say that I believe he was drunk, because I used to say 'What, are you drunk, Eddie?', and he used to say, 'No, I am only happy'. He did not exactly seem like he was drunk; I mean, he could absorb his beer pretty much when I was with him. He seemed to have a good deal of his senses about him. He was able to walk on his hands many times. I did not see him wobbling around like I would see when some fellow on the street was drunk." (R. 335). Once the accused had related

that he had fallen in love with his brother's wife, which was one reason for his being in the Army (R. 335). "I used to asked him why he drank so much, and he said that every time he started thinking about his brother's wife he would go and get drunk. When he used to go out with me in San Antone sometimes, he would always want to have a few beers. The reason I did not let him drink was the simple reason that once he got a few beers in him, he always wanted to head for the west side -- the red light district of San Antone, Texas." (R. 343).

In the opinion of Master Sergeant Staggs, "if Leonski was told to do a thing, regardless of what it might be, if it was an order, he always carried it out. I never heard of any trouble of insubordination or disobedience of orders in the time I have known him." (R. 348) When he was drunk you could tell it by his eyes and his voice; "he always talks in a very fine voice when he is drunk, whereas ordinarily he does not." (R. 349). The accused had possibilities as a clerk. "He typed well and he could take shorthand, so he did one day's work wonderfully. I told him to be back in the morning. The next morning he was not there. Then the following morning I ran into him and he had been drinking. I could tell he just didn't care; yet he never disobeyed me in any way." (R. 349).

It was stipulated that Private Tuzzeo, if present, would have testified:

> "He, referring to the accused, would put ketchup, mustard, pepper, salt, whisky and beer and milk too, all in one drink down in Louisiana. When we had orders to move he was drunk. He cried out "Everybody is leaving me". I went over to tell him I was not leaving him and he said "You are a good boy to me." He used to ask people to fight with him, to put on the gloves. When somebody would land one punch then he would go wild and finish the boys off. He had great strength. He was a show-off. He would frequently walk on his hands. When he was sober he would continue it. When he was drunk sometimes he could not go very far. He would like to show that he was a great drinker. He eats lots and eats anything. He broke guard and used to say that he was not afraid of prison. The moment he got money he did not seem to care." (R. 351).

15. Although the court determined as an interlocutory question that the accused, at the time of trial, and on the dates of the alleged crimes, was sane, that determination was not conclusive. The presumption of sanity having been attacked, it was then encumbent upon the prosecution to prove, as a part of its case in chief, the mental responsibility of the accused beyond a reasonable doubt (M.C.M. par. 78a). In military jurisprudence "A person is not mentally responsible for an offense unless he was at the time so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right." (ibid).

The medical witnesses who examined the accused qualify as experts. They agree in their opinions that he is a psychopathic personality without psychosis. Supposing it possible for a board of review to psychoanalyze an accused solely through information contained in the trial record, the diagnosis of psychopathic personality nevertheless appears correct. The personal history of the accused as recounted by his contemporaries and superbrs alike, reveals his emotional instability and maladjustment, which, according to current authorities, characterize the psychopathic. Such persons, the medical witnesses agree, are normally sane, but they may under certain conditions behave insanely. Finding the accused without psychosis, these witnesses, conceding that alcohol affected his behavior, yet believe he was sane at the times the crimes were committed,

Whatever the evolution of a psychopathic personality under alcoholic influence, legal responsibility is measured by the ability to distinguish right from wrong, and adhere to the right. That the accused knew it wrong to strangle a female without justification or excuse is not open to reasonable doubt. His actions in fleeing from the scenes, in attempting to conceal or destroy evidence against him, and his manner and conduct with Gallo, compel the belief he appreciated the nature and quality of his

acts on each occasion. Could he adhere to the right? There is a natural reluctance to believe that three similar heinous crimes would result from the exercise of free volition. Further, medical witnesses state that given the same conditions the accused might repeat these crimes. There is thus insinuated the idea of an irresistible impulse actuating the accused's conduct. He himself makes no such pretentions. In the Hosking case he states his victim had a lovely voice which he wanted, but he also says she was leaving to go to her house and he did not want her to go, so he grabbed her by the throat. In the Thompson case his victim sang to him as they walked. But when they came to her house he choked her, although he told her to keep singing. In the McLeod case, he saw his victim smile, and he commented on her bag, but when she moved back into the recess, he followed and squeezed her throat.

The accused does not state his motives. He comments upon his victims' voices and other characteristics, but his statements do not show an irresistible impulse to capture the voice as the defense suggest. It is rather the bodies themselves that bear witness to his ultimate intentions. Each was more or less disrobed; with the privates exposed. This circumstance alone is enough to indicate a sex motive, regardless of whether connection was actually accomplished. It is conceivable that the accused did not necessarily intend the deaths of his victims, or was indifferent to the results, but, that his ultimate objective was some lustful gratification from his victims' bodies seems inescapable. Yet sexual desire, even when heightened by alcohol, is not accepted as irresistible. Sex crimes by their very nature require some discernment in their perpetrators. The accused was want to choose unaccompanied strangers with whom he could ingratiate himself for the moment with a smile, an inflection of voice, or a few choice remarks. Nor was it every available female that he throttled, as is shown by his own statement in the McLeod case that preceding that assault he had been on the beach with another woman whom he fondled but did not attack. Not only did he exercise choice in the selection of his victims, but also in the place of his attack. In the Hosking case it was a deserted park, in the Thompson case a dark stairway, in the McLeod case a secluded recess. By so withholding his advances until conditions were suitable the accused exhibited his ability to adhere to the right. And too, he boasted to Gallo that he was a veritable were-wolf, a Dr. Jekyll and Mr. Hyde, two personalities assumable at will.

Giving due regard to the natural import of all the evidence, the accused had the ability to adhere to the right. That he did not do so, and might not in the future, proves his moral decline, but not his mental irresponsibility. It is the conclusion of the Board of Review that the record of trial is legally sufficient to support the findings that the accused was sane beyond a reasonable doubt at the time of trial, and at the times of his various offenses.

16. In passing upon this record of trial the Board of Review, contrary to precedent (Dig. Op. JAG, sec. 408 (1) (2)), but with a view to affording additional safeguards for the rights of the accused, has endeavored to weigh the evidence, judge of the credibility of witnesses, and reach conclusions on controverted questions of fact. Its independent findings as to the essential elements of each of the alleged crimes are in accord with those of the court-martial hearing the case, and the reviewing and confirming authorities. The Board has considered the errors or irregularities noticed by prior reviewers of the record, but after examination of the entire proceedings in accordance with Article of War 37, has concluded that no errors complained of have injuriously affected the substantial rights of the accused.

17. The adjudged death sentence is authorized only if the offenses of which the accused was convicted are, by the Articles of War, expressly made punishable by death. Each of the Specifications of the charge alleges in correct form the crime of murder, which under Article of War 92, is so

punishable. That the assaults committed by the accused were without legal justification or excuse is not open to doubt. That he either intended to cause the death of, or grievous bodily harm to, his victims, and this without any provocation adequate at law, is equally proved. Being sane, and entertaining malice aforethought, the acts of the accused constituted murder. The death sentence, concurred in by all of the members of the Court-martial present at the time the vote was taken, is therefore lawful.

18. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Charge and the Specifications thereunder, and the sentence.

, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

, Judge Advocate.
Major, J.A.G.D.

1st Indorsement. 30 October 1942.

War Department, Branch Office of The Judge Advocate General, Melbourne, Victoria, A.P.O. 924. To Commander-in-Chief, Southwest Pacific Area, A.P.O. 500.

1. In the case of Private Edward J. Leonski (32007434) Headquarters Company, 52nd Signal Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM 73).

ERNEST H. BURT,
Colonel, J.A.G.D.,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 1, USAFSWPA, 4 Nov 1942)

WAR DEPARTMENT
Services of Supply
In the Branch Office of The Judge Advocate General
Melbourne, Australia

November 13, 1942.

Board of Review

CM A 93

UNITED STATES v. Private Claude Spillman, (33100143) Company C, 811th Engineer Battalion, (Aviation); Private Leonard Bonner, (38058313) Company C, 811th Engineer Battalion, (Aviation); Private Reginald G. Maddox, (33099867) Company C, 811th Engineer Battalion, (Aviation).	)	Trial by G.C.M., convened at Noumea, New Caledonia, September 28, 1942. Dishonorable discharge, and confinement for two years.

HOLDING by the BOARD OF REVIEW
CONNALLY, ROBERTS and MURPHY
Judge Advocates

1. The record of trial of the soldiers named above has been examined by the Board of Review.

2. The three accused were tried at the same time, pursuant to a written stipulation between the trial judge advocate and the defense counsel, upon the following charges and specifications:

Privates Spillman and Bonner:

CHARGE: Violation of the 96th Article of War.

Specification: In that Private Claude Spillman, Company C, 811th Engineer Battalion (Avn), and Private Leonard Bonner, Company C, 811th Engineer Battalion (Avn), acting jointly and in pursuance of a common intent, did, at Company C, 811th Engineer Bivouac Area, New Caledonia, on or about August 7, 1942, simulate an act of carnal intercourse.

Privates Spillman and Maddox:

CHARGE: Violation of the 96th Article of War.

Specification: In that Private Claude Spillman, Company C, 811th Engineer Battalion (Avn), and Private Reginald G. Maddox, Company C, 811th Engineer Battalion (Avn), acting jointly and in pursuance of a common intent, did, at Company C, 811th Engineer Bivouac Area, New Caledonia, on or about August 7, 1942, simulate an act of carnal intercourse.

Each of the accused pleaded not guilty to the charge and specification upon which he was arraigned, and was found guilty as charged. No evidence of previous convictions was introduced. Each accused was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for two years. The reviewing authority approved the several sentences, designated the Federal Reformatory, El Reno, Oklahoma, as the place of confinement, and transmitted the record for action under A.W. 50½.

3. The evidence for the Prosecution consists of the testimony of three soldiers, all tent-mates of the accused Spillman. Corporal Roberson testified that he and four other men occupied a pyramidal tent with accused Spillman. The night of August 7, 1942, was cold and raining. At 11:30 or 12 o'clock, Private Spillman came in the tent in a drunken condition. He was "staggering drunk" (R. 17), "knocked out", "numb"(R.9), "stuttering", and "did not talk plainly", but undressed himself and went to bed unassisted (R. 17). About 12:30 accused Maddox came in the tent, "drank with us", got in Spillman's bed, and stayed there 10 or 15 minutes (R. 7-8). Witness could not see either Spillman or Maddox in bed and heard no noises or conversation, although his cot was right in front of accused's cot. When Maddox left the bed he "buttoned up his pants and tightened his belt" (R. 8). Shortly thereafter Private Bonner got in Spillman's bed and stayed there about 10 or 15 minutes, but witness saw nothing and heard no noises or conversation (R. 9). The light in the tent was out and there was no moon (R. 11-18). The cots were covered with mosquito nets, which were down. Spillman was "on his back"(R. 12, 18). Witness did not know what accused Maddox and Bonner were doing (R. 19).

Private Dobson testified substantially the same as Corporal Roberson. He saw Maddox get in Spillman's bed; "the bed was squeaking."(R. 21). Maddox was lying on his stomach with his feet turned down (R. 21). Spillman was lying on his back with his feet turned up (R. 22). When he left the bed Maddox fastened up his pant's fly (R. 21). Bonner assumed the same position in Spillman's bed as had Maddox; witness could see only his feet and they were turned down (R. 22). He observed nothing unusual when Bonner left the bed. It was raining, there were no lights in the tent, and all tent flaps were down. Witness had been drinking native rum, "3 or 4 drinks", but was "not exactly drunk (R. 24).

Private First Class Wilkerson, another occupant of this tent, was awakened by Corporal Dobson shining a light on him, and asking him to look in Spillman's bed. He saw accused Maddox in bed with Spillman (R. 26) but could not see how he was lying. When Maddox left the bed he "fastened his pants". While Bonner was in bed with Spillman the witness heard a groaning noise, "like a drunken man would make" (R. 27-29). Witness had been drinking but stated he was "perfectly sober" (R. 27-28). The accused Spillman "was drunk" (R. 29).

Second Lieutenant William Bowen was not permitted to testify as to statements made by each accused, the court holding that no proper warning had been given (R. 29-35).

The defense offered no testimony, and each accused remained silent.

4. Assuming the legal sufficiency of the specifications, there remains to be determined whether each allegation constituting the offense is supported by substantial evidence. The accused are charged with jointly and in pursuance of a common intent simulating carnal intercourse. Simulate means "to assume or have the appearance of, without the reality; to assume the signs or indications of, falsely; to counterfeit; feign, imitate * * * " (Websters, New International Dictionary, 2nd ed.). The uncontradicted evidence shows the accused Spillman went to bed drunk, and there is no indication whatever that he thereafter was capable of, or did any act, or entertained any intent. The accused Maddox and Bonner entered Spillman's bed, may even have lain on their stomachs, and have rearranged their clothes upon arising. That they did anything more that could remotely be interpreted as feigning, imitating, or assuming the appearance of carnal intercourse is not born out by the testimony of witnesses. In the opinion of the Board of Review the competent evidence of record fails to prove either of the accused guilty of the acts alleged. Suspicion or conjecture may furnish a practical explanation of the accused's conduct, but cannot suffice as evidence to overcome defects of proof.

> "'While we may be convinced of the guilt of the defendant, we cannot act upon such conviction unless it is founded upon evidence which, under the rules of law, is deemed sufficient to exclude every reasonable hypothesis except the one of defendant's guilt. We must look alone to the evidence as we find it in

the record, and applying it to the measure of the law, ascertain whether or not it fills the measure. It will not do to sustain convictions based upon suspicions * * *. It would be a dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around the lives and liberties of the citizens'". (Buntain v. State, 15 Tex. App. 490, quoted in C.M. 208895 (Zerkel)).

5. For the reasons stated, the Board of Review holds that the record of trial is legally insufficient to support each of the findings and sentence.

William Fenner B, Judge Advocate
Lieut. Col., J.A.G.D.

Nathan J. Robert, Judge Advocate
Lieut. Col., J.A.G.D.

James O'Murphy, Judge Advocate
Major, J.A.G.D.

1st Ind.

Branch Office of The Judge Advocate General, Melbourne, A.P.O. 924, 13 Nov. 1942
To: Commanding General, Americal Division, A.P.O. 502.

In the case of Privates Claude Spillman, Leonard Bonner, and Reginald G. Maddox, all of Company C, 811th Engineer Battalion (Aviation), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings and sentence in their entirety. The holding of the Board of Review is concurred in and the record is herewith returned for a rehearing or such other action as may be determined upon.

Ernest H. Burt
ERNEST H. BURT,
Colonel, J.A.G.D.,
Assistant Judge Advocate General.

WAR DEPARTMENT
Services of Supply
In the Branch Office of The Judge Advocate General
Melbourne, Victoria.

November 13, 1942.

Board of Review

CM A-96

UNITED STATES	)	
	)	Trial by G.C.M., convened at
v.	)	Noumea, New Caledonia, Sept-
	)	ember 28, 1942. Dishonorable
General Prisoner James M. Hyatt,	)	discharge, and confinement for five
(14030672)	)	(5) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
CONNALLY, ROBERTS and MURPHY
Judge Advocates

1. The record of trial in the case of the general prisoner named above has been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria.

2. The accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 58th Article of War.

Specification: In that General Prisoner James M. Hyatt, did, at Noumea, New Caledonia, on or about August 6, 1942, attempt to desert the service of the United States by attempting to secure a passage on a boat, in the harbor at Noumea, New Caledonia, bound for Australia, with intent to permanently absent himself without leave from his post and proper duties.

CHARGE II: Violation of the 69th Article of War.

Specification: In that General Prisoner James M. Hyatt, having been placed in confinement at Prison Stockade, Paita, New Caledonia, on or about May 28, 1942, did, at Paita, New Caledonia, on or about 7:00 P.M. Wednesday, August 5, 1942, escape from said confinement before he was set at liberty by proper authority.

CHARGE III: Violation of the 94th Article of War.

Specification: In that General Prisoner James M. Hyatt, acting jointly with Private Paul E. Janssen, Battery B, 97th Field Artillery Battalion (Pack), a person under sentence adjudged by Court Martial, did, at Noumea, New Caledonia, on or about Wednesday, August 5, 1942, feloniously take, steal, and carry away a motor vehicle, value about $900.00, the property of the United States Government.

Accused pleaded not guilty to each charge and specification. He was found guilty of Charge I and the specification thereunder, except the words, "bound for Australia"; guilty of Charge II and its specification, and guilty of Charge III and its specification, except the words, "feloniously take, steal, and carry away", substituting therefor the words, "did willfully

misappropriate". No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years. The reviewing authority approved the sentence, suspended execution of the dishonorable discharge, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The sentence was published in General Court-Martial Orders No. 36, Headquarters, Americal Division, October 21, 1942.

3. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings as to Charge I, and II, and the specifications thereunder, and is legally sufficient to support the sentence. There remains for determination the legality of the findings as to Charge III, and the specification thereunder, as amended.

4. Charge III purports to allege larceny in violation of Article of War 94. The Specification omits the necessary allegation that the property was "furnished and intended for the military service", and therefore fails to charge an offense under Article of War 94, but does charge an offense in violation of Article of War 93 (M.C.M., 1928, par. 150i; Dig. Op. JAG, 1912-1940, sec. 451(43)).

By exceptions and substitutions the court-martial acquitted the accused of larceny, but found him guilty of willfully misappropriating government property. Under the provisions of paragraph 78c, Manual for Courts-Martial, 1928, a court may make findings with exceptions and substitutions:

a. As to figures, dates, amounts, or other details "provided that such action does not change the nature or identity of any offense charged", or

b. If the evidence fails to prove the commission of the offense charged but "does prove the commission of a lesser offense necessarily included in that charged".

The exceptions and substitutions made by the court in the present case do not relate merely to details. They go to the substance and change the identity of the offense. On the precise question the Judge Advocate General has held:

> "That upon a charge of larceny accused may not be found guilty of misappropriation of property, the latter offense not being included in the former." (C.M. 197396, Mimeo. Ops. JAG, No. 40 (1932); see also C.M. 199841 (1932), Dig. Op. JAG, 1912-1940, sec. 452(18)).

5. For the reasons stated the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge I and II, and the specifications thereunder, and legally sufficient to support the sentence, but not legally sufficient to support the findings of guilty of the Specification, Charge III, and Charge III.

William Thomas, Judge Advocate.
Lt. Colonel, J.A.G.D.

Nathan J. Roberts, Judge Advocate.
Lt. Colonel, J.A.G.D.

James A. Murphy, Judge Advocate.
Major, J.A.G.D.

WAR DEPARTMENT

SERVICES OF SUPPLY
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
MELBOURNE, VICTORIA

A.P.O. 924,
13 November, 1942.

SUBJECT: Record of trial by general court-martial of General Prisoner James M. Hyatt.

TO: Commanding General, South Pacific Area.

Inclosed is the record of trial described above and the holding of the Board of Review in this office that the record of trial is legally insufficient to support the findings of guilty of the specification under Charge III and of Charge III. I concur in that holding, and recommend that such findings of guilty be vacated.

A form of action effectuating this recommendation is inclosed for your convenience in the event that you concur in the action recommended.

ERNEST H. BURT,
Colonel, J.A.G.D.,
Assistant Judge Advocate General.

(Findings of guilty of Specification under Charge III and of Charge III vacated. GCMO 1, USAFISPA, 15 Nov 1942)

WAR DEPARTMENT
Services of Supply
In the Branch Office of The Judge Advocate General
Melbourne, Victoria.

Board of Review | February 21, 1943.

CM A-131

UNITED STATES	)	
	)	Trial by G.C.M., convened at
v.	)	Bora Bora, September 21, 22,
	)	and 23, 1942. Dishonorable
Corporal HUBERT WINDOM	)	discharge and confinement for
(6967662), Battery H,	)	ten (10) years. Federal Cor-
13th Coast Artillery.	)	rectional Institution, Engle-
	)	wood, Colorado.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The Board of Review has examined the record of trial in the case of the soldier named above and submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of the Judge Advocate General, Melbourne, Victoria.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Corporal Hubert Windom, Battery "H", Thirteenth Coast Artillery, did, at Battery South, Base Bobcat, on or about September 7, 1942, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Mamana Matua also known as Mana Metua, a human being, native of Bobcat, by shooting him with a rifle.

The accused pleaded not guilty to the charge and its specification, was found guilty as charged and sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record to the Commanding General, South Pacific Area, for confirmation pursuant to Article of War 48. The confirming authority approved so much of the findings of guilty of the specification and of the charge as involves a finding of guilty of voluntary manslaughter in violation of Article of War 93, and modified the sentence to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years. The Federal Correctional Institution, Englewood, Colorado, was designated as the place of confinement and the record forwarded for action under Article of War 50½.

3. The evidence shows that on the afternoon of September 7, 1942, the accused was in charge of a camouflage detail working in the vicinity of a hut

occupied by the deceased, Mamana Metua, and his wife, on the island of Bora Bora, otherwise known as "Bobcat" (R.5). The accused at the time in question was carrying an unsheathed bolo knife (R.20, 26-7). The wife of the deceased testified that accused, for whom she had several times done laundry, whistled at her as she was working at the "upper washstand". Her husband, carrying an empty bucket suspended on a pole four or five feet in length, then approached accused (R.18, 25, 26, 71). He asked accused in native dialect, "What are you doing here?" (R.19). Several soldiers in the vicinity testified that deceased, contrary to the statement of his wife, jabbed, or swung, the pole at accused and pursued him a short distance (R.31). Accused ran to the road, and thereafter walked to the battery camp, some three or four hundred yards distant. He returned between five and fifteen minutes later with a bandolier and rifle, fired eight times at deceased, killing him, and then shouldered his rifle and walked back to his hut in the camp area (R. 21, 34, 55, 61, 72, 77, 80, 88).

The accused testified that he was frightened by the deceased and tried to run away. Thereafter he remembered nothing until he heard a shot; he did not realize what had happened until he was back in the battery area (R.122-4). He denied having had relations with native women, and disclaimed racial prejudice. In 1940 he had cut another soldier in an altercation, for which he was sentenced to be dishonorably discharged and confined for three years, but was subsequently restored to duty after a year of confinement.

There is testimony that the accused remarked to another soldier, immediately after the first encounter with the deceased, that "a native had swung a club at him" (R.75); that he made a spontaneous declaration to his battery commander immediately after the shooting that "he had done a good job and he was going to turn in his stripes" (R.43). He stated to a room-mate, perhaps an hour after the event, that "if he hadn't of killed the native he couldn't have gone back and faced his daddy" (R.146).

A Board of Medical Examiners was duly appointed to examine accused as to his sanity. The Board found "There was no mental disease at the time of the shooting" (R.139) and at the time of the examination he was not suffering from a psychosis (R.149).

4.

The foregoing evidence is conclusive as to the homicide alleged. Clearly, there is no legal justification or excuse. There is evidence tending to show provocation, but the adequacy thereof and the sufficiency of cooling time are no longer of issue in view of the court's findings and of the action of the confirming authority. The time element for the "cooling period" was of such duration that the court was fully warranted in finding that accused killed deceased without just provocation, but in any event the confirming authority removed any such doubt by modifying the finding to that of the lesser included offense of voluntary manslaughter. The deliberate actions of accused in going a considerable distance from the first encounter with deceased; securing his gun from his hut and returning, and firing several rounds in a cool, calculating and accurate manner; his return to his hut, and the statements he then made, are proof conclusive of a conscious design on the part of accused to commit the acts alleged. His retreat when attacked by deceased was timely, lawful, and well taken. But his subsequent unwarranted assault, transgressed every principle of justice, and having taken the law in his own hands, he must now pay the penalty for his deed. The record is clear and convincing beyond any reasonable doubt as to accused's guilt.

The only remaining question for consideration is accused's plea as to his mental responsibility at the time the homicide was committed. The Medical Board made its findings that accused was responsible for his acts at the time alleged and at the time of the trial. The defense strenuously objected to this

evidence primarily on the grounds that the members of the Board were not qualified as experts in psychiatry (R.136-141). This objection was properly overruled as the evidence clearly shows the members of the Board to possess the highest standards in the medical profession and that they were fully qualified to testify as to the issues in question. The court is the exclusive judge as to the credibility of witnesses, of their qualifications as experts, and as to the weight and sufficiency of their testimony. In the instant case the mental irresponsibility of the accused receives support only from his self-professed loss of memory. His actions and remarks, during and after the event, belie any such lack of mental equilibrium. That he knew right from wrong and was able to adhere to the right is amply sustained by the evidence, independent of the opinion of the Board of Examiners.

A confirming authority is empowered "to confirm so much only of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense" and "to confirm * * * the whole or any part of the sentence" (A.W. 49). Pursuant to such authority the confirming authority confirmed only so much of the finding of guilty of Article of War 92 as involved the finding of guilty of voluntary manslaughter in violation of Article of War 93 and, for the purpose of ordering the execution of a legal sentence therefor did modify the sentence to dishonorable discharge, total forfeitures and confinement at hard labor for ten years.

5.

The authority of the Commanding General, South Pacific Area, to act as confirming authority herein is contained in a letter of the Secretary of War (W.D. 321.4 (9-14-42)EG-E) dated September 22, 1942, which provides in pertinent part:

> "4. The Commanding General, South Pacific Area, is vested with and is empowered to exercise all the powers, statutory or otherwise, of a commanding general of a territorial department pertaining to courts-martial, including the power of confirmation of sentence of general courts-martial and included powers conferred in time of war by Articles of War 48 and 49, and is further empowered by the President to exercise the powers set forth in Article of War 50. The exercise of such powers will be subject to and in accordance with the provisions of Article of War 50½."

6.

It is, therefore, the opinion of the Board of Review that the record is legally sufficient to sustain the findings and the sentence as modified by the confirming authority.

[signature], Judge Advocate.
Lt. Col., J.A.G.D.

[signature], Judge Advocate.
Lt. Col., J.A.G.D.

[signature], Judge Advocate.
Major, J.A.G.D.

(Sentence as confirmed ordered executed.
GCMO 2, USAFISPA, 1 Mar 1943)

WAR DEPARTMENT
Services of Supply
In the Branch Office of The Judge Advocate General
Melbourne, Victoria

28 December, 1942.

Board of Review

CM A- 141

UNITED STATES v. Private James P. Traynor, (18084438), and Private Floyd R. Thiel, (20630427), both of Headquarters Detachment, Base Section No. 5.	Trial by G.C.M., convened at Headquarters 22nd Port of Embarkation and Base Section 4, A.P.O. 924. As to Private Traynor: Dishonorable discharge, confinement for four (4) years. As to Private Thiel: Dishonorable discharge, confinement for five (5) years. Federal Correctional Institution, Eaglewood, Colorado.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates

1. The Board of Review has examined the record of trial of the soldiers named above and submits this, its opinion, to the Assistant Judge Advocate General, Branch Office, Melbourne, Australia.

2. The accused were tried upon the following charge and specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private James P. Traynor, Headquarters Detachment, Base Section Number 5, APO 925 and Private Floyd R. Thiel, Headquarters Detachment, Base Section Number 5, APO 925, acting jointly and in pursuance of a common intent, did, at North Adelaide, South Australia, on or about 6 P.M., 26 July, 1942, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Alfred Swaine Randell, of North Adelaide, South Australia, the sum of £22, lawful money of the Commonwealth of Australia, and of the value of about $71.02.

They plead not guilty to the Charge and Specification and were found guilty as charged. They were sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, Private James P, Traynor for four (4) years and Private Floyd R. Thiel for five (5) years. The reviewing authority approved the sentences and designated The Federal Correctional Institution, Eaglewood, Colorado, as the place of confinement. Pursuant to the provisions of Article of War 50½, the record was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Australia.

3.

The evidence shows that about 6 P.M. on Sunday, July 26, 1942, the accused came to the home of Dr. Alfred S. Randell, Wellington Square, North Adelaide, Australia, and asked Mrs. Randell for a "bottle opener". Mrs. Randell got the bottle opener for them but it developed that they needed

a "corkscrew". They asked Mrs. Randell "if they could come inside", while she secured the corkscrew. Mrs. Randell asked them in the hall, and her husband not being home at the moment, she requested her daughter to stay with them. Her husband returned in the meantime and opened the bottle for them. Mrs. Randell offered them hot coffee, but they declined, and she then retired to the sitting room, leaving the accused and her husband in the hall.

Dr. Randell talked with accused Thiel who told him that his people were cattle raisers in Texas, and that accused Traynor's people were wheat growers (R. 9). Accused Traynor left the house and "walked down the drive", Thiel remaining in the house. Thiel then stated to Dr. Randell that they were on their first weekend leave from Sandy Creek and had only 12/- and requested a loan of a "couple of shillings". He then asked Dr. Randell for a loan of a pound offering to put his overcoat up as security. Dr. Randell made the loan, refusing to take any security. Accused Thiel then gave Dr. Randell his name, serial number, and address on an envelope. Thiel then asked Dr. Randell to "come down to the front gate and say good-bye to us" (R. 10). Dr. Randell and Thiel then "strolled down the drive and found accused Traynor sitting on the railing outside the gate", Dr. Randell said to Thiel "There's your dopey friend waiting for you" (R. 10). Traynor then approached witness "and when he got beside me I got a terrific smack on the head with a full bottle of wine and then I got hit on the right ear". Who did that I don't know"(R. 10). Witness grabbed accused Thiel and they "rolled about a bit and he got me by the throat". Thiel then said to Traynor "It's in his hip pocket" and Traynor "took what money I had and both ran down the road". Witness had £22 in his pocket. Witness never became unconscious but was "too dazed to follow them". He returned to the house and rang up the police. Accused were apprehended the following day and definitely identified by Dr. Randell as the ones who assaulted and robbed him. Witness did not think either of accused were "intoxicated".

Both accused took the stand and testified that they were drunk and remember very little of the happenings on the night of the alleged crime. However, both remembered being in Dr. Randell's home. Traynor recalls sitting in a chair and getting sick and leaving the house and of Thiel saying to him "come on let's go". He remembers "getting on a tram and the conductor saying something to me and I remember him"(R. 24). Thiel recalls going into Dr. Randell's home and opening a bottle of wine, borrowing £1 from Dr. Randell, and giving him his name, organization, and serial number (R. 21-3).

4.

The evidence is clear and convincing that both accused assaulted and robbed Dr. Randell in the manner alleged in the Charge and Specification. Both were positively identified by Dr. Randell as the persons who assaulted and robbed him. Both participated in the assault and the actual robbery. Their defense that they were so drunk as to be unable to remember anything is untenable. Accused Thiel recalls in detail going into Dr. Randell's home, opening a bottle of wine, borrowing one pound and giving his correct name, organization and serial number. Traynor recalls being in the home, sitting in a chair, getting sick and leaving, boarding a tram and conversing with and remembering the conductor. Dr. Randell testified neither of accused were "intoxicated". The court was warranted in finding that the accused were fully capable of knowing the results of their conduct. The manner in which the crime was perpetrated negatives the defense of drunkenness but on the contrary shows a well conceived plot and its execution. The evidence contains all the necessary elements of the crime charged and is clear and convincing of accuseds' guilt. No errors affecting the substantial rights of the accused appear in the record and the findings of guilty are fully sustained.

5.

The record shows the service records of accused to be as follows:

"Private James P. Traynor.
Age 22 years, Pay, $60.00 per month, Allotments to dependents, $10 per month, Government Insurance deduction, $6.60 per month. Data as to service: Enlisted in Regular Army, January 8, 1942.

Private Floyd R. Thiel.
Age 24 years, Pay $60.00 per month, Allotments to dependents, none per month. Government Insurance deduction, none per month. Data as to service: Enlisted in National Guard, September 30, 1940."

6.

For the reasons stated above the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Charge, and the Specification thereunder, and the sentence.

_____, Judge Advocate
Lt. Col., J.A.G.D.

_____, Judge Advocate
Lt. Col., J.A.G.D.

_____, Judge Advocate
Major, J.A.G.D.

WAR DEPARTMENT
Services of Supply
In the Branch Office of The Judge Advocate General
Melbourne, Victoria

Board of Review

December 18, 1942.

CM A - 162

UNITED STATES v. Private Sidney F. Graham, (38021362), Company I, 29th Quartermaster Regiment (Trk).	Trial by G.C.M., convened at Parramatta, N.S.W., 1st June, 1942, reconvened at Mt. Isa, Queensland, 14 July, 1942, and at Brisbane, Queensland, 20 November, 1942. Dishonorable discharge and confinement for life. Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY.
Judge Advocates.

1. The Board of Review has examined the record of trial in the case of the soldier named above, and submits this, its opinion, to the Assistant Judge Advocate General, Branch Office, Melbourne, Australia.

2. Accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: 'In that Private Sidney F. Graham, Co. "I", 29th Quartermaster Regiment (Truck) did, at Kensington, a suburb of Sydney, Australia, on or about April 25th, 1942, forcibly and feloniously, against her will, have carnal knowledge of Vera Goddard.

He pleaded not guilty to and was found guilty as charged. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances, due or to become due, and to be confined at hard labor for ten years. The mandatory penalty for this offense being death, or imprisonment for life, the reviewing authority ordered the court reconvened for the purpose of properly sentencing the accused. The court duly and legally convened, revoked its former action and sentenced accused to be dishonorably discharged the service, to forfeit all pay and allowances, due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the findings and the sentence and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. Pursuant to the provisions of Article of War 50½, the record was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Australia.

3. The evidence shows that Vera Goddard was employed as assistant secretary of the Australian Golf Club, at Kensington, and had been so employed for 17½ years. She left the Club at twenty minutes past eight o'clock on the evening of April 25, 1942, and walked down a footpath on the Kensington Race Course, to catch a bus to her house (R. 2). The footpath paralleled a main road with street lights. Air raid shelters were located about 20 feet from the footpath. About half way from the Club to the bus station witness was approached from the rear by a soldier who asked the way to Randwick Race Course (R. 2). Witness directed the soldier to the Race Course, and both continued walking in the same direction. When passing an air raid

shelter the soldier grabbed witness, placed his hand over witness's mouth and nose, and pushed her toward the entrance of the air raid shelter telling her, "If you do not keep quiet I will kill you" (R. 3). Witness, who weighed 124 pounds, struggled, tried to break his hold, tried to bite his hand, but the soldier was too strong and her resistance was futile. In the struggle an umbrella witness was carrying looped over her gloved hand was broken. At the entrance to the air raid shelter witness stumbled and fell full length on the sand. The soldier pulled witness around a right angle corner of the shelter and dropped her on the floor, (R. 4) on her back. The soldier undid witness's clothing and accomplished his purpose, which carried with it all the essential elements of rape. Witness protested "volubly and struggled as much as I could and I tried to get up, but it was impossible when he was on top of me" (R. 30). After the assault witness caught a tram and immediately went to the office of her doctor in Kensington, arriving there at half past nine o'clock. The doctor was out, but the doctor's assistant gave her a cup of coffee and some tablets and tried to communicate with Dr. Halliday and Dr. Daniels, neither of whom were available. Dr. Halliday was subsequently contacted on the telephone and instructed witness to "Wait till I get back". Witness asked the use of a bathroom to "clean myself up" as she did not want her mother to know what had happened (R. 6). Dr. Halliday arrived at his office at eleven o'clock P.M. He examined witness, gave her a contraceptive, and a syringe, and drove her home.

The nurse, Isabell Croft, testified that when Vera Goddard came to the office of Dr. Halliday "sometime after nine" [o'clock P.M.] "she was very agitated and trembling all over and supported herself against the wall" (R. 13). "Her hair was also disheveled and covered with sand, she was dirty as though she had been rolled in the dirt and sand." "Her umbrella was broken, she had a bag with eggs and things in it, and they were broken" (R. 14). Witness corroborated Miss Goddard's testimony as to the treatment given her by witness and of her efforts to contact Drs. Halliday and Daniels. Dr. Halliday arrived about a quarter to eleven or eleven o'clock.

Miss Goddard came to work on the morning of April 26, following the alleged attack, although it was her "day off" as she knew "a reaction was going to set in" (R. 7). She notified the Australian police of the crime that day at 12 o'clock.

On the afternoon of April 27, 1942, while walking along Anzac Parade she saw accused and recognized him as the man who had assaulted her the previous Saturday night. Accused turned and "I am pretty certain he recognized me" (R. 7), and then entered a hamburger shop where there were approximately ten colored men sitting at the bar. They were all American soldiers of various colors (R. 8). Witness then ran to a nearby police station and shortly returned with "Detective Quinn and a policeman in uniform "(R. 8). Accused had left the hamburger shop, but witness saw him standing near a petrol pump, pointed him out to the police and accused was then arrested by Detective Quinn (R. 9). He denied his guilt and said "I have never seen you before lady" (R. 9). Witness stated she also recognized accused's voice and upon being asked what she would like accused to say, replied, "Show me the way to the Randwick Race Course". Accused repeated this sentence and witness definitly and positively identified accused as the one who had attacked her on the previous Saturday night (R. 9).

On cross-examination witness testified that her duties at the golf club required a "certain amount of training in recognition, because I am in a private club where members are introduced to us and we have to know them again" (R. 10). That the road where the alleged attack occurred was a "main road with street lights. There was a light which shines directly in the mouth of the shelter". He [accused] was in silhouette the whole time, and a silhouette is the clearest recognition of the face. It was "not a very bright night but it was light enough to see a person along side of you" (R. 10). That there was no doubt in her mind, there was not a possibility, even remote, that she could be mistaken in her identity of accused for "I had his voice in my ear and his face was very close to mine" (R. 11). He had a very prominent lower jaw, thick lips, dark brown complexion, 6 feet, one or two, and broad in proportion",

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which was the same description given by witness to the police on the morning of April 26, 1942 (R. 12).

4.

The accused elected to remain silent. Zenora Anthony, a witness for the defense, testified that on the afternoon, and part of the night, of April 25, 1942, he was shooting dice and that accused took part in the game. Witness knows accused was in the game "after dark", but witness left the game, went to town and had supper at about 8:15 or 8:30 (R. 15-16). Clarence Wilson was also in a crap game about 7:30 P.M. It was dark and they had candles burning. Accused asked witness to change a five pound note for him. The time was about seven o'clock (R. 17). Archibald Birdines testified that between 6:30 and 7 o'clock he was gambling and that accused was in the game, dressed in fatigue clothes (R. 19-20). Columbus Moore testified that he borrowed a field jacket and a pair of civilian shoes from accused, and that the time was about 8:10 or 8:15 but "I would not be sure what time it was" (R. 23). Joe R. Davis testified that he saw accused in the company street about 8:45 dressed in "coveralls". Witness was going for a "hot dog" and asked the guard the time.

First Lieutenant Frederick K. Pearman testified accused was a member of his company and had been since March 27, 1941. That accused had been a good soldier, had a very good record and no previous convictions. He classified him "as one of my best truck drivers" (R. 25).

Witness made two trips to an air raid shelter on Anzac Parade, one in the afternoon and one at night. The shelter is totally dark inside, you "cannot see your hand before your face". There was one small street light about the candle power of a flashlight. In the opinion of witness it would be very hard to identify anyone at night in that vicinity (R. 26). It was the opinion of witness that a person could not identify by silhouette if standing between the shelter and the entrance (R. 27).

5.

All of the elements of the offense charged are proven. The victim positively identifies the accused as being the one who committed the crime. Miss Croft testifies as to Miss Goddard's physical and mental condition immediately thereafter which tends to further corroborate the testimony of Miss Goddard. The defense offered no evidence to show that the shelter described by Lieutenant Pearman was the same one as testified to by Miss Goddard, nor was any evidence offered to show that the lighting conditions on May 3, 1942, the time the inspection was made by Lieutenant Pearman, were the same as on April 25, 1942, the date of the alleged attack. The testimony of the witnesses for the defense was confusing and not convincing and the court, by its findings, did not consider the alibi of accused established.

The sentence first imposed by the court not being authorized by the 92nd Article of War, there was no error in the appointing authority returning the record to the court for a reconsideration of the sentence in accordance with the mandatory provisions of the Manual for Courts-Martial, under Article of War 40. This was legally done and the mandatory sentence duly promulgated by the court.

6.

The record shows the service of accused to be as follows:

> "Sidney F. Graham, No. 38021362; Private, Company I, 29 Q.M.C., Truck. The accused is twenty two years of age and seven months and receives pay of thirty dollars per month and allotment to dependants of 24 dollars per month, and no Government insurance. The accused was inducted at Oklahoma, State Oklahoma, March 27, 1941, and his reserve record shows no previous conviction either within the Statutory limit or without it."

No errors appear in the record which affect the substantial rights of the accused, and the evidence fully warrants the findings by the court.

For the reasons above stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Charge and the Specification thereunder, and the sentence.

_____, Judge Advocate.
Lt. Col., J.A.G.D.

_____ Judge Advocate.
Lt. Col., J.A.G.D.

_____ Judge Advocate.
Major, J.A.G.D.

WAR DEPARTMENT
Services of Supply
In the Branch Office of The Judge Advocate General
Melbourne, Victoria

Board of Review

22 December, 1942.

CM A - 180

UNITED STATES v. Private Joseph F. Valdes, (14066277), 464th Ordnance Company.	Trial by G.C.M., convened at Townsville, Queensland, 5 November, 1942. Dishonorable discharge and confinement for fifteen years. U.S. Disciplinary Barracks, Fort Leavenworth, Kansas.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The Board of Review has examined the record of trial in the case of the soldier named above, and submits this, its opinion, to the Assistant Judge Advocate General, Branch Office, Melbourne, Victoria.

2. Accused was tried upon the following charge and specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Joseph F. Valdes, 464th Ordnance Company, Charters Towers Air Base, Charters Towers, Queensland, did, at Townsville, Queensland, on or about May 5, 1942, desert the service of the United States, by absenting himself without proper leave, from his organization with intent to avoid hazardous duty, to wit: his platoon was scheduled to embark the following day to a place known to be under frequent enemy fire, and did remain absent in desertion until he surrendered himself at Alva, Queensland, on or about May 31, 1942.

He pleaded not guilty to the charge and specification and was found guilty as charged. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for fifteen years. The reviewing authority approved the finding and sentence, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. Pursuant to the provision of Article of War 50½, the record was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria.

3. The evidence shows that during the first week of May, 1942, the accused, then stationed at Townsville, Queensland, was advised that his organization was to move immediately to a station in the combat zone and in close proximity to the enemy (R. 8). He, with other members of the organization, was given a pass on the night of May 3 or 4, 1942, which expired at 12 midnight. On the morning of May 5, 1942, when the organization embarked accused was not present and although search for him was made, he could not be found (R. 8).

Mr. Vladislad Darveniza, a civilian farmer, residing about 86 miles from Townsville, testified that on the morning of May 6, 1942, the accused, dressed in civilian clothes, "came to his place", admitting that he was an American but denying that he was a deserter, or a member of United States Army forces, and asked for a job. (R. 17). Witness promised accused work in two or three weeks and accused said that "he would wait". "After about 2, 3, or 4 days",

he admitted that he had left the American Army, saying "he had leave till midnight that night and he got into a party with an Australian boy and girl and they got him drunk on whisky, and he said it was about 10:00 a.m. next morning when he woke up, and he was afraid that if he reported himself that he would be shot as the penalty was death" and further said "I would like to go back but I am afraid they would shoot me" (R. 17).

Darveniza assured accused that he would not be shot, whereupon accused on May 31, 1942, surrendered himself to a U.S. Army Signal Corps installation at Ayr. On the way to the military post Valdes attempted to find his uniform which he had hidden in the bush, but the locality had recently been burnt by fire and the clothes could not be found.

Defense counsel made an unsworn statement on behalf of the accused which corroborated the testimony of the prosecution witnesses and attributed the absence of the accused only to the fact that because he had been drinking he had missed the boat and became "scared" (R. 30).

4. All of the elements of desertion are proven by clear and convincing evidence. He was a long distance from his station, dressed in civilian clothes. He denied being in the military service and was attempting to find work in a civilian capacity. He knew his organization was moving into a combat area and not until after three weeks did he surrender himself. The use in the specification of the word Alva instead of Ayr as the place where the accused returned to military control is not a material variance.

No errors appear in the record which injuriously affect the substantial rights of accused, and the evidence fully warrants the findings of the court and the sentence.

The record shows the service record of accused to be as follows:

> "Age 25-3/12 years, Pay $59.75 per month, Allotments to dependents (None) per month. Government Insurance deduction, $6.70 per month.
> Data as to service: PRIOR SERVICE: None. CURRENT ENLISTMENT: Enlisted at Fort McPherson, Georgia, January 2 1942, to serve duration of war plus six months".

5. For the reasons above stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Charge and the Specification thereunder, and the sentence.

[signature], Judge Advocate.
Lt. Col., J.A.G.D.

[signature], Judge Advocate
Lt. Col., J.A.G.D.

[signature], Judge Advocate.
Major, J.A.G.D.

WAR DEPARTMENT
Services of Supply
In the Branch Office of The Judge Advocate General
Melbourne, Victoria

Board of Review

CM A-204 8 January, 1943.

UNITED STATES v. 1st Lt. Malcolm E. Jenna (0389205), 247th Field Artillery Battalion.	)	Tried by G.C.M., convened at Noumea, New Caledonia, November 12, 1942. Dismissal from Service, total forfeitures and confinement at hard labor for five (5) years. Federal Correctional Institution, Englewood, Colorado.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The Board of Review has examined the record of trial in the case of the officer named above, and submits this, its opinion, to the Judge Advocate General, Branch Office, Melbourne, Australia.

2. The accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 93rd Article of War.

Specification 1: In that First Lieutenant Malcolm E. Jenna, 247th Field Artillery Battalion, did, at Service Battery Area, 247th Field Artillery Battalion, on or about August 30, 1942, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection by mouth with Master Sergeant Marshall P. Demarais, 247th Field Artillery Battalion.

Specification 2: In that First Lieutenant Malcolm E. Jenna, 247th Field Artillery Battalion, did, near the highway known as Colonial Route No. 1 between the Headquarters area of the 246th Field Artillery Battalion and Boulapari, New Caledonia, on or about September 4, 1942, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection by mouth with Corporal Elmo W. Snowden, 247th Field Artillery Battalion.

CHARGE II: Violation of the 95th Article of War.

Specification 1: In that First Lieutenant Malcolm E. Jenna, 247th Field Artillery Battalion, did, at Noumea, New Caledonia, on or about October 14, 1942, conduct himself in a manner unbecoming an officer and a gentleman in that he made improper advances toward Private First Class Bethel Heugel, Service Battery, 247th Field Artillery Battalion, by placing his hand upon the private parts of said Private Heugel.

Specification 2: In that First Lieutenant Malcolm E. Jenna, 247th Field Artillery Battalion, did, at Bourail, New

Caledonia, on or about October 9, 1942, conduct himself in a manner unbecoming an officer and a gentleman in that he made improper advances toward Private First Class Frank A. Rutledge, Service Battery, 247th Field Artillery Battalion, by placing his hand upon the private parts of said Private Rutledge.

He pleaded not guilty to and was found guilty as charged. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of five years. The reviewing authority approved the sentence and the confirming authority duly confirmed the same and designated the Federal Correctional Institution, Englewood, Colorado, as the place of confinement. Pursuant to provisions of Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria.

3. The evidence shows that on August 30, 1942, about 8:30 or 9:00 P.M., accused asked Master Sergeant Marshall P. Demarais to come to his tent. The witness who was the Master Sergeant of the battery of which the accused was commanding officer, complied with this request. Accused asked witness to have a drink and they consumed a bottle of beer, a bottle of gin and a bottle of vermouth (R.8). Accused then "played around" with witness who wanted to leave but the accused said "no". Accused unbuttoned witness's pants and committed sodomy upon him per os. Witness "could not resist because he was not in a good state of physical being"(R.9); things were "blurry" and he was "too weak to push him away" but he "tried" (R.13). Witness left at 10:00 P.M., got in his truck and went to sleep. He did not feel capable of driving it the 150 yards to the parking place. (R.15). He had served under the command of accused since May 29, 1942 and had never "been in any trouble with him" (R.11).

On September 24, 1942, Corporal Elmo W. Snowden was on a three day pass in Noumea. He met accused who asked him if he wanted a ride back to camp. Witness accepted and left Noumea on a truck. They stopped at the 246th Field Artillery for supper, [after which witness lay down and went to sleep]. Engine trouble developed and the truck was pulled to the side of the road somewhere between the camp of the 246th Field Artillery and Bouleupari. It was here that accused committed sodomy on witness per os. Witness told accused "to stop three or four times and pushed him away" (R.12,20). After the act accused lay down in the truck and went to sleep. Witness slept under a tarpaulin some distance from the truck. Later in the night accused sent a guard, who was stationed nearby, directing witness to return to the truck. Witness refused to comply but stayed where he was until next morning when the truck was towed to a service station. Accused had not been drinking in Noumea but when he left the 246th Field Artillery "he was pretty drunk but he could drive".(R.16).

Private First Class Bethel Heugel, a member of accused's battery and his driver for about six weeks, testified that he drove the accused to Noumea on October 14, 1942, and that they spent the night in a Frenchman's house in that city. Accused, another officer, and two enlisted men were in the room and drank some whiskey while witness drank "a few beers". Witness was not drunk (R.24). "When we were ready to go to bed" and before witness had taken his clothes off, "Lt. Jenna wanted me to sleep with him. I said no. He started playing around. He felt of me and played with my penis"(R. 23, 24, 25). Witness thought that accused was going to commit an "act upon him" so he got up and slept on a divan in another room. Accused was not further molested that night.

Private First Class Frank A. Rutledge testified that he knew accused for three months; that about on October 9, 1942, when he was supposed to be on guard duty at Bouril, the station of accused's battery, accused phoned for witness to come to his house. He went to the house, was offered what he thinks was rum and they both drank. "He kept wanting me to drink booze". Accused told witness to get undressed; witness complied and went to bed. Accused took his (Rutledge's) penis in his hand and "played around" with him. Witness turned over on his stomach and in a few minutes accused went to his own bed (R.29). Witness was not drunk and knew what he was doing (R.29).

First Lieutenant Willard F. Hines was called as a witness for the court. He testified that he had known accused "since the formation of the battery"(R.62). Accused was witness's battery commander and witness had "a little trouble with him as battery commander." (R.63) He had seen accused seeking the company of enlisted men socially (R.65). Witness thinks accused made an improper advance toward him about 10:00 o'clock one evening after accused had invited witness to his tent for a drink. Witness stated that he did not drink anything as he thought it "might bother my appendix."(R.66). Accused "wanted to examine me" and thinking it was a joke, or that accused "knew something about it", he unbuttoned his trousers, pulled them down, and lay on the bed (R.66). "I wanted to see what he would do, thinking that he would put his hand around the vicinity of my appendix, but instead of that he put his hand right above my penis. He made two or three attempts trying to convince me to keep my hand away" (R. 67). Witness further stated that there was some doubt in his mind as to accused "trying to reach my penis but he thought he was trying"(R. 69). Witness stated that prior to the time charges were preferred against the accused that they spent the night in Noumea together, and that accused did not approach witness at that time (R.71). Witness further testified, "Some say he (Jenna) has slept with enlisted men. I did not see that. The only thing that I have heard is that men go out to pick him up and then come back in the morning" (R.65) and in response to the question by the president of the court, "Does this officer have a reputation with respect to playing around with people's genitals?", answered, "Yes, sir, from what I have heard" (R.67).

Lieutenant Colonel Robert E. Moffet testified that he was accused's commanding officer; that he considered him a "capable officer, and as a supply officer he was over and above the average" (R.34). He knew of no ill-feeling between Sergeant Demarais and the accused (R.76) and contrary to the testimony of the accused did not "support the action of Sergeant Demarais as opposed to the action suggested by Lieutenant Jenna." (R.76).

Captain Thomas W. Casey had known accused for six years, having spent four years with him at Harvard University. He considered the accused a "good officer"(R.37) and Captain Robert B. Keith, who knew the accused since 1941 considered him "better than the average" (R.40).

First Sergeant Huggin testified that on one occasion he had heard Sergeant Demarais say, "If Lieutenant Jenna did not stay away from him he would have to shoot him" but did not know what provoked the remark (R.43, 44) and knew of no trouble between them. Such statement was apparently made after the accused had learned of the charges by the Sergeant against him and the accused had said "that he was going to get two men" (R.72).

M. Andre Losac testified that he permitted accused to use a room in his house in Noumea. That the accused was never there alone but generally came with a lieutenant and a sergeant. That on one occasion accused brought his chaffeur but the chaffeur had slept in another room. That he had never seen the accused drinking with enlisted men but that it was possible for him to drink in his room without witness knowing of it (R.61).

Accused elected to take the stand and testified under oath in the following sequence and manner:

The first accused knew anything "was wrong within the battery was when someone told him there were two accusers and, later on there were three" (R.47). Accused did not believe the story and sought the Colonel's advice. He was "amazed at the accusations of Lieutenant Hines (who at this stage of the proceedings had not yet testified) but did not think much of the four enlisted men". Accused had "warned Lieutenant Hines on several occasions to run his own section" (R.48) and "Sergeant Demarais continuously went over my head and discussed affairs with the battalion commander". Accused had no recollection "of that particular night Sergeant Demarais mentioned but on several occasions I have given him one or two bottles of beer" (R.48). On October 9, 1942, a party had been held in Bouril for officers only. Accused admitted that on this occasion he called Private Rutledge who was on guard duty, at 10:00 P.M., to drive him back, and that he had asked for a guard "because it was late and I did not want to get anyone who had to work next day because they were asleep" (R.48). He stated, "Rutledge said I offered him rum or liquor, he said he drank it and went to bed. He did drink some and then went to bed but as far as anything else happening I am not aware of it"(R.48). "With reference to that incident of which Heugel spoke of and also the one by Snowden I recall as far as I know I know nothing"(R.49). Accused stated that Lieutenant Hines had slept with him four times after Hines had alleged that he, the accused, "had played with his legs" and "attempted to commit sodomy on him". (R. 48,49). On cross-examination accused stated he had trouble with Sergeant Demarais ever since he became a Master Sergeant. That he felt Demarais was head-strong and that he and Heugel held malice toward him. "I do not think that the others hold any malice toward me"(R.49). Accused specifically denied giving liquor to Rutledge, Heugel, and Demarais but admitted that on several occasions he had given them several bottles of beer and some wine, although he had previously testified that Rutledge "did drink some and went to bed", (R.48). That the reason he stayed in a private home in Noumea was that when on duty as supply officer he frequently had to stay two or three days and no accommodations were available at the hotels. Accused admitted that he and Snowden were in the same vehicle and that they spent the night on the side of the road near the 246th FA area because of car trouble (R.52). Accused admitted that on one occasion that an enlisted man had slept with him in the home in which he stayed while in Noumea (R.53). That at all times, during the period in question, he had control of his senses and mental powers and that he had no knowledge of the alleged acts (R.57).

By stipulation a statement was introduced in evidence signed by two medical officers that accused "was not insane at the time of the alleged crimes for which he was being held". Included in this statement there appears the following : "he blames his acts on poor family background, previous experiences of a similar nature, and drinking at the time of the acts." (Pros. Ex. 1).

The offenses of which the accused was found guilty are proven by clear and convincing evidence. The very nature of the crimes of which accused is charged precludes the presence of witnesses, other than the immediate parties to the act. In the instant case, however, there is much corroborating evidence which has a material bearing on the issues. Accused admits having given wine and beer on several occasions to the four

witnesses directly concerned. He admits that he called Private Rutledge from guard duty on the night in question and that at a house reserved for the use of officers only, after the other officers had left, he gave witness rum, or liquor, and that Rutledge went to bed there, but he offered no explanation for his actions. He admitted that Private Heugel drove him to Noumea on the date testified to by the witness and further admitted having been with Corporal Snowden on a truck at the time and place of the offense testified to by Snowden. He was "amazed" at the accusation of misconduct made by Lieutenant Hines, but did not specifically deny the acts which were the bases thereof. These facts, with the direct and unequivocal testimony of the four witnesses primarily involved, weave such a web of evidence around the accused that the court was clearly warranted in finding him guilty as charged.

The contention of the accused that the testimony of the several witnesses involved in the acts alleged was false and engendered by malice, is not corroborated by the evidence. Accused himself testified that only Demarais and Heugel, of the four witnesses, bore malice toward him. Lieutenant Colonel Moffet and Sergeant Huggin denied any knowledge of ill-feeling between the accused and Demarais. Without some degree of proof, of which there is none, a conclusion is unwarranted that the accused could have been "framed" by all four of the complaining witnesses, and also by Lieutenant Hines, each testifying to acts alleged to have occurred at different times and places, the opportunity for each act was admitted by the accused. From the testimony, the truth of the accusations, rather than their falsity, is the more reasonable conclusion.

The testimony of Lieutenant Hines as to alleged improper advances made to him by the accused was in explanation of an act not contained in any of the specifications for which the accused was on trial but evidence of which was first placed beforethe court by the accused's own testimony. It has been repeatedly held, moreover, that upon a trial of having committed any of the crimes known as "sexual offenses", evidence of prior acts of the same character are admissible, although such prior acts are, in and of themselves, crimes (sec. 356, Wharton, Criminal Evidence). Accordingly, the admission of such testimony was not erroneous. The court, by its own questioning, improperly placed the accused's character in evidence by hypothetical questions propounded to various officer witnesses. These witnesses, in the main, testified favorably with reference to the character of the accused and the Board therefore deems the error harmless.

Testimony of Lieutenant Hines, from which the reputation of the accused for the commission of acts of sexual perversion based solely upon "what the witness had heard", should not have been admitted in evidence. The statement of the medical officers, admitted by stipulation, contained evidence tantamount to a confession by the accused of the acts charged. Paragraph 126, Manual for Courts-Martial, 1928, stated in pertinent part that, "A stipulation which practically amounts to a confession where the accused has pleaded not guilty and such plea still stands * * * should not ordinarily be accepted by the court * ** in * * * important cases a stipulation should be closely scrutinized before acceptance". Although the subject of close scrutiny the admission of such stipulation is not necessarily prejudicial error. The witnesses who would have testified but for the stipulation were stationed in the immediate vicinity of the place of trial by court-martial and nothing in the record indicates that they could not have been in attendance if their presence had been requested. Throughout the record there is sufficient legally admissible evidence upon which the court could base its findings of guilty. Under authority of Article of War 37,, the errors contained in the record did not injuriously

affect the substantial rights of the accused (sec. 395(2) Dig. Ops. JAG, 1912-40).

The record shows the service record of accused to be as follows:

"Name, etc., of accused: Jenna, Malcolm E., 0-389205, First Lieutenant, 247th Field Artillery Battalion. Age: 23. Pay: $205.04 per month. Allotments to dependents: $160.00 per month. Government Insurance deduction: $6.60 per month. Data as to service: Commissioned June 18, 1940, as Second Lieutenant. Inducted into Federal Service January 16, 1941."

For the reasons stated above the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the charges and specifications thereunder, and the sentence.

, Judge Advocate.
Lt. Col., J.A.G.D.

, Judge Advocate
Lt. Col., J.A.G.D.

, Judge Advocate
Major, J.A.G.D.

1st Indorsement

War Department, Branch Office of the Judge Advocate General, Melbourne, Victoria, 11 January, 1943.
TO: Commanding General, United States Army Forces in South Pacific Area.

1. In the case of First Lieutenant Malcolm E. Jenna, 0-389205, 247th Field Artillery Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM 204)

ERNEST H. BURT,
Brigadier General, U. S. Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 1, USAFISPA, 16 Jan 1943)

WAR DEPARTMENT
Services of Supply
In the Branch Office of The Judge Advocate General
Melbourne, Victoria.

Board of Review

CM A-216

19 March, 1943.

UNITED STATES v. Private Elton C. Hovi (20646699), Headquarters Company, 2nd Battalion, 127th Infantry.	)	Trial by G.C.M., convened at Camp Cable, Queensland, November 11, 1942. Dishonorable discharge and confinement for a year and five months. The execution of dishonorable discharge and so much of the sentence in excess of hard labor for three months and forfeiture of $40.00 per month for three months suspended.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the soldier named above having been examined in the office of the Assistant Judge Advocate General, Melbourne, Australia, and there found legally insufficient to support the findings and sentence in part, has been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 61st Article of War.

Specification 1: In that Private Elton C. Hovi, Headquarters Company, 2nd Battalion, 127th Infantry, did, without proper leave, absent himself from his post and duties at Headquarters Company, 2nd Battalion, 127th Infantry, Camp Cable, Queensland, Australia, from about September 13, 1942 to about September 16, 1942.

Specification 2: In that Private Elton C. Hovi, Headquarters Company, 2nd Battalion, 127th Infantry, did, without proper leave, absent himself from his post and duties at Headquarters Company, 2nd Battalion, 127th Infantry, Camp Cable, Queensland, Australia, from about September 17, 1942 to about September 23, 1942.

CHARGE II: Violation of the 58th Article of War.

Specification: In that Private Elton C. Hovi, Headquarters Company, 2nd Battalion, 127th Infantry, did, at Camp Cable, Queensland, on or about October 3, 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at Brisbane, Queensland, on or about October 20, 1942.

CHARGE III: Violation of the 69th Article of War.

Specification 1: In that Private Elton C. Hovi, Headquarters Company, 2nd Battalion, 127th Infantry, having been duly placed in arrest in Headquarters Company, 2nd Battalion, 127th Infantry street on or about September 16, 1942, did, at Headquarters Company, 2nd Battalion, 127th Infantry street on or about September 17, 1942, break his said arrest before he was set at liberty by proper authority.

Specification 2: In that Private Elton C. Hovi, Headquarters Company, 2nd Battalion, 127th Infantry, having been duly placed in confinement in Headquarters Company, 2nd Battalion, 127th Infantry street on or about September 23, 1942, did, at Headquarters Company, 2nd Battalion, 127th Infantry street on or about October 3, 1942, escape from said confinement before he was set at liberty by proper authority.

The accused pleaded guilty to Charge I and the specifications thereunder; not guilty to the specification of Charge II and Charge II, but by exceptions and substitutions guilty of absence without leave in violation of Article of War 61; to Specification 1 of Charge III, guilty, to Specification 2 thereof, not guilty, and of Charge III, guilty. He was found guilty of Charges I and III and specifications thereunder, and of a violation of Article of War 61 in accordance with his plea in substitution to Charge II. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for one year and five months. The reviewing authority approved the sentence but suspended the dishonorable discharge and so much of the sentence as exceeds hard labor without confinement for three months and forfeiture of $40.00 of his pay per month for three months and ordered the execution thereof. The result of the trial was published in General Court-Martial Orders No. 32, Headquarters 32nd Infantry Division, A.P.O. 32, 26 December, 1942.

3.

The record is legally sufficient to support the findings of guilty as to Charges I and II and the specifications thereunder and the findings of guilty of Charge III and Specification 1 thereunder.

4.

There being no question before the Board of Review other than Specification 2, Charge III, the evidence will be discussed only as to the issue raised by this specification.

On September 13, 1942, the organization of which accused was a member, went on an 8-day cross-country hike (R. 9). Accused did not accompany them but was, at the time, absent without leave. On September 21, 1942, the company returned. In the meantime accused had been apprehended. Upon being brought before his commanding officer, Captain John L. Lehigh, he was placed in arrest and confinement in the company guard tent, under an armed guard (R. 10,11). The guard was ordered "to watch him at all times and not to let him escape" (R. 16). Sergeant Elmer G. Coon, testified that on October 3, 1942, he was guarding accused in a regular army pyramidal tent, with the sides rolled up (R. 43). That for about five minutes he left the tent to lock some telephone equipment in the safe. That no one was left to guard accused (R. 44). During this interval accused escaped (R. 45).

5.

The sole question for the consideration of the Board of Review is the sufficiency of the evidence to sustain the findings of the court that accused was guilty of escape from confinement as charged.

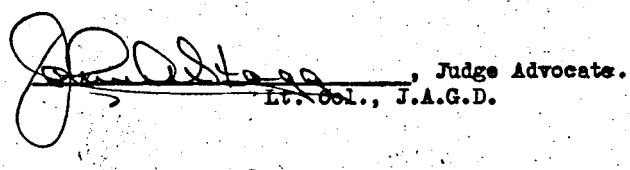
Confinement imparts some physical restraint (par. 139, M.C.M., 1928). In the instant case accused was placed in confinement in an ordinary pyramidal tent, with an armed guard under orders "not to let him escape". The sides of the tent were rolled up and there were no barriers, barbed wire, or other obstructions around the tent physically confining the accused. The guard of his own volition surrendered the only physical restraint by leaving accused and going away to lock up some telephone equipment. Accused was thus relieved of all physical restraint and, unmolested, walked out of the tent. As the accused did not escape from physical restraint he can not be guilty of breach of confinement.

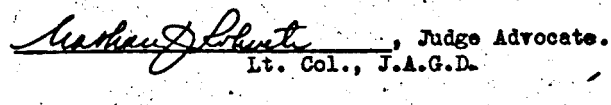
> "While a prisoner in a post guardhouse accused was sent by a sergeant to wash some pails in a lake at a point 50 or 75 yards from the guardhouse and out of sight of any sentry. Accused failed to return to the guardhouse and surrendered to the civil police several days later. Held: The record does not support the finding. There must be escape from actual physical restraint to constitute a violation of A.W. 69". (CM 224109, Medlock, sec. 427 (6a), Sept. 1942, Bul. JAG).

With reference to whether or not the accused can legally be found guilty of a lesser included offense, The Judge Advocate General has held under a similar state of facts that "Although the evidence shows the accused committed an offense analogous to breach of parole in violation of Article of War 96 (par. 139 a, M.C.M., 1928) he cannot be punished therefor in this case because he has not been charged with such an offense"(CM 224109, supra). The evidence, therefore, is not legally sufficient to sustain the finding of guilty of specification 2 of Charge III.

6.

For the reasons above stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty as to Charges I and II and the specifications thereunder and of Charge III and Specification 1 thereunder, and to support only so much of the sentence as provides for confinement at hard labor for 5 months and 18 days and forfeiture of two thirds pay per month for like period.


, Judge Advocate.
Lt. Col., J.A.G.D.


, Judge Advocate.
Lt. Col., J.A.G.D.

JAMES B. MURPHY, Disqualified, Judge Advocate.
Lt. Col., J.A.G.D.

WAR DEPARTMENT
Services of Supply
Branch Office of The Judge Advocate General
Melbourne, Victoria

A.P.O. 924,
March 24, 1943.

SUBJECT: Record of trial by general court-martial of Private Elton C. Hovi, Headquarters Company, 2nd Battalion, 127th

TO: Commander-in-Chief, Southwest Pacific Area, A.P.O. 500.

1. Inclosed is the record of trial described above and the holding of the Board of Review in this office that the record of trial is legally sufficient to support only part of the findings of guilty and only so much of the sentence as provides for confinement at hard labor for five months and eighteen days, and forfeiture of two-thirds of the accused's pay per month for a like period. I concur in that holding and recommend the necessary corrective action.

2. The form of action effectuating this recommendation, together with a form of general court-martial order promulgating such action are inclosed for your convenience in the event that you concur in the action recommended.

ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

4 Inclosures:
Incl. 1 - Record of trial.
Incl. 2 - Holding of Board of Review.
Incl. 3 - Action sheet.
Incl. 4 - Proposed general court-martial order.

(Finding of guilty of Specification 2, Charge III, vacated; so much of sentence as exceeds confinement at hard labor for five months and eighteen days and forfeiture of two-thirds of accused's pay per month for a like period vacated. GCMO 1, USAFFE, 5 April 1943)

WAR DEPARTMENT
Services of Supply
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

CM A-260

April 9, 1943.

UNITED STATES v. Private JOHN W. HILL (34063977), Company B, 394th Quartermaster Battalion (Port).	)	Trial by G.C.M., convened at Townsville, Queensland, 12 November, 1942. Dishonorable discharge and confinement for ten years. Main Stockade, Base Section No. 3. Execution of dishonorable discharge suspended.

HOLDING by the BOARD OF REVIEW
STAGG and ROBERTS AFFIRMING
MURPHY DISSENTING:
Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private John W. Hill, Company B, 394th Quartermaster Battalion (Port), did, at and in the camp area of such battalion, in the vicinity of Birdum, Northern Territory, on or about July 5, 1942, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Clarence Clark, Company B, 394th Quartermaster Battalion (Port), a human being, by shooting him with a rifle.

The accused pleaded not guilty to the charge and its specification and was found not guilty of the charge but guilty of a violation of Article of War 93, and guilty of the specification except the words "with malice aforethought", "and with premeditation", of the excepted words, not guilty. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for ten years. The reviewing authority approved the sentence and designated the main stockade, Base Section No. 3, A.P.O. 923, as the place of confinement but suspended the execution of so much of the sentence as pertains to dishonorable discharge. The result of the trial was published in General Court-Martial Orders No. 3, Headquarters United States Army Services of Supply, A.P.O. 501, 6 January, 1943.

3. The evidence discloses that Privates Clark (the deceased), Hill (the accused), Alexander, Anderson, and Cormier were tent mates. Deceased, a man more than six feet tall, weighing about 200 pounds, a "bully" type who swore

a great deal(R.10, 17, 19, 32, 35, 57), was much bigger than accused and "could easily handle the latter if they were in a fight" (R.17, 18, 33, 57). On the morning of July 5, 1942, when Private Anderson returned from guard duty, at the request of deceased, he brought deceased's blanket back to the tent (R.13). That evening, accused, Anderson and Cormier were playing cards in the tent by the light of a hand made oil torch (R.13, 27). Between 9:30 and 10:00 o'clock Clark came in and joined the card game (R.14, 27). He played for a short time and then asked Anderson where his blanket was (R.14, 28). Anderson replied that he had placed it on Cormier's bunk. Deceased looked there for the blanket, could not find it, and then looked on the other bunks. He discovered two blankets on Hill's bunk and one in the bag at the foot of his bunk (R.15, 20, 29, 62). Hill, who had stopped playing and lain down (R.15, 20, 29), was accused by Clark of having his blanket.

Private Anderson testified that Clark "cursed and used vulgar language" saying "I am going to have the damn blanket" (R.22); "God-damn this, and God-damn that" (R.23) and testified:

> "He [Hill] said he brought one blanket from the States with him, from Fort Leonard Wood. I told him if it was not Private Clark's blanket to loan him one of them because he did not have any. Private Hill said 'I will loan him one blanket but I aint going to give it to him, because it is my blanket I brought from the States'. Private Clark then walked over to Private Hill's bunk. Private Hill got up and stood right up at the end of his bunk in the doorway of the tent. Private Clark bent down and grabbed one of the blankets off Private Hill's bunk. The next thing I know of is Clark and he both was going out of the tent. The next thing was the report had arrived" (R.15).

Private Edgar Cormier testified that when Clark found the three blankets on accused's bed he said "Either give me my blanket, or go to Hell tonight" (R.29, 38), and called accused a "Son of a Bitch" (R.34). Witness heard nothing said after deceased had snatched the blanket from Hill's bed. Witness was not paying much attention to them because "I thought they were just tusselling as they usually did" (R.30). They went out of the tent and in about ten seconds or a little longer he heard a rifle shot, ran out of the tent and saw Clark lying about three or four feet away (R.31).

Technician 5th Grade Tass McCowan testified that on the evening of July 5, while he was in his tent located some distance from that occupied by the deceased and accused, he heard Clark and Hill arguing about the blanket. Witness decided to stop the arguing and got up. Almost before he reached the corner of his tent he saw them come out of the door of their tent wrestling in a "huddled position", "crouched down" (R.41, 43) but could not say who came out of the tent first. They wrestled to the side of the tent out of his view and he heard a shot.(R.43). He went to the corner of the tent and saw deceased lying on the ground.

Corporal Sylvester Cannon testified that he was sleeping in his tent (R.47-48) and was awakened by the sound of gun fire. In about two minutes (R.48) he was at the tent where the shooting had occurred. He saw accused standing about 10 yards from the tent (R.48) with his rifle at port arms (R.49). Witness told accused to come to him. Accused advanced, ejected a shell from the chamber of his rifle (R.50) and gave the rifle to witness (R.52). Witness asked accused why he had shot Private Clark and accused answered "He took my blanket and hit me and called me a name" (R.50). Witness accompanied accused to the guardhouse and on the way "Private Hill was crying and saying that he did not intend to do it - that he did not intend to shoot Private Clark" (R.51). Witness further testified that Hill did not appear to have any injuries on his face to show

that Clark had hit him; there was no evidence by any blood that he had been hit but his clothes were disarranged and his shirt was hanging out (R.52).

About midnight Lieutenant Philip W. Newman was awakened, informed of what had transpired, and conducted a preliminary investigation. The accused, after having been advised of his rights, made and signed the following written statement:

> "I was playing a card game in the tent this evening, and Clark borrowed some money and got in the game. He went broke and he said he was going to bed. He looked at his bed and asked where was his blanket. Then he said he wanted his blanket. I told him I had three blankets, but I had brought all three from Ft. Leonard Wood, Missouri. Then I went to bed. He said 'John Hill, all I want is one of your mother-fucking blankets.' I said, 'I'll loan you one, but I won't give you one.' Then he snatched the cover off of me. Then I jumped up and said, 'Clark don't pull the cover off of me like that!' 'put the cover back on my bed. Then he said, 'I'll put your mother back on your bed.' He hit me when I tried to get my blanket from him. I got up and grabbed my rifle. I was going to hit him with it. I backed out of the tent and Clark had hold of the barrel of the rifle. The rifle went off during the scuffle."
>
> "I did not know the gun was loaded. When I was on guard today, I had one shell in my gun and four in my pocket. I turned in the four in my pocket and forgot to turn in the one in my gun." (Ex. B).

The other two soldiers in the tent did not see deceased strike accused (R.17, 21, 33) nor did they believe that either Clark or Hill were talking very loudly (R. 31, 36). Neither of them saw the rifle in the possession of the accused (R.19, 31, 36, 37) and both thought that there was nothing unusual about the incident (R.16, 20, 30). Neither knew which of the two left the tent first but accused apparently had been standing closer to the door than deceased (R.18, 39). Both of them stated that only a few seconds or minutes elapsed between the start of the altercation and the fatal firing of the rifle (R.16, 20, 21, 30, 31).

Lieutenant Julius Tepper M.C., testified as a medical expert that he examined deceased and found that his death resulted from a rifle bullet which entered the body "about the level of the second interspace, just to the right of the sternum, and left the body just below the twelfth rib in the left flank" (R.9). There was a bullet hole in his shirt showing a dark ring which witness "interpreted" as powder marks of a gun discharged "fairly closely" (R.10). Witness further testified "Assuming that the patient were not lying on the ground, or that the bullet had not been fired from a height, it was my impression that the wound had been sustained by the patient in the bending over position, with the bullet making what might have been an almost straight line going from that direction" (R.9). When asked if the trigger of the gun could have been reached by "the men" if they had been standing erect and the gun held in the position indicated by the wound witness answered "I suppose they could but it would be a rather awkward way to shoot the gun." A private, who demonstrated for the benefit of the court, "managed" to reach the trigger while standing erect (R.9).

The accused was sworn and testified that on the evening in question as supernumary of the guard he was issued five rounds of ammunition. When he went off guard at 6 P.M. he was supposed to turn the ammunition in but neglected to do so (R.64). Witness testified that deceased accused him of having his, Clark's, blanket, saying:

"* * *'You know damn well that you do not have three blankets.'
* * *
"* * *I told him 'Yes, I have'. He said 'Well, how do you come by three blankets'. I told him I brought one from Fort Leonard Wood, and when I came away from California I was issued two there. Then he started calling me all kinds of mother fuckers, and sons of bitches. Then I told Adam, 'Well, Adam, I cannot keep on losing money. I will go to bed.' I goes over and pulls off all them clothes and got into bed. He kept on talking and he came over to where I was - he stood before me and he said 'John Hill, all I want is my mother-fucking blanket'. I said 'Clark, I told you what I would do. I said I would loan you a blanket but I would not give you one', and I just kept on repeating that I would loan him a blanket but would not give him one. Then he snatched all the covers off me and I got up, and he hit me.
* * *

"I fell across the bed, and the rifle was in the corner, and I grabbed it just like that (witness demonstrated). I grabbed my rifle just like this, and I stood up and swung around and hit him, and he caught the barrel. Then he started to push me out of the tent, and kept trying to take the rifle away from me. When we got round to the side of the tent, the rifle went off, and after the rifle went off the rifle fell, and I picked it up, and walked round to the right of the tent* * *"(R.62).

Accused testified that deceased pushed him out of the tent backwards and both of them were tusselling around with the rifle. Accused asked Clark to "turn me loose. He told me 'You son of a bitch, I am going to kill you tonight'"(R.65) Accused did not know what caused the safety catch to be off, the gun to be cocked or the trigger pulled (R.65). That although they had never quarrelled before, more than a month previous they "had a little row" and deceased had hit him (R.66).

The accused demonstrated the position in which he and the deceased held the rifle in the following manner:

"Accused stood with the rifle, with the right hand grasping the small of the stock and the left hand grasping the balance. The assistant defense counsel stood facing the accused with his hands on the rifle between the muzzle and the balance near the upper stacking swivel with the left hand grasping the stacking swivel and the right hand just ahead of the left hand.

Accused demonstrated to the court how the victim put his hand at the rear of the cocking piece and <u>tussled sideways, back and forth</u>" (underscoring supplied) (R.63).

4.

The accused is found guilty of voluntary manslaughter. Voluntary manslaughter is homicide committed in the heat of sudden passion caused by provocation or homicide unintentionally caused in the commission of an unlawful act amounting to a felony (par. 149<u>a</u>, M.C.M., 1928).

Two questions are presented by the evidence which will be stated and answered <u>seriatim.</u>

<u>a</u>. Was the death caused by the accused?

Accused admitted that the rifle which caused the death was one that he picked up to use as a club. Immediately after the shooting the accused was

found holding the rifle at the position "port arms" and before surrendering it he first ejected a cartridge therefrom. Immediately after the event he gave a reason for his shooting the deceased and a short time later stated that he did not intend to do it. The latter statement denies the intent of the accused but not the homicide. Although accused testified that the rifle was discharged during the struggle, that he did not know who cocked it or how the trigger was pulled, there is ample evidence in the record from which the court could infer that the accused caused the death of the deceased.

b. What motive impelled the accused to pick up the rifle?

In determining the reasons why accused picked up the rifle to use as a club there is sufficient evidence in the record from which the court may have reached either of two conclusions. One that he acted by force to retain possession of his blanket and the other, to inflict physical hurt upon the deceased.

(1) Accused offered to loan the blanket to deceased, his tent mate, but objected to deceased's claim of ownership. Although deceased snatched the blanket from the bed under claim of ownership, accused had no immediate need of the same and it was not being dissipated or removed from the tent. Determination of the true owner of the blanket could easily have been concluded by peaceful means, through recourse to higher authority if necessary, the following day. A soldier may not take the law into his own hands, using force and arms under circumstances the natural result of which would inflict great bodily injury, in order to prevent the unauthorized use of issue property by a tent mate or to determine its ownership. The use of the rifle as a club by the accused for the purpose of retaining possession of the blanket, accordingly, would have been the use of more force than the circumstances warranted and would constitute an unlawful act amounting to a felony. If the court determined from the evidence that the accused intended to use the rifle for such purpose and that in the course thereof deceased met his death even though such death was not intended by accused, he may legally be found guilty of voluntary manslaughter.

(2) If the accused reasonably believed that he was in immediate danger of death or grievous bodily harm from the deceased he was justified in using such means as were then available to him including that of killing his assailant in self-defense (Brown v. United States, 256 U.S. 335, 343), but the facts and circumstances which would excuse the killing must be such as to induce the reasonable belief or fear of the existence of such peril of death or great bodily harm (Allison v. United States, 160 U.S. 203, 217; Acers v. United States, 164 U.S. 388, 392).

Certain evidence is present in the record from which the court could conclude that the accused, when he picked up the rifle to use in the nature of a club, acted in self-defense -- the deceased had said "Give me my blanket or you will go to Hell tonight"; deceased said "You are a son of a bitch, I am going to kill you tonight"; deceased struck accused causing him to fall across the bed; accused was pushed out of the tent by the deceased during the struggle for possession of the rifle. From other evidence in the record the court could conclude that the accused at such time could not entertain the reasonable belief that he was in danger of death or grievous bodily harm -- the altercation was not so heated that other soldiers in the tent became interested in the affair, one thought that they were just tusselling as they usually did; his tent mates did not think that either the accused or the deceased were talking loudly, although another soldier some distance away heard arguing and got up with the intent of stopping it; accused did not call out for help from his tent mates but a few paces away; immediately after the shooting accused bore no marks of injury upon his face or person although his clothes were disarranged and his shirt was hanging out; accused neither in his statement immediately after the affair or as a witness at

the trial claimed that he was in fear of his life or of grievous bodily harm; at the trial, after reasoned thought, the accused, in answer to the question "Why did you pick up the gun?", testified "Well, Sir. He asked for my blankets and he hauled off and hit me, and then I grabbed my rifle to hit him with it * * *"; deceased had a reputation for swearing, accordingly, the swearing in this instance was not unusual. As it was accused who picked up the rifle initially, the threats of the deceased upon the life of accused cannot be associated with the rifle or any other dangerous weapon.

The deceased had committed an ordinary assault upon accused in striking him. Generally, an ordinary assault is not sufficient justification for the use of a deadly weapon in defense (Allen v. United States, 164 U.S. 492, 498; sec. 613, Wharton's Criminal Law). Whether or not sufficient circumstances exist to establish that the accused acted in self-defense is for the court to decide as a question of fact (Allison v. United States, supra; Brown v. United States, supra). There is sufficient evidence in the record from which the court could conclude that the use of the rifle as a club by the accused was not justified in self-defense. Hence, if the death of the deceased was caused thereby, although unintended by the accused, he is legally guilty of voluntary manslaughter.

(3) That accused at the start of the quarrel did not intend the death of deceased but during the altercation, in the heat of sudden passion intended the act causing death is sufficient to constitute the crime of manslaughter. Although accused testified that when he first seized the rifle he intended to use it as a club and in fact the rifle was not fired while the participants were in the tent, the court could none the less find from the evidence before it that subsequently accused intended to discharge the rifle. It is sufficient that such intent exists at the time the act is committed. It is not necessary that the intention to kill previously existed. The accused demonstrated to the court that during the "tussle" he held the rifle with the small of the stock in his right hand and the balance in his left. The deceased first had both hands near the end of the muzzle and later moved one down to the rear of the cocking piece as they tussled sideways, back and forth. Thus, from the evidence the court could well conclude that accused and deceased came out of the tent in a "huddled position, crouched down" (R.43), struggled sideways, back and forth, with the rifle between them, the stock toward the accused and the muzzle toward the deceased at almost the height of the latter's shoulder as he was bending over, in which position the rifle was discharged. Thus, weight can be given to the testimony of the medical officer that "it was my impression that the wound had been sustained by the patient in a bending over position, with the bullet making what might have been an almost straight line from that direction" (R.9). In addition to such testimony and the admitted initial intent of accused to use the rifle as a club, the court had before it the evidence that the accused alone knew that the rifle was loaded and in answer to the question "Why did you kill Private Clark?" asked immediately after the shooting, said "He took my blanket and hit me and called me a name." From the facts, the court could infer that at the time of the homicide the accused intended the commission of the act. Accordingly, there is sufficient evidence in the record from which the court could determine that the act causing death was committed by the accused in the heat of sudden passion caused by provocation.

5.

Accordingly, the conflicting evidence is susceptible of the conclusion a. that the homicide was unintentionally caused by the accused in the commission of an unlawful act amounting to a felony, or b. that accused caused the death of the deceased in the heat of sudden passion caused by provocation. In either event the record reveals ample evidence to support the finding of guilty of voluntary manslaughter.

"* * * the law gives to the court-martial and the reviewing authority exclusively * * * [the] function of weighing evidence and determining what facts are proved thereby; therefore, if the record of trial contains any evidence which, if true, is sufficient to support the findings of guilty, the board of review and the Judge Advocate General are not permitted by law, for the purpose of finding the record not legally sufficient to support the findings, to consider as established such facts as are inconsistent with the findings even though there be uncontradicted evidence of such facts. C.M. 152797." (A.W. 50, M.C.M., 1928).

6.

For the reasons above stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the charge and the specification thereunder, and the sentence.

_____, Judge Advocate.
Lt. Col., J.A.G.D.

_____, Judge Advocate.
Lt. Col., J.A.G.D.

Dissenting: JAMES B. MURPHY, Judge Advocate.
Lt. Col., J.A.G.D.

(Dissenting opinion attached.)

1st Indorsement.

War Department, Branch Office of The Judge Advocate General, A.P.O. 924, 22 May, 1943. TO: Commanding General, United States Army Services of Supply, Southwest Pacific Area, A.P.O. 501.

In the case of Private John W. Hill, (34063977), Company B, 394th Quartermaster Battalion (Port), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved.

ERNEST H. BURT,
Brigadier General, U. S. Army,
Assistant Judge Advocate General.

DISSENTING OPINION by MURPHY, Judge Advocate.

April 20, 1943.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review in the Branch Office of The Judge Advocate General. With the opinion of the majority of the Board of Review I am not in agreement, and this opinion accordingly is submitted to the Assistant Judge Advocate General, Melbourne, Victoria, Australia.

2. The foregoing summary of the evidence by the majority of the Board of Review is hereby adopted as the statement of facts in this case. I feel, however, that to have a more completely accurate resume, the following pertinent additions should be made thereto:

a. The evidence shows that deceased, immediately prior to the commencement of the altercation with accused, had lost his money for the second time in the course of the evening, and had left the card game "broke" (R.20, 35, 36, 61, 62), and, at this time, was in an ugly frame of mind.

b. The evidence shows that the tent of Technician McCowan was "about 100 yards or more" from that of accused and deceased (R.40, 44, 45, 46), and not simply "some distance away", thereby establishing that the affair was not a mere minor quarrel but one of great proportion.

c. The evidence in regard to the relative size of accused and deceased shows that, according to the testimony of Private Anderson, deceased was "about 6'2" or 6'3" tall", "weighed about 210 pounds", and "looked something like a giant over the accused" (R.17); and, according to the testimony of Technician McCowan, deceased "could whip him [accused] with his fists, to my idea" (R.44), giving ample reason for accused to fear great bodily harm.

d. The evidence shows that accused in fact made the following additional statements when he testified before the court-martial:

In regard to what transpired after the deceased had pushed him out of the tent -

"Q. At any time during this scuffle when you were outside of the tent, did Clark leave hold of the rifle with one hand?

A. Yes, Sir. He took his hand off from up here [demonstrating on rifle].

Q. How did you have hold of the rifle?

Witness demonstrated.

Q. How did Clark have hold of it?

A. He was pushing me back. He had his hand on the sight cover and kept tusselling with me, and tried to knock my hand off here. When he got his hand down here - that happened.

Q. The rifle went off?

A. Yes, the rifle went off and fell, Sir, and I picked it up. I said did that bullet hit you and he said 'Oh'. He was shot" (R.62, 63).

In regard to the actual shooting, on cross-examination -

"Q. Is it not a fact, you intended to pull the trigger in that gun?

A. No, Sir.

Q. How long had you been angry with Clark?

A. I was not angry with him. He was angry with me, for what I don't know.

* * *

Q. Did you not take the safety off before you shot Clark?

A. I did not touch the safety.

Q. Did not you pull the trigger?

A. I did not pull the trigger, Sir." (R.65).

In regard to the gun with which deceased was killed -

"COURT: Does the hammer stick out of the cocking piece out in the rear?

A. I don't know, Sir.

Q. You were not familiar with the gun at all?

A. No, Sir.

Q. Did you fire it at all on the range?

A. No, Sir.

Q. You have never fired the gun?

A. No, Sir.

Q. You were walking post with a rifle you had not fired of that particular type?

A. Yes, Sir." (R.67).

Accused also pointed out that the rifle before the court, and with which he demonstrated what had occurred, was in fact <u>not the same rifle</u> over which he had struggled with Clark (R.66); that whereas the struggle in point of fact had been waged over a 1917 Remington, the rifle before the court was a <u>different model</u>, with a different type of safety. (R.67).

3.

Accused was convicted of voluntary manslaughter. Voluntary manslaughter is defined as a willful homicide committed in the heat of sudden passion caused by provocation, or homicide resulting from an act amounting to a felony (par. 149, M.C.M., 1928; CM 217590, Dig. Ops. JAG, 1912-40, Supp. 1, 1941).

In concluding that this record is legally sufficient to sustain the findings, the majority opinion addresses itself to the resolution of the questions

"<u>a</u>. Was the death caused by the accused?" and

"<u>b</u>. What motive impelled the accused to pick up the rifle?"

With the necessity for selecting basic principles from which to approach the evidence I am in agreement; but with the principles selected by the majority, and with their application to the facts I am not in accord.

In my opinion, the court at the time of the trial was, and the Board of Review now is, concerned with the achievement of satisfactory answers to the following:

a. Is there any evidence in the record upon which the court could find, beyond a reasonable doubt, that accused willfully and deliberately caused the death of Private Clark?

b. If accused did not willfully and deliberately cause the death of Private Clark, were his actions, viewed in the light of all the circumstances, otherwise so unlawful as to constitute a felony?

Applying these propositions to the instant case, the evidence, to my mind, is susceptible of only one conclusion and the findings of the court are clearly contrary to this conclusion. I am mindful of that principle that it is for the court to weigh the evidence, judge of the credibility of witnesses, and determine controverted questions of fact. But when the court fails so to do, and departs from these principles and bases its findings on conjecture and speculations, directly in the face of competent, relevant, and uncontradicted testimony, then it is the right, and solemn duty of the Board of Review to assume the functions for which it was created - to see that substantial justice is always accorded the accused and to set aright patent legal wrongs, so that those coming into military courts will have their rights determined in a fair and equitable manner, free from bias or prejudice, and in accordance with the Constitution of the United States which guarantees to every citizen, be he soldier or civilian, that his innocence is presumed until he is proven guilty beyond a reasonable doubt.

(a) Is there any evidence in the record upon which the court could find, beyond a reasonable doubt, that accused willfully and deliberately caused the death of Private Clark?

The facts, when marshalled, show by competent testimony that deceased was the aggressor. Step by step deceased's actions were aggresive. He left the card game broke, and failing readily to find his own blanket demanded of accused that of which accused was in lawful possession. Refusing the loan of a blanket by the accused, he again demanded unqualified possession, accompanying such demand with vile oaths and a threat that if possession, not a loan, be not given, accused would "go to Hell tonight". Such words carried a threat to accused's life, particularly when followed by an assault. Deceased then dispossessed accused of his property by force, and when accused stood up, knocked him down. Accused then being assaulted by one "who looked something like a giant" over him, grabbed a rifle from the corner of the tent, or from the cot, and either struck, or struck at, deceased, using the rifle solely as a club. Let it be noted here that deceased was sufficiently close to accused to grab the rifle - which he did. This conclusively shows that deceased was still pursuing the unprovoked attack. A visualization of these facts will bear out the foregoing statements. Deceased then attempted to wrest the rifle from accused and by superior strength pushed accused out of the tent.

The foregoing recital of the uncontradicted facts shows that from the very inception of the affair, to that period when we have only the accused's version, deceased was the aggressor in an affray in which he participated in an unwarranted manner. During this time accused was solely on the defensive. From this point on we have only the testimony of accused, which bears out the physical facts to a remarkable degree of accuracy. When last seen by witnesses, both deceased and accused were struggling for possession of the rifle in a "crouched" position. The shot was heard within five or ten seconds thereafter. The testimony of the medical officer shows the bullet ranging straight downward

from the collar bone emerging from near the twelfth rib in the left flank. Here again the physical facts speak eloquently as to what actually transpired, disregarding accused's testimony, entirely. To say that accused, a small man, could have wrested the rifle from a "giant" compared with him, cocked, aimed and pulled the trigger and shot him so that the bullet traveled in a "downward" path is basing the conclusion on nothing more than conjectures and speculations, unwarranted, and not contained in the record by one scintilla of evidence. On the contrary, if the rifle was accidentally discharged, as the physical facts show, and as accused's testimony states, then the death was accidental and the element of willful homicide can not be found in the record, thereby leaving no evidence for the court to weigh, or upon which the finding could be based. It is submitted that accused's testimony bears out the physical facts, and there being no other evidence in the record, the court was not priveleged to disregard such, and find accused guilty of a crime based solely on conjectures and speculations. A careful reading of accused's testimony, supra, majority opinion, page 4, will conclusively bear out this statement.

From the bare facts alone to spell out the fact that the shooting, beyond a reasonable doubt, was an intentional, willful, and deliberate act of the accused requires a departure from the realm of finite analysis into that of conjecture and speculation. Clearly, when the accused first reached for the rifle the intention to kill did not manifest itself in his acts. Similarly, a soldier intending to shoot another does not swing the rifle as a club when he intends to discharge it. If the accused at any time intended to shoot the deceased his very acts indicate that the design was formulated between the instant when deceased attempted to wrest the rifle from him and the instant when the rifle was discharged. Moreover, if accused actually intended to shoot the rifle it is not likely that he would deliberately have fired a rifle no more than inches from a man with whom he was struggling, and then as that man sank to the ground, inquire whether he had been shot.

There is no positive proof in the record contradicting accused's statements to the court that the shooting was accidental; that he did not pull the trigger of the rifle; that he did not touch the safety; and that he did not intend the death of deceased. Quite to the contrary, accused testified that he was not even familiar with the gun with which deceased was killed, never having fired it. Admittedly, accused immediately after the shooting when asked why he had shot Clark, replied that Clark had abused him, taken his blanket and struck him. It is to be noted that it was not accused who said he had shot deceased, but his questioner. Accused at that time was emotionally upset, as the evidence shows. His answer, without distorting the meaning, can be taken to be the response to the implied question "What were you fighting about?" In any event, it was the response of a man clearly upset over a tragedy which had just occurred and in which his was a principle role. Moreover, almost simultaneously with making this reply, accused "was crying and saying that he did not intend to do it -- that he did not intend to shoot Private Clark" - a statement which he subsequently reiterated to the court.

"From these facts" the majority opinion tells us, "the court could infer that at the time of the homicide the accused intended the commission of the act." Intention - the factual state of a person's mind in the absence of his positive statements bearing directly on the problem in question- is a matter of inference to be drawn from his acts alone. When, as in the instant case, there are present both statements and acts, then both must be considered in reaching a conclusion as to intent. The law permits the court to reject accused's own statement, reporting his state of his mind, and to adopt an opposite conclusion as to his intention, only after there has been adduced a degree of proof of such magnitude as to render the truth of accused's statements an unlikely probability. Such is totally lacking in the instant case.

The facts, when marshalled, are far more persuasive on the side of innocence than on the side of criminality. From the same evidence the court was privileged in concluding not only that accused did not intend to shoot Clark, but that Clark himself caused the gun to be discharged. It could conclude that neither man actually pulled the trigger which discharged the gun, but that the gun went off when either touched a part of the firing mechanism. The demonstration of how the rifle might have been fired was most unfair in that a rifle of a different type from the one actually involved was used, and one which had a different safety catch. From this fact alone the court, not having an accurate picture of the facts presented, could have reached an erroneous conclusion quite harmful to accused. That a reasonable doubt was thus raised and never overcome by the prosecution is clear and conclusive.

In the instant case surmise on the question of intent is certainly as persuasive of innocence as of guilt. The evidence is fraught with doubt and guesses - it is not sufficient to cause with certainty the rejection of one contention over another. Certainly, the prosecution has not shown beyond a reasonable doubt that accused willfully and deliberately shot deceased.

(b)

Were accused's actions, viewed in the light of all the circumstances, so unlawful as to constitute a felony?

The resolution of this question, like the preceding one, must be determined from the facts before the court. They show that Clark and accused were on such friendly terms on the night in question that they were playing cards together, thus refuting any intent upon the part of the accused that his gun was loaded for any subsequent unlawful purpose. The succession of the aggressive acts of deceased outlined supra, page 3, show that deceased was, at all times, the aggressor. He committed two unlawful acts, one a trespass on accused's rights, in forcibly taking his blanket; the other an unprovoked assault upon accused's person.

In appraising the course of accused's acts a most important consideration is the physical size and weight of the two men. Clark was undoubtedly a large man. The record does not disclose the actual measurements of accused, but several witnesses stated that Clark "looked something like a giant over the accused", and could "whip him with his fists", and "could easily handle him in a fight". Under such circumstances, considering the disparity in the size of the two men, and considering that Clark was clearly the aggressor, accused was, as a matter of law, privileged in using the rifle as a club to ward off an attack which he had every reason to believe was likely to be repeated. Accused cannot be expected to have weighed with considered calm the possible consequences of chosing a rifle over any other weapon which may or may not have been available to him. He was not, in law, called upon to wait to be struck again by deceased. If he arose, unarmed, the probability of receiving another blow from a powerful antagonist was acute. In such a situation he was warranted in acting upon appearances (Wharton, Criminal Law, sec. 614). The moment was pregnant with activity, action not choice, was required. To quote Justice Holmes, "Detached reflection cannot be demanded in the presence of an upturned knife." (Brown v. United States, 256 U.S. 335, 343). It is well established as a basic principle of law, that one is permitted to repel force used against one with force. The right of self-defense against unjustified attack is fundamental. The only qualification upon this doctrine is that the force of defense must be proportioned to the force of attack (Wharton, Criminal Law, sec. 613).

The opinion of the majority speculates that accused may have used his rifle in order to regain possession of his blanket. It interjects the dicta "the true ownership of the blanket could easily have been concluded by peaceful means, through recourse to higher authority, if necessary". In point of fact accused offered the loan of the blanket to deceased without invoking such "recourse to higher authority" but deceased flatly refused this peaceful gesture and took the

the law unto himself by forcibly taking the blanket thus establishing a claimed ownership by might. Accused, accordingly, had a just and legal right to protect his property, with the safekeeping of which he was charged by the government.(Wharton, Criminal Law, secs. 130, 132). But the majority opinion singularly fails to note that in his initial effort to regain possession, accused did not employ this rifle. He attempted simply to snatch the blanket back. When the deceased thereupon struck accused and knocked him down, the complexion of the dispute changed - the focus swiftly shifted from an unlawful taking of the property to the jeopardizing of the very life and limb of the owner by one capable of administering great bodily harm, followed by the threat, "You are a son of a bitch, and I am going to kill you tonight".

The crux of the matter lies in the fact that accused did not initially use his rifle to shoot Clark - a way clearly calculated to cause death or serious bodily harm. Had he done so, and had he then claimed that the act was done in self-defense, the shooting of the deceased would have needs been justified. But events took a different course, and created a different question. Here accused need only justify his use of the rifle as a club in order to remove his acts from the realm of illegality. This, the evidence conclusively proves that he did.

The law prescribes tests with which the justification for accused's acts is to be determined. Danger must have been imminent and apparent. And the danger need be imminent and apparent according to accused's honest belief alone at that instant when he introduced his rifle into the drama which was unfolding (Wharton, Criminal Law, sec. 623). His act does not become any the less justifiable because his conclusion as to the imminence of the danger is not that which a cool observer of Spartan capacity might have reached. His conduct is not to be judged against that of a hypothetical reasonable man. It is certainly not for the members of the court to determine whether the danger was in fact real as they sit in quiet reflection on the case. The imminence of the danger must be determined solely from the point of view of an immature youth, 19 years of age, in the face of an attack by one of greatly superior strength and size, whose bullying propensities were well known to him, in the light of a threat on accused's life. Moreover, the law does not cast upon accused the burden of establishing beyond a reasonable doubt the fact that he acted in self defense. The rule followed by the majority of jurisdictions is that if a reasonable doubt exists as to whether accused in fact acted in self defense a court trying him must acquit (Wharton, Criminal Evidence, sec. 906; Frank v. United States, 9th C.C.A., 42 Fed. 2nd 623). To conclude that the accused was not justified in availing himself of the use of his rifle under the instant circumstances is to brand accused as the aggressor from that moment forward, Had the accused and not deceased been killed in the struggle, it is obvious as a matter of law, that deceased would not have been heard to say that his aggression had terminated, and that accused had become the aggressor when he seized the rifle.

Balanced against such tests as these the accused's initial seizure of his rifle in self defense was certainly not so unlawful as to amount to a felony. Fault, if any be, was merely the fault of failing to turn in cartridges which had been issued to him. In any event, the conviction in this case for voluntary manslaughter cannot be rested on the ground that the accused was culpably negligent in employing a loaded rifle as a club in order to defend himself, provided only that accused acted justifiably in his own self-defense. Culpable negligence in the performance of an act, itself lawful, constitutes involuntary manslaughter (sec. 149, M.C.M., 1928).

Had accused remained silent the prosecution's case would have even failed to establish that accused, and not deceased, was the cause of the rifle being made an instrument over which a struggle subsequently developed. It is true that the credibility of an accused who testifies in his own behalf is subject to the same tests as are legally applicable to any other witnesses. His admitted self-interest in the result of the case, however, does not open the door to adverse conjecture and speculation. His testimony cannot arbitrarily be rejected, discredited, or undermined when it is uncontradicted, either directly or indirectly, by other witnesses or the corroborating circumstances of the case (Wharton, Criminal Evidence, sec. 1418).

The evidence in the case leaves accused's statements unassailed. The eye witnesses to what occurred within the tent in no way contradict accused's version. Rather, they support it. Similarly, the violence of deceased is corroborated by the fact that Technician McCowan in bed, 100 yards away, heard the disturbance, and sought to quell it.

It is quite true that the law gives the court-martial and the reviewing authority the function of weighing the evidence and determining what facts are proven thereby, but likewise the Board of Review has the right and duty to determine if the record contains such facts to be weighed, and to correct findings based on suspicions and conjectures. In CM 223336 (sec. 422(5), Bul. 3, JAG, Aug. 1942) The Judge Advocate General stated:

> "Convictions by courts-martial may rest on inferences but may not be based on conjecture. A scintilla of evidence - the 'slightest particle or trace', is not enough. There must be sufficient proof of every element of an offense to satisfy a reasonable man when guided by normal human experience and common sense springing from such experience. The following from an approved holding by the Board of Review is pertinent:
>
> 'The Board of Review, in scrutinizing proof and the bases of inferences does not weigh evidence or usurp the function of courts and reviewing authorities in determining controverted questions of fact. In its capacity of an appellate body, it must, however, in every case determine whether there is evidence of record legally sufficient to support the findings of guilty (A.W. 50½). If any part of a finding of guilty rests on an inference of fact, it is the duty of the Board of Review to determine whether there is in the evidence a reasonable basis for the inference.
>
> 'We must look alone to the evidence as we find it in the record, and applying to it the measure of the law, ascertain whether or not it fills that measure. It will not do to sustain convictions based upon suspicions or inadequate testimony. It would be a dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around the lives and liberties of the citizens. (Buntain v. State, 15 Tex. Appeals, 490)' (CM 212505, Tipton)."/underscoring supplied/

There were no witnesses to the actual shooting. Only the testimony of accused as to what really happened. Both men were struggling for the possession of a loaded gun. One powerful of physique - the other small of stature. One just having made a threat "I'm going to kill you tonight", and having been the aggressor from the inception of the affray. Deceased was killed in such a manner that the bullet went parallel to his body. The findings of the court that accused deliberately killed deceased, with the intent so to do, rest entirely on this premise and there is no evidence in the record to the contrary. The court's findings therefore are based on an inference of fact, and it is, therefore, the duty of the Board of Review so to hold.

The findings in this case cannot be permitted to stand if they rest on suspicion and conjectures. The majority of the Board of Review are themselves able to justify conviction only by recourse to speculation. They admit that there is an element of patent doubt concerning the facts. This doubt - and it is all in the favor of accused - the prosecution utterly, and in its entirety, failed to overcome. In Davis v. United States, 160 U.S. 469, The Supreme Court stated:

> "No man shall be deprived of his life under the forms of law unless jurors who try him are able, upon their consciences, to say that

the evidence before them by whomsoever adduced, is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged."

Accused was negligent in leaving his gun loaded. For such he must be held accountable. Even though deceased was the primary cause of the trouble, the manifest aggressor, he met his death by reason of accused's negligence. For homicide resulting from negligence the accused can be held only for involuntary manslaughter. Involuntary manslaughter being an offense lesser included within that with which accused was charged, and that of which he was found guilty, I am of the opinion, for the reasons stated, that the record is legally sufficient to sustain a finding of guilty of involuntary manslaughter only and a maximum sentence of only three years.

James B. Murphy, Judge Advocate
Lt. Col., J.A.G.D.

JOHN W. HILL

CM A-260

ADDENDA

DISSENTING OPINION by MURPHY, Judge Advocate.

Since the dissenting opinion was written in the case of the soldier named above, the Branch Office of The Judge Advocate General has received additional books for its library. A search of these authorities throws further light on the case in question and the following additional argument is presented in support of the dissenting opinion.

An analysis of the case in the light of the present available authorities reveals far more conclusive reasons supporting the views expressed in the dissenting opinion. As a premise let it be noted that the prosecution is charged with the proof of three requisites, all to be proven, beyond a reasonable doubt, the failure of any one of which being fatal to a finding of guilty:

(a) That the act charged was really committed.

(b) That the accused committed it, as charged.

(c) That accused committed it as charged with the requisite criminal intent.

The only tangible evidence in the entire record of trial that accused killed deceased rests upon the statements of accused in answer to a question which, in itself, required an affirmative answer, "Why did you kill Clark", and the further statements made when accused was crying and hysterical, discussed at length in the dissenting opinion.

> "Proof of this first essential is not done away with by the fact that accused confessed the offence. In other words, proof of a confession does not prove the corpus delicti (or body of the crime) but the latter must be independently proved before evidence of the confession can be admitted." (1 Greenl Ev. sec, 217). (underscoring and parenthesis supplied).

The record is devoid of even a scintilla of evidence, other than the statements of accused as to how deceased met his death. The body of the crime, as charged, is that accused, - independent of all other factors: accidental, deceased pulling the trigger, the gun discharging during the struggle for its possession, or otherwise, - with a criminal intent killed deceased. All of these doubtful and possible elements entered into this drama and must be eliminated by the prosecution before any statements of accused can enter the arena of facts proving guilt.

> "Oral declarations or admissions alleged to have been made by the accused should be viewed with caution, and remarks made by him at the time of the arrest, or afterwards, should be fairly construed in view of all the facts and surroundings" (U.S. vs. McKenzie, 35 F 826). (F.D. 24 sec. 473)

Both intent and the act must be present at the time of the crime alleged and must contemporaneously occur.

> "To complete the legal crime, an intent to effect the wrong and an act performed in pursuance of such intent must concur, and without this combination there can be no crime." (3 Greenl Ev. sec. 13).

The clear and undisputed evidence that accused was defending himself from an unprovoked attack by a superior antagonist certainly deletes from the record the necessary element of intent, and more so, beyond the reasonable doubt required of the prosecution.

In the crime alleged a specific intent, independent of the mere act is essential to constitute the offense. This must be proven. It differs from such crimes as arson, rape, perjury, disobedience of orders, drunkenness on duty etc. In the former the characteristic intent must be established affirmatively as a separate fact, in the latter it is only necessary to prove the unlawful act. (3 Greenl Ev. sec. 13-14)

In the instant case there is no evidence to be found in the record that accused, seizing a rifle in defense of his person, had the intent to kill deceased. There was no expression upon his part when warding off an assault by a powerful antagonist who had just knocked him down, and who was pressing the attack with the threat to kill him. The intent cannot be inferred in this class of alleged crime. It must be proven and there is a complete lack of such proof. The record contains no evidence of such intent; only by inference, and inference is not sufficient.

> "It is encumbent on the government to prove beyond a reasonable doubt the truth of every fact in the indictment necessary in point of law to constitute the offence". (U.S. vs. McGene, 1Curtis 2).

> "The burden of proof of guilt never shifts from the side of the prosecution. The accused may indeed admit the commission by him of the act charged, claiming that it did not constitute an offense on his part because of the existence of a certain fact which he sets up as a defence. Asserting this defence, the burden is upon him to maintain it. But the onus of proving guilt remains with the State, and if the accused so far makes out his defence as to involve the main issue in a reasonable doubt, the prosecution must dispel this doubt by further evidence, in order to obtain a conviction." (Winthrop Mil. Law, p. 321).

Adverting to the argument in the majority opinion as to the question of proving intent, stress was laid upon the fact that accused and deceased had trouble more than a month before the fatal encounter. Unquestionably this had its effect upon the court in its finding as to the intent of accused. In Bird vs. United States, 180 U.S. 356, The Supreme Court said:

> "Testimony against accused, on a trial for murder, that more than a month before the homicide he threatened violence to another member of the same party, and that he was very disagreeable and abusive and vulgar in his language toward the others, and testimony that he tried to pick a fight with another about six months after the homicide, is inadmissible because the time is too remote, and because the facts do not show enmity toward the person whom he killed."

This was clearly inadmissible evidence and should not be considered in determining the issues involved in this case.

It will also be noted that throughout the majority opinion great stress was laid upon the fact that it was for the court to determine as to whether accused was acting in self-defense, or was justified in using such force as might be necessary to protect himself. Equally so was the opposite view expressed in the dissenting opinion that if the defendant at the time of the encounter was acting as a reasonable man would under such circumstances that he was justified in so doing, and that the court cannot and did not have the right to infer a motive from such act. That drawing such inference from the facts was beyond the province of the court, but that it was encumbent upon the prosecution to prove the intent beyond a reasonable doubt. In Owens v. United States, 130 Federal, 279, The Circuit Court said:

"Where, in a prosecution for homicide, defendant claimed that the killing was done in self-defense, an instruction that the jury should say from the evidence whether it was necessary for defendant to kill deceased to protect himself, in order that the killing should be justified, was erroneous, since defendant was entitled to defend himself against attack by deceased, to the extent of killing deceased, if it appeared to defendant at the time of the encounter, acting as a reasonable man, that it was necessary for him to kill deceased to prevent injury to himself." (underscoring supplied).

It will thus be seen that the original statement as a premise for the dissenting opinion (a. p. 3, dissenting opinion) is amply supported by decisions from the United States Circuit Court and that the concluding paragraph in the discussion of the first premise (p. 5, dissenting opinion) is substantiated by the best possible authority.

It will also be noted that the question of the utter failure of the prosecution to prove an intent upon the part of accused beyond a reasonable doubt was stressed in the dissenting opinion. The main argument was advanced upon the theory that the court could infer such intent from all of the surrounding facts and circumstances but as was pointed out in CM 223336 (p. 7, dissenting opinion) "If any part of a finding of guilty rests on an inference of fact, it is the duty of the Board of Review to determine whether there is in the evidence a reasonable basis for the inference". It is respectfully submitted that the evidence does not contain one scintilla of testimony upon which a finding could be so based. There is no living witness to what transpired outside of the tent. In State vs. Comeaux, 142 La. 651, Corpus Juris Secundum, Volume 22, page 883, the court said, "If necessary intent is not proved accused must be acquitted." On the same page the premise is stated, "The burden is on the prosecution to prove a specific intent, where such intent is essential; but it need not prove motive." On page 189, Volume 23, we find, "Intent is a matter of fact and cannot be implied as a matter of law. Where a specific intent is a necessary ingredient of the offense charged, the evidence must be sufficient to establish it in order to warrant a conviction."

In the dissenting opinion the statement was made that the question of intent was equally as persuasive of innocence as of guilt (p. 5, dissenting opinion). Exactly what happened outside of the tent must be drawn from inferences and conjectures. Accused's testimony is certainly persuasive of innocence and there being no eye-witnesses the facts alone stand clearly forth that Clark may have been killed equally in an accidental manner in the struggle for the rifle as having been intentionally shot by accused. In Corpus Juris Secundum, Volume 23, page 190, the court says:

"A specific intent may be proved by direct and positive evidence or by circumstantial evidence. To warrant a conviction, the circumstances proved to establish the intent must be such that the requisite intent is reasonably deducible therefrom, must be wholly inconsistent with the theory of innocence, and are insufficient to establish the intent if they are consistent with the absence of criminal intent, as where they are equally consistent with innocence as with wrongdoing, or where they furnish the basis for an inference of some intent other than that necessary to constitute the crime charged. The court and jury are not bound by the evidence of accused as to what his intent was in the doing of a particular act, but such evidence may be considered along with all the other evidence in determining his intent.

"Where a particular intent is a necessary ingredient of the crime, the evidence, whether direct or circumstantial, must be sufficient to establish it beyond a reasonable doubt."

It will be seen from the foregoing that the court solely by inferences based its findings that accused deliberately and intentionally killed deceased. This inference, it is respectfully submitted, is wholly inconsistent with the theory of innocence, and as such findings were not based upon competent evidence in the record and therefore should not be allowed to stand.

The culpable negligence of accused is stressed at length in the majority opinion in that accused used a loaded rifle in self-defense. In People vs. Hoffman, 294 N.Y.S., page 621, Corpus Juris Secundum, Volume 23, the court said:

> "Ordinarily, existence of culpable negligence on part of accused is question for judgment of jury, but it may become question of law when negligence is so slight as not to reach the required standard and then the court should advise an acquittal of accused."

It will be noted that in the majority opinion, page 5, the statement is made "There is ample evidence in the record from which the court could infer that accused caused the death of deceased". This assertion is a conclusion which the facts in the record will not bear out under the admissible, competent, and relevant testimony therein contained. Likewise, in the majority opinion, page 5, the statement is made "In determining the reasons why accused picked up the rifle to use as a club there is sufficient evidence in the record from which the court may have reached either of two conclusions. One that he acted by force to retain possession of his blanket and the other, to inflict physical hurt upon the deceased." It will thus be seen that the question of intent as propounded in the reasoning of the majority opinion makes the admission that the evidence of motive was the acts of the accused to retain by force the possession of his blanket or to inflict physical hurt. The record is clear that after having failed to repossess his blanket accused was knocked down and his antagonist after having thwarted his efforts to retain his property continued his unprovoked assault. From that point on the scene underwent a transition from one of protecting or repossessing lawful property to that of one of self-defense. Thus the first proposition which the majority opinion stresses as a premise upon which the court could infer a motive is eliminated. The question then assumes the roll of accused's right to protect himself from great bodily harm. This question has been fully discussed in both the dissenting opinion and the addenda thereto. Failure to establish beyond a reasonable doubt the premise upon which the motive was based, the essential elements necessary upon the part of the prosecution to prove guilt are utterly lacking, and the record containing no evidence upon which a court could base its findings it follows that a verdict of acquittal should have been rendered by the court, and failing so to do the Board of Review is under a duty to protect the accused in both his military and constitutional rights.

The element of self-defense being clearly established, the only remaining question is the guilt of accused in contributing to deceased's death by his culpable negligence in leaving his rifle loaded. An acquittal on a plea of self-defense might be said to operate likewise as an acquittal for the lesser included offense of involuntary manslaughter. "Involuntary manslaughter is homicide unintentionally caused in the commission of an unlawful act not amounting to a felony, nor likely to endanger life, or by culpable negligence in performing a lawful act, or in performing an act required by law." (M.C.M., 1928). In the instant case it is clear that accused was performing a lawful act in defending himself against what he terms, and which is undisputed, serious bodily harm. But at the same time he was culpably negligent in having left his gun loaded the result of which neglect caused the death of Clark. It follows that a finding of involuntary manslaughter can thus be sustained. In conclusion, I desire to accentuate the fact that a motive drawn from an inference without supporting outside facts is not sufficient for a conviction. Even though the bare statements of accused when construed in a light most favorable to the prosecution are an admission or a confession that he killed Clark, there is yet that element that the same was done in an accidental manner. This admission carrying with it all the elements of an accidental death clearly brings it within that realm of reasonable doubt and there being no evidence in the record other than this it is respectfully submitted that there was not a basis on which the court could infer that the accused killed deceased in the manner alleged and with the necessary intent incident thereto.

James A. Murphy, Judge Advocate,
Lt Col J.A.G.D.

WAR DEPARTMENT
Services of Supply
In the Branch Office of The Judge Advocate General
Melbourne, Victoria.

Board of Review

CM A-285

19 February, 1943.

UNITED STATES v. Private JAMES E. NETTLES (33053717), 28th Chemical Decontamination Company.	)	Trial by G.C.M., convened at Brisbane, Australia, 13 October, 1942. Dishonorable discharge, total forfeitures, and confinement at hard labor for ten years. Federal Correctional Institution, Englewood, Colorado.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The Board of Review has examined the record of trial in the case of the soldier named above and submits this, its opinion, to the Assistant Judge Advocate General, Branch Office, Melbourne, Victoria.

2. The accused was tried upon the following charge and specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private James E. Nettles, 28th Chemical Decontamination Company, Camp Wacol, Q., did, at Stanley Street, South Brisbane, Q., on or about 5:30 P.M., September 11th 1942, with intent to do him bodily harm, commit an assault upon John C. Grimes, American sailor, by cutting him on the shoulders and neck with a dangerous weapon to wit, a knife.

Specification 2: In that Private James E. Nettles, 28th Chemical Decontamination Company, Camp Wacol, Q., did, at Stanley Street, South Brisbane, Q., on or about 5:30 P.M., September 11th 1942, with intent to do him bodily harm, commit an assault upon John F. Hail, American sailor by cutting him on the stomach and back with a dangerous weapon, to wit, a knife.

Specification 3: In that Private James E. Nettles, 28th Chemical Decontamination Company, Camp Wacol, Q., did, at Stanley Street, South Brisbane, Q., on or about 5:30 P.M., September 11th 1942, with intent to do him bodily harm, commit an assault upon Police Sergeant Archer B. Brown, Woolongabba Police Station, by cutting him on the arm with a dangerous weapon, to wit, a knife.

Specification 4: In that Private James E. Nettles, 28th Chemical Decontamination Company, Camp Wacol, Q., did, at Stanley Street, South Brisbane, Q., on or about 5:30 P.M., September 11th 1942, with intent to do him bodily harm, commit an assault upon James E. Mannix, 16 Manning Street, South Brisbane, by striking him on the back with a dangerous weapon, to wit, a knife.

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He pleaded not guilty to the charge and to all specifications thereunder, and was found guilty as charged. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for ten years. The reviewing authority approved the sentence and designated the Federal Correctional Institution, Englewood, Colorado, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded for action to the Board of Review, Branch Office of the Judge Advocate General, Melbourne, Victoria.

3.

The evidence shows that on the afternoon of September 11, 1942, accused and an Australian soldier were drinking at the Adelaide Hotel, Brisbane, Queensland (R.14). Accused was drunk (R.15) but there was a conflict as to whether or not he was staggering and could walk straight (R.6-11). Prior to leaving the hotel accused "drew a knife" (R.14) but the record is silent as to the manner or purpose of such action. Leaving the hotel, in company with the Australian soldier accused "bumped into some American sailors" and they called him a "black _____". (R.15) (The record does not disclose the words used other than quoted). He then drew a knife and "stabbed a sailor in the back" (R.15) and when another sailor "called him the same thing" he "stabbed him in the stomach". Accused then ran, and was pursued by Seaman Hail. Police Sergeant Archer B. Brown was attracted by the commotion and intervened. Accused "started away" but returned and attempted to attack another sailor. The police sergeant grabbed accused and flung him to the ground and fell on top of him (R.6-7-13). An unknown person then struck the police sergeant from behind, causing him to lose his hold on accused, who then arose, stabbed the police sergeant in the right arm, and fled (R.7-15-19). James E. Mannix, a civilian, who was in no manner connected with the fight, testified that as the accused passed him, he "brought his punch down on my back"(R.13). Police Constable Frank James White pursued accused and the Australian soldier a "considerable" distance and arrested them. The Australian soldier gave the constable a knife which he had received from accused (R.9-22).

4.

Accused elected to testify under oath. He states that on September 11, 1942, he arrived from his camp in Brisbane at 12:30 or 1:30 p.m., and started drinking rum and whiskey with an Australian soldier (R.24). Sometime during the afternoon he met a man who asked him if "he would like to get drunk on a cheap drunk". Accused paid a pound and a half for a "little capsule of white powder" (R.24) and took it with a drink of wine. He began to burn and scratch in not over "three seconds" (R.25). Accused continued to drink, had a "thumping in his head", which continued until hit over the head with a pistol at the time of his arrest by Constable White (R.9,25). Accused did not remember seeing the sailors but "after I broke away from the boy with me I don't know how I got the knife open. It seems like once I stabbed him I wanted to see blood" (R.25).

On cross-examination accused admitted seeing the sailors and when asked if he remembered stabbing two of them replied, "Why, I guess I did" (R. 25). He remembered seeing Police Sergeant Brown but did not recall having stabbed him (R.26). Accused identified the knife in question as his own but "meant to leave it in my jacket back in camp"(R.26).

The evidence is clear and convincing that accused committed the acts alleged in Specifications 1, 3 and 4. The only questions for the consideration of the Board of Review are whether the alleged drunkenness and doped condition of the accused were sufficient to take from the acts the element of intent, and the sufficiency of the evidence as to the acts alleged in Specification 2.

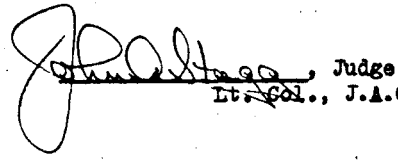
5.

That accused as shown by his acts was not so drunk or doped as to not know what he was doing is clearly established. Two witnesses testified

that he was "not staggering", "could walk straight", and he himself testifies that he remembers seeing the sailors and "once I stabbed him I wanted to see blood." After having been flung to the ground by the police sergeant, he recovered his knife which he had lost in the scuffle, and cut the sergeant. He then fled a "considerable" distance, and disposed of his knife by giving it to his Australian soldier companion. The court was fully warranted from this, and other acts of accused, in finding that accused was mentally responsible when the alleged acts were committed, and the findings are fully sustained. The only provocation appearing in the record is that accused was called a "black _____." This is no defense. "Mere words, however threatening, or insulting, are not in themselves sufficient to constitute an assault." (M.C.M., 1928, p. 177).

The evidence as to Specification 2 was not as direct and positive as that produced in support of the other specifications. Seaman Hail, the victim, was not available as a witness. Seaman Grimes testified that he "presumed" Hail was cut by accused (R.10). Miss Haldane asserted that she saw two sailors stabbed, one in the back and one in the stomach, and there is no evidence that any sailors other than Grimes and Hail were cut. Accused, himself, testified "I guess I did" stab two sailors (R.25). Private Joe Anderson, the Australian soldier companion of accused, testified that he saw accused stab "the sailors and the police officer". Accused was the only person present who is alleged to have had a knife and his trouble, in its inception, was with the sailors. This evidence, together with the facts and circumstances surrounding the entire affray, is sufficient to warrant the court in its finding of guilty as to this specification.

6. For the reasons stated above the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the charge and the specifications thereunder, and the sentence.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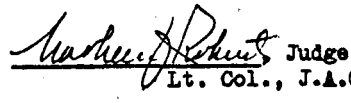
Lt. Col., J.A.G.D.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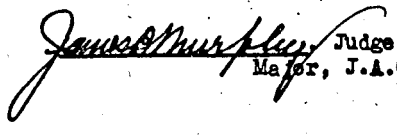
Judge Advocate.
Major, J.A.G.D.

WAR DEPARTMENT
Services of Supply
In the Branch Office of The Judge Advocate General
Melbourne, Victoria.

Board of Review

CM A-286

16 March, 1943.

UNITED STATES v. Private Curtis E. Stapleton (18058276), 11th Materiel Squadron, 8th Air Base Group.	Trial by G.C.M., convened at Sydney, New South Wales, 14 November, 1942. Dishonorable discharge, confinement at hard labor for ten years. Federal Correctional Institution, Englewood, Colorado.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria.

2. The accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 58th Article of War.

Specification: In that Private Curtis E. Stapleton, 11th Materiel Squadron, did at Sydney, N.S.W., on or about 21st July 1942 desert the service of the United States and did remain absent in desertion until he was apprehended at Lismore, N.S.W., on or about 17th August 1942.

CHARGE II: Violation of the 93rd Article of War.

Specification: In that Private Curtis E. Stapleton, 11th Materiel Squadron, did at Lismore, N.S.W., on or about 17th August 1942, with intent to defraud falsely make in its entirety a certain check in the following words and figures, to wit:

"No. D 205120 17th Aug 1942

THE COMMERCIAL BANKING COMPANY OF SYDNEY LIMITED
Lismore, N.S.W.
Pay C. E. Morgan or Bearer
the sum of Twenty Pounds Ten Shillings
£20 - 10 E. P. Kearney. "

which said check was a writing of a private nature, which might operate to the prejudice of another.

CHARGE III: Violation of the 94th Article of War.

Specification: In that Private Curtis E. Stapleton, 11th Materiel Squadron, did at Sydney, N.S.W., on or about September 3, 1942, feloniously take, steal, and carry away one (1) pr. green fatigue trousers value 85¢, one (1) pr. OD trousers value $4.88, one (1) green fatigue hat value 91¢, one (1) pr. cotton drawers value 30¢, one (1) pr. khaki trousers value $1.90, and one (1) pr. green coveralls value $2.18, property of the United States furnished and intended for the military service thereof.

CHARGE IV: Violation of the 96th Article of War.

Specification 1: In that Private Curtis E. Stapleton, 11th Materiel Squadron, did at Sydney, N.S.W., on or about July 23, 1942, with intent to deceive and injure wrongfully and unlawfully make and utter to Mrs. C. M. Maule, 143 Victoria Street, Pott's Point, Sydney, N.S.W., a certain check, in words and figures as follows to wit:

"NATIONAL BANK OF COMMERCE
of San Antonio
San Antonio, Texas, 7/23 1942 No. K.1766
Pay to the
order of Mrs. C. M. Maule $4.80

Four dollars and eighty cent 80/100 DOLLARS

C. G. Stapleton "

in payment of rent and cleaning, he the said Private Curtis E. Stapleton, then well knowing that he did not have and not intending that he should have any account with the National Bank of Commerce of San Antonio, San Antonio, Texas, for payment of said check.

Specification 2: In that Private Curtis E. Stapleton, 11th Materiel Squadron, did at Kempsey, N.S.W., on or about August 11, 1942, with intent to defraud wrongfully and unlawfully make and utter to Mr. Jack Vlandys, Kempsey, N.S.W., a certain check in words and figures as follows, to wit:

"No. 839606
BANK OF NEW SOUTH WALES
Sydney, N.S.W. 11 Aug. 1942
Pay J. C. Stephenson or Bearer
the sum of Twelve Pounds Fifteen Shilling
£12 - 15

C. G. Stapleton "

and by means thereof, did fraudulently obtain from Mr. Jack Vlandys monies of the value of about Twelve Pounds Fifteen Shillings (£12/15), he the said Private Curtis E. Stapleton, then well knowing that he did not have and not intending that he should have any account with the Bank of New South Wales, Sydney, N.S.W., for the payment of said check.

Specification 3: In that Private Curtis E. Stapleton, 11th Materiel Squadron, did at Kempsey, N.S.W., on or about August 11, 1942, with intent to defraud wrongfully and unlawfully make and utter to Mr. Jack Vlandys, Kempsey, N.S.W., a certain check, in words and figures as follows, to wit:

"No. 839605
BANK OF NEW SOUTH WALES
Sydney, N.S.W. 9th Aug 1942
Pay J.C. Stephenson or bearer
the sum of Ten Pounds Ten Shillings
£10 - 10
C. G. Stapleton "

and by means thereof, did fraudulently obtain from Mr. Jack Vlandys monies of the value of about Ten Pounds Ten Shillings (£10/10), he the said Private Curtis E. Stapleton, then well knowing that he did not have and not intending that he should have any account with the Bank of New South Wales, Sydney, N.S.W., for the payment of said check.

Specification 4: In that Private Curtis E. Stapleton, 11th Materiel Squadron, did at Kempsey, N.S.W., on or about August 11, 1942, with intent to defraud wrongfully and unlawfully make and utter to Mr. J. M. Samayai, Kempsey, N.S.W., a certain check in words and figures as follows, to wit:

"No. 873329
UNION BANK OF AUSTRALIA LIMITED
Kings Cross
Sydney, N.S.W. 10 Aug. 1942
Pay J. C. Stephenson or bearer
the sum of Twelve Pounds Ten Shillings
£12 - 10
C. G. Stapleton "

and by means thereof, did fraudulently obtain from Mr. J. M. Samayai, monies of the value of about Twelve Pounds Ten Shillings (£12/10), he the said Private Curtis E. Stapleton, then well knowing that he did not have and not intending that he should have any account with the Union Bank of Australia Limited, Sydney, N.S.W., for the payment of said check.

Specification 5: In that Private Curtis E. Stapleton, 11th Materiel Squadron, did, at Kempsey, N.S.W., on or about August 11, 1942, with intent to defraud wrongfully and unlawfully make and utter to Mr. J. M. Samayai, Kempsey, N.S.W., a certain check in words and figures as follows, to wit:

"No. 873330
UNION BANK OF AUSTRALIA LIMITED
Kings Cross
Sydney, N.S.W. 10th Aug. 1942
Pay J. C. Stephenson or bearer
the sum of Ten Pounds Ten Shillings
£10 - 10
C. G. Stapleton "

and by means thereof, did fraudulently obtain from Mr. J. M. Samayai, monies of the value of about Ten Pounds Ten Shillings (£10/10), he the said Private Curtis E.

Stapleton, then well knowing that he did not have and not intending that he should have any account with the Union Bank of Australia Limited, Sydney, N.S.W., for the payment of said check.

ADDITIONAL CHARGE I: Violation of the 69th Article of War.

Specification: In that Private Curtis E. Stapleton, 11th Materiel Squadron, 8th Air Base Group, having been duly placed in confinement on or about 25 August, 1942, did at Sydney, New South Wales, on or about 11 September, 1942, escape from said confinement before he was set at liberty by proper authority.

ADDITIONAL CHARGE II: Violation of the 96th Article of War.

Specification: In that Private Curtis E. Stapleton, 11th Materiel Squadron, 8th Air Base Group, did at Sydney, New South Wales, on or about 24 July, 1942, with intent to deceive and injure wrongfully and unlawfully make and utter to F. B. Smith, Sydney, Australia, a certain check in words and figures, as follows, to wit;

"NATIONAL BANK OF COMMERCE
of San Antonio
San Antonio, Texas, 7/24 1942 No.K.1766
Pay to the
order of F. B. Smith $ 16.00
Sixteen --------no/100 DOLLARS
C. G. Stapleton"

in payment of rent and other items, he the said Private Curtis E. Stapleton, then well knowing that he did not have and not intending that he should have any account with the National Bank of Commerce of San Antonio, San Antonio, Texas, for the payment of the said check.

He pleaded not guilty to all charges and specifications "by reason of insanity". This plea was overruled by the law member and considered by the court as a plea of not guilty. He was found guilty as charged and sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for 26 years. The reviewing authority approved the sentence but reduced the period of confinement to ten years. The Federal Correctional Institution, Englewood, Colorado, was designated as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded for action to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence shows that pursuant to Special Orders 71, dated 29 September, 1942, Headquarters Base Section 7 and 23rd Port of Embarkation, USASOS SWPA, a board of medical officers was convened for the purpose of examining the accused to determine his sanity. The Board found that "the accused is a constitutional psychopathic personality with emotional instability", "he is not insane at the present time and there is no evidence of his having been insane at the time of the offenses with which he is charged." (Ex. L). Captain Henry M. Fox, M.C., 118th General Hospital, the psychiatrist member of the board, testified that he did not think that "there is anything organically wrong with the brain of the defendant"; and "at the time of my examination I felt he was able to distinguish between right and wrong". "There was no evidence that at

any time in the past he was in any different mental state as far as distinguishing between right and wrong." (R.27,28).

Lieutenant Nathan Lickerman, M.C., an expert psychiatrist, testified in behalf of the accused that this case "is a typical case of psychosis"; "even in his normal state accused is not a fully fledged honorable citizen; even in his best moments he is impetuous, temperamental, irresponsible, unreliable, very undisciplined, unbalanced, poorly brought up, and therefore his conduct and behavior is unpredictable. To my mind his plea of insanity is wholly justified." (R.35). That, at the time of the trial "if he had a choice between right and wrong he would choose the right" * * * "On the 21st July he did not know the difference between right and wrong" * * * "He was insane on the 17th August", and "in his normal state he is a victim of psychosis and is not a useful member of society" (R.35-36) * * * "During his lucid intervals he could distinguish between right and wrong" (R.37).

By stipulation there was introduced in behalf of accused the opinion of Dr. W. P. Page, alienist, that accused "suffers from a constitutional psychopathic personality (schizoid)" (R.40). Dorothea Stapleton, wife of accused, testified "that on many occasions accused appeared unbalanced"; "he just kind of lost his memory or something, he did not know any of us." (R.40).

At the conclusion of this testimony the defense moved that the court enter a finding of not guilty by reason of the insanity of the accused. The motion was overruled by the law member without objection by any member of the court (R.43). During the further course of the trial additional evidence with reference to the sanity of the accused was elicited. Neil Geraghty (R.17) and Mrs. F. B. Smith (R.72) testified that when they saw the accused he acted normally. Janet Stephenson, mother-in-law of accused, testified that when he was at her house accused "had a funny turn" which lasted about three hours and that she contemplated calling a doctor for him (R.46). Lieutenant John Brehm, the investigating officer, testified that he included in his report of investigation the recommendation that accused be examined by a psychiatrist; that he doubted the sanity of the accused because of the report of Dr. Edward Rutledge of the Prince of Wales Hospital that accused was "of abnormal personality" and further, because accused left a clear trail of evidence behind his actions, making no effort to hide his derelictions, and "laughed when I presented him with an additional charge" (R.80). The court made no separate findings with reference to the sanity of the accused.

4. The evidence shows that the accused was placed in the Prince of Wales General Hospital, Sydney, New South Wales, by military authority on 19 July, 1942. He left without authority the following day (R.9;10,77,82; Ex. A1). He joined his wife and went to Kempsey, New South Wales, and subsequently from there to Lismore, New South Wales. Lismore was approximately 600 miles from Sydney. He and his wife stayed at a hotel in Lismore, New South Wales, from 13 August until 17 August, 1942, and registered under the name of Mr. and Mrs. Morgan (R.16,43). When apprehended by Detective Simpson, accused was dressed in civilian clothes. He had in his possession an identity card bearing the name C. E. Morgan, of Kempsey (R.17). Accused first told Detective Simpson that he had been a refrigeration engineer aboard the S.S. Mariposa and had been put ashore sick, in Sydney. (R.18). He later admitted that he had "left the Army" (R.20). A picture secured by the police through the medium of a street photographer's ticket, found in the possession of accused, showed him on a street corner in Lismore, dressed in civilian clothes (R.17; Ex.F). Other witnesses testified that they saw accused both in Kempsey and in Lismore dressed in civilian clothes (R.13,16,45,47). Witness Kearney testified that accused told him that he was going to see the manpower officer so that he could get a job (R.16). Witness Samayai testified accused told him that "he was sick and tired of the army" and asked the witness to get him a civilian identity card (R.49,50).

On August 21, 1942, accused was taken in custody by the military police (R.20), and was confined in a police station in Sydney (R.56). On September 11, 1942, he escaped from such confinement (R.56,57,70) and, again, while

wearing civilian clothes, was on October 14th, 1942, arrested in Kempsey, New South Wales, about 300 miles from Sydney. He was again returned to military control.

When arrested in Lismore by Detective Simpson, a check in the sum of £20.10.0, bearing what purported to be the signature of E. P. Kearney (Ex.B, Charge II) was found in the possession of accused. Kearney testified that he had never signed the check (R.14), and accused admitted to Detective Simpson that he wrote the check and signed E. P. Kearney's name thereon with the "intention of using it to procure funds to leave town" (R.23).

Jack Vlandys, of Kempsey, testified that at the request of Mrs. J. C. Stephenson, the mother-in-law of accused, he went with accused to his, Vlandys', bank, and guaranteed payment of two checks drawn by accused on the Bank of New South Wales, one in the sum of £12.15.0 and the other for £10.10.0 (Exs. G and H). That accused cashed the checks, receiving the funds therefor in the presence of witness (R.44). The checks were subsequently returned to witness marked "no account". They form the bases of Specifications 2 and 3, Charge IV.

Henry Kybert, manager of the Union Bank of Australia Limited, Kings Cross, testified that on July 23, 1942, accused requested him to cash a check for $500 drawn on a bank in San Antonio, Texas. When witness refused, accused requested in writing that witness cable to the San Antonio bank and ascertain whether or not the check could be cashed (R.74). The request was granted and a reply duly received from the bank's American correspondents that an account in the name of accused could not be located (R.75). Accused did not return to the bank to learn the answer to the cable. Shortly thereafter witness had "a telephone message from one of the banks in Kempsey as to whether they could cash his [accused's] check" (R.75).

Witness Joe Samayai, of Kempsey, testified that he cashed two checks drawn by accused on the Union Bank of Australia Limited, in the sums of £12.10.0 and £10.10.0, respectively (Exs. M and N; Specs. 4 and 5, Chg. IV). These checks were returned to witness marked "no account". When asked about them accused told witness that he had made a mistake and that "the money is in a different bank". Witness then said "All right, leave it till tomorrow". The next day accused left Kempsey and witness has never received payment of the checks (R.51). Detective Simpson testified that accused admitted giving the checks to Samayai, but stated that they were in payment for civilian clothes purchased by accused from Samayai (R. 21,51,52).

Mrs. F. B. Smith testified with reference to Additional Charge II that accused had stayed at her house from May 19 until June 30, 1942, and had given her a check (Ex.W) in payment of rent, drawn on the National Bank of Commerce, San Antonio, Texas. She had never received payment for this check (R.72). The testimony of Mrs. C. M. Maule was received by way of stipulation. Accused gave her a check upon the same bank in Texas in payment of rent, cleaning, and a small loan. She was unable to cash the check (R.73-91). This check was made the bases of Specification 1, Charge IV.

Private James S. Campbell testified that he had been confined in the guardhouse at Bankstown prior to July 20, 1942, and that accused had been confined there about the same time (R.66). Witness escaped from such confinement about July 20, 1942, leaving his barracks bag containing the clothing alleged in the specification of Charge III. Upon return of witness to the guardhouse his barracks bag was missing (R.64-65). Lieutenant John Brehm, M.P., testified that he examined the contents of accused's barracks bag and found clothing contained therein marked with the initials "J.S.C.". This clothing was identified by Campbell in the presence of accused as property of the United States furnished in the military service and issued to witness (R.60-64). Lieutenant Brehm further testified that accused "did not deny that he had taken them from Campbell and he really did not have much of a statement to make at all" (R.62).

Lieutenant Brehm also testified that he was the investigating officer in the instant case and that accused had admitted to him that he "donned civilian clothes in Kempsey about August 5"; that he admitted making the checks in Kempsey against uncollected funds from America and when the checks were returned he left and went to Lismore where he cashed the "phoney check"(R.77, Ex. A1).

Accused elected to take the stand and make a sworn statement. He testified that "because I have had trouble with headaches and going out of my mind and getting into trouble" he asked the medical officer of his organization that he be placed under observation in a hospital. On July 19, 1942, while a patient in the Prince of Wales Hospital he "just wandered off from there". Thereafter, he did not know "exactly what had happened." He admitted going to the Union Bank of Australia, but "cannot relate a single thing that happened" there. He did not know "whatever possessed me to go to Mrs. C. M. Maule and pass that check." He "just got scared" after issuing the F. B. Smith check and "took off". At Kempsey he "got in trouble with Jack Vlandys' check and things of that sort" and again "took off" going to Lismore. He had no knowledge at all of the Geraghty check. He could not explain the reason why he wore civilian clothes but the idea of desertion "never entered his head" and that "I have always pestered my dad to sign papers to let me enlist but he refused to do so because he said I would be in this type of trouble I am in, but still he would not take me to a doctor to be examined or anything of that sort" (R.82-83).

On cross-examination accused admitted that he had written all of the checks in question, and stated that "I have never had an account in a bank anywhere" and that he "never had any dealings with the bank in San Antonio" (R.83). He also admitted that he left both the hospital on July 21st, and the jail on August 25th, without authority (R.83); and that he registered at the hotel in Lismore under the name of Morgan but did so because he had used the name of Stapleton on the bad checks in Kempsey and feared that the police would be after him (R.86). He also testified that since early childhood he had committed petty thievery throughout the United States but had never been convicted for such depredations (R.87).

5. The question of accused's sanity was before the court both as an interlocutory question and for determination at the conclusion of the trial. While no formal finding was made by the court, accused being found guilty as charged, the court determined him to be sane at the time of the alleged acts. In CM 128252 (sec. 395(36) Dig. Ops., JAG, 1912-40) the Board said: "It is the function of the court to consider the report of the Board [of Medical Examiners] and accord to it that weight and credence to which, in the judgment of the court, it may be entitled." The record shows that accused was accorded a full and comprehensive hearing as to his sanity. A review of the testimony discloses no evidence upon which the findings of the court should be disturbed. Accused's actions were far removed from that realm of mental irresponsibility which he seeks as a cloak to cover his wrongdoings. His own statements, when confronted with the worthless checks, "I just took off," and then in new fields repeated the same acts, belie his contention of mental irresponsibility and rather show the workings of a mind skilled in the art of trickery and deceipt. The Board is, therefore, of the opinion that the court committed no error in refusing the motion of the defense to find accused not guilty by reason of insanity (R.43), nor does subsequent testimony affect the issue.

The evidence is conclusive in warranting the findings of the court that accused was guilty of desertion. His absence of an extended duration, his apprehension approximately 600 miles from Sydney, dressed in civilian clothes, obtaining a civilian registration card under an assumed name, his statements that he was tired of the Army and seeking civilian employment, his admission to Constable Lyons that he had deserted, all are proof conclusive of his intention not to return to the Service.

That accused had in his possession the articles alleged in Charge III is undisputed. While the evidence is not clear on this charge, it is sufficient to warrant the court's findings of guilty. Accused was in the same jail with Private Campbell and had access to the articles in question. They were subsequently found in his possession and identified by the owner in accused's presence. He made no denial or explanation as to his possession of them. In CM 208895, Zerkel, the Board said: "It is well established that all of the elements of an offense, including the corpus delicti, may be proven by circumstantial evidence." "Unexplained possession of stolen property is sufficient to support a conviction of larceny" (sec. 451(37) Dig. Ops. JAG, 1912-40). Here possession was conclusively proven and upon an opportunity being afforded accused to explain, he remained silent. The evidence in the instant case contains all of the elements necessary to sustain the court's findings as to accused's guilt, as charged.

The evidence and the confession of accused fully sustain the court's finding as to the issuing of the checks with intent to deceive and defraud set forth in Charge IV, Specifications 1 to 5 inclusive and additional Charge II and its specification. Accused admits having given each check as alleged and also as to not having any money at any bank on which they were issued. He states, "I never had an account at any bank anywhere" and "I never had any dealings with a bank." He admits he was hard up for cash and when confronted with the worthless checks, "I just got scared and took off." The drawing of the $500 check on the bank in San Antonio, Texas, where he admittedly had no funds, and using this as a pretext to postpone the day of reckoning on the checks drawn on local banks is proof conclusive of his intention to deceive and defraud those who befriended him. The fact that the checks drawn on the bank in San Antonio, Texas, were never presented for payment is immaterial in the light of accused's confession. The law does not require one to do a useless thing and the formality of presenting a check to a bank for payment when the maker admits that there would be no funds to meet it is immaterial under the circumstances in the instant case. The intent to deceive and defraud was present when the checks were issued. This, in itself, is sufficient proof to sustain the findings of the court as to accused's guilt on these charges and specifications.

Accused admits the acts alleged in the additional Charge I. He was legally confined in prison on August 25, 1942. He broke this restraint in the presence of armed guards. That he left without authority is proven by uncontradicted evidence of the prison officials and by his own admissions. The court rightly found accused guilty as charged.

6. For the reasons above stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of all charges and specifications thereunder and the sentence.

[signature], Judge Advocate.
Lt. Col., J.A.G.D.

[signature], Judge Advocate.
Lt. Col., J.A.G.D.

[signature], Judge Advocate.
Lt. Col., J.A.G.D.

WAR DEPARTMENT
Services of Supply
In the Branch Office of The Judge Advocate General
Melbourne, Victoria.

Board of Review 25 February, 1943.

CM A-294

UNITED STATES v. Technician 5th Grade Calvin S. Cash (6154638), Battery B, 4th Field Artillery Battalion, Force 9156.	)	Trial by G.C.M., convened at Headquarters, Force 9156, 8 January, 1943. Forfeiture of $19.20 per month for six months, restricted to detachment area for two months.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates

1. The record of trial in the case of the soldier named above having been examined in the office of the Assistant Judge Advocate General, Melbourne, Victoria, and there found legally insufficient to support the findings of guilty, and the sentence, has been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office, Melbourne, Victoria.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 86th Article of War.

Specification: In that Calvin S. Cash, Tech 5th Grade, Battery B, 4th FA Bn, Force 9156, being on guard and posted as a sentinel, at APO 932, on or about 0100, December 25, 1942, was found sleeping upon his post.

The accused pleaded not guilty to the charge and specification. The Court found accused not guilty of a violation of Article of War 86, but guilty of a violation of Article of War 96, substituting the words, "duty as a switchboard operator" and "while on duty" for the words "guard and posted as a sentinel" and "upon his post."

3. He was sentenced to forfeit the sum of $19.20 of his pay per month for a period of six months and to be restricted to the detachment area for a period of two months. The reviewing authority approved the sentence and ordered its execution. The sentence was published in General Court-Martial Orders No. 10, Headquarters United States Army Forces in Efate, New Hebrides, February 10, 1943. The record of trial was forwarded to the Branch Office of the Judge Advocate General, Melbourne, Victoria, Australia.

The evidence shows that on or about December 25, 1942, accused, with another soldier, was on duty at a telephone exchange located in a dugout and serving the Battery area, Force 9156. About 0100 Lieutenant Colonel L'Abbe attempted to put through a telephone call but could not get a connection. He tried to get an answer for 15 to 20 minutes and then called the General's aide, First Lieutenant John A. Lockard and instructed him to go to the exchange and "see what the trouble was" (R. 4). Lieutenant Lockard went to the dugout and found accused on duty, with "his face buried in his arms, sleeping with his arm upon the bottom part of the switchboard" (R. 5). The relief was asleep on a cot. Witness took accused by the left shoulder and shook him. Accused's eyes were blood-shot and there was a wrinkle in his face from where his head was resting on his arm. He uttered inarticulate sounds and "wasn't aware at that time as to who I was or as to what I was doing" (R. 5). Captain Myron P. Smith testified that accused although not a member of his organization was only attached thereto. That posted by the switchboard was a written notice stating "that any unusual occurrences would be brought to my attention, either through the sergeant in charge of the dugout or to me personally, and that any necessay changes that might be necessary would be made by myself" (R. 7). The notice (P. Ex. 1) contained, inter allia:

> "The switchboard operator and chief operator (or acting chief operator) will remain in the immediate vicinity of the switchboard while on duty except that one may relieve the other for mess.
>
> "The operator will remain alert at all times while on the switchboard and comply with the notices of procedure as they are posted.
>
> "The chief operator of each shift will receive complaints, give information as available, record trouble on the line, (and see that it is passed on to the wire chief), keep traffic diagram up to date, see that the appearance of the dugout is maintained and relieve the operator for mess and short periods of rest from the board. However, the operator then temporary takes over the chief operator duties.
>
> "During slack periods the chief operator may lie down and rest within the dugout.
>
> "Both operator and chief operator will remain on duty until properly relieved."

Witness further testified that the two men in the dugout were on an 8 hour shift and were to so remain until relieved. That they could divide the duty between them as they desired. There were no fixed schedules for periodical checks and that the last time witness had made an inspection was "approximately a week ago" (R. 10). No order had been issued designating the switchboard in question as a "sentinel's post" (R. 11), and that accused had never been informed that a "switchboard operator was a sentinel and responsible as such" (R. 12). The defense called First Sergeant Joseph T. Collins, who testified that one of his duties was the supervision of the switchboard in question. That his orders were "to check it once in a while to see that it was maintained" (R. 14). Witness would go to the dugout "every couple of days but never from 10 P.M. to 6 A.M."(R. 15). The accused was "attached" to the signal detachment but that witness "did not have any control over him," as he was transferred to the detachment for duty (R. 16).

Sergeant Edgar W. Scott testified that his duties were to "make up the operator's schedule; to handle any disagreement between subscribers, and the operators, and to keep the switchboard room clean at all times." That he visited the dugout "twice a day" but did not give the operators any special instructions as they went on duty (R. 17). That no order had ever been given that the switchboard operator was "a sentinel on post" (R. 18).

Accused elected to take the stand and make a sworn statement. He testified that on the night in question he and another soldier left Force Headquarters and reported for duty to the dugout where the switchboard was located. That the tour of duty was 8 hours and that he and the other operator agreed to divide it, accused taking the first four hour shift. When Lieutenant Lockard came in the dugout accused was "dozing" but not asleep (R. 20). That he was never posted as a sentinel, nor told that he was a guard (R. 21), nor did Captain Smith or any commissioned officer ever go down to the switchboard and post him there (R. 21). That he has never been relieved of his duties and has worked his "regular tour ever since," and has never been in confinement nor placed under arrest (R. 22). That he never considered his duty as that of a sentinel, but only routine detail, the same as one to " go out and pick up coconut shells" (R. 23).

4. The only question presented to the Board for its consideration is the authority of the court, after having found accused not guilty as charged under Article of War 86, to find him guilty by exceptions and substitutions of an offense under Article of War 96, as a lesser included offense thereof.

The Manual for Courts-Martial, 1928, at paragraph 78c, authorizes a court to make substitutions "provided that such action does not change the nature or identity of any offense charged in the specification. * * * If the evidence fails to prove the offense charged, but does prove the commission of a lesser offense necessarily included in that charged, the court may, by its findings, except appropriate words, etc., of the specification, and, if necessary, substitute others instead, finding the accused not guilty of the excepted matter but guilty of the substituted matter."

The record clearly discloses that the duty of the accused in his assignment as a switchboard operator possessed none of the attributes of a sentinel on post, nor did it cloth him with the responsibilities incidental thereto or connected therewith. Failure to perform a routine duty has no element of "Sleeping on Post," and when the Court, by its findings, found accused not guilty, as originally charged under Article of War 86, they are estopped from finding him guilty of an entirely unrelated offense; one containing not a single element of the offense originally charged. That he is guilty of some dereliction of duty is evident, but not having been so charged, he cannot be so convicted. The action of the court is such a clear violation of military law, and is so obvious that further discussion is deemed unnecessary.

5. The Board of Review is, therefore, of the opinion that the record of trial is legally insufficient to support the findings of the court of guilty, by exceptions and substitutions, of a violation of Article of War 96, and the sentence.

[signature], Judge Advocate.
Lt. Col., J.A.G.D.

[signature], Judge Advocate.
Lt. Col., J.A.G.D.

[signature], Judge Advocate.
Major, J.A.G.D.

WAR DEPARTMENT

SERVICES OF SUPPLY

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

201-Cash, Calvin C.

A.P.O. 924,
5 March, 1943.

Subject: Record of trial by general court-martial of Technician 5th Grade Calvin S. Cash, Battery B, 4th Field Artillery Battalion, Force 9156.

To : Commanding General, South Pacific Area, A.P.O. 502.

Inclosed is the record of trial described above and the holding of the Board of Review in this office that the record of trial is legally insufficient to support the findings and sentence. I concur in that holding and recommend that the findings and sentence be vacated.

A form of action effectuating this recommendation is inclosed for your convenience in the event that you concur in the action recommended.

ERNEST H. BURT,
Brigadier General, U. S. Army,
Assistant Judge Advocate General.

3 Incls:

Incl. 1 - Record of trial
Incl. 2 - Holding of Board of Review
Incl. 3 - Action sheet.

(Findings and sentence vacated. GCMO 3, USAFISPA, 10 Mar 1943)

WAR DEPARTMENT
Services of Supply
In the Branch Office of The Judge Advocate General
Melbourne, Victoria.

Board of Review

CM A-333

8 April, 1943.

UNITED STATES v. Second Lieutenant Joseph J. Michalowski (0-888245), Company E, 127th Infantry Regiment, 32nd Infantry Division.	))))))))	Trial by G.C.M., convened at Sinemi Village, New Guinea, January 18, 1943. Dismissal, total forfeitures, and confinement for ten years. United States Disciplinary Barracks, Fort Leavenworth, Kansas.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The Board of Review has examined the record of trial of the officer named above and submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 64th Article of War.

Specification: In that Second Lieutenant JOSEPH J. MICHALOWSKI, Company E, 127th Infantry, having received a lawful command from Colonel JOHN E. GROSE, his superior officer, to lead several unwounded enlisted men from Company E, 127th Infantry, back into the attack on the "Spit" of Buna Mission, did, near Buna Mission, New Guinea, on or about 31 December, 1942, willfully disobey the same.

CHARGE II: Violation of the 75th Article of War.

Specification: In that Second Lieutenant JOSEPH J. MICHALOWSKI, Company E, 127th Infantry, being present with his company while it was engaged with the enemy, did, near Buna Mission, New Guinea, on or about 31 December, 1942, shamefully abandon the said company and seek safety in the rear, and did fail to rejoin it.

The accused pleaded not guilty to each charge and specification. At the close of the prosecution's evidence accused requested the court, and was permitted to change his plea of not guilty to Charge I, and its specification, to that of guilty (R.36). He was found guilty by the court of each charge and specification and sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of

ten years. The reviewing authority approved the sentence and the confirming authority confirmed the same and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. Pursuant to the provisions of Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of the Judge Advocate General, Melbourne, Victoria, Australia.

3.

The evidence shows that Colonel John E. Grose, as the commanding officer of the Urbana Forces, and the 127th and 128th Infantry, issued a written order for an attack on December 31, 1942, upon Buna Mission, setting forth that all ground taken would be held (R.11, 16). Starting at 4:30 A.M. 137 men of Company E, 127th Infantry and Company F, 128th Infantry, crossed a river before daybreak (R.6, 13). Company E lead the attack followed by F Company. Lieutenant Bragg was in command of Company E, 127th Infantry (R.5) and accused was in command of the 2nd platoon thereof (R.44). Accused in his unsworn statement (R.47) denied he was in command of the second platoon, but that he was at the front is shown by his own statement to Colonel Grose: "he stated that he couldn't stay up there" (R.15), and subsequent testimony, infra.

Corporal Joseph V. Labinsky testified that Lieutenant Bragg "instructed the whole company that we was supposed to go across the river and go up along the beach and as soon as we contacted the enemy to get off the beach and * * * dig our foxholes and get in and stay in the foxholes" (R.6). After the 1st and 2nd platoons of E Company, and part of the weapons (R.13, 43) crossed the river, they proceeded along the beach near three barges where they met resistance from the enemy in the form of hand grenades and rifle fire (R.6).

Colonel Grose was located in the Regimental O.P. about 150 to 200 yards from where the attack took place (R.43,44). Seeing grenades being thrown in the vicinity of a barge, he inquired by power phone of an orderly located near there as to what the situation was. He was advised that men were coming to the rear and that accused was also "moving to the rear" (R.14). He instructed the first sergeant of Company E, 128th Infantry, to have the men return and dig in. Upon being advised that accused was near the O.P. he ordered accused to report to him. Accused appeared "considerably excited and seemed a little out of breath from running. He was not exactly incoherent; he said he was very nervous." (R.15). Colonel Grose ordered accused to take the unwounded men "back over to the Mission." At this time men of Company E were still at the front (R.19). He informed accused that he was "now in command of the company, that Lt Bragg had been wounded. He said he couldn't command the company, he told them he wanted the sergeants to command the company" (R.41). Colonel Grose then warned the accused of the gravity of his action and told him that he could be tried for cowardice and "I asked him if he knew what that meant and he said he did." (R.41); "that he just couldn't do it - he couldn't take them back to that slaughter - that he wasn't a coward, he wasn't yellow, he just couldn't take the men across there anymore, couldn't stand to see them get all shot up." (R.26).

Colonel Grose then gave accused a direct order to "take these man and return to his former position". Accused refused to obey this command, was then disarmed, placed under a guard, and sent back to the regimental headquarters (R.15).

Sergeant Harold F. Koch testified that he was communications sergeant for Company E, 127th Infantry, located at the O.P. That at 6:30 A.M. on the morning of the attack eight wounded men came back, accompanied by about six unwounded men. "I saw him [accused] standing by the O.P. at that time." He heard the conversation between Colonel Grose and accused. That all of Company E except four cooks participated in the attack on the morning in question. Upon being asked who was commanding the 2nd platoon, witness replied that as far as he knew accused was "still in charge of it". At this time there was sniping and machine gun fire at the O.P. (R. 44).

Private Herbert L. Keller testified that he was the personal bodyguard for Colonel Grose. That he was present when Colonel Grose ordered accused to get the unwounded men together and return to the attack on Buna Mission.

> "As I stated, when he [accused] entered the forward OP he was completely out of breath from the labor of getting to the OP from where he had come, I hadn't observed how he got there, and his physical condition was of a man out on his feet, dead tired, exhausted completely; hard to put into words, but you can see it on their faces after you have been up there for some time. It just looks to me, as I have already stated in my testimony, that he was out on his feet physically. I got the impression that he wasn't quite aware of what was going on, he was so dead tired. I will qualify that last statement of mine - - I said I got the impression he didn't know what was going on. That wasn't a mental reference, that was physically, that he had gone that far and he couldn't go any further, he had given all he had." (R.30).

He also heard accused state to Colonel Grose that he had helped wounded men back (R.31). The defense called all witnesses for the prosecution, excepting Corporal Labinsky. Their testimony was, in substance, the same as it was for the prosecution. Accused elected to make a written unsworn statement, viz:

> "Prior to the morning of December 31 I had been relieved of command of my platoon by Lt Bragg, the company commander, and had no assigned duties with the company. I do not have a clear memory of the events on the morning of December 31. The only clear thing I remember of what happened there was that I was under arrest before Colonel Bowen at the Regimental CP. I have no clear recollection of what happened before that time except a confused memory that I was somewhere with Colonel Grose and he was trying to get me to do something. I did not understand or appreciate the significance of what had happened until I had calmed down at the Regimental CP." (R.47).

4.

The unsworn statement of accused appears somewhat inconsistent with his plea of guilty to Charge I and the specification thereunder in that he did not have a "clear recollection of what happened". The plea may have been entered improvidently or through lack of understanding, but in either event, disregarding such plea, ample evidence appears in the record to legally support the findings of guilty. Accordingly, the accused cannot be said to be prejudiced thereby.

5.

Winthrop at page 622 (Military Law and Precedents, Reprint) in discussing "misbehavior before the enemy", in violation of Article of War 42 (modified and now known as A.W. 75) in pertinent part providing -

> "Any officer or soldier who misbehaves himself before the enemy, runs away, or shamefully abandons any fort, post, or guard, which he is commanded to defend * * *shall suffer death * * *"

states that the offense of abandoning a command may be committed only by the commanding officer thereof.

Such statement is further explained by his following discussion of the words "which he is commanded to defend", present in that Article of War.

> "It is conceived that, to constitute the offense, no express or specific instruction to defend the post need have been given,

> but that it is sufficient if an obligation to make a defense was - as it could hardly fail to be - devolved upon the commander as a necessary or reasonable implication from the order which assigned him to the command, or as a duty properly attaching to his position." (underscoring supplied) (p. 625).

The words "which he is commanded to defend" do not appear in the present Article of War 75, and the words "which it is his duty to defend" have been substituted therefor.

The Manual for Courts-Martial, 1921, in its discussion of Article of War 75 states:

> "While the word 'abandon' is broad enough to include a case in which a soldier or subordinate officer leaves a fort, post, guard, or command which it is his duty to defend, it is probable that this clause of the article looks only to offenses by the commanding officers of such commands, and that abandonment by a subordinate should be charged as a misbehavior or running away" (sec. 425, III).

The most recent edition of the Manual for Courts-Martial in its discussion of Article of War 75, omits the opinion last-quoted.

As Winthrop's interpretation of the instant offense is based upon the then Article of War 42, since modified and embodied in Article of War 75, and as the discussion with reference to the latter article appearing in the Manual for Courts-Martial, 1921, is patently not definitive and has been omitted from the current edition of the Manual for Courts-Martial, the Board of Review is of the opinion that such earlier opinions are not now applicable. The Board is of the opinion that the words of Article of War 75, that "Any officer or soldier who * ** shamefully abandons * * * any fort, post, camp, guard, or other command which it is his duty to defend, shall suffer death * * *proscribes an act which may be committed by any officer or soldier.

The evidence is clear and convincing that accused was with Company E, 127th Infantry, when the attack was made against the enemy on Buna Mission. It is likewise clear that accused was under orders from both the regimental and company commanders that all ground taken was to be held. It further appears that accused made his way to the rear accompanying about six wounded soldiers and that at this time others of his company were still engaged with the enemy. Accused disclosed no superior authority or tactical necessity for his withdrawal. Colonel Grose testified that accused in answer to the question "Did Lt Michalowski offer any explanation for his returning from the mission side of the spit to the village side?" said "'I cant stay up there, it's too hot' or something to that effect. He, I believe, made some other remarks; I can't recall the exact words of those." (R.16). Such facts constitute an abandonment as charged.

Should, however, it be considered that such offense could be committed only by a commanding officer, the Board of Review is of the opinion that there is sufficient evidence in the record to sustain the finding of guilty under such theory. The competent evidence established that upon the return of the accused from the mission side of the spit, where his company was then in contact with the enemy, to the village side, others of his company still remaining, accused admitted to the colonel that he knew that Lieutenant Bragg had been wounded and that he, the accused, was then "the senior officer now with the company" and in command thereof. That at that time the accused stated that "he didn't want to have that responsibility, that he couldn't command it [the company]" (R.18). He then refused to return with the unwounded men to the position occupied by the balance of the company. Accordingly, he then and there abandoned his command.

The return of the accused to the rear from the position that he had occupied was clearly for the purpose of seeking safety. The fact that the accused had reached a place of only comparative safety and which was under fire from rifle and machine gun bullets does not refute the admitted intent of the accused in leaving his position and of refusing to return thereto.

6. The defense made a motion for a finding of not guilty of Charge II, and its specification, on the grounds that there was a duplication of charges in that the acts alleged in both Charges I and II were continuous and proven by the same evidence. The court rightly refused this motion. The record fully sustains the acts alleged in Charge II and its specification. Had accused not been seen by Colonel Grose and there given the order which he refused to obey, it would not have erased his shameful conduct. While separated by a short interval of time each act alleged was committed and stands separate and apart. Even had accused obeyed the command of Colonel Grose and returned as ordered, the evidence fully sustains the charge of abandoning his company. There was no error in refusing this motion.

7. The record contains much hearsay testimony, but the same in no manner injuriously affects accused's substantial rights. There is sufficient competent testimony to fully sustain the court's findings.

8. For the reasons above stated the Board of Review if of the opinion that the record of trial is legally sufficient to support the findings of guilty of the charges and the specifications thereunder, and the sentence.

_____, Judge Advocate.
Lt. Col., J.A.G.D.

_____, Judge Advocate.
Lt. Col., J.A.G.D.

_____, Judge Advocate.
Lt. Col., J.A.G.D.

(Sentence ordered executed. GCMO 9, USAFFE, 31 Oct 1943)

238108

WAR DEPARTMENT
Services of Supply
In the Branch Office of The Judge Advocate General

Board of Review

16 March, 1943.

CM A-334

UNITED STATES v. Captain Roderick H. Fitch, Ch. (0-377171), Headquarters and Headquarters Squadron, 29th Service Group, ASC.	)	Trial by G.C.M., convened at Headquarters Base APO 708, 22 February, 1943. Dismissal, total forfeitures, confinement for three years. United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria.

2. The accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 93rd Article of War.

Specification 1: In that Captain Roderick H. Fitch, Headquarters and Headquarters Squadron, 29th Service Group, did, at APO 708, in the 29th Service Group area, on or about February 16, 1943, commit the crime of sodomy by feloniously and against the order of nature having carnal connection by mouth with Staff Sergeant Jack (NMI) Manz, 82nd Service Squadron, 29th Service Group.

Specification 2: In that Captain Roderick H. Fitch, Headquarters and Headquarters Squadron, 29th Service Group, did, at APO 708, in the 29th Service Group area, on or about February 17, 1943, commit the crime of sodomy by feloniously and against the order of nature having carnal connection by mouth with Staff Sergeant Jack (NMI) Manz, 82nd Service Squadron, 29th Service Group.

CHARGE II: Violation of the 95th Article of War.

Specification: In that Captain Roderick H. Fitch, Headquarters and Headquarters Squadron, 29th Service Group, did, at APO 708, in the 29th Service Group area, on or about February 16, 1943, conduct himself in a manner unbecoming an officer and a gentleman in that he made improper advances toward Technical Sergeant John W. Hatfield, 82nd Service Squadron, 29th Service Group, by placing his hand upon the private parts of said Technical Sergeant John W. Hatfield.

Accused pleaded guilty to Charge I, Specifications 1 and 2 and not guilty to Charge II and its specification. He was found guilty of the first charge and specifications and not guilty as to the second charge and specification, and sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for three years. The reviewing authority approved the sentence and forwarded the record to the confirming authority pursuant to the provisions of Article of War 48. The confirming authority confirmed the sentence and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. The record was forwarded to the Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia, under the provisions of Article of War 50½.

3.

The accused having been found not guilty of Charge II and its specification, the Board will not discuss the evidence pertaining thereto.

4.

The evidence shows that on the night of February 16, 1943, Staff Sergeant Jack Manz, while on his way to the movies was approached by accused and asked to "take a ride" in a jeep. Sergeant Manz stated to accused his desire to attend the movies, but upon the suggestion of accused that the ride would "take but a few minutes" consented (R.4). The jeep was driven a short distance and parked. Accused asked witness questions about his life and "asked me if I ever thought about getting real drunk". Witness replied that he did (R.4). Accused then told witness to meet him after the show and "we would have a few drinks". After the show witness met accused in the parked jeep and together they drank a bottle of what accused said was "gin and apple juice". The conversation then was "about sex" and accused committed sodomy on witness per os (R.5).

Witness reported the act to two of his comrades and also to the executive officer who "figured there might be some way to trap the man in the act". "It was pre-arranged that I should contact the man and bring about the same incident as before. We were to go to the same place. I would cough as a signal and an officer was supposed to come on the scene (R.5). Witness testified:

> "While riding in the jeep [the following evening] he [accused] said it was about this time of evening that he got the urge. Then he said he was sorry and didn't want to offend me and that we had better stop. I acted like I was laughing it off. I fumbled with my crotch and he said, when he drove around he felt like doing it again. I said all right with me. He asked me if I wanted some gin. I said yes. I practically led him on." (R.6).

Accused again committed sodomy on witness per os.

Accused elected to make an unsworn statement. He testified that he thought he was doing the right thing when he accepted a commission by "contributing to the welfare of the Armed forces". After entering the service "I realized I had not done the wise thing", but finding that he could not be released, he decided "to see it through and endeavour to surmount the difficulty by will power" (R.9). At no time did accused deny the acts alleged in Charge I, Specifications 1 and 2.

It was stipulated that Lieutenant Colonel Reyher, Group Commander of accused, if present, would testify that accused had done excellent work under field conditions in administering to the spiritual need of the group personnel (R.8). An official monthly report was introduced in evidence as to the efficiency of the accused as a chaplain (Ex. C).

5. The evidence is conclusive that the accused committed the acts of which he was found guilty.

Although the pathic, through the suggestion of his superior officers, made himself available to the accused and "practically led him on", the court was justified in concluding that the offense was incited and intended by the accused. "Where the evidence shows an intention on the part of the accused to commit the crime charged, evidence obtained by entrapment is admissible, and this is true even though the witnesses acted as decoys, taking part in the transaction which, itself, was criminal"(sec. 378, Wharton's Criminal Evidence). The Board of Review has considered CM 207652, Fay (sec. 395(35), Dig. Ops. JAG, 1912-40), and is of the opinion that the conclusion therein was predicated upon facts and circumstances other than those present in the instant case, and therefore is clearly distinguishable therefrom.

6. For the reasons stated above, the Board of Review is of the opinion that the record of trial is legally sufficient to support the finding of guilty of Charge I and the specifications thereunder, and the sentence.

, Judge Advocate.
Lt. Col., J.A.G.D.

, Judge Advocate.
Lt. Col., J.A.G.D.

, Judge Advocate.
Lt. Col., J.A.G.D.

1st Indorsement
War Department, Branch Office of the Judge Advocate General,
A.P.O. 924, 16 March, 1943, To Commanding General, USAFISPA, A.P.O. 502.

1. In the case of Captain Roderick H. Fitch, Ch. (O-377171) attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM A-334)

ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 5, USAFISPA, 2 Apr 1943)

WAR DEPARTMENT
Services of Supply
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

21 April, 1943.

CM A-342

UNITED STATES v. Privates L. V. CARTER (38039566), PERRY J. GARRETT (37061532), CELESTIAL A. RATLIFF (38028087), and JAMES E. WINTERSMITH (15043042), all of Company F, 29th Quartermaster Regiment (Trk).	Trial by G.C.M., convened at Mt. Isa, Queensland, 12 September, 1942. As to Privates Carter and Ratliff: Dishonorable discharge suspended, confinement for five years. The Main Stockade, Base Section No. 3, A.P.O. 923. As to Private Wintersmith: dishonorable discharge suspended, confinement for three years. The Main Stockade, Base Section No. 3, A.P.O. 923. As to Private Garrett: Dishonorable discharge, confinement for five years. The United States Disciplinary Barracks, Fort Leavenworth, Kansas.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review and the Board submits this, its opinion, to the Assistant Judge Advocate General, Melbourne, Victoria, Australia.

2. The several accused were tried upon like charges and specifications as follows:

CHARGE I: Violation of the 64th Article of War.

Specification: In that Pvt. L. V. Carter, [Pvt. Perry L. Garrett], [Pvt. Celestial A. Ratliff], [Pvt. James E. Wintersmith], Co. F 29th Q.M. Regiment, did at Winton, Q., Australia, on or about 13 June 1942, lift up a weapon, to wit, a U.S. Service rifle Cal. 30, against Capt. Collett B. Dilworth, his superior officer, who was then in the execution of his office.

CHARGE II: Violation of the 66th Article of War.

Specification: In that Pvt. L. V. Carter, [Pvt. Perry L. Garrett], [Pvt. Celestial A. Ratliff], [Pvt. James E. Wintersmith], Co. F 29th Q.M. Regiment, did at Winton, Q., Australia, on or about 13 June 1942, voluntarily join in a mutiny which had been begun in Co. F 29th Q.M. Regt., against the lawful military authority of Capt. Collett B. Dilworth, the commanding officer thereof, and did, with intent to usurp, subvert, and override for the time being, in concert with sundry other members of said Co. F 29th Q.M. Regt., assembled at the Winton Dance Hall, Winton, Q., Australia, refuse to disperse and surrender their arms to the commanding officer thereof.

They pleaded not guilty to all charges and specifications. Accused Ratliff, Garrett, and Wintersmith were found guilty as charged. Accused Carter was found guilty of Charge II and the specification thereunder and of Charge I and the specification thereunder, guilty except the words "against Capt. Collett B. Dilworth" substituting therefor "against 2nd Lt. Harvey C. Bowdle"; the approving authority disapproved the finding as to Charge I and the specification thereunder. Evidence of one previous conviction each was introduced as to accused Garrett and Wintersmith. Each of the accused were sentenced to dishonorable discharge, to forfeit all pay and allowances due or to become due and confinement at hard labor; Carter, Garrett, and Ratliff for five years and Wintersmith for three years; the reviewing authority approved the sentences but suspended the dishonorable discharge as to accused Carter, Ratliff, and Wintersmith. The place of confinement for Carter, Ratliff and Wintersmith was designated as the Main Stockade, Base Section No. 3, A.P.O. 923, and for Garrett, the United States Disciplinary Barracks, Fort Leavenworth, Kansas. The reviewing authority forwarded the record of trial to the Branch Office of the Judge Advocate General, Melbourne, Victoria, Australia, pursuant to Article of War 50½.

3.

After the accused had pleaded to the general issue, a special plea in bar was interposed as to each accused upon the grounds that Article of War 70 had been violated in that the accused had been denied their right to cross-examine witnesses (R.7). After testimony of the several accused in support of their plea, the investigating officer testified that he "explained very carefully their rights and privileges to each one of them, that is, in regard to any statements that they should make, whether oral, written or otherwise; also their rights to have any of the witnesses there to ask them any question that they desired * * *All four said during the investigation that they didn't care to make a statement * * *they didn't care to call any witnesses of their own or witnesses on Charge Sheet" (R.16, 17). The court denied such pleas (R.22).

4.

The evidence discloses that on the evening of June 13, 1942, the citizens of Winton, Queensland, gave a dance for the American and other troops in town. At about 8:30 or 9:00 o'clock that evening the four accused all members of Company F, 29th Quartermaster Regiment, were attending the dance when a fight started. Captain Collett B. Dilworth, commanding officer of Company F, interceded to stop the fight. Captain Dilworth testified, "In that fight I found that Private Garrett was definitely engaged, also Ratliff. I walked across the dance hall over to the engagement. I found that Garrett was the only one that was fighting." With the assistance of some enlisted men the four accused were ejected from the dance hall, ordered to leave, and to "not come back that night" (R.23). The accused left as ordered (R.31, 32) but about 10:00 o'clock the same night were seen by Lieutenant Harvey C. Bowdle returning, each having a rifle. The lieutenant notified Captain Dilworth and they accosted the accused who then stated to these two officers that they had "come back for those white boys - that they were treated wrong and were going in to settle the score" (R.31). Captain Dilworth ordered them to return to camp. Privates Wintersmith and Ratliff ran around the officers and entered the dance hall. Private Carter "ran around to the back way." Captain Dilworth testified that he entered the dance hall and approached Ratliff who "said to me, 'Get away, I know what I'm doing.' I said, 'You will have to get out of here' and he said, 'Leave me alone' and then 'Stand back or you will get hurt'." Witness managed to eject Ratliff from the dance hall, "I kept pressing him and telling him to let me have his gun. He said, 'Stand back or I'll shoot you.' * * * I got a pistol from Sergeant Jackson and walked into Ratliff and told him if he did not give me his rifle I would shoot him. 'Stand back', he said. I kept walking up to him and he had his gun * * *at low port and not pointed directly at me." Witness then pressed his pistol against Ratliff's stomach and again demanded the rifle. Ratliff then gave him the rifle (R.24, 32).

Lieutenant Bowdle approached Garrett and demanded his rifle. Garrett said, "Stay back Lieutenant or I will shoot you." Witness stood there until Captain Dilworth came from the dance hall with Ratliff and Wintersmith. He again approached Garrett and demanded his rifle. Carter, who had then returned, said "Don't you touch him or I'll shoot you Lieutenant" (R.31).

Carter later attempted to go over a picket fence and Sergeant Jackson testified that Sergeant Wheaton "walked up to him, pulled him off, took his rifle, and pitched the rifle to Pvt. Alfred Hulin. He /Wheaton/ then walked up to Wintersmith, he took Wintersmith's rifle. Pvt. Garrett put his rifle on Wheaton and told him to give the rifle back. Wheaton unloaded the rifle before he gave it back to Wintersmith" (R.36, 42). Captain Dilworth then approached Garrett and demanded his rifle. Garrett said "Don't come any closer for I'm going to shoot." The captain "walked into him with my pistol" and Garrett "gave me his rifle" which he was holding at port arms (R.24). Lieutenant Bowdle then took Wintersmith's rifle (R.31-2). The rifles of each accused were then inspected by the officers and each was found "loaded and cocked" (R.34-35). All of the accused were then returned to camp (R.45).

5.

Each accused elected to testify under oath.

Accused Carter testified:

> "When we got to dance they were fighting and so then I got in to a jeep with Sgt. Harrison and went back to camp and I went to bed and I heard them say 'Get your rifle'. I got out of bed, got my rifle and went into town. Time I got there Cpl. Wheaton took my rifle, gave it to someone and put me in Jeep. I sat in Jeep until we got ready to leave." (R.49).

He did not know who stated "Get your rifles". He had a "whole lot" to drink, "Wine, beer and whiskey all mixed." Accused denied pointing the rifle at Captain Dilworth. The only reason for getting his rifle was "to stop the row". (R.49-51).

Accused Wintersmith testified that he

> "Went up there and had several drinks and we had supper and messed around. Decided to go over to dance hall. Went around dance hall and were standing by talking together when fighting started. After the fight the company commander ordered everybody out of the dance hall. We went to camp and went to bed. Somebody yelled 'Get you rifles' and we heard some shots up town so I grabbed my rifle and started up that way. We got there and ran into Cpl. Wheaton who said 'Give me that rifle' and I gave him the rifle without any trouble." (R.52).

He did not talk to, nor point his gun at Captain Dilworth. The reason he took his rifle was to stop trouble. He did not know who said "Get your rifles". Accused was "kinda" drunk (R.52-55).

Accused Garrett testified:

> "We went to town and were dry and wanted something to drink. Drunk wine, beer, whiskey and stuff.* * *I really don't know what happened * * * Don't remember * * *How much I drunk I don't remember but I drunk a lot." (R.56, 57).

Accused Ratliff testified that he and Corporal Latson went to town about 5:30 and together drank one and a half bottles of whiskey. Later that evening:

"I went in and stood about ten minutes. I came out and went back to camp. Somebody came back from town and said something was happening and get your rifles and go to town. Someone handed me a rifle which was loaded (I didn't find that out until later). I went back to town and met Captain Dilworth at the door. He said 'You can't come in here'. I backed out of the door with my rifle in my hands at port arms. Captain said 'Sgt. Ratliff, give me your rifle.' My having been drunk I said 'Captain sir I am not a Sgt.' and by the time I said that he ran around to his left and got a pistol from Sgt. Jackson. Then he turned around again and said 'Give me that rifle' and I handed him the rifle." (R.58).

Witness said he was not present when Captain Dilworth gave the order to leave and remain away from the dance hall (R.58, 59).

6.

The court found from the testimony that Article of War 70 had been substantially complied with, and overruled the plea in bar of trial made in behalf of the several accused. The record discloses no reason why such determination of the court should be disturbed.

By the approved findings Wintersmith, Ratliff and Garrett were each found guilty of lifting up a rifle against Captain Dilworth. The evidence is clear that Ratliff and Garrett committed the act charged. While it does not appear that Wintersmith actually lifted his rifle against the captain, yet, being present with a loaded rifle, he aided and abetted in the unlawful act, and, as an accomplice, is equally guilty with the principals. (sec. 245, Wharton's Criminal Law, p. 327).

The four accused, with the expressed intent of righting, by force, a supposed wrong, returned to the dance hall in disobedience of an order of their commanding officer. To accomplish their purpose they threatened their military superiors there present with bodily harm and refused to give up their loaded rifles until compelled to do so by force. The acts of the several accused constituted a concerted insubordination and defiance of lawful military authority with the intent to override such authority or neutralize it for the time being. Accordingly, they are each guilty of mutiny as charged (par. 136a, M.C.M., 1928; sec. 424, Dig. Ops. JAG, 1912-40).

While the evidence shows each accused to be drinking earlier in the afternoon, it likewise shows each accused to have been fully possessed of his mental faculties at the time in question.

7.

For the reasons above stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the approved findings and the sentences.

_____, Judge Advocate.
Lt. Col., J.A.G.D.

_____, Judge Advocate.
Lt. Col., J.A.G.D.

_____, Judge Advocate.
Lt. Col., J.A.G.D.

WAR DEPARTMENT
Services of Supply
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

23 April, 1943.

CM A-348

UNITED STATES v. First Lieutenant LOUIS A. CHAGNON (0-372956), 127th Infantry.	)))))))	Trial by G.C.M., convened at Sinemi Village, New Guinea, January 16, 1943. Dismissal, total forfeitures, confinement at hard labor for five years. United States Disciplinary Barracks, Fort Leavenworth, Kansas.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 75th Article of War.

Specification: In that First Lt. Louis A. Chagnon, 127th Infantry Regiment, did, at Siwori Village, New Guinea, on or about January 4, 1943, misbehave himself before the enemy by refusing to advance with his command which had then been ordered forward by Colonel John E. Grose, IGD, Commanding Officer, 127th Infantry Regiment, to engage with the Japanese Army, which forces, the said command was then opposing.

He pleaded not guilty to the charge and its specification and was found guilty as charged. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of ten years. The reviewing authority approved the sentence, the confirming authority confirmed the same, but reduced the period of confinement to five years, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence shows that on January 4, 1943, Colonel John E. Grose, Inspector General's Department, I Corps, was in command of the 127th Infantry (R.4). Accused was in command of a detachment thereof on a strip of land lying along Siwori Creek, near Siwori Village, in the Buna area, New Guinea.

On December 22, 1942, he was joined by Lieutenant James J. Angus with about 30 men, bringing the strength of the detachment up to about 70 men (R.18).

For several days the Japs had been seen swimming to the rear of the detachment and much patrol activity had been conducted by the detachment in clearing the area of the enemy. On the afternoon of January 4, 1943, the Japs made a flank attack and succeeded in cutting off the detachment (R.33). Lieutenant James J. Angus was in a slit trench about 20 yards to the rear of accused and after having exhausted all of his ammunition was forced to retreat to the river. The telephone was some 15 or 20 yards from the foxhole occupied by accused, his orderly, and a sergeant. Accused, while under fire, twice left his foxhole and attempted to telephone to the C.P. but failed to establish communication. He returned and ordered his men to open up and fire and keep on firing, and used his own rifle for firing. The result of this firing must have been effective for the Japs drew back and there was "much screaming and yelling by people being mortally hit"(R.36). There was an abandoned machine gun near accused's foxhole and with the covering fire of his orderly and the sergeant, accused crawled forward, dismounted the machine gun, returned with it to his foxhole, set it up and began firing it with the assistance of the sergeant who fed it the ammunition until about three-fourths of the belt had been used when it jammed. At this time "they were on top of us". "When we left there we were the last three to leave that position" (R.37). Accused then swam the river to the boat crossing and went to Lieutenant Kirchenbauer's C.P.

Private Wesley R. Wilson testified that he was accused's orderly and was with accused between December 31, 1942, and January 5, 1943. That there was much enemy activity. Every day "we had to move out and comb this spit" of Japs. That accused was kept constantly on the alert at all times and "he was up most of the nights with these [telephone] calls". That during the period of December 31 to January 4, "there was little opportunity for rest periods because you no more than got to sleep at night and you would be called and woke up" (R.26). When witness and accused arrived at the C.P. across the river to the rear, accused was "very shaky at that time and quite wobbly on his feet." Accused then began checking the men as they came in, and returned to an outpost on the spit. When he returned from this outpost "he had all he could do to stay on his feet. He almost collapsed there. We made him sit down and we gave him some ammonia.* * * After we had been there a little while they notified us that there was an ammunition detail coming in and we were supposed to send a guide down for it, and nobody was sure of the way and Lt Chagnon took three men and went down to guide up this ammunition detail." When he returned about midnight "* * *I would say he was done for, as far as being able to carry on any further." (R.27, 28). On the basis of his experience and what he observed during the withdrawal of that outpost he would not say that Lieutenant Chagnon "was either frightened or a coward" (R.29).

Staff Sergeant Richard Hansen testified that he was in the same foxhole with accused. He verified previous testimony as to accused crawling from his foxhole and bringing back the abandoned machine gun, setting it up and firing it. Upon being asked "Was there any time during that attack while you were in that foxhole that Lt Chagnon showed lack of bravery?" he replied, "No sir, at no time did Lt Chagnon show any lack of bravery." (R.37). Witness saw accused at the river about three-quarters of an hour after the withdrawal. "He looked to me like he was rather tired. I believe I would be safe in saying that he was a little worse for wear, worse so than any of the other men" (R.37).

Sergeant Lester L. Sherman testified that he was with accused from the night of December 31, 1942, through the afternoon of January 4, 1943. Witness was in a foxhole about 15 or 20 yards from accused on the afternoon of the final attack. There was automatic fire from the enemy from both front and rear. Accused "was over in my foxhole a couple of times where the telephone was" (R.33). Witness saw accused "exposing himself to enemy fire" and in the face of "a lot of automatic

fire" go out and get the machine gun, "drag it to his foxhole himself and start firing" (R.33). Witness saw accused go out on at least one patrol and testified "I think he took one Jap. I don't know how many he killed." During the period from January 1st to 4th, the accused "had quite a lot of work to do at night. They would wake him up in the middle of the night "three or four times, maybe five or six times". When witness saw accused at Lieutenant Kirchenbauer's C.P. about 7:00 o'clock that night, accused "acted sort of tired, like he was petered out, pretty much * * * he wasn't as cool as he usually is" and later in the evening at the "37 gun crew and the 50 caliber position" he ordered them to keep firing and "wasn't natural the way he usually was" (R.34).

First Lieutenant James J. Angus testified that from January 1st through January 4th, 1943, there was enemy activity both day and night in the area where accused and his detachment were located. After the detachment commanded by accused was driven back on the night of January 4, 1943, witness met accused at the C.P. in Siwori Village. Accused "was wet, and looked tired, nervous and shaky." Later that night "he talked as though he was still nervous, and a little exhausted". "It was raining, and I remember once I saw him he was going back to the Buna crossing to lead up the ammunition supply." (R.20). That on the morning of January 5, 1943, "he was in too nervous a state to lead troops" (R.22).

Second Lieutenant Alfred E. Kirchenbauer saw accused at his [witness's] C.P. about 7:15 P.M. on January 4, 1943. He "was in a very nervous condition. He put his hand on my shoulder and said, 'Kirk, I'm all shot, please take' - - he didn't even say please - - 'take charge.'" That after accused returned from guiding the ammunition detail back to the village at 1:00 A.M. on January 5, 1943, "there was a general feeling in words to the effect that Lt Chagnon was not in any condition to do what he was ordered to do."

First Lieutenant James T. Coker testified that he was at the C.P. in Siwori Village at 4:00 A.M. on January 5, 1943, and was in command of Company F, 127th Infantry. That he heard accused talk with Colonel Grose over the telephone, and that "Lt Chagnon while he was talking seemed to be very nervous. In fact, his condition, I would say would be one of near nervous exhaustion. His mental capacity in such a state would be more or less gone, and his whole reaction while he was talking over the phone, which was just about all the talk I had with him or heard him speak, was that he was very highly nervous and was in no condition to undertake any more strain, or go into any more fights at that time." "In fact, [I] could hardly blame Lt Chagnon for not taking us across in that condition."

Colonel John E. Grose testified that on January 4, 1943, he was in command of the 127th Infantry in the Buna area, New Guinea. The regiment was in contact with the enemy. About 7:00 P.M. January 4, 1943, witness was informed that accused's patrol, or outguard, had withdrawn to Siwori Village (R.4). Shortly after 7:00 P.M. witness talked with accused over the telephone. Accused was "somewhat excited, and - - but seemed to be fairly well in control of himself" (R.5). Shortly thereafter witness ordered accused to take a patrol of his own men and return to the river and form a bridgehead there, but upon being informed by both accused and Lieutenant Kirchenbauer that "these men were scattered, badly disorganized, and many of them without arms" he countermanded this order. Witness then directed accused "to stay around there so I could get in touch with him" (R.8). He tried to get in touch with him on several occasions but "he couldn't be found" (R.5). Witness finally contacted accused by telephone about 3:00 o'clock next morning (R.43), and ordered him to take a patrol from F Company, then under the command of Lieutenant Coker, which had been ordered up to Siwori, and to form a bridgehead across the river. Accused refused, saying "he was unable to do that"* * *"he couldn't do it"* * *"he would have to refuse to go back" (R.5). Accused was then placed under arrest by Colonel Grose (R.24). Lieutenant Angus was ordered to take the patrol and subsequently carried out this assignment (R.7).

Colonel Grose testified "In no case did Lt Chagnon say he was wounded, or that he was physically incapacitated and I have received no report to that effect"(R.9); but on cross-examination testified:

"Q. Colonel Grose, did Lt Chagnon offer any explanation as to why he refused to take this -- comply with your orders?

A. I believe he did. I can't remember everything he said. He said he was -- he was -- I will have to think just what he did say. I can't recall right off. He did offer some explanation. His explanation, however, all of it had to do with the condition he was in from having left his position, and seemed to be -- to me, to be due to fright.

Q. Not to mental strain?

A. Well, there might have been mental strain, but I think it was all due to fright. That's the way I sized it up at the time. I paid very little attention to it, because my main objective was to direct him to go back, * * * I gave very little consideration to his excuses, because he was not wounded and he was able to go back." (R.9).

4.

Although Colonel Grose did not have the opportunity of personally seeing and observing accused, the opinion of this witness with reference to accused's mental and physical condition at the time of the offense charged was admitted in evidence. Based upon the opinion formed solely from a telephone conversation with accused and admitting that he "gave very little consideration to his excuses", Colonel Grose testified that the accused "was able to go back", and that his refusal to obey the order "was all due to fright" (R.9).

On matters within the common observation and experience of men, a witness may express an opinion (M.C.M., 1928). Thus a witness may testify as to the physical condition, the emotions of fear, nervousness, and anxiety which are manifested by another and observed by him (sec. 1012; 1013, Wharton, Criminal Evidence). Such opinion is based on experience and observation of the conduct, conversation, and facial expression of others in similar emotional conditions (Carney v. State, 79 Ala. 14). In order to qualify for the purpose of expressing such opinions, a non-expert must show that he had a reasonable opportunity to observe the facts which form the bases of his proposed testimony. If the cross-examination reveals the witness really had no personal knowledge of the matter as to which he proposes to testify, his testimony should be rejected, or if it has been received, it should be stricken (sec. 973, Wharton, Criminal Evidence).

Accordingly, it is patent upon the face of the record that, as Colonel Grose had not personally observed the accused, he did not possess the legal qualifications necessary to give opinion testimony with reference to the physical or mental condition of the accused. The testimony of this witness, the regimental commander, that accused because of fright refused to obey an order to advance against the enemy, imputes to the accused cowardice before the enemy and should not have been admitted in evidence, and beyond question, injuriously affected accused's substantial rights.

5.

"As to each offense charged, the burden is on the prosecution to prove beyond a reasonable doubt by relevant evidence that the offense was committed, that the accused committed it, that he had the requisite criminal intent at the time, and that the accused is within the jurisdiction of the court, except to the extent that such burden is relieved by a plea of guilty. Whatever the defense may be, this burden never changes." (par. 41c, M.C.M., 1928).

As a general rule in matters of defense, mitigation, excuse, or justification, the accused is required to prove such circumstances by evidence sufficient to create only a reasonable doubt of his guilt. If the circumstances relied on are supported by such proof as produces a reasonable doubt as to the truth of the charge when the whole evidence is considered by the jury, there must be an acquittal. (sec. 211, Wharton, Criminal Evidence). "Where the evidence of the accused raises a reasonable doubt, * * * to warrant a conviction it must overcome such doubt thus raised by proof beyond a reasonable doubt of the existence of each essential element of the crime" (sec. 207, supra). In his discussion of misbehavior before the enemy, Winthrop states -

> "Besides negativing the facts charged, the accused may show in defence * * * that he was suffering under a genuine and extreme illness or other disability at the time of the alleged misbehavior" (Mil. Law & Precedents, Reprint, p. 624).

Six of the seven witnesses who testified in the instant case saw the accused, observed his condition immediately before, or at the time of, the alleged offense, and stated, in substance, that "there was a general feeling * * *Lt Chagnon was not in any condition to do what he was ordered to do" because of mental and physical exhaustion, and because of such conditions refused to comply with the order alleged to have been disobeyed by him. The mental or physical ability of the accused to commit the offense charged having been placed in issue, it became incumbent upon the prosecution to prove such ability beyond a reasonable doubt. While it is the function of the court as triers of fact to consider and weigh the evidence, it may not in the face of unimpeached, direct evidence to the contrary, find the accused guilty of an offense when proof of the capacity of the accused to perform the same is entirely lacking.

In CM 233448, Reisenman, accused claimed to be unable to perform his duties because of physical disability and was charged with "feigning disability with intention of evading duty". The Board of Review stated:

> "The evidence shows that on April 15, 1942, the accused was discharged from Barnes General Hospital and returned to his station for duty. It also shows that on the following morning he reported to his superior medical officer and advised him that he was unable to perform regular military duty. Despite this claim of illness, the accused was not examined and no determination at that time was made of his physical or mental condition, although his superior medical officer testified that he felt that the accused was at that time '* * * terribly nervously upset, wrought up, nervous, * * *'.
>
> "In view of this testimony and the absence of any direct evidence showing that the accused was actually feigning disability on April 16, 1942, the findings of guilty under the Specification should be disapproved."

In CM 223336 (sec. 422(5), Bul. 3, JAG, Aug. 1942) The Judge Advocate General held:

> "The uncontradicted evidence shows that at the time the orders were given the accused had been drinking to great excess and was very drunk. The commanding officer of the station hospital testified that accused's acts were 'inconsistent' and 'uncontrolled', and another competent witness testified that accused was obviously 'out of control'. These were the only witnesses who testified upon the particular issue of mental capacity and their testimony was, in substance, that accused had lost control of his mental faculties. No witness testified that

accused appeared to have the mental capacity to understand the orders or their significance. Such circumstances as are in evidence, considered in their entirety, negative the possibility that accused had the mental capacity willfully and intentionally to disobey the orders. It will ordinarily be presumed that a person intends the natural consequences of his acts, but this is a rebuttable presumption and falls before evidence to the contrary (par. 112a, M.C.M., 1928). The presumption may not be indulged in the face of the evidence in this case."

"'The Board of Review, in scrutinizing proof and the bases of inferences does not weigh evidence or usurp the function of courts and reviewing authorities in determining controverted questions of fact. In its capacity as an appellate body, it must, however, in every case determine whether there is evidence of record legally sufficient to support the findings of guilty (AW 50½). If any part of a finding of guilty rests on an inference of fact, it is the duty of the Board of Review to determine whether there is in the evidence a reasonable basis for the inference.'"

The only witnesses who gave competent testimony upon the issue of accused's mental and physical condition testified that he then suffered from exhaustion; that "he was done for, as far as being able to carry on any further"; that "he wasn't natural"; that "he was in too nervous a state to lead troops"; and "was not in any condition to do what he was ordered to do." Counsel for accused made it clear in his opening statement that one element of its defense would be the inability of the accused to carry out the order given him by Colonel Grose at about 3:00 A.M. on January 5, 1943, by reason of mental strain and physical exhaustion. This is established by six witnesses, four of whom the prosecution declined to cross-examine, and the two examined were not asked any questions regarding accused's defense. The court recalled Colonel Grose as a witness and the prosecution failed to cross-examine him. No evidence was introduced by the prosecution rebutting the testimony of any of these witnesses, and the record discloses no evidence which warrants an inference that accused had the mental/capacity to perform the order given.
or physical

"We must look alone to the evidence as we find it in the record, and applying to it the measure of the law, ascertain whether or not it fills that measure. It will not do to sustain convictions upon suspicions or inadequate testimony. It would be a dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around the lives and liberties of the citizens. (Buntain v. State, 15 Tex. Appeals, 490)" (CM 212505, Tipton).

6.

For the reasons stated above the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

[signature], Judge Advocate.
Lt. Col., J.A.G.D.

[signature], Judge Advocate.
Lt. Col., J.A.G.D.

[signature], Judge Advocate.
Lt. Col., J.A.G.D.

War Department, Branch Office of The Judge Advocate General, A.P.O. 924, 27 April, 1943. To Commanding General, Sixth Army, A.P.O. 442.

1. Attention is invited to the basic review by the Board of Review in this office of the record of trial of First Lieutenant Lewis A. Chagnon, 127th Infantry. The Board concludes its review with the expression of its opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence. This opinion is approved, in consequence of which the findings and sentence should be vacated.

2. When the inclosed record of trial has served its purpose its return to this office is requested, together with the original holding of the Board of Review and this indorsement.

ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

WAR DEPARTMENT
Services of Supply
In the Branch Office of The Judge Advocate General
Melbourne, Victoria.

Board of Review

1 April, 1943.

CM A-351

UNITED STATES v. Private R. C. HOOSMON (18023241), Company B, 901st Air Base Security Battalion.	)	Trial by G.C.M., convened at Noumea, New Caledonia, 6 March, 1943. Dishonorable discharge and confinement at hard labor for ten years. Federal Correctional Institution, Englewood, Colorado.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private R. (I.O) C. Hoosmon, Company B, 901st Air Base Security Battalion, did, at Station #60, on or about February 18, 1943, with intent to commit a felony, viz, rape, commit an assault upon Mademoiselle Marguerite Ulm, Station No. 60, by willfully and feloniously striking the said Mademoiselle Marguerite Ulm on the head with a pistol.

Accused pleaded not guilty to the charge and specification, and was found guilty as charged. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for ten years. The reviewing authority approved the sentence and designated the Federal Correctional Institution, Englewood, Colorado, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Branch Office of the Judge Advocate General, Melbourne, Australia.

3.

The evidence shows that about 11 o'clock A.M. on February 18, 1943, the accused, accompanied by a civilian Javanese, came to the home of M. Joseph Ulm, in Noumea, New Caledonia. He asked M. Ulm's daughter, Mademoiselle

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Marguerite Ulm for some milk. Upon being told that no milk was to be had he then asked for some water which he took, and left. He returned at 1 P.M. the same day and got more water, paying Mademoiselle Ulm twenty cents for it. At 4 P.M. that day he again returned, this time coming through the brush with a bundle of clothes under his arm. Mademoiselle Ulm told accused that she did not do any washing and directed him to a relative next door who would do it for him. Accused left, and Mademoiselle Ulm went to take a bath. Returning from her bath she saw some cattle in the road in front of her house and told her father to get them, leaving her alone in the house. She was clad only in a slip. She heard someone walking in the house and thought it was her father. When she turned to look she saw accused with a revolver in his hand. "He made a sign with his finger to keep quiet -- put his finger over his mouth then pointed the revolver at me" (R.9). Witness tried to run away but accused grabbed her, struck her on the head with his fists and then on the forehead with the revolver. Witness screamed, and accused then grabbed her by the throat and tried to put his fingers up her nose "so I wouldn't make any noise" (R.10). Accused bit witness on the cheek. She exhibited scars to the court. Witness's father heard her scream and ran into the house. Accused then "ran out by the other room and jumped the window" (R.10), and ran away through the brush.

The washing which accused left with Mademoiselle Ulm's sister-in-law had a serial number thereon and from this evidence accused was subsequently apprehended.

4.

Accused elected to remain silent and introduced only one witness, Corporal Davis. This witness stated that he had been with accused continuously on February 18, during the forenoon and until 3 o'clock in the afternoon; that neither he nor accused had been in the company of a civilian Javanese on that day, nor did they at any time stop to go to any house (R.29). This testimony was refuted by accused when he, on February 20, 1943, made and signed the following confession:

> "* * * On February 18, 1943, in the morning, I, and Corporal Davis, went to the house near our guard tents to get some water. I stayed around the house and Corporal Davis returned to the tent area.
>
> After returning from dinner, I and Pvt. Scott, remained in the area. The rest went to town. At about 3.30 I took my clothes and went back to a house above the one where the assault took place. On my way back I passed the house where the girl lives and I saw her through the window. She was dressing at this time and had no clothes on. I entered the house and talked to her for a moment and then grabbed her by the arm and pulled her to me. She screamed and I struck her on the head with my pistol and she fell to the floor. At this time I heard a man coming in the door, so I jumped out of a window.
>
> I entered this house to have intercourse with the girl that I had seen through the window.
>
> * * * I knew I was doing wrong and must have been out of my mind.* * *".

The evidence is clear and convincing as to accused's guilt. In it he furnishes the necessary proof of his intent, and the record contains no errors which injuriously affect accused's substantial rights.

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5.

For the reasons above stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of the court and the sentence.

_____, Judge Advocate.
Lt. Col., J.A.G.D.

_____, Judge Advocate.
Lt. Col., J.A.G.D.

_____, Judge Advocate.
Lt. Col., J.A.G.D.

WAR DEPARTMENT
Services of Supply
In the Branch Office of The Judge Advocate General
Melbourne, Victoria

Board of Review

CM A-375

12 April, 1943.

UNITED STATES	)	
	)	Trial by G.C.M., convened at
v.	)	Guadalcanal, S.I., February
	)	2, 1943. Dismissal, and
Captain JOHN K. McFARLIN	)	total forfeitures.
(0370848), 35th Infantry.	)	

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 85th Article of War.

Specification: In that Captain John K. McFarlin, 35th Infantry was, at the 35th Bivouac Area, Evacuation Camp, Schofield Barracks, T. H., on or about November 24, 1942, found drunk while on duty as Commanding Officer of Anti-Tank Company, 35th Infantry.

CHARGE II: Violation of the 96th Article of War.

Specification 1: In that Captain John K. McFarlin, 35th Infantry did, at the 35th Infantry Bivouac Area, Evacuation Camp, Schofield Barracks, T.H., on or about November 24, 1942, wrongfully introduce intoxicating liquor into the 35th Infantry Anti-Tank Company Bivouac Area, in violation of paragraph 2, General Orders No. 20, Headquarters 25th Infantry Division, dated July 18, 1942.

Specification 2: In that Captain John K. McFarlin, 35th Infantry did, at the 35th Infantry Bivouac Area, Evacuation Camp, Schofield Barracks, T.H., on or about November 24, 1942, wrongfully discharge a caliber .45 pistol in his quarters.

Specification 3: In that Captain John K. McFarlin, 35th Infantry was, at the 35th Infantry Bivouac Area, Evacuation Camp, Schofield Barracks, T.H., on or about November 24, 1942, disorderly under such circumstances as to bring discredit upon the military service.

Accused pleaded not guilty to all charges and specifications. He was found guilty as charged, and sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record to the confirming authority pursuant to the provisions of Article of War 46. The confirming authority confirmed the sentence and forwarded the record to the Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia, under the provisions of Article of War 50½.

3.

The evidence shows that on November 24, 1942, Colonel R. B. McClure was the commanding officer of the 35th Infantry, which was stationed at Schofield Barracks, Oahu Island, T. H., and the accused was in command of an anti-tank company of said regiment.

The court took cognizance of paragraph 2, General Orders No. 20, Headquarters 25th Infantry Division, the gist of which was, "Intoxicating liquor will not be introduced by officers or enlisted men into command posts, bivouacs, and in installations of this Division". (R.5).

The regiment was to embark for an unannounced destination on the morning of November 25, 1942 (R.14, 15). No officers or enlisted personnel of accused's unit were to leave the area without special passes. The accused and officers of his company occupied the west room of a three room building, the center room was used as an orderly room and the east room as quarters for a few non-commissioned officers and enlisted men of the company (R.9). A disturbance having been reported as coming from the quarters of accused at about 10:30 P.M. on November 24, 1942, Colonel R. B. McClure, the regimental commander, went to the scene and found a "drunken orgy". Accused was "drunk and unable to function" (R.7). There were eight or ten large quart-size empty champagne bottles on the floor, a bottle of whiskey three-quarters consumed, several broken glasses, and the equipment of the officer indiscriminately piled and thrown about the room. Witness could not awaken accused but in the early morning of the 25th he did question him "but his mental reactions were such that I had to repeat questions several times over to get any answers at all" (R.7). At 8:00 or 9:00 o'clock on November 25, 1942, witness again questioned accused, at which time he was "reasonably sober". Accused admitted purchasing the liquor at the officer's club and personally bringing it into the camp area. Witness further testified that accused was on a full duty status at the time in question, as was every officer in camp. That a definite departure date had been set, and that accused's company was assigned to a certain train and a certain number of cars which the company was to occupy on the early morning of the 25th, at which time accused was "not fit for such work" (R.10,11). Lieutenant Colonel James L. Dalton II, 35th Infantry, visited accused's quarters shortly after 9:00 P.M. on November 24, 1942, and substantiated Colonel McClure's testimony as to accused being very drunk and also as to the condition of accused's quarters (R. 13). Witness testified that accused was on duty at this time (R.15). There was evidence by holes in the floor and wall of a .45 caliber pistol having been fired (R.9). The slugs were subsequently found on the floor of the orderly room (R.44). Lieutenant Frederick L. Reynolds testified that he saw accused firing the pistol (R.30).

Major Francis P. LaSorsa, regimental surgeon, 35th Infantry, saw accused on the night in question, and after examining him found him to be drunk. He was "lying on his cot in a stuporous condition, and was quite ashen in color. He was difficult to arouse, and had an alcoholic odor of breath." The condition of the room was as described by the preceding witnesses, and in the center of the room were four empty shells. Five lieutenants, occupants of the same quarters with accused each testified in substance as the three witness supra. They also admitted having participated in buying the liquor, drinking same, and contributing to the general conduct of which accused is charged, excepting the shooting. Several of the enlisted personnel who occupied a room in the same building with accused testified that there was a lot of racket going on, and that the party was "boisterous" and a "lot of shooting" (R.36, 40, 42). Accused was very drunk and came through the

orderly room after having taken a shower with his coveralls on (R.41).

4.

Accused elected to remain silent. The defense introduced a number of officers who had served with or had known accused. All gave him an excellent character, exceptional executive ability, and possessing the requisites of an officer and a gentleman (R.46-48-50). The enlisted personnel who testified for the prosecution stated they would like to serve under him.

5.

The evidence is clear and convincing that accused did, at the time and place, commit the acts as alleged. That he was on duty at the time is unquestioned. His regiment had been alerted to leave the next morning by ship for an unnamed destination. War conditions prevailed. All passes for both officer and enlisted personnel had been cancelled. His office as commander of a unit required of him to be in a position to execute at all times any order which might be given by superior authority pertaining to any military duty under the conditions then existing. The events happening proved such, for when called upon by his lieutenant colonel to help quell a disturbance in his own unit he was incapable of responding. The disturbance was subsequently shown to be that caused by accused. The fact that he was in his quarters has no bearing on the issue, for his duty status was claar and the circumstances demanded that he be able to respond to any call. In CM 222739 (1942) Bulletin No. 2, JAGD, page 105, the Board of Review said:

> "Accused was found guilty of being found drunk while on duty in violation of A.W. 85. Accused, a major, was executive officer of the garrison of an island outpost. The island had been shelled by a hostile submarine 2 months before, and a nearby island had been similarly shelled on the day in question. The troops were held at their posts until 8 p.m., when they were released to their quarters but denied passes and cautioned to be especially alert. Accused was found drunk in his quarters at 10:30 p.m., a time when he was not required to be in his office. Held: The record is sufficient to support the finding. Under the circumstances the accused was on duty at all times within the meaning of A.W. 85."

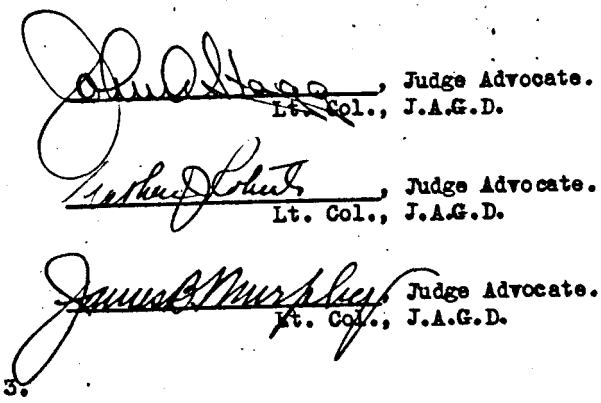
In the above case accused was only an executive officer while in the instant case accused was the immediate commander of a unit. The Board of Review finds nothing in the record upon which the findings of the court should be disturbed.

6.

That accused was of excellent character and possessed exceptional ability as an officer is unquestioned. However, such is no defense to the alleged acts, and the court, by its findings, did not consider this evidence sufficient to warrant mitigation.

7.

For the reasons above stated the Board of Review is of the opinion that the record is legally sufficient to sustain the findings of guilty and the sentence.



Lt. Col., J.A.G.D., Judge Advocate.

Lt. Col., J.A.G.D., Judge Advocate.

Lt. Col., J.A.G.D., Judge Advocate.

243755

1st Indorsement

War Department, Branch Office of The Judge Advocate General, Melbourne, Victoria, 13 April, 1943. To Commanding General, U.S.A.F.I.S.P.A., A.P.O. 502.

1. In the case of Captain John K. McFarlin (0370848), 35th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM A-373)

ERNEST H. BURT,
Brigadier General, U.S.Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 6, USAFISPA, 21 Apr 1943)

WAR DEPARTMENT
Services of Supply
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

26 April, 1943.

CM A-384

UNITED STATES v. Private THOMAS E. SMITH (32158937), Company D, 96th Engineers.	)))))))	Trial by G.C.M., convened at A.P.O. 929, Australia, November 22, 1942. Dishonorable discharge and confinement for two and one-half years. The Stockade, United States Army Advanced Base, A.P.O. 929.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The Board of Review has examined the record of trial in the case of the soldier named above and submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of the Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 86th Article of War.

Specification: In that Private Thomas E. Smith, Company "D", 96th Engineers, being on guard and posted as a sentinel at Company "D", 96th Engineers Camp Area, Port Moresby, New Guinea, on or about August 8, 1942, was found sleeping upon his post.

The accused pleaded not guilty to and was found guilty of the charge and its specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two and one-half years. The reviewing authority approved the sentence, but suspended the execution of that portion thereof adjudging dishonorable discharge and designated the Stockade, United States Army Advanced Base, A.P.O. 929, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 77, Headquarters United States Army Service of Supply, A. P. O. 501, 21 March, 1943.

3. From the evidence in the record it appears that on August 8, 1942, Company D, 96th Engineers were encamped near Port Moresby, New Guinea. That night the tour of guard duty was divided between two corporals of the guard, the first from 6:00 P.M. until midnight and the other from midnight until 6:00 A.M. Each corporal posted three reliefs of two hours each. The record does not disclose to which relief accused was assigned. It is certain, however, that he was a member of the guard, his post being "to walk from the motor pool to the officer's tents" (R.9). Sergeant Dan

A. Gray testified that he was sergeant of the guard on the night in question. There were two corporals of the guard but he remembered the name of only one, Corporal Patterson (R. 9). That "Corporal Patterson did the posting from 6:00 to 12:00 o'clock" (R.12).

Corporal Patterson testified that he was corporal of the guard from 12:00 to 6:00 o'clock (R.13); that he did not post accused (R.11-12), nor did he remember whether accused was posted as a sentinel but "assumed" that he was (R.12). Witness, upon being recalled, was again questioned along the same line by the defense at which time he testified "Yes, I posted him if I am not mistaken" (R.14); "I can't remember exactly. I believe I posted him. I believe that I did" (R.14); and "Q. Are you certain that you posted Smith?" "A. Yes, sir." (R.15). Witness further testified that "I remember that one of the boys relieved Smith to go to the latrine. It was the time he was on guard. He asked for relief. The sergeant sent a man to relieve him" (R.13). At some undisclosed time during the 12 hour period, Corporal Patterson took a man out to the post to relieve accused and "he could not find him on post" (R.12). After making inquiries at the guard tent, the corporal looked for accused and found him asleep "on the side of the hill where he was sitting on the fender" of a truck (R.11). Witness called the sergeant of the guard and without awakening accused, his rifle was removed and taken to the guard tent. Later accused went to the guard tent and asked for his rifle (R.10, 12). The sergeant (Gray) testified that the truck upon which the accused was asleep was "off his post * * * * it was not where he was designated to walk" (R.10). No other evidence appears in the record with reference to the location of the truck. It does not appear from the record as to which relief the accused was assigned or whether he was performing the duties of a sentinel at the time he was found asleep. The record does not disclose that accused was required to remain on his post during the alternate hours when he was not actually acting as a sentinel. Accused elected to remain silent.

4. In order to sustain the finding of guilty it is necessary that it be proven

(a) that the accused was posted as a sentinel as alleged, (or that he assumed the duties of such); and

(b) he was found sleeping while on such post (par. 146b, M.C.M., 1928).

The evidence in the record is of such uncertain and indefinite nature that there is nothing therein from which the court could infer that the accused had been posted, or had assumed the duties of a sentinel, for the two hour period immediately prior to the time he was found asleep.

The record discloses that accused was found asleep "off his post" on a truck on the "side of the hill". The record discloses no evidence that such place was within a contiguous area from which accused could properly discharge his duties as a sentinel (par. 146a, M.C.M., 1928; CM 222856, Stevenson; sec. 444 (1), Bul. 7, JAG, Dec. 1942). Accordingly, the record contains no evidence which establishes the fact that accused was on his post, or in an area contiguous thereto, when found asleep. Assuming that accused was acting as sentinel at the time he was found asleep, he would have been guilty of the offense of abandoning or leaving a post, which is a distinct and different offense from the offense charged and not a lesser included offense therein (CM 127961 (1920) Dig. Ops. JAG, 1912-40, sec. 444).

5. For the reasons stated the Board of Review is of the opinion that the record is legally insufficient to support the findings and sentence.

, Judge Advocate,
Lt. Col., J.A.G.D.

, Judge Advocate,
Lt. Col., J.A.G.D.

, Judge Advocate,
Lt. Col., J.A.G.D.

1st Indorsement

War Department, Branch Office of The Judge Advocate General, A.P.O. 924, 28 April, 1943. To Commander-in-Chief, S.W.P.A., A.P.O. 500.

1. Attention is invited to the basic review by the Board of Review in this office of the record of trial of Private Thomas E. Smith, Company D, 96th Engineers. The opinion of the Board that the record is legally insufficient to support the findings and sentence is concurred in and it is recommended that the findings and sentence be vacated.

2. When the inclosed record of trial has served its purpose it is requested that the record, the original holding of the Board of Review, and this indorsement, together with five copies of the General Court-martial Order promulgating the vacating of the findings and the sentence, if such is your action, be transmitted to this office.

(CM-384)

ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

2 Inclosures:
Incl. 1 - Record of trial.
Incl. 2 - Draft of action.

(Findings and sentence vacated. GCMO 2, USAFFE, 6 May 1943)

WAR DEPARTMENT
Services of Supply
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

CM A-386

UNITED STATES v. Technician 5th Grade EDWIN J. PROCHASKA, 42nd General Hospital.	)	Trial by G.C.M., convened at Brisbane, Queensland, January 28, 1943. Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

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1. The Board of Review has examined the record of trial in the case of the soldier named above and submits, this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charges and specifications:

CHARGE 1: Violation of the 92nd Article of War.

Specification: In that Technician 5th Grade Edwin J. Prochaska, 42nd General Hospital, Stuartholme, Brisbane, Q., did, at the Exchange Hotel, Edward & Charlotte Streets, Brisbane, Q., on or about 5:00 P.M., December 8, 1942, forcibly and feloniously, against her will, have carnal knowledge of Iris Denise Kingston, age 15 years.

CHARGE 2: Violation of the 93rd Article of War.

Specification: In that Technician 5th Grade Edwin J. Prochaska, 42nd General Hospital, Stuartholme, Brisbane, Q., did, at the Exchange Hotel, Edward & Charlotte Streets, Brisbane, Q., on or about 5:00 P.M., December 8, 1942, with intent to do her bodily harm, commit an assault upon Iris Denise Kingston, age 15 years, by cutting her on the left shoulder with a dangerous weapon, to wit, a knife.

Accused pleaded not guilty to the charges and specifications, and was found guilty as charged. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for the term of his natural life. The Reviewing Authority approved

the sentence and designated the United States Penitentiary, McNeil Island, Washington as the place of confinement. Pursuant to Article of War 50½ the record of trial was forwarded to the Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence shows that on the afternoon of December 8, 1942, Iris Denise Kingston, age 15 (R.28), returned from school to the Exchange Hotel, in Brisbane, Australia, where she lived with her mother and father. Arriving home at about half past two she went to her room, read a book, and then went to sleep. At about 5:00 P.M., she awakened and started to get up, when a man, she later positively identified as accused, came over and grabbed her by the throat. He took a knife from his pocket and told her, "I'll put it through your guts if you don't get back." He stuck the knife in the pillow, pulled up her clothes, cut her right bloomer leg, caused her nose to bleed, and cut her shoulder. (R.10) and did then commit rape by accomplishing the required penetration by force without the consent of the victim. This operation took about three minutes. (R.7) Accused then found some water, dampened his handkerchief, and told witness to wipe the blood off his shirt, which she did. When accused went to put the water back on the table witness ran from the room and down the back stairs and told the cook what had happened. At this time Miss Kingston was hysterical. The cook took the victim to her mother and explained what had happened. During this conversation with the victim's mother, accused "came down" and Miss Kingston said, "that's the man". The cook testified that accused had been to the kitchen prior to the alleged attack when she told him that "Mr. Kingston didn't like anyone hanging around the kitchen" he had then left. (R.14) Mr. Charles E. Kingston, father of the victim arrived at the Hotel about 5:15 P.M., o'clock. Upon learning of the attack on his daughter he saw an American soldier crossing the street. He took his daughter and Mrs. Schimke, the cook, to the street and they identified accused. Witness then approached accused and asked him, "Are you the man who assaulted my daughter"? Accused replied, "Buddy, I think you are making a mistake". (R.15) Mr. Kingston then asked accused, "Well come back to the hotel and prove it." Accused replied, "Why should I"? Witness saw several Australian Military Police who, at his request, arrested accused and took him back to the Exchange Hotel. The victim had locked herself in the private bar but was prevailed upon by the Military Police to open the door. Immediately upon seeing accused she said, "That's the man, don't let him come near me, Daddy, he will hurt me." (R.15) Upon being asked by the Military Police about the blood on his coat and shirt he stated that he had been in a fight "with an Australian soldier in the Royal Hotel and my nose bled". Upon being further asked how he accounted for the blood stains on his trousers accused replied, "You got me, that's more than I know". (R.24) The Police searched accused and took from him a knife which the victim identified as being "silver colored with two blades" and "I think that is the knife" accused had in the room with her. (R.13) Sergeant Sawtell said accused smelled of liquor but appeared to be "quite normal" and his manner of speech was all right, I would say he was sober". (R.17) The C.I.B. was notified and accused was shortly thereafter taken to police headquarters. (R.17) The victim was then taken to Dr. Jack M. Thompson, a medical practitioner, who examined her. He found contusions around her neck "evidently caused by fingers" and an incised wound on the point of her left shoulder about half inch long, gaping, and requiring two stitches to close. Further examination showed the victim to still be a virgin but, this in itself, would not disprove penetration. A smear was taken from the vulva, which, upon subsequent analysis, showed the presence of spermatazoa. (R.25) The garments of both accused and the victim were examined and the stains thereon were shown to be human blood. (R.25-Ex. "P") The victim was then taken to the headquarters of the C.I.B. and there from a line-up of eight soldiers, similar in build, description, and dress to that of accused positively identified him.

Accused did not take the stand or make any statement in his own behalf.

The defense called Private Norbert Petrowski who testified that he accompanied accused from Camp Columbia to Brisbane arriving about noon on the day in question. They visited about five "pubs" and were drinking champaigne, beer, and whiskey. When he left accused 2-30 P.M., accused had drunk about twenty-one drinks. (R.29-30) That accused had a good reputation as a soldier and did not display drunkedness easily. Major W.E. Waller testified that he knew accused, that he was a member of his organization. That accused was a "good soldier and a credit to the service." (R.31)

4. The evidence is clear and convincing that accused did at the time and place commit the crimes as alleged. His identity was established beyond question and while the evidence shows him to have been drinking earlier in the afternoon, it likewise shows him to have been fully possessed of his mental faculties at the times in question. While there is no direct evidence in the record that accused cut the victim with a knife, the circumstances are such that the court could infer that the assault was committed as alleged. The victim had no cut on her shoulder before the attack by accused but at the conclusion of same she had a wound of sufficient size that it required two stitches to close.

> "Where accused is charged with an assault with intent to do bodily harm with a dangerous weapon, the intent to do bodily harm may be inferred from the circumstances surrounding the event, the nature of the weapon used, and the character of the wounds inflicted". (CM 193085, Digest J.A.G.D. 1940-451-10)

The victim testified that penetration was accomplished by force without her consent and was further corroborated by spermatazoa being found in the vulva. All of the elements of proof necessary for a conviction of both charges and specifications were present and there are no extenuating circumstances. His acts were of a most revolting character and the mandatory sentence of life imprisonment is appropriate to the crime committed by accused.

5. For the reasons above stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of the court and the sentence.

/s/ JOHN A. STAGG, Judge Advocate.
Lt. Col. J.A.G.D.

/s/ NATHAN J. ROBERTS, Judge Advocate.
Lt. Col. J.A.G.D.

/s/ JAMES B. MURPHY, Judge Advocate.
Lt. Col. J.A.G.D.

WAR DEPARTMENT
Services of Supply
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

May 7, 1943.

CM A-425

UNITED STATES v. Second Lieutenant EDWARD B. FOULK (0385437), Cavalry Reserve	)	Trial by G.C.M., convened at Headquarters II Island Air Command, A.P.O. 913, April 8, 1943. Dismissal, total forfeitures, and confinement at hard labor for five years. Federal Correctional Institution, Englewood, Colorado.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial of the officer named above has been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Second Lieutenant Edward B. Foulk, Cavalry Reserve, did, at a place about five miles southeast of the Military Police Headquarters, 37th Infantry Division, on or about March 17, 1943, with intent to commit a felony, viz, rape, commit an assault upon Rosalie Keenan, by willfully and feloniously seizing her body.

The accused pleaded not guilty to the charge and specification and was found guilty as charged. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of five years. The reviewing authority approved the sentence and the confirming authority confirmed the same. The Federal Correctional Institution, Englewood, Colorado, was designated as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence shows that on the night of March 17, 1943, a dinner and dance was given at the officers' mess in Lautoka, Fiji. Accused escorted Miss Rosalie Keenan to the dinner and called at her home for her at about 6:05 P.M. (R.7-8). About 7:00 P.M. they left the dinner party in a weapons car and drove to the home of Mrs. Zoe Olive Stokes. The three of them then went to

accused's quarters, where they were joined by Lieutenant Luther D. Blakely, and had two or three drinks of gin-cola (R. 7, 9, 31). They then went to the dance, accused and Miss Keenan in the weapons carrier, and Mrs. Stokes and Lieutenant Blakely in a command car, arriving at the dance hall about 8:00 P.M. At 10:00 P.M. the four of them went to accused's quarters where they had a drink of rum-cola, returning to the dance hall a few minutes later. The command car was used for this trip. Upon arriving at the dance hall, Mrs. Stokes and Lieutenant Blakely entered the hall, accused and Miss Keenan remaining in the command car. Miss Keenan testified that at this time accused told her that he was in love with her and wanted to marry her, at the same time putting his arm around her and kissing her. She then told accused she thought they had better go inside, which they did.

The dance was over at 11:00 P.M. Accused and Miss Keenan left in the weapons carrier and Mrs. Stokes and Lieutenant Blakely in the command car, Miss Keenan telling Mrs. Stokes "* *we will be right behind you" (R.12). Accused did not follow the command car but took a road to a place some distance past the golf links. Miss Keenan told accused that she wanted to go straight home as she was staying with Mrs. Stokes while her husband was away and that her parents were watching Mrs. Stokes' children while she was at the dance and "I wanted to get back because I knew they would all be back, and wait for me" (R.12). Miss Keenan was insistent that accused turn the weapons carrier around and take her home but accused "* * didn't take any notice at all" (R.14). After driving about ten minutes the accused stopped the weapons carrier in the middle of the road, cut off the motor and extinguished the lights. It was a "desolate spot" about five miles from Lautoka at a place where there were no houses or people. Accused got out of the weapons carrier, walked around to the side of the car where Miss Keenan was sitting and told her his intention was to have sexual intercourse with her. Accused then walked around for a few minutes and came back and repeated his statement as to his intentions, telling her "* *to get out of the truck" (R.15-16). Miss Keenan refused, and accused then grasped her shoulders and dragged her out. She fell on the ground, and accused held her down. Accused then told her to take her underclothes off and, upon her refusal, he pulled them off. Miss Keenan strenuously resisted, but he was "* *stronger than I was." Accused pushed her on her back to the ground and fell on top of her with his privates exposed and forced her legs apart. During the struggle she struck and scratched accused's face with her fingernails until his face was bleeding. This continued for about fifteen minutes when she finally struck him so hard that he fell back to a "sitting position". She stood up, picked up her underclothing and bag, and then got into the weapons carrier and sat there; she "* *was crying and a bit hysterical." She asked accused "* * a million times to take me home." Accused got into the weapons carrier and sat at the wheel and again told her "how much he loved me" and "he told me he had a wife" (R.17-18). He put his arm around her and tried to kiss her. She scratched and hit him again. Accused was then in a temper. He left the weapons carrier, came around where she was sitting, hit her on her knees with his fists, pulled her our of the weapons carrier, and she "* *hit the ground pretty hard then, because I had quite a lump on my head" (R.19). Accused then sat on her chest facing her, with his privates exposed, and told her that if she did not submit he would force her to aid him in committing sodomy (R.20). Miss Keenan then screamed, and was again crying and hysterical. Believing she could not resist much longer she pretended fainting. Accused then changed his position and attempted to carry out his avowed purpose. She then "* *sat up again and hit his face and scratched him, and did as much as I could do. Every time I could come to his face, I hit him and scratched him. He was bleeding quite a bit. We rolled over two or three times. When we got to the position where he was at the bottom of my foot, I kicked him with the heel in his face" (R.20). She then got up and got into the weapons carrier. Accused then got in the weapons carrier with her; he was "crying , hysterical, and blood was pouring off his face" *He kissed me and put his arms around me". Miss Keenan did not resist for before when she did "* *he tried to carry out his threat" (R.21). After a short while accused started the motor and drove toward Mrs. Stokes' home, stopping several times and putting his arm around her. Miss Keenan said nothing for fear that "* *he might drag me out of the car again" (R.22). Accused was capable of driving the weapons carrier and, at times, did so with one hand. Arriving at Mrs. Stokes' home, Miss Keenan got out and accused drove off. Miss Keenan then told Mrs. Stokes and her mother what had happened (R.22-24).

Mrs. Zoe Olive Stokes substantiated, in substance, the testimony of Miss Keenan as to the events of the evening up until the time accused and Miss Keenan entered the weapons carrier after the dance. She saw accused take four drinks during the evening and stated that no intoxicating liquors were served at the dance (R.39). Witness testified that Lieutenant Blakely drove her straight home from the dance and waited for accused and Miss Keenan until twelve o'clock, when he left. Witness and Mrs. Evans /Miss Keenan's mother/ waited until Miss Keenan returned. When she walked in about 1:00 A.M. on the night in question, she looked "* *as if she had a nasty shock. She had blood and mud on herself. Her blouse was torn, * * blood was in her hair* * she had a big lump on her head* * a lot of bruises on her back, scratches on the top of her back, and she had lumps and bruises. Also on the chest, she had lumps and bruises * *when she returned from having a bath, she seemed to be uncomfortable as she sat down to go to bed" (R.35).

Mrs. Rosalia Maddock-Evans corroborated the testimony of Mrs. Stokes as to Miss Keenan's injuries, stating that the next morning when she went to call her she "* *noticed her arms were very much bruised.* *The skin was rubbed off her back. Her chest was also bruised, and she had a large lump on the back of her head." Witness and her husband reported the matter to the military authorities shortly after Miss Keenan's return. (R.42).

First Lieutenant Luther D. Blakely corroborated the testimony of Miss Keenan and Mrs. Stokes as to the events of the evening prior to the time accused and Miss Keenan drove off in the weapons carrier after the dance. Witness saw accused next morning. His face "* *was badly scratched" and witness asked accused, "What have you been into, a mess of wildcats?" (R.50). Accused made no answer. At 4:00 o'clock that afternoon he talked with accused and accused stated he "* * was in a kind of hot spot* *he had Miss Keenan behind the golf course, and had tried to screw her" (R.51). That on the night in question accused was very drunk, but not too drunk to walk (R.53), and that he had seen accused take only four drinks during the evening (R.55). Upon being asked, "Were his faculties so impaired that he should not drive a motor vehicle?" witness replied, "I would say they were, sir." (R.54). That he saw nothing from which he could assume that accused should not be held responsible for his actions (R.56).

Accused elected to not take the stand, but to have his counsel make a statement in his behalf, which, in substance, was that accused was intoxicated and did not recall what had happened (R.57). By stipulation it was agreed that Major Horatio W. Newell, Medical Corps, neuropsychiatrist, if present, would testify that accused was sane and had never been insane. That he knew right from wrong, and showed a certain degree of emotional instability, but not enough to be classed as a mental disease. That he had a low order of intelligence, with reading ability of an 8th grade level, and intelligence of a mental age of 14 years, 4 months, and an I.Q. of 96 (R.57).

4.

The evidence is clear and convincing that accused assaulted Miss Keenan at the time and place alleged with the intent to commit rape. His plea of drunkenness beyond the stage of accountability is not sustained by his actions. He had only four drinks over a period of six hours. He was able to drive the weapons carrier to a lonely road five miles from his quarters, and sufficiently capable of forming an evil design of a bestial offense with cunning and coolness, the execution of which was only thwarted by the vigorous opposition of his intended victim. There are no extenuating circumstances, and the record is clear that accused was fully appreciative of the nature and quality of his acts at the time of his offense. While his mentality may be that of one of only fourteen years, his accountability for his actions remains unquestioned, and the evidence fully justifies the sentence imposed.

5.

For the reasons stated above the Board of Review is of the opinion

that the record is legally sufficient to support the findings of the court, and the sentence.

_____, Judge Advocate.
Lt. Col., J.A.G.D.

NATHAN J. ROBERTS -Absent , Judge Advocate.
Lt. Col., J.A.G.D.

_____, Judge Advocate.
Lt. Col., J.A.G.D.

1st Indorsement

War Department, Branch Office of the Judge Advocate General, A.P.O. 924, 10 May, 1943. To Commanding General, U.S.A.F.I.S.P.A., A.P.O. 502.

1. In the case of Second Lieutenant Edward B. Foulk, (0385437) Cavalry Reserve, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and the facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM A-425)

ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 8, USAFISPA, 15 May 1943)

WAR DEPARTMENT
Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

17 June, 1943.

CM A-432

UNITED STATES v. Private JACK R. OLSON (20737536), 391st Engineers.	Trial by G.C.M., convened at Sydney, New South Wales, Australia, 18 February, 1943. Dishonorable discharge, total forfeitures, confinement at hard labor for 240 months. Federal Correctional Institution, Englewood, Colorado.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial of the soldier named above has been examined by the Board of Review and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 58th Article of War.

Specification: In that Private Jack R. Olson, 391st Engineers, did at Albury, N.S.W., on or about September 1, 1942, desert the service of the United States by absenting himself without leave from his organization, with intent to avoid hazardous duty and to shirk important service, to wit: to proceed with such organization forthwith to Townsville, Queensland, for embarkation to "Maple" then and there being in the active combat zone.

CHARGE II: Violation of the 96th Article of War.

Specification 1: In that Private Jack R. Olson, 391st Engineers, at Manly, N.S.W., from about 4th October, 1942, until about 28th November, 1942, and at Dubbo, N.S.W., from about 28th November, 1942, did falsely represent himself to be an officer, to wit: First Lieutenant Jack Doyle, and did appear in the uniform of a First Lieutenant of the United States Army.

Specification 2: In that Private Jack R. Olson, 391st Engineers, alias Lt. J. R. Doyle, U.S.A., alias Lt. Jack R. Doyle, U.S.A., did at Manly, N.S.W., from about 5th October to about 28th November 1942, incur a bill at the Warrawee House, Manly, N.S.W.,

in the amount of ten pounds (£10/0/0) or thirty-two dollars and twenty-eight cents ($32.28) for board and lodging, and did leave Warrawee House on 28th November 1942, without paying said bill, although the same was due and he well knew it was due.

Specification 3: In that Private Jack R. Olson, 391st Engineers, alias Lt. J. R. Doyle, U.S.A., alias Lt. Jack R. Doyle, U.S.A., did at Dubbo, N.S.W., from about 28th November 1942 to about 11th December 1942, incur a bill at the Castlereagh Hotel in the amount of Five pounds and thirteen shillings (£5/13/-) or eighteen dollars and twenty-four cents ($18.24), for rent and lodging, and did fail to pay said bill, well knowing that same was due and payable.

CHARGE III: Violation of the 93rd Article of War.

Specification 1: In that Private Jack R. Olson, 391st Engineers, alias Lt. J. R. Doyle, U.S.A., alias Lt. Jack R. Doyle, U.S.A., did at Manly, N.S.W., on or before 28 November 1942, feloniously take, steal, and carry away one Foth Flex Camera, value about twelve pounds, ten shillings (£12/10/-) or forty dollars and thirty-five cents ($40.35)

one pair of sandals, value about one pound seven shillings and sixpence (£1/7/6) or four dollars and forty-four cents ($4.44);
one athletic supporter, value about three shillings and sixpence (3/6) or fifty-six cents ($0.56);
two handkerchiefs, each of the value of about one shilling (1/-) or sixteen cents ($0.16);
one sports shirt, value about one pound five shillings (£1/5/-) or four dollars and four cents ($4.04);
one pair of beach shorts, value about eighteen shillings and sixpence (18/6) or two dollars and ninety-nine cents ($2.99);
one green sports shirt, value about fifteen shillings and sixpence (15/6) or two dollars and fifty cents ($2.50);
one sports shirt, value about twelve shillings and sixpence (12/6), or two dollars and two cents ($2.02);
one pair of blue pyjamas, value about one pound five shillings (£1/5/-) or four dollars and four cents ($4.04);
one singlet, value about two shillings and sixpence (2/6) or forty cents ($0.40);
one grey scarf, value about seven shillings and sixpence (7/6) or one dollar and twenty-one cents ($1.21);
one pair of grey sports trousers of the value of two pounds and five shillings (£2/5/-) or seven dollars and twenty-seven cents ($7.27);
all the property of Eric Murch.

Specification 3: In that Private Jack R. Olson, 391st Engineers, alias Lt. J. R. Doyle, U.S.A., alias Lt. Jack R. Doyle, U.S.A., did at Manly, N.S.W., on or about 28 November 1942, feloniously take, steal and carry away one bath-towel, value about thirty-five cents ($0.35), the property of Mrs. A.A. Branch, Warrawee House.

Specification 4: In that Private Jack R. Olson, 391st Engineers, alias Lt. J. R. Doyle, U.S.A., alias Lt. Jack R. Doyle, U.S.A., did at Manly, N.S.W., on or about 2 November 1942 feloniously take, steal and carry away one pair of blue Jantzen bathing

trunks, value about seventeen shillings and sixpence (17/6) or two dollars and eighty-two cents ($2.82), the property of Roy Francis Melvin.

Specification 5: In that Private Jack R. Olson, 391st Engineers, alias Lt. J. R. Doyle, U.S.A., alias Lt. Jack R. Doyle, U.S.A., did at Harboard, N.S.W., on or about 2 November 1942, feloniously take, steal, and carry away one gold signet ring, value about thirty shillings (30/-) or four dollars and eighty-four cents ($4.84), the property of Frederick C. W. Pittard.

Specification 6: In that Private Jack R. Olson, 391st Engineers, alias Lt. J. R. Doyle, U.S.A., alias Lt. Jack R. Doyle, U.S.A., did at Sydney, N.S.W., on or about 17 October 1942, feloniously take, steal and carry away -

one leather bag, value about ten dollars ($10.00);
one broadcloth officer's shirt, value about one dollar and fifty cents ($1.50);
one officer's shirt, value about ten dollars ($10.00);
one pair of officer's trousers, value about fifteen dollars ($15.00);
one sweater, value about one dollar ($1.00);
one Schick "Colonel" razor, value about ten dollars ($10.00);
one pair of bedroom slipers, value about one dollar ($1.00);

all the property of Captain Lewis G. Olson, then First Lieutenant.

Specification 7: In that Private Jack R. Olson, 391st Engineers, alias Lieut. J. R. Doyle, U.S.A., alias Lt. Jack R. Doyle, U.S.A., did at Sydney, N.S.W., on or about 17th October 1942, feloniously take, steal and carry away -

one gold anchor compass, value about ten dollars ($10.00);
one tobacco pouch, value about three dollars ($3.00);
one penknife, value about two dollars ($2.00);
one United States Army issue Elgin Wrist Watch, value about eleven dollars and fifty cents ($11.50);

all the property of Captain S. Manning.

Accused pleaded not guilty to all charges and specifications and was found guilty as charged. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for 240 months. The reviewing authority disapproved the findings of the court as to Specification 3, Charge II, and Specifications 3, 4, and 5 of Charge III (there was no Specification 2, of Charge III). The findings as to the specification Charge I and Charge I, and as to Specifications 1 and 2, Charge II and Charge II, and as to Charge III, were approved. Only so much of the finding of guilty of Specification 1, Charge III, as involves a finding of guilty of larceny of one Foth Flex camera, value about £12/10/- or $40.35, one green sports shirt, value about 10/10 or $1.77, one pair of blue pyjamas, value about £1/5/0 or $4.04, all being of the total value of £14/5/10 in Australian currency, being of the total value of about $46.16 the property of Eric Murch, was approved; and only so much of Specification 6, Charge III, as involves a finding of guilty of larceny of one leather bag, value about $10.00, one officer's shirt, value about $10.00, one pair of officer's trouser's, value about $15.00 and one Schick "Colonel" Razor, value about $10.00 the property of Captain Lewis G. Olson was approved being of the total value of $45.00 and only so much of the finding of guilty of Specification 7, Charge III, as involves a finding of guilty of larceny of one gold anchor compass, value about $10.00, one tobacco pouch, value about $3.00, and one United States Army issue Elgin wrist watch, value about $11.50, being of the total value of about $24.50, the property of Captain S. Manning, was approved. The sentence was approved. The Federal Correctional Institution, Englewood, Colorado, was designated as the place of confinement. Pursuant to

Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The reviewing authority having disapproved the findings as to Specification 3 of Charge II and as to Specifications 3, 4, and 5 of Charge III, the Board will not discuss the evidence pertaining thereto.

4. The evidence shows that on August 29, 1942, the 391st Engineer Company, of which accused was a member, was stationed at Melbourne, Australia. On that date accused and Sergeant William J. Theodore were ordered to entrain for Sydney, New South Wales, where they would join a detachment of the 391st Engineer Company and proceed to Townsville, Queensland, there to proceed to "Maple" (code name for New Guinea) (Ex. 2). Accused, claiming he was sick, left the train at Albury about half way between Melbourne and Sydney, to go to a chemist's shop (R.58). He missed the train and was heard from no more until arrested about 7:15 P.M. on December 11th, 1942, in Dubbo, New South Wales, by Constable John A. Burke of the Australian Civil Police (R.9). On this date Constable Burke approached accused and asked him his name to which accused replied "I am Lieut. Jack Doyle" (R.10), further stating that he was a correspondent for American newspapers and held the "rank of honorary 1st Lieut." Accused was then asked to produce his credentials and stated they were at the Castlereagh Hotel, where he would get them. On the way to the hotel accused broke away from the constable and made his escape, but was subsequently found at 11:00 P.M. that night hiding under a bed in a flat occupied by a man named Blaxland. He was taken to the police station where he admitted his identity and also that he was a deserter from the American Army. The following day he was handed over to the American Provost Marshal (R.11).

Accused's room was searched and the belongings of accused were conveyed to the police station from which he selected property that did not belong to him consisting of a Gladstone bag, tobacco pouch, blue pyjamas, green sweater and two shirts (R.12-13). Accused claimed these articles had been given him by two Australian soldiers (R.12). Among the belongings of accused was also found a copy of Movement Order 29 which ordered accused to proceed to "Maple" (R.46, Ex. 2).

Mrs. Ann Adelaide Branch testified that she knew accused as Lieutenant Jack Doyle. On October 5, 1942, accused booked in at her Warrawee Guest House in Manly, New South Wales, and stayed until November 29 or 30, 1942. Accused represented himself as an American journalist, that he was flying from Sydney to Melbourne, and wanted this place as his Sydney address. Accused became indebted to witness for board and lodging which he promised to pay.(R.26). He then left without notifying witness (R.27), owing her £17/17/0 (R.26-28).

Sergeant Charles A. Smith, Headquarters, U.S.A.S.O.S., testified that he met accused at Warrawee Guest House in October, 1942, dressed as a first lieutenant and that he saw him for three or four weeks and knew him as Jack Doyle (R.16). Charles J. Brook likewise testified that he became acquainted with accused who was a lieutenant in the United States Army (R.36).

Eric Murch, a photolithographer, testified that he was stopping at the Warrawee Guest House where he met accused, and understood him to be an officer in the United States Army. That shortly before accused left the Warrawee Guest House he found certain of his property, consisting of a Foth Flex camera, a green sports shirt and blue pyjamas, was missing (R.32-35). Upon apprehension of accused the shirt and pyjamas were found in his possession together with a pawn slip that referred to the camera (R.12, 46).

Captain Lewis G. Olson and Captain Steven Manning were billeted together at 61 Kings Lynn, Itacha Road, Elizabeth Bay (R.20, 21). Captain Manning testified that about October 15, 1942, he found certain of his property to be missing from his flat which in part consisted of a gold compass, tobacco pouch and one United States Army issue Elgin wrist watch (R.18, 20). The tobacco pouch was found in

possession of accused (R.12). Captain Olson testified that he found certain of his property to be missing from his apartment about October 17, 1942, which in part consisted of an officer's shirt, a pair of pink trousers, a leather bag and a Schick Colonel razor (R.21-23). The leather bag, shirt and trousers were found in possession of accused (R.12).

John A. Phillips, a chemist of Manly Wharf, Manly, New South Wales, met accused in his shop some time in October or November 1942. Accused introduced himself as Lieutenant Doyle, pointing to the silver bars on his shirt, stating he had been invalided from Port Moresby with shrapnel in his leg, which he received while in a plane (R.40). Accused visited witness's shop frequently for a month or six weeks during which time accused sold witness a Schick Colonel razor for two pounds ten shillings, pawned a U.S. Army issue Elgin wrist watch for six pounds and gave witness a gold compass. Accused told witness he would return to his base at Port Moresby when his leg was well (R.41).

The Schick Colonel razor was identified by Captain Olson as his razor which was missing from his apartment (R.23) and Captain Manning identified the compass and watch as his property which was taken from his flat (R.18-20).

Allen R. W. Skiller qualified as an expert as to values. He testified that the values of the following alleged stolen articles shown him in court were:

> a Foth Flex camera £13/0/0, a green sports shirt 13/6, a pair blue pyjamas £1/5/0, a leather bag £3/0/0, an officer's shirt £1/10/0, a pair of officer's trousers £5/0/0, a Schick Colonel razor £5/0/0, a gold compass £2/10/0, a tobacco pouch £1/5/0, and a U.S. Army issue wrist watch £6/10/0 (R.37-38).

Captain H. M. Fox, 118th General Hospital, was called as a witness for the defense and qualified as an expert in psychiatry. Witness examined accused and diagnosed his condition as "psychoneurosis, anxiety state" (R.49). Accused had no mental derangement, and could distinguish right from wrong (R.50).

Accused elected to take the stand and made an unsworn statement. He stated that he joined the National Guard in 1939, and was subsequently inducted into Federal Service. He was subsequently transferred to the Engineer Company, but "did not fit in very well". He left Melbourne about August 29, 1942, with a Sergeant for Sydney but got sick on the train and got off at Albury to go to a chemist's. The conductor told him he would have 45 minutes to wait as they had to change trains there. Accused was gone about 20 minutes but when he returned the train had left. He immediately called the Headquarters in Sydney and explained the situation but was told that he was "A.W.L." Things then went "from bad to worse". "I tried time after time to go up. I just could not do it". He hurt his ankle and a woman from Dubbo took care of him for several weeks (R.57-58).

> "I do not know how it all happened; all my life I was proud of myself; for two years in the army I had never taken a thing. I do not know how it happened, it is there, that is all." (R.58).

5. The court made no separate findings as to accused's sanity. By their verdict of guilty it is clear that they found accused sane at the times in question. The evidence fully sustains this conclusion.

The record contains no errors which injuriously affect accused's substantial rights. The evidence is clear and convincing that accused did, at the times and places alleged, commit the crimes as charged, and as approved by the reviewing authority. There are no extenuating circumstances and the findings of the court as approved are fully supported by the evidence.

6. For the reasons stated above the Board of Review is of the opinion that the record is legally sufficient to support the findings as approved by the reviewing authority, and the sentence.

John A. Hull, Judge Advocate.
Col., J.A.G.D.

Lawrence S. Poland, Judge Advocate.
Lt. Col., J.A.G.D.

James O. Murphey, Judge Advocate.
Lt. Col., J.A.G.D.

WAR DEPARTMENT
Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review | 24 May, 1943.

CM A-448

UNITED STATES v. Private ROOSEVELT LUCKERSON (34100376), Company B, 96th Engineer General Service Regiment	Trial by G.C.M., convened at Port Moresby, APO 929, 21 March, 1943. Dishonorable discharge, total forfeitures, confinement at hard labor for ten years. The Federal Correctional Institution, Englewood, Colorado.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Roosevelt (NMI) Luckerson, Company "B", 96th Engineers, did, near Port Moresby, New Guinea, at or about 6:55 A.M. February 15, 1943, with intent to commit a felony, viz, murder, commit an assault upon Private Walter S. Gregory, Company "B", 96th Engineers, by willfully and feloniously shooting him in the side with a revolver.

The accused pleaded not guilty to the charge and specification and was found guilty of both. He was sentenced to be dishonorably discharged the service, total forfeitures, and confinement at hard labor for ten years. The reviewing authority approved the sentence and designated the Federal Correctional Institution, Englewood, Colorado, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence shows that on February 15, 1943, Company B, 96th Engineer Regiment, was stationed near Port Moresby, New Guinea. Accused was a member of this unit. Some time on the early morning of February 15, 1943, accused was riding in a truck driven by Private Walter S. Gregory, a member of the same unit as accused. Private Gregory testified that they had been drinking and accused

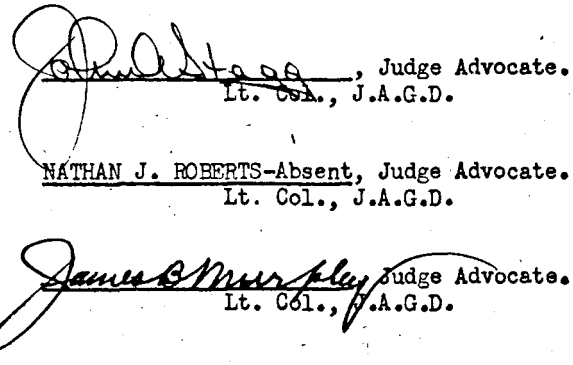
was drunk (R.13). They drove to a place where trucks were loaded with earth, which was referred to as "The Chinaman". Accused went to sleep between 3:00 and 4:00 A.M. (R. 14, Ex. C). Private Gregory left him about 4:30 A.M. (R.12). Accused woke up about 5:30 A.M. and together with Private Earl Hodges started to camp in a truck. About half way to camp accused stated to Hodges, "Private Gregory has been taking my money", to which Hodges replied, "Maybe you lost it at the Chinaman; we'll turn around and see if you lost it". They returned, but did not find the money and then proceeded to camp, the accused stating to Hodges, "If Gregory don't give me my money, I'm going to kill him", to which Hodges replied, "You ask him about it, he will give it to you" (R.5). Upon arriving at camp accused and Hodges went to Gregory's tent, but failed to find him, and then went to the mess hall, where they parted and went to opposite sides of the mess hall (R.5). Accused found Gregory drinking coffee. Accused said to him "Give me my money". Gregory replied, "I don't have your money." Accused then said, "You must have it. Earl Hodges says that there was no one around but you". "You better have my money by the time I get back" (Ex. C). Accused then ate breakfast, went to his tent,and returned to the mess hall where he met Gregory, who was washing his mess kit (R.6). Accused demanded of Gregory, "Give me back my money." Gregory got behind Sergeant Hall, stating to accused, "I haven't your money." Accused replied, "You have to, I'm going to kill you if you don't give me my money"(R.9). Sergeant Hall tried to persuade accused to let him have the pistol stating, "Wait a minute, let me have that gun, I will get it for you" (R.9). Accused refused, and just as Gregory said, "I ain't got your money but I will get it for you, but I ain't got it", accused reached around Sergeant Hall and fired once, hitting Gregory in the right chest inflicting a superficial wound (R.13-18), which necessitated a stay in the hospital for 36 days (R.13). Accused had plenty of time to shoot again but he did not. Captain William F. Marcuson, accused's commanding officer, saw him immediately after the shooting and testified that accused was sober and gave no evidence of drunkenness (R.17). He further testified that accused had been in his company since February 1942, and had received only one company punishment, that for speeding. As to his reputation for truth, honesty and integrity, "I know of nothing against him" (R.21). Later accused made a written confession to Captain John W. Thomas, the investigating officer, which was received in evidence and further substantiated the above stated facts (Ex. C).

Accused elected to take the stand and be sworn. He testified that on the morning of February 15, 1943, he and Gregory drank about a pint (of what the record does not state)(R.23). They drove to the "Chinaman" where accused went to sleep. When he awoke about 5:30 A.M., Private Gregory was gone. He asked Private Hodges if he had seen Gregory, and received an affirmative reply. He then missed his money, about sixty-five pounds, and stated to Hodges, "Gregory must have my money." Hodges replied, "he must have it, you go in and ask him for it" (R.23). Accused and Hodges then returned to camp in the truck. Accused found Gregory and demanded his money, Gregory replying, "I don't have it". Accused left and returned shortly thereafter with the intention to "scare him up to get my money back". "I didn't mean to hurt him, the gun accidentally went off" (R.24). Accused then put the gun back in his pocket. He could have shot again "but I didn't want to shoot it". By stipulation it was agreed that the pistol used by accused was a .38 caliber Smith and Wesson Australian Service Revolver (R.9). Accused testified he found it (R.26).

4. The evidence is clear and convincing that accused did, at the time and place alleged, commit an assault with intent to murder. There are no extenuating circumstances. Accused, believing Private Gregory had taken his money, constituted himself the law to recover it. That he was not tried for murder is the good fortune that his shot did not prove fatal. His acts were

wholly unwarranted and unlawful. The court rightly found that he should pay the penalty for his misdeed. The record discloses no evidence upon which the findings of the court should be disturbed.

5. For the reasons stated above the Board of Review is of the opinion that the record is legally sufficient to support the findings of the court and the sentence.



_____, Judge Advocate.
Lt. Col., J.A.G.D.

NATHAN J. ROBERTS-Absent, Judge Advocate.
Lt. Col., J.A.G.D.

James B. Murphy, Judge Advocate.
Lt. Col., J.A.G.D.

WAR DEPARTMENT
Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

CM A-500

14 June, 1943.

UNITED STATES v. Private NEWMAN PATTON (34023135), Battery D, 77th Coast Artillery (AA).	)	Trial by G.C.M., convened at Headquarters, IV Island Command, 15 May, 1943. Dishonorable discharge, total forfeitures, confinement for ten years. The Federal Correctional Institution, Englewood, Colorado.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 64th Article of War.

Specification: In that Private Newman Patton, Battery D, Seventy-Seventh Coast Artillery (AA), then Corporal, Battery D, Seventy-Seventh Coast Artillery (AA), did, at APO 930, on or about March 2, 1943, lift up a weapon, to wit, a service rifle, against First Lieutenant MARVIN B. ALLEN, Seventy Seventh Coast Artillery (AA), his superior officer, who was then in the execution of his office.

CHARGE II: Violation of the 93rd Article of War.

Specification 1: In that Private Newman Patton, Battery D, Seventy-Seventh Coast Artillery (AA), then Corporal, Battery D, Seventy-Seventh Coast Artillery (AA), did, at APO 930, on or about March 1, 1943, by force and violence, and by putting him in fear, feloniously take, steal and carry away from the presence of Sergeant James Littles, Battery D, Seventy Seventh Coast Artillery (AA), the sum of about one hundred thirty-three dollars ($133), lawful money of the United States, the property of said Sergeant James Littles.

Specification 2: In that Private Newman Patton, Battery D, Seventy-Seventh Coast Artillery (AA), then Corporal, Battery D, Seventy-Seventh Coast Artillery (AA), did, at APO 930, on or about March 1, 1943, with intent to commit a felony, viz., murder, commit an assault upon Sergeant William F. Eason, Battery D, Seventy Seventh Coast Artillery (AA), by willfully and feloniously shooting at the said Sergeant William F. Eason with a service rifle.

The accused pleaded not guilty to all charges and specifications and was found guilty as charged. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for fifteen years. The reviewing authority approved only so much of the finding of guilty of Specification 2, Charge II, as involves a finding of guilty of assault with intent to do bodily harm, and reduced the period of confinement to ten years. As thus modified, the sentence was approved and the Federal Correctional Institution, Englewood, Colorado, designated as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence shows that on the evening of March 1, 1943, at A.P.O. 930, accused, Sergeants James Littles, William F. Eason and _____ Easley, Corporal Reginald Williams, and several other noncommissioned officers played a game of dice. The dice made several passes in succession, accused and Sergeant Hayes being the only losers; Sergeants Easley and Littles winning about $250 from accused. Both accused and Sergeant Hayes picked up the dice and said they were crooked (R.13-37). Accused then demanded his money back. An argument developed between accused and Sergeant Easley culminating in a fight (R.37) after which the game broke up (R.13). By stipulation it was agreed that the dice were mismatched (R.44).

Sergeant Littles testified that later that evening, while he was on his bed counting his money which amounted to $133.00 -

> "* * *Patton spoke. Before that I didn't see him. He was in a kneeling position with a rifle pointing towards me. He said 'Sergeant, I might as well start with you first'. I asked him to come in. He said 'Sergeant, I am not playing.' 'If you believe I'm playing, watch the rear candle'. 'I want to tell you what I'm here for.' * * *'I came to get my money'.* * * I got the money and started towards him to give it to him. He asked me to back up and I immediately backed up again. He told me to throw the money to him. I did that. Corporal Patton took the money and backed out of the door.* * *" (R.7).

About an hour and a half after the game had stopped (R.13), Sergeant Eason and Corporal Williams were in their hut talking. Private Gilbert Smith "brought in the message" that "there was a man in the area with a gun" (R.13) "prowling" (R.16) about. The light was extinguished when they heard someone near the side of the hut (R.13, 16). Smith inquired who was there but received no answer. A few seconds later a man whom Eason recognized as accused (R.14) appeared in the doorway with a gun and a flashlight (R.13). "Just as quickly as possible" (R.14) Eason went out the front window and "left the area" (R.15). About the same time that Eason jumped out the window a shot was fired (R.14, 15). Eason was not threatened, he did not see the flash of the gun, nor did he know where the bullet went (R.15). Williams testified that he could not see who fired the shot or toward whom it was fired. "* * *I just saw when it went off and flashed over my head about twelve inches" (R.17). Williams "rolled out of bed to the ground" and then "ran out" (R.17). Smith saw "someone" come with a light. "He came through the front door and I saw a rifle pointing in" (R.19). Smith then "went out through the wall" (R.20) of the hut which was made of coconut fronds. He did not recognize the person who had the rifle nor did he know the direction in which the shot was fired (R.20).

Lieutenant Marvin B. Allen heard two shots fired, one about 11:10 P.M. and the other about thirty minutes later, and thereupon had the guard increased (R.28). About 3:00 A.M., March 2, First Sergeant Roger B. Smith and other noncommissioned officers were in the Lieutenant's hut. They saw accused, armed with a 1903 rifle (R.23) (identified as that issued to Corporal Willis (R.21)) approach Smith's hut and call him. Both the Sergeant and the Lieutenant called to accused to come over to the Lieutenant's hut but accused walked back into the bivouac area (R.28). Smith followed accused and testified:

"A. He [accused] shined the light in my face and told me 'All right, Sergeant, I want to see you, I won't hurt you'. I said O.K. Patton, I'm not armed'. He said 'I'm not going to hurt you'. I walked up and asked what happened. He said 'They cheated me out of my money with crooked dice.

Q. Just what were his reactions?

A. He was acting cooly and calmly and then he broke down and started to cry" (R.25).

Accused then surrendered the rifle to the First Sergeant and voluntarily accompanied him to the Lieutenant's hut (R.26), where he turned over to the Lieutenant about one hundred rounds of loose ammunition (R.23). Lieutenant Allen asked accused what he was doing with the rifle. He answered that "he was cheated out of some money" and that he did not "go through the proper procedure to get it back" because "he was angry or something and didn't realize it" (R.23). Lieutenant Allen told accused that "it was best for him and everybody concerned that he go to the guard house" (R.28). The First Sergeant left to make arrangements for a truck to take accused to the guard house. Accused stated that he had some things that he wanted to get and the Lieutenant accompanied him toward accused's hut. On the way accused "turned around and said 'You can shoot me now if you want to'" (R.28). Upon nearing his hut accused bent over and started to search in the weeds and grass, saying that he had lost something there (R.29). Accused picked up an M1 rifle from the grass and "spun on" the Lieutenant holding it at "a bayonet thrust" saying "Don't try anything funny or I'll shoot" (R.29). At that time Corporal Willis approached with his rifle. Upon order of the accused, the Corporal dropped the rifle and took the pistol (which was not loaded (R.29)) from the Lieutenant's holster and handed it to accused who put it in his pocket (R.29). Accused then ordered Lieutenant Allen and Corporal Willis to "march back" to the First Sergeant's hut (R.29). The Lieutenant testified that accused walked behind them stating "If you know what's good for you, you will have them [the guards] lay down their rifles" (R.30). "He kept telling us not to try anything funny that this was his rifle and his ace in the hole, and that he thought about it ahead of time" (R.30). On the way they passed other soldiers some of whom were sentinels or guards. Accused, under threats implying danger to the Lieutenant, caused the Lieutenant to tell them to lay down their rifles and join the procession until there were seven or eight being marched by accused (R.24, 30), who was "crouched down with his rifle in * * *[their] direction" (R.30). He detailed First Sergeant Smith and Private Frost from this group to bring some ammunition and accused "filled his pockets" with .30 caliber ammunition (R.9).

Sergeant Johnson then arrived with the truck originally ordered to take accused to the guard house. Accused then dismissed all of the soldiers telling them "he was finished with them" (R. 30), and with Lieutenant Allen, about three paces in front of him, walked about 100 yards where they met a guard. Accused ordered Lieutenant Allen to have the guard "step out in the road and lay down his rifle". The guard was left standing there and accused and Lieutenant Allen went to the main road, and again under the direction of accused, Lieutenant Allen called to the sentry to send for the truck. Accused said to the Lieutenant "If anyone comes with it and tries to shoot me, I'll shoot you" (R.31). The truck came up and shortly thereafter Captain David S. Patcher arrived. At this time accused was lying in the shade of a tree with Lieutenant Allen about 3 feet from him and Captain Patcher standing in the road in the moonlight, both being where they were upon accused's instructions (R.32). Accused and Captain Patcher engaged in a lengthy conversation, accused insisting that he had done nothing which warranted any punishment, stating that if Captain Patcher would forget everything that happened, he would let Lieutenant Allen go (R.31). The record does not disclose whether Captain Patcher so agreed, but Captain Patcher left and accused and Lieutenant Allen returned to the bivouac area. Accused then released Lieutenant Allen and gave him back his pistol. Accused returned to his hut but kept his rifle and ammunition (R.32). The Lieutenant testified "I told him he could be safe there. That was the thought uppermost in his mind" (R.34).

About 5:30 A.M. accused came to Lieutenant Allen's hut and left about 200 rounds of caliber .30 ammunition. Later in the morning, while accused saw the Chaplain, the Lieutenant secured the M1 rifle from accused's hut (R.32).

Accused elected to be sworn as a witness and testify. He admitted taking Corporal Willis' 03 rifle, loading it and causing Sergeant Littles to give him $133.00 (R.40, 41), but testified that he "didn't have the rifle pointed at him". "I thought I would shoot the candle out to let him know that it was loaded" (R.41), but stated that he did not know what he would have done if Littles had refused to give him the money (R.45). He further testified -

> "I started to go to the others.* * *Naturally I didn't call Sergeant Easley's name or nobody's name. But I did go to the front entrance and I saw a light there and I knew someone was around besides myself. I didn't actually shoot but I was used to an M1 rifle and I had an .03 rifle and on the M1 rifle the cut-off is on the trigger while on the .03 the cut-off is on the top. I was going to put on the lock and it went off and it didn't go into the hut. I wasn't in the hut at all." (R.41).

Accused also stated that he did not know what he would have done if Sergeant Eason did not give up the money (R.46).

Accused testified substantially the same as did Lieutenant Allen and other witnesses for the prosecution as to his subsequent actions during the morning of March 2. In explanation of such actions he testified that after the gun went off in Sergeant Eason's hut he became excited; that "once before one Corporal was shot and he wasn't given a chance." and he was afraid that "they were going to shoot" him (R.41). After he had surrendered to Lieutenant Allen the first time, accused testified that Lieutenant Allen said -

> "'Stop, wait'. It seemed like he wanted to shoot me. I said 'Go ahead and shoot me'. It looked like he wanted to shoot me. * * * It seemed my mind snapped and I figured he'd shoot me.* * * I knew as long as I had him [Lt. Allen] I had my life but if I left him they would get me.* * * what I wanted to do was get to the guard house alive and in one piece." (R.41, 42).

4. The evidence is clear that accused wrongfully lifted up a weapon against his superior officer (par. 134a, M.C.M., 1928) as alleged in the specification of Charge I. Although accused attempted to excuse his unusual actions by claiming that he was in fear of being shot, the record contains no facts from which a reasonable man in like position could infer that he was in grave bodily danger. The evidence is clear and convincing that accused at the time and place alleged took from Sergeant Littles $133.00 by force and violence and by putting him in fear. There is no evidence that all of this money was won from accused in a crooked dice game. The taking, in the manner alleged, contains all of the elements of roberry (par. 149b, M.C.M., 1928). The accused admitted going to Sergeant Eason's hut with a loaded rifle. The rifle was discharged. From such facts and the avowed purpose of accused to recover the money that he had lost to Eason in the game, the court could legally infer that accused intentionally discharged the rifle at Eason in an endeavor to do him bodily harm, the lesser included offense of Specification 2, Charge II, approved by the reviewing authority.

5. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused are found in the record. For the reasons stated above the Board of Review is of opinion that the record is legally sufficient to support the findings of guilty and the sentence.

[signature], Judge Advocate.
Col., J.A.G.D.

[signature], Judge Advocate.
Lt. Col., J.A.G.D.

[signature], Judge Advocate.
Lt. Col., J.A.G.D.

WAR DEPARTMENT
Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review 12 July, 1943.

CM A-501

UNITED STATES v. Private JAMES ALBERT LYONS (15114197), Company C, 592nd Engineer Amphibian Regiment.	)))))))	Trial by G.C.M., convened at Headquarters, I Corps, A.P.O. 301, 7 May, 1943. Dishonorable discharge, total forfeitures and confinement for one year. Main Stockade, Base Section 3, A.P.O. 923.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The Board of Review has examined the record of trial in the case of the soldier named above and submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that Private James Albert Lyons, Company C, 592d Engineer Amphibian Regiment, (then Cpl. James Albert Lyons) 562d Eng. Boat Maintenance Co., EAB) having been lawfully married on or about January 10, 1942, and while his lawful wife was living and lawfully wedded to him, did, on or about October 17, 1942, at Carrabelle, Florida, with full knowledge of the facts aforesaid, unlawfully and feloniously marry one Arline Whitaker.

The accused pleaded not guilty to the charge and specification and was found guilty as charged. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved the sentence and ordered its execution but suspended the execution of so much thereof as pertains to dishonorable discharge, and designated the Main Stockade, Base Section No. 3, A.P.O. 923, as the place of confinement. The result of the trial was published in General Court-Martial Orders No. 10, Headquarters I Corps, A.P.O. 301, 1 June, 1943.

3. The record discloses that during the course of the investigation of the instant charges accused stated to the investigating officer that some time in 1942 he married one Edna Leola Lyons in a "little town about 30 miles from Whitesville", West Virginia, from which place he was inducted into the Army; that subsequently, on a date that he could not remember, he married Arline Whitaker in Carrabelle, Florida. Accused further stated that his first marriage had not been annulled and that "he was still, as far as he knew, married to his first wife" (R.6). Accused was stationed in Carrabelle, Florida, from about the middle of October, 1942, until December of that year (R.8).

The only other evidence before the court were three exhibits offered by the prosecution and received in evidence over objection of defense counsel. Exhibit A states -

" CERTIFICATE OF MARRIAGE

STATE OF WEST VIRGINIA,

BOONE COUNTY COURT CLERK'S OFFICE, TO-WIT:

I, O. H. Carson, Clerk of the County Court in and for said County and State (the same being a Court of Record), also, the custodian of the Marriage Records do hereby certify that the Marriage Record disclosed the fact that James A. Lyons (age 22, born in Mingo Co., W. Va.) and Edna Dheel (age 17, born in Fayette Co., W. Va.) were united in marriage by Rev. O. E. Stump, at Whitesville, W. Va., on the 10th day of January, 1942.

Given under my hand and official seal at Madison, West Virginia, this 23rd day of December, 1942.

/Seal/
County Court
Boone County
West Virginia

O. H. Carson
Clerk of the County Court of
Boone County, West Virginia.

Recorded in Marriage Record
No 14 at page 461

By Walter Hendricks
Deputy Clerk of said Court.

Exhibit B states -

" THIS IS TO CERTIFY

That James A Lyons of Camp Carrabelle in the State of Florida and Arline Whitaker of Apalachicola in the State of Florida were by me joined together in HOLY MATRIMONY on the 17th day of October in the year of our Lord, 1942.

Witness Mrs. Horace V. King
Witness Horace V. King

Rev. J. A. Boyd
Carrabelle, Fla.

/on reverse side/

"This is a true and certified copy taken from the Marriage Records of Franklin County, Florida, as per book number 5, page 232.

/Seal/
County Judge
Franklin - County, Fla.

R. M. Witherspoon
COUNTY JUDGE "

Exhibit C was an application for National Service Life Insurance dated April 18, 1942, signed by accused, wherein it appears that he designated as the principal beneficiary, Edna Leeola Lyons, his wife.

At the conclusion of the prosecution's testimony the defense counsel made a motion for a finding of not guilty which was overruled. The accused elected to remain silent and offered no testimony.

4. The statements of accused to the investigating officer were an acknowledgment of guilt and constitute a confession of the offense alleged. As the record does not indicate that the confession was not voluntarily made, it was properly admitted by the court (par. 114a, M.C.M., 1928). In order to sustain the finding of guilty herein the record must contain some evidence corroborative of the confession

which must touch upon the corpus delicti (sec. 395(11), Dig. Ops. JAG, 1912-40). As the mere presence of an accused in the community and his opportunity to commit a crime is not sufficient to establish guilt (CM 197408, McCrimon), the only corroborating evidence is the three exhibits offered by the prosecution and objected to by the defense counsel and admitted into evidence by the court.

Exhibit A, supra, introduced in corroboration of the first marriage, does not purport to be a certified copy of a public record, but is the statement of a public officer under oath and authenticated by the seal of a court that the public records in his possession reveal certain information, the statements contained therein not being founded on the personal knowledge of such officer. As such it is a mere hearsay assertion of the person making it and not admissible in evidence (par. 117a, M.C.M., 1928; sec. 784, p. 1351, Wharton's Criminal Evidence; sec. 1678, p. 557, Wigmore on Evidence, 2d Ed.)

Although Exhibit B purports to be a certified copy of a public record it also is not admissible in evidence herein. A copy of a public document of the kind here under consideration, in order to be admissible in evidence before a court-martial as an exception to the rule which excludes hearsay evidence, must be certified and duly authenticated (par. 116a, M.C.M., 1928; p. 366, Winthrop, Mil. Law & Prec.) according to the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States (par. 111, M.C.M., 1928). When a copy of a public record is certified and authenticated in accordance with the provisions of section 906, Revised Statutes (sec. 688, U.S.C.A.), its admission in evidence before a district court is mandatory. That statute provides -

> "Proofs of records in offices not pertaining to courts. All records and exemplifications of books, which may be kept in any public office of any State or Territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other State or Territory, or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal, of the State, or Territory, or country, that the said attestation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or country aforesaid, in which it is made. And the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the State, Territory, or country, as aforesaid, from which they are taken."

Copies of public records not certified and authenticated in accordance with the provisions of the quoted act of Congress may nevertheless be admitted in evidence before a district court -

> a. When certified and authenticated in the manner and form prescribed by the statutes of the state in which the original record is filed (sec. 1680 a, Wigmore, supra), or

> b. When emanating from a court of record, signed by the legal custodian of the original record and authenticated by the seal of the court (sec. 2164, Wigmore, supra).

It is manifest that Exhibit B under consideration is not authenticated in the manner set out in section 906, Revised Statutes, supra, and thus, if it is to be admissible in evidence, it must satisfy either of the two conditions (supra) pursuant to which its admission in a district court is permissive.

From the record it does not specifically appear that the instant certificate and authentication is in the manner and form prescribed by the laws of the state in which the original document is filed. The court-martial, not having been convened in the State of Florida, can not take judicial notice of its laws (par. 125, M.C.M., 1928) and thus must have before it specific proof that the authentication is in the form required by the statutes of that state. Such proof being absent from the record, the certificate may not be admitted in evidence pursuant to condition a, supra.

To be admitted pursuant to condition b, supra, a certificate must be signed by the legal custodian of the original document (sec. 1677, Wigmore on Evidence; sec. 784, p. 1351, Wharton's Criminal Evidence), it appearing upon the certificate or by other evidence that the certifying officer was in fact such custodian (23 C.J.S. sec. 845; People v. Reese 179 N.E. 305, 258 N.Y. 89; Reidy v. Myntti, 116 F. 2d 725, C. C. A., Alaska). The instant certificate is signed by a county judge. It does not appear upon the certificate or by other evidence that he is, in fact, the legal custodian of the original record. If a judge is also the ex officio clerk and thus the custodian of records he must certify in each capacity (Keith v. Stiles, 92 Wis. 15, 64 N.W. 860; cf. cases cited note 57, sec. 687, Tit. 28, U.S.C.A.). In a related case to that now under consideration, The Judge Advocate General stated -

> "The rule of paragraph 116a of the Manual for Courts-Martial authorizing the introduction in evidence of copies of War Department records when authenticated by the custodians is an exception to the best evidence rule. As an exception it may not properly be extended by implication beyond its terms. To permit authentication of a copy of a record by an officer into whose hands the record may temporarily come for limited and defined purposes but who is not the custodian as recognized by law or regulations would not only amount to an extension by implication of the exception to the general rule, but would be an innovation apt to endanger the substantial rights of accused persons." (Bul. 7, JAG, sec. 395 (17), Dec. 1942).

In addition to lack of proof that the certifying officer was the legal custodian of the original record, the seal of an individual, the county judge, and not the seal of a court is affixed. The present certificate is sufficient authentication to permit the document to be introduced in evidence only in the county of its origin (sec. 2162, Wigmore, supra). The certificate does not purport to emanate from a court of record, it is not signed by one appearing to be the legal custodian of the original and no portion of condition b, supra, is satisfied.

Accordingly, Exhibit B is not so authenticated as to permit its admission in evidence herein. As that exhibit is the only evidence in corroboration of the second marriage by the accused, and as the exhibit is not legally admissible, the record is devoid of any evidence in corroboration of an essential element of the corpus delicti. Consequently, the court should properly have sustained the motion for findings of not guilty, requested by counsel for accused.

The instant case is readily distinguishable from C.M. 125065 (1919), (sec. 395 (17), Dig. Ops. JAG, 1912-40), wherein "the record evidence of both marriages of the accused was properly certified by the official custodians thereof".

It should be noted that the offense of which the accused is charged is civil in its nature and one for which he may be prosecuted in a criminal court of competent jurisdiction upon his severance from the service. Although the Board of Review may be convinced of the guilt of the accused, we must look alone to the evidence as we find it in the record of trial and ascertain whether or not, under the rules of law, the conviction of the accused can be sustained. If the competent evidence is not legally sufficient the Board of Review may not usurp the authority delegated to courts-martial and declare its own opinion as to accused's guilt or innocence. Neither can the Board of Review supply by independent investigation essential evidence omitted from the record of trial. To do so would render precarious the protection which the law seeks to throw around the lives and liberties of the citizens and destroy the fabric of military justice (CM 197408, McCrimon; CM 192659, Rehearing (1930)).

5. For the reasons above stated the Board of Review is of the opinion that the record is not legally sufficient to support the findings and sentence.

Judge Advocate
~~Colonel~~, J.A.G.D.

Judge Advocate
Lt. Col., J.A.G.D.

Judge Advocate
Lt. Col., J.A.G.D.

1st Indorsement

War Department, Branch Office of The Judge Advocate General, A.P.O. 924, 15 July, 1943.

To: Commander-in-Chief, S.W.P.A., A.P.O. 500.

1. Attention is invited to the basic review by the Board of Review in this office of the record of trial of Private James Albert Lyons (15114197), Company C, 592nd Engineer Amphibian Regiment. The opinion of the Board that the record is legally insufficient to support the findings and sentence is concurred in and it is recommended that the findings and sentence be vacated.

2. When the inclosed record of trial has served its purpose it is requested that the record, the original holding of the Board of Review, and this indorsement, together with seven copies of the General Court-martial Order promulgating the vacating of the findings and the sentence, if such is your action, be transmitted to this office.

ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

2 Inclosures:
Incl. 1 - Record of trial.
Incl. 2 - Draft of action.

(Findings and sentence vacated. GCMO 4, USAFFE, 21 Jul 1943)

WAR DEPARTMENT
Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review 10 June, 1943.

CM A-509

UNITED STATES v. Private TIMOTHY BURNEY (13053154), Company A, 901st Air Base Security Battalion.	Trial by G.C.M., convened at Noumea, New Caledonia, 1 May, 1943. Dishonorable discharge, total forfeitures, confinement for life. U. S. Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private (Then T Gr-4) Timothy Burney, Company "A", 901st Air Base Security Battalion, did, at APO #502, on or about April 6, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Technician 5th Grade Leonard Bell, a human being by shooting him with a rifle.

The accused pleaded not guilty to the charge and specification and was found guilty of both. He was sentenced to be dishonorably discharged the service, total forfeitures, and confinement at hard labor for life. The reviewing authority approved the sentence, and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence shows that on April 6, 1943, accused, a member of the 901st Air Base Security Battalion, stationed in New Caledonia, was in a tent with Sergeants McGriff and Clinton, Corporals Parks and Bell, and Private Glover. All of them except Clinton and Glover were playing a game of cards, no money being involved. At 8:30 P.M. Sergeant McGriff and accused quit the game, and Sergeant McGriff went to bed, accused going "toward his bed". About 9:30 or 10 o'clock P.M., Corporal Neely came in the tent and the game was renewed by all present except Sergeant Clinton and Private Glover who were asleep.

Accused got up and sat on the side of his bed holding his head in his hands, and "he looked up and he was thinking about something" (R.8). Upon being asked by Sergeant McGriff what was the matter he replied "nothing about you". Accused then went to the rifle rack, took his rifle, returned to his bed and started cleaning it. Accused again got up from his bed and a few minutes thereafter a shot was heard and deceased was found to be shot, the bullet entering near the front of his left chest near the armpit and emerging in a downward course near the spinal column. (R.6). Sergeant Clinton was awakened by the shot, and saw deceased on the floor and tried to help him up. This witness stated that deceased told him who had shot him but refused to testify as to whomdeceased had named. After telling witness he was dying and "goodby" and saying "something about his mother" (R.14) he went into a coma. Corporal John L. Parks testified substantially as to the actions of accused as did Sergeant Clinton. Corporal Parks further stated that immediately after he heard the shot he saw a rifle on the floor. Deceased hollered "Oh, he shot me"(R.18) and upon being asked by witness as to who shot him, deceased replied "Tim shot me" (R.19). Corporal Joe H. Neely testified that he and Corporals Parks and Bell were sitting on the floor of the tent talking and playing cards. Accused was sitting on his bed. Accused got up, went outside, and came back in and got his rifle and began to work on it (R.23). He then walked back to the rifle rack, asked what time it was, and immediately thereafter a shot was heard, and accused "dropped the rifle" (R.24). He saw accused and Sergeant McGriff leave the tent. Witness secured a truck, and with Corporal Parks and Sergeant Clinton took deceased to the 27th Station Hospital. Upon arriving, the doctor pronounced him dead (R. 5).

Immediately after the shooting accused left the tent. Sergeant McGriff ran out after accused, caught him by the hand and asked him where he was going. Accused replied

> "I am going up to the Colonel. I asked him 'What's the matter did you lose your mind'? He said 'No.' I said 'You shot Bell.' He said 'I know.' I said 'Did you mean to do it?' He said, 'Yes'. I said 'Then it wasn't an accident?' He said 'No'. I told him to wait and I would go with him. I told Corporal Neely to bring my coveralls. I told him that we had better get the First Sergeant. We went by Company 'A' and got the First Sergeant and we took him to Captain Householder's tent. Sergeant McNeely explained to the Captain that Burney had shot Bell. Captain Householder dropped his head and asked me what it was about. I said I didn't know. Captain asked Burney if it was an accident. Burney said 'No sir'. Captain Householder sat there a while and said 'Did you mean to do it?' Burney said 'Yes'. Captain Householder told Sergeant McNeely and myself to wait there until he got back.
>
> Q. Did you wait there until the police arrived?
>
> A. Yes sir. The Captain went to get the Colonel. The Colonel asked Burney 'Did you mean to shoot Bell?' Burney said 'Yes sir'. The Colonel asked 'Why did you shoot him?' Burney said 'I would rather not tell, sir'." (R.9).

Captain Donald M. Householder largely corroborated the testimony of Sergeant McGriff.

All witnesses testified that there was no ill-feeling between accused and deceased and that no unpleasantness had occurred in the tent that night, one witness saying, "we all live like brothers" (R.10).

The Commanding General, I Island Command, by Special Orders No. 97, dated 19 April, 1943, appointed a Board of Medical Officers to examine accused as to his sanity. The Board met on April 26, 1943, and found "Pvt. Timothy Burney

* * *is not insane * * *he is fully responsible for all his actions." (Ex. "B").

The defense offered no evidence and accused elected to remain silent.

4. The record is clear and convincing that accused did, at the time and place alleged, kill Technician Leonard Bell by shooting him with a rifle. The record contains no evidence as to the motive. The essential element of intent is clearly established by accused's statements, all coming within the res gestae. That he was sane and laboring under no delusion is established by evidence which the court, by its verdict, found to be conclusive. The act, while devoid of the usual spectacular circumstances in most murder cases, was committed with coolness, revealing a definite purpose on the part of accused to take the life of one of his comrades. Such purpose, or imagined wrong, rests with accused. The deed contains all of the essential elements of murder and there are no extenuating circumstances.

5. For the reasons above stated the Board of Review is of the opinion that the record is legally sufficient to support the findings of the court and the sentence.

_____, Judge Advocate.
Col., J.A.G.D.

_____, Judge Advocate.
Lt. Col., J.A.G.D.

_____, Judge Advocate.
Lt. Col., J.A.G.D.

WAR DEPARTMENT
Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review 29 June, 1943.

CM A-510

UNITED STATES v. Private KARL MAX BOCK (12062137), Port Detachment "C". Private GEORGE BRUDERMANN (12062124), Port Detachment "C".	Trial by G.C.M., convened at A.P.O. 927, 16 April, 1943. Dishonorable discharge, total forfeitures and confinement for ten years. Disciplinary Barracks, Fort Leavenworth, Kansas.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused Bock was tried upon the following charges and specifications:

CHARGE I: Violation of the 93rd Article of War.

Specification: In that Private Karl Max Bock, Port Detachment "C", did, at Casino, N.S.W., in conjunction with Private George Brudermann Port Detachment "C", on or about February 8, 1943, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of Walter John Hampson one Ford Sedan motor Car No. HV 763 and gas producer trailer unit No. GX 991 of the value of about $839.28, the property of De Luxe Motors, and the sum of £4.0.0 (value about $12.91) the property of Walter John Hampson and the De Luxe Motors.

CHARGE II: Violation of the 96th Article of War.

Specification: In that Private Karl Max Bock, Port Detachment "C", having received a lawful order from Stanley A. Jaskolski, Port Detachment "C", a sentinel in the execution of his duty, to "turn over his pass to him", did at Kincoppal Barracks, APO 927, on or about 2400 hours January 22-23, 1943, willfully disobey the same.

CHARGE III: Violation of the 69th Article of War.

Specification: In that Private Karl Max Bock, Port Detachment "C", having been duly placed in arrest at Kincoppal Barracks, Sydney, N.S.W., on or about 23 January, 1943, did at Sydney, N.S.W., on or about 26 January, 1943, break his said arrest

before he was set at liberty by proper authority.

CHARGE IV: Violation of the 61st Article of War.

Specification: In that Private Karl Max Bock, Port Detachment "C", did, without proper leave, absent himself from his station at Kincoppal Barracks, Sydney, N.S.W., from about 26 January 1943, to about 8 February, 1943.

The accused Brudermann was tried upon the following charges and specifications:

CHARGE I: Violation of the 93rd Article of War.

Specification: In that Private George Brudermann, Port Detachment "C", did, at Casino, N.S.W., in conjunction with Private Karl Max Bock, Port Detachment "C", on or about February 8, 1943, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of Walter John Hampson one Ford Sedan motor car No. HV 763 and gas producer trailer unit No. GX 991, of the value of about $839.28, the property of De Luxe Motors, and the sum of about £4.0.0 (value about $12.91) property of Walter John Hampson and the DeLuxe Motors.

CHARGE II: Violation of the 96th Article of War.

Specification 1: In that Private George Brudermann, Port Detachment "C", having received a lawful order from Stanley A. Jaskolski, Port Detachment "C", a sentinel in the execution of his duty, to "turn over his pass to him", did at Kincoppal Barracks, APO 927, on or about 2400 hours January 22-23, 1943, willfully disobey the same.

Specification 2: In that Private George Brudermann, Port Detachment "C", having received a lawful order from Private Stanley A. Jaskolski, Port Detachment "C", a sentinel in the execution of his duty, to "turn over his pass" to him", did, at Kincoppal Barracks, APO 927, on or about 1730 hours January 22, 1943, insult him by using insulting language, to wit: "Go fuck yourself".

CHARGE III: Violation of the 69th Article of War.

Specification: In that Private George Brudermann, Port Detachment "C", having been duly placed in arrest at Kincoppal Barracks, Sydney, N.S.W., on or about 23 January, 1943, did at Sydney, N.S.W., on or about 26 January, 1943, break his said arrest before he was set at liberty by proper authority.

CHARGE IV: Violation of the 61st Article of War.

Specification: In that Private George Brudermann, Port Detachment "C" did, without proper leave, absent himself from his station at Kincoppal Barracks, Sydney, N.S.W., from about 26 January, 1943 to about 8 February, 1943.

Each accused pleaded not guilty to all charges and specifications and was found guilty as charged. They were each sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for ten years. The reviewing authority disapproved Specification 1, Charge II, as to accused Brudermann. The sentence as to each accused

was approved. The United States Disciplinary Barracks, Fort Leavenworth, Kansas, was designated as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. On the afternoon of January 22, 1943, both accused endeavored to leave the camp area at Kincoppal without showing their passes to the sentry at the gate and were ordered back to their quarters. The record does not disclose how or when accused left the camp area but a few minutes before midnight of the same day accused were challenged by the sentry at the gate. The sentry testified -

"Q: On or about January 22, 1943, what were your duties?
A: My duties were Sentry on the gates, Kincoppal Barracks. I had to look at all passes going out and pick up all passes coming back.

* * *And when they were coming in sir, one of them showed his pass and one of them walked in and says he has got to go on guard duty. The other one would not show his pass to me.

Q: Did either one of them produce a pass?
A: Yes." (R. 23).

At this time accused Brudermann used vile and insulting language toward the sentinel (R. 23).

The accused Bock testified -

"* * *That night I came in about 2 minutes to 12 and I was late for guard detail and I ran by him and he started to holler and I hollered back and told him I would give my pass to the Sergeant in the morning. When we came back I met Brudermann and he told me the Sergeant was going to ask for my pass, so the next morning I handed in my pass. He asked me for it and I gave it to him and then he told me I was arrested. That is all sir." (R.26).

The accused Brudermann also testified -

"* * *And then about up at the barracks we walked in there at night and he asked for a pass and we told him we were going to give it to the Sergeant in the morning * * *" (R.26).

On the morning of January 24, 1943, Lieutenant C. W. Nation, the officer of the day, placed both accused under arrest because "they insulted a sentry" on the evening of January 22, 1943. On January 28, 1943, accused while under arrest were assigned to K.P. detail and about two or three o'clock that afternoon they were reported missing (R.22).

Accused went to Brisbane and stayed three or four days and thence to Lismore where they stayed until February 8, 1943. While there they ran out of money (Ex. E). They arranged with Walter John Hampson, a taxi driver for the De Luxe Motors, to take them to Casino in a Ford sedan equipped with a gas producer (R.15). The value of the car and gas producer was two hundred and sixty pounds (R.16, 19). One of the accused sat on the front seat and the other on the back seat. When they had driven to within three miles of Casino each accused pressed a loaded automatic pistol against Hampson (R. 16-17), ordered him to stop the car and marched him about 150 yards across a paddock to a clump of trees telling him that if he ran or squealed they would shoot him. He was then tied to a tree and robbed of his personal money, his purse, and some money belonging to the De Luxe Motors all amounting to approximately £4.0.0. They told him "We want your car and money, we want to get away. We are A.W.O.L., and the Military Police are after us" (R.17). Accused then took the car and drove it

to Casino. They then drove the car until it gave out of fuel and abandoned the gas producer. Purchasing a thermos full of petrol they drove until they wrecked the car at a railroad crossing where they abandoned it (Ex. E), and were picked up by four civilians traveling toward Grafton. About 8 miles from Grafton the car was stopped by Constable Burdon and Detective Dallas and accused were arrested and disarmed each having a loaded pistol. Accused were then searched and the taxi driver Hampson's purse, together with a piece of rope "similar" to that used in tying up the taxi driver were found in Brudermann's pocket, and two keys of the stolen car found in Bock's pocket (R. 13, 14). The accused were then taken to the police station at Grafton, the abandoned gas producer and the stolen car being picked up on the way. At the police station each accused made a confession as to the robbery (Exs. D and E).

4. The evidence clearly establishes that both of the accused, by force and violence and by putting him in fear, did feloniously steal and carry away from the presence of Walter Hampson one Ford sedan, a gas producer, and some money, all of a value of more than $50.00. The evidence is equally clear that each of the accused having been placed in arrest on or about 23 January, 1943, did break his said arrest before he was set at liberty by proper authority and that each did, without proper leave, absent himself from his proper station from about 26 January, 1943, to about 8 February, 1943. It is further established by the evidence that the accused Brudermann used insulting language to a sentinel.

The specification, Charge II, alleges accused Bock disobeyed a lawful order of a sentinel "to turn over his pass to him". While the testimony of the sentinel does not disclose this identical language was used, he does testify that he asked them for their passes. When they first attempted to leave the area they refused to show the sentinel their passes and were then ordered back to their quarters by the Sergeant of the Guard. When they passed the sentinel returning to the area near midnight accused Bock again was asked for his pass and was "hollered" at by the sentinel and as he ran by him he "hollered" back that he would give his pass to the sergeant in the morning. Collectively taken, the testimony of the sergeant of the guard ordering accused back to their quarters when they attempted to leave the area at 5:00 P.M., because they had no passes, the sentry stating that it was his duty to inspect outgoing and take up incoming passes and that he asked for them, and accused's Bock's testimony that he ran by the sentry, fully prove the crime alleged.

The sentry had the right and the duty to order accused to surrender his pass, either by a polite request or by a formal demand. The quoted language in the specification shows on its face that this language was not meant to be the exact words used by the sentinel. The court rightly interpreted the specification to set forth a demand by the sentinel for accused to surrender his pass and the evidence clearly discloses a refusal so to comply. The specification fully appraised the accused of the offense charged and by his own testimony accused admitted his guilt. The court was fully warranted in its findings of guilty of this specification.

5. For the reasons stated above the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of the court, as approved by the reviewing authority, and the sentence.

Col., J.A.G.D., Judge Advocate

Lt. Col., J.A.G.D., Judge Advocate

Lt. Col., J.A.G.D., Judge Advocate

NOTE:

gas, as used in the opinion is produced from charcoal.
petrol, is gasoline.
Australian pound value ...$3.228

WAR DEPARTMENT
Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

CM A- 523

26 June, 1943.

UNITED STATES v. Major GLENN O. FINCH (0-271454), Quartermaster Corps.	Trial by G.C.M., convened at Townsville, Queensland, Australia, 22 February, 1943. Dismissal.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the officer named above has been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specifications:

CHARGE I: Violation of the 96th Article of War.

Specification 1: In that Major Glenn O. Finch, Quartermaster Corps, Base Section No. 2, then Commanding Officer, 2nd Battalion, 29th Quartermaster Regiment, did, at A.P.O. 922 on or about October 29, 1942, with intent to deceive Lieutenant Colonel Cary B. Hutchinson, Cavalry, Executive Officer, Headquarters, Base Section No. 2, in an official report of investigation as to the changing of certain numbers on a command and reconnaissance car required to be made by the said Major Glenn O. Finch, make the following statements in such report, viz.: "One C/R Car, which I now learn the correct W-number to be 2052051"; "was stuck in a large marshy mud hole near my Camp."; "It was out of gasoline and pulled into my Camp by my Motor Section"; "1st and 2nd echelon maintenance applied to it which put it in good running order"; "Monday I signed a work order for a paint job W-208859 which was given me by my Dispatcher who made a mistake on copying the correct number of the vehicle on the work order"; "I was in the Provost Marshal's Office just before noon Tuesday, 27 October, 1942 and asked Miss Nell Middin, for the W-Number of missing Vehicles which she gave me six," "I stated I wanted to check W-Numbers for missing Vehicle W-208859, after checking the numbers I found that W-205201 was listed as being missing, therefore the number did not tally", which said statements above quoted contained in such report were known by the said Major Glenn O. Finch to be untrue at the time of making such report.

Specification 2: In that Major Glenn O. Finch, Quartermaster Corps, Base Section No. 2, then Commanding Officer, 2nd Battalion,

> 29th Quartermaster Regiment, did, at A.P.O. 922, on or about October 26, 1942, knowingly and willfully misappropriate for use of his organization a command and reconnaissance car more particularly described as Dodge Reconnaissance ½ ton, 4 x 4 motor vehicle, Registration No. USA W-2052051, Model WC 2-23-USA, Serial No. 81516586, Motor No. T 215-14783, which said motor vehicle had theretofore been assigned to the 2nd Bombardment Squadron, 22nd Bombardment Group, United States Army Air Corps, of the value of more than $50, property of the United States furnished and intended for the use of said 2nd Bombardment Squadron.

He pleaded not guilty to the charge and specifications and was found guilty as charged. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the findings of guilty of Specification 1 of the Charge as involves a finding of guilty of making the following false official statements: "Monday I signed a work order for a paint job, W-208859, which was given me by my dispatcher who made a mistake in copying the car number of the vehicle on the work order", and "I stated I wanted to check W numbers for missing vehicle W-208859. After checking the numbers I found that W-205201 was listed as being missing, therefore the number did not tally", at the time and in the manner alleged, and approved the sentence. The confirming authority confirmed only so much of the finding of guilty of Specification 1 of the Charge as involves a finding of guilty of making the following false official statements therein stated: "who made a mistake in copying the car number of the vehicle on the work order" and "I stated I wanted to check W numbers for missing vehicle W-208859. After checking the numbers I found that W-205201 was listed as missing, therefore the number did not tally", at the time and in the manner alleged, and confirmed the sentence but remitted the forfeitures. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence shows that on October 20, 1942, 1st Lieutenant J. M. Andrews, Transportation Officer of the 2nd Bombardment Squadron, 22nd Bombardment Group, signed a work order for a Dodge reconnaissance ½ ton 4x4 motor vehicle, registration number W-2052051, and sent Sergeant McCormack with the car to the 86th Ordnance repair shop. At this time the car had a top on in "excellent" condition, and had four identifying marks in green, red, white, and yellow on both front and rear bumpers (R.9-10). On October 24, 1942, word was received that the car had been repaired and Sergeant Aubrey L. McCormack called for it and saw it on the "Ready Line". He went into the shop office and signed for it but upon returning found the car to be "missing" (R.12). The area was then searched by Sergeant McCormack, and Sergeants Fountain and Lemons of the 86th Ordnance, but the car could not be found (R.13).

Sergeant John L. Langford, a member of accused's organization, testified that on October 24, 1942, he was at the 86th Ordnance area having some gasoline racks welded on six vehicles. While there Sergeant Duckworth called him. The witness testified -

> "Well, I goes around to him and he is sitting in the vehicle with the motor running. He is under the steering wheel and he says to me, 'Here's a car for Major Finch'. 'Well', I says, 'If it's for Major Finch, I guess it's all right'. He gets out and I tell Private Hatter to take it over and leave it at the area." (R.101).

Witness further testified that the car "wasn't no vehicle of our organization (R.30) but since "Sergeant Duckworth said it was for Major Finch * * *I figured it was O.K." (R.101). Private Hatter corroborated this testimony (R.106) but Sergeant Duckworth specifically denied such facts or of having any conversation with anyone about the car in question (R.94). Pursuant to the instructions from Sergeant Langford, Private Hatter drove the car to Headquarters, 2nd Battalion, Quartermaster Regiment area and parked it behind the supply tent which was occupied by Private John R. Williams (R.23).

Private John R. Williams testified that he was a mechanic in accused's organization. That he first saw the car in question on October 25, 1942, parked in front of his tent. Major Finch instructed him to "clean the car up and get it ready to send to the 86th for a paint job" (R.34). That he secured some lye from the supply sergeant, and "swept it /the car/ up and laid the top out in the back over on some gas drums * * *I went and started scrubbing on it * * *all over complete on the front end. I took all the paint off there, because everywhere the lye hit the paint was removed.* * *About that time I thought maybe I should have some help on it as I didn't have none; so I got me some paint and smeared it back on there and then I quit" (R.34-5). The car was "pretty dirty; muddy too" (R.37). Witness used about a gallon of mixed green paint on the car. When asked "Who suggested that you use lye in washing this car?", witness answered "I suggested that myself, sir* * *" (R. 39), and stated he had never scrubbed a car in a like manner before. When asked "Why did you go ahead and get some paint and paint the car?", witness replied "I don't know, sir, why, I often wonder why myself" (R.35).

On Sunday, October 25, 1942, Sergeant Langford was instructed by Major Finch to make out a job order for the car in question. He testified that he was given a "piece of paper" with some numbers upon it which he copied on the job order, after which he threw the paper away. The job order, directed to the 86th Ordnance (MM), was signed by accused and provided in pertinent part -

"ARTICLE ...½ Ton Dodge Reconnaissance, 4x4 1941 DATE WORK WANTED ... soon as possible.

DESCRIPTION OF WORK:

TRUCK NO. 208859

1. Request that numbers above to be Stenceled on.
2. Paint job. " (Ex. E).

On October 26, Major Finch signed the foregoing order and instructed Sergeant Langford to take the car to the paint shop. Witness did so, but was informed that the work requested could not be done that day and returned with the car to his organization and so reported to Major Finch. He was then instructed to take the car back and "if they don't do anything to call him /Major Finch/* * *and he would see that it would be done" (R.48). Langford, accompanied by Private Williams, subsequently returned the car to the paint shop where "they discovered it was a stolen vehicle" (R.49).

Herbert V. Skinner, Technical Sergeant, testified that he was in charge of the paint shop of the 86th Ordnance. That on Wednesday, October 28, 1942, when preparing the car in question for the paint job he noticed "that the numbers on the car were missing and that paint had been put over where the numbers were with a brush" (R.57). Applying paint remover he removed the fresh paint and found that the original numbers had been "sanded off". The original numbers, however, were discernible in the metal. The old numbers - W-2052051 - found on the vehicle were the same as those on the car delivered to the 86th Ordnance by the 2nd Bombardment Squadron for repair and which was subsequently missed from the ready line. The number specified upon the paint and stencil order signed by Major Finch was W-208859 (R.45). Sergeants Lancaster and Lemons corroborated Sergeant Skinner's testimony (R. 64-5).

Major Finch arrived at the paint shop shortly thereafter, having been previously notified by Private Williams "to come down and see about it and that it was a stolen car" (R.49). Skinner asked accused about the car and testified -

"/The Major said/ 'That car don't belong to me. Turn it back to the unit it belongs to.' That's the best I remember the way he brought it around, sir. One word brought on another and I don't remember just what was said, until I asked him about the car coming in and he says he don't know anything about when the car came in. We talked on for a few moments and walked towards the door and I then asked him about the top and he said he didn't think the top was on it when it came in." (R.59).

* * *

> 29th Quartermaster Regiment, did, at A.P.O. 922, on or about October 26, 1942, knowingly and willfully misappropriate for use of his organization a command and reconnaissance car more particularly described as Dodge Reconnaissance ½ ton, 4 x 4 motor vehicle, Registration No. USA W-2052051, Model WC 2-23-USA, Serial No. 81516586, Motor No. T 215-14783, which said motor vehicle had theretofore been assigned to the 2nd Bombardment Squadron, 22nd Bombardment Group, United States Army Air Corps, of the value of more than $50, property of the United States furnished and intended for the use of said 2nd Bombardment Squadron.

He pleaded not guilty to the charge and specifications and was found guilty as charged. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the findings of guilty of Specification 1 of the Charge as involves a finding of guilty of making the following false official statements: "Monday I signed a work order for a paint job, W-208859, which was given me by my dispatcher who made a mistake in copying the car number of the vehicle on the work order", and "I stated I wanted to check W numbers for missing vehicle W-208859. After checking the numbers I found that W-205201 was listed as being missing, therefore the number did not tally", at the time and in the manner alleged, and approved the sentence. The confirming authority confirmed only so much of the finding of guilty of Specification 1 of the Charge as involves a finding of guilty of making the following false official statements therein stated: "who made a mistake in copying the car number of the vehicle on the work order" and "I stated I wanted to check W numbers for missing vehicle W-208859. After checking the numbers I found that W-205201 was listed as missing, therefore the number did not tally", at the time and in the manner alleged, and confirmed the sentence but remitted the forfeitures. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence shows that on October 20, 1942, 1st Lieutenant J. M. Andrews, Transportation Officer of the 2nd Bombardment Squadron, 22nd Bombardment Group, signed a work order for a Dodge reconnaissance ½ ton 4x4 motor vehicle, registration number W-2052051, and sent Sergeant McCormack with the car to the 86th Ordnance repair shop. At this time the car had a top on in "excellent" condition, and had four identifying marks in green, red, white, and yellow on both front and rear bumpers (R.9-10). On October 24, 1942, word was received that the car had been repaired and Sergeant Aubrey L. McCormack called for it and saw it on the "Ready Line". He went into the shop office and signed for it but upon returning found the car to be "missing" (R.12). The area was then searched by Sergeant McCormack, and Sergeants Fountain and Lemons of the 86th Ordnance, but the car could not be found (R.13).

Sergeant John L. Langford, a member of accused's organization, testified that on October 24, 1942, he was at the 86th Ordnance area having some gasoline racks welded on six vehicles. While there Sergeant Duckworth called him. The witness testified -

> "Well, I goes around to him and he is sitting in the vehicle with the motor running. He is under the steering wheel and he says to me, 'Here's a car for Major Finch'. 'Well', I says, 'If it's for Major Finch, I guess it's all right'. He gets out and I tell Private Hatter to take it over and leave it at the area." (R.101).

Witness further testified that the car "wasn't no vehicle of our organization (R.30) but since "Sergeant Duckworth said it was for Major Finch * * *I figured it was O.K." (R.101). Private Hatter corroborated this testimony (R.106) but Sergeant Duckworth specifically denied such facts or of having any conversation with anyone about the car in question (R.94). Pursuant to the instructions from Sergeant Langford, Private Hatter drove the car to Headquarters, 2nd Battalion, Quartermaster Regiment area and parked it behind the supply tent which was occupied by Private John R. Williams (R.23).

Private John R. Williams testified that he was a mechanic in accused's organization. That he first saw the car in question on October 25, 1942, parked in front of his tent. Major Finch instructed him to "clean the car up and get it ready to send to the 86th for a paint job" (R.34). That he secured some lye from the supply sergeant, and "swept it [the car] up and laid the top out in the back over on some gas drums * * *I went and started scrubbing on it * * *all over complete on the front end. I took all the paint off there, because everywhere the lye hit the paint was removed.* * *About that time I thought maybe I should have some help on it as I didn't have none; so I got me some paint and smeared it back on there and then I quit" (R.34-5). The car was "pretty dirty; muddy too" (R.37). Witness used about a gallon of mixed green paint on the car. When asked "Who suggested that you use lye in washing this car?", witness answered "I suggested that myself, sir* * *" (R. 39), and stated he had never scrubbed a car in a like manner before. When asked "Why did you go ahead and get some paint and paint the car?", witness replied "I don't know, sir, why, I often wonder why myself" (R.35).

On Sunday, October 25, 1942, Sergeant Langford was instructed by Major Finch to make out a job order for the car in question. He testified that he was given a "piece of paper" with some numbers upon it which he copied on the job order, after which he threw the paper away. The job order, directed to the 86th Ordnance (MM), was signed by accused and provided in pertinent part -

"ARTICLE ...½ Ton Dodge Reconnaissance, 4x4 1941 DATE WORK WANTED ... soon as possible.

DESCRIPTION OF WORK:

TRUCK NO. 208859

1. Request that numbers above to be Stenceled on.
2. Paint job. " (Ex. E).

On October 26, Major Finch signed the foregoing order and instructed Sergeant Langford to take the car to the paint shop. Witness did so, but was informed that the work requested could not be done that day and returned with the car to his organization and so reported to Major Finch. He was then instructed to take the car back and "if they don't do anything to call him [Major Finch]* * *and he would see that it would be done" (R.48). Langford, accompanied by Private Williams, subsequently returned the car to the paint shop where "they discovered it was a stolen vehicle" (R.49).

Herbert V. Skinner, Technical Sergeant, testified that he was in charge of the paint shop of the 86th Ordnance. That on Wednesday, October 28, 1942, when preparing the car in question for the paint job he noticed "that the numbers on the car were missing and that paint had been put over where the numbers were with a brush" (R.57). Applying paint remover he removed the fresh paint and found that the original numbers had been "sanded off". The original numbers, however, were discernible in the metal. The old numbers - W-2052051 - found on the vehicle were the same as those on the car delivered to the 86th Ordnance by the 2nd Bombardment Squadron for repair and which was subsequently missed from the ready line. The number specified upon the paint and stencil order signed by Major Finch was W-208859 (R.45). Sergeants Lancaster and Lemons corroborated Sergeant Skinner's testimony (R. 64-5).

Major Finch arrived at the paint shop shortly thereafter, having been previously notified by Private Williams "to come down and see about it and that it was a stolen car" (R.49). Skinner asked accused about the car and testified -

"[The Major said] 'That car don't belong to me. Turn it back to the unit it belongs to.' That's the best I remember the way he brought it around, sir. One word brought on another and I don't remember just what was said, until I asked him about the car coming in and he says he don't know anything about when the car came in. We talked on for a few moments and walked towards the door and I then asked him about the top and he said he didn't think the top was on it when it came in." (R.59).

* * *

"He said he didn't know about the numbers being changed and to return it back to the unit it belonged to." (R.60).

Lieutenant John W. Hoar Jr., testified, by deposition, that at the time in question he was Battalion Motor and Supply Officer for Company "G", 29th Quartermaster Regiment. That normally he would have been notified of any vehicle picked up by Major Finch and that during the time in question he received no notification of a Dodge reconnaissance ½ ton 4x4 motor vehicle having been found. The motor vehicle number W-208859 does not appear in the records of the 2nd Battalion 29th Quartermaster Regiment.(Ex. F). By stipulation it was also agreed that if the Base Ordnance Officer were present he would testify that no such registration number was on file in the Base Ordnance Office for this area (R.81).

Miss Nell Maddin testified that she was a stenographer in the office of the Provost Marshal, Townsville, Queensland. That on October 27, 1942, she was making some additions to the permanent list of stolen vehicles. That accused came in the office and asked for the use of the telephone. She testified -

"A. He just asked me if those were stolen vehicle numbers that I was typing. I said, 'Yes; those were a few I had on my pad and I was adding to my list'.

Q. At that time did the accused ask you for a copy of those particular numbers?

A. Yes, just those numbers." (R.73).

Witness complied with his request. Miss Maddin testified that accused did not ask her for the W numbers of missing vehicles for the purpose of checking such vehicles; that he did not state he was looking for any particular number nor did he ask for a complete list. Her pertinent testimony is -

"Q. At that time did the accused tell you that he was looking for a particular vehicle number?

A. No, Major.

Q. At that time did the accused ask you if those numbers which you gave him were the numbers of all the missing vehicles that you had on file in the office?

A. No.

Q. At that time did the accused ask you for a complete list of numbers of the reported missing vehicles?

A. No.

Q. At that time could you have given him such a list?

A. Yes. If he had asked I could have gotten the rest of them for him.

Q. Had you done so, would that list of numbers have contained the C/R Car No. W-2052051?
* * * *

A. Yes, Major. " (R. 74).

On October 29, 1942, accused again came to the office with the list of the numbers previously given him and asked witness to "certify them as the list of stolen vehicles for that day" (R.74). Witness did not immediately comply, but went to see the Provost Marshal, Colonel Patterson, who directed

her to "Bring the Major in here. If there is anything he's done, I wanted to be the first to know it" (R.74). Witness accompanied accused into Colonel patterson's office, and upon being asked what he wanted the list for accused did not tell Colonel Patterson "very much". "He didn't seem as though he was too keen about answering the Colonel. He didn't give any sort of special answers". (R.75). Witness then typed the numbers previously given accused on a sheet of paper and signed it (Ex. G).

Colonel John M. Patterson testified that he was Provost Marshal, Base Section 2, A.P.O. 922. That accused came into his office with Miss Maddin on October 29, 1942. He testified -

> "* * *'Why did you request the girl in this office to sign the slip?' He never did give me a direct answer. He got a little red and got embarrassed. I told him at the time, 'Do you want a complete list of our cars, that is a list that we issue every few days, of cars that are missing?' [no answer] * * *"
>
> "Q. Did you give Miss Maddin any instructions at the time relative to affixing her signature to that partial list?
>
> A. I said, 'Let me have the slip and I'll write it down and then you can sign it after I get through writing on it.' I don't remember the exact wording that I put down at the time." (R. 77).

Witness had previously gone to the 86th Ordnance and found that the car in question was one having been reported to him as stolen, the number being W-2052051, a Dodge reconnaissance ½ ton truck (R. 78). The prosecution then requested the court to take judicial notice of AR 850-5, dated August 5, 1942, Subject: Vehicles - Changing registration number prohibited. (R.81).

Colonel Cary B. Hutchinson, Executive Officer, Base Section 2, directed accused to "make a complete investigation of the change of numbers ordered by him * * *and to submit that report without delay" (Ex. A). The report was introduced in evidence (report set forth in full <u>infra</u>).

The accused elected to be sworn and testify. On Saturday night about 12;00 o'clock October 24, 1942, while going to his barracks he saw a command car in a mud hole near the shower baths. Next morning about 10:30 A.M. he saw a command car near the supply tent, "dirty, muddy, and the paint not so good" (R.87). He was told by one of his men in his organization that it had been dragged out of the mud hole near the shower baths (R.87). On cross-examination he could not recall the name of this man and was able to identify him only as "one of my soldiers in my command" (R.118). He instructed Private Williams to thoroughly clean the car and give it whatever repairs might be needed. On Monday morning Sergeant Langford told him the car needed "a touching up of paint" and he instructed the Sergeant to make a paint order for whatever painting was needed. This was done and the order placed on accused's desk and signed by him. "At that time I made a note of the numbers that were on the paint order", but expected him (the Sergeant) to get the number off the vehicle (R.87-90). On Tuesday, October 27, 1942, he went to the Provost Marshal's office to get some colored soldiers out of the stockade. While there, and while using the telephone, he saw Miss Maddin copying the W-numbers of stolen vehicles. He testified -

> "* * *I asked her were those recently stolen vehicles. She said, 'Yes'. I asked her if I could have a copy of them, and she said, 'Yes'. I started to write them down and my telephone rang and she wrote them down and gave them to me. I later on checked this list that I received from her with the command car which I had and it did not tally." (R.87).

At this time, he told Miss Maddin he wanted the list as a number of his men had "700 keys" and might have driven some of those cars in his area and he did not want them to get mixed up with stolen vehicles, his men having stolen vehicles before (R.87). On Wednesday, October 28, 1942, he received a call about 10:30 A.M. from the 86th Ordnance paint shop to come by as they had some papers on a

command car. Upon arriving he was asked by Sergeant Skinner, "Major, is this your command car?" and replied "No" (R.88). The Sergeant then showed him the work order and said "The numbers do not coincide". The Sergeant then told him "The car was taken from the Ready Line * * * on Saturday and it belongs to an Air Corps Bomb Squadron". Accused said "If it does, I want them to have it back. It doesn't belong to me." The Sergeant then told accused that he would drive or deliver it back to the Air Corps Bombardment Squadron and that would be all there was to it (R.88). Accused never used the car, never assigned it, nor was it picked up on his property records. He had no intentions whatever of keeping it (R.88). About 2:30 on the same afternoon he had a call from Miss Maddin for an appointment with Colonel Patterson, the Provost Marshal. He was then questioned by Colonel Patterson about the matter and asked some questions about "why the paint was off and so forth" and then, with Colonel Patterson, he went to Colonel Hutchinson's office. He was instructed by Colonel Hutchinson "to make a report and get that report in the next day" (R.88). The following report was made by accused:

"1. In compliance with instructions, I have made an investigation and find the following facts:

One C/R Car, which I now learn the correct W-number to be 2052051. Was driven by some unknown person late Saturday night or early Sunday morning 25 October 1942, and stuck in a large marshy mud hole near my Camp. It was out of gasoline and pulled into my Camp by my Motor Section, I saw the car around 11:00 AM Sunday morning, it had no top on it and was dirty and muddy, I ordered the car to be cleaned and repaired, as far as, 1st and 2nd echelon maintenance could be provided by my Motor Section to put the car in running condition.

2. The car thoroughly cleaned all over and 1st and 2nd echelon maintenance applied to it which put it in good running order. Monday I signed a work order for a paint job W-208859 which was given me by my Dispatcher who made a mistake on coping the correct number of the Vehicle on the work order. The car was driven to the Light Maintenance Shop Tuesday and Wednesday mornings for whatever painting that was needed.

3. I was called by Telephone Wednesday morning about 10:30 AM that they had some papers on the car, and if I would come by, which I did. I was asked 'Is this your car?'. I said no to Sgt. Skinner. He said, 'You have the wrong number on your workorder', he then gave me the correct one. He then asked me 'Was there a top on the car?' I said no I have two tops; one on my C/R Car and an extra one,' He then told me the car was taken from the Red Line and belonged to an Air Squadron'. He further stated 'That he would return the same to the proper organization, and that was all there would be to it. I said, 'whoever it belong_ to I want them to have it.

4. I was in the Provost Marshall's Office just before noon Tuesday 27 October 1942 and asked Miss Nell Middin, for the W-Number of missing Vehicles which she gave me six, 'I stated I wanted to check W-Numbers for missing Vehicle W-208859, after checking the numbers I found that W-205201 was listed as being missing, therefore the number did not tally.

5. The car has been turned back with top to it's proper organization in good running condition. I will continue to make further investigations and report any facts found in connection with the above mentioned Vehicle." (Ex. A).

Upon being called by the court as a witness Sergeant William D. Duckworth testified that prior to October 24, 1942, he had never had any conversation with Major Finch regarding a reconnaissance car. That he had known Major Finch "a good while" and that prior to the date in question he had been in the area of the 29th Quartermaster hunting for vehicles that had been left stranded by other organizations when they left. He asked, and received from, Major Finch twenty-one rounds of .45 ammunition (R.110). The accused, recalled by the court, admitted giving Sergeant Duckworth twenty-one rounds of ammunition telling him "that wasn't the thing to do but I think I let him have twenty-one rounds" (R.117).

4. The evidence is clear that the car in question was the property of another unit. It was taken to the 86th Ordnance repair shop and seen on the "Ready Line" repaired and in condition to be delivered to its proper organization. From the "Ready Line" it disappeared. Sergeant Langford testified that Sergeant Duckworth, whom he had not previously known, approached him and asked him if he was from accused's organization. Upon replying in the affirmative, he was told that the command car in question was for Major Finch. Private Hatter was instructed by Sergeant Langford to drive the car to accused's area and did so, leaving it near Private William's tent. Accused testified that he saw a command car in a mud hole near his area about midnight on October 24, 1942, and the next morning saw "a command car which was dirty, muddy, and the paint not so good" near his supply tent. He asked one of the men in his organization where the car came from and was told that "it had been dragged out of the mud hole near the water tank at the shower baths". Accused could not remember the name of, nor could he produce, the member of the organization who gave him such report. Private Williams, upon accused's instructions to clean the car, removed much of its paint, using lye, and in so doing obliterated the four color markings on the front and rear bumpers and then attempted to further conceal the identification numbers and markings by smearing them over with a gallon of green paint. The car was sent to the repair shop with an identification number to be stenciled thereon which was fictitious and which number did not appear in the recorded files of the Base Ordnance Officer. Only when advised that the identity of the car had been clearly established did accused take any steps toward making restitution or show any desire to return the car to its proper organization. He did not pick up the car on his property report and although he had the same in his possession four or five days he made no report to the office of the Provost Marshal and made no effort to find the true owner.

The accused is charged in Specification 1 with making a false official statement with intent to deceive a superior officer. In its final analysis, the guilt of the accused hinges upon the truth of the testimony of accused and that of Sergeant John L. Langford and Miss Nell Maddin.

In his official report accused stated "[Sergeant Langford] made a mistake on coping the correct number of the Vehicle on the work order". In support thereof he testified that Sergeant Langford prepared the work order in its entirety and that he had nothing to do with the registration number placed thereon by the Sergeant. Sergeant Langford testified that he prepared the work order but that the registration number (W-208859) appearing thereon was given him by accused "on a piece of paper" and that he (the Sergeant) copied the same on the order.

In his official report the accused advised his superior officer "I stated [to Miss Maddin] I wanted to check W-numbers for missing Vehicle W-208859, after checking the numbers I found that W-205201 was listed as being missing, therefore the number did not tally." Miss Maddin specifically denied that accused said that he "wanted to check W-numbers for missing Vehicle W-208859". She gave him only a partial list of missing vehicles and none of the four numbers upon such partial list referred to car W-205201 (or to car W-2052051).

The evidence adduced, coupled with the circumstances that the accused was unable to corroborate his story as to how the car reached his area, are properly the subject of inference of guilt by the court. The Supreme Court of the United States has recently stated:

" *** an accused who takes the stand 'may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence, in which he participated and concerning which he is fully informed, without subjecting his silence to the inference to be naturally drawn from it'" (Johnson v. United States, 63 S. Ct. 549, 553).

In cases in which the President is neither reviewing nor confirming authority, it is exclusively the province of the court-martial, (including the reviewing and confirming authority) to weigh evidence, judge of its credibility, and determine controverted questions of fact (sec. 408(2), Dig. Ops. JAG, 1912-40). In the instant case the credibility of the witnesses and the weight to be given their respective testimony having been resolved against the accused, and there being substantial evidence in the record, which, if uncontradicted, would be sufficient to warrant the findings of guilty of Specification 1, such findings are conclusive.

The evidence is clear and convincing that accused did, at the time and place alleged in Specification 2, take possession and control of the car in question for the use and benefit of his own organization. While this specification is not artfully drawn, there is no question but that accused was appraised of the offense stated therein. The car came into his area on Saturday or Sunday, October 24th or 25th, 1942, and from thence until its identity was established accused treated it as property of his unit. While in his control its identity was attempted to be destroyed, it was given a fictitious number, and was twice sent to the 86th Ordnance shop with a work order requesting a complete paint job and for the fictitious number to be stenciled thereon. Had its identity not been discovered, and the work order duly complied with, the car would have been returned to accused's organization with the likelihood that the organization rightfully entitled to it never would have regained its possession.

5. For the reasons stated above the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings as confirmed and the sentence.

, Judge Advocate
Col., J.A.G.D.,

, Judge Advocate
Lt. Col., J.A.G.D.,

James B. Murphy, Judge Advocate
Lt. Col., J.A.G.D.

1st Indorsement

War Department, Branch Office of The Judge Advocate General, A.P.O. 924, 28 June, 1943.
To: Commander-in-Chief, Southwest Pacific Area, A.P.O. 500.

1. In the case of Major Glenn O. Finch, 0-271454, Quartermaster Corps, Base Section 2, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM A-523).

ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 3, USAFFE, 2 Jul 1943)

WAR DEPARTMENT
Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

June 24, 1943.

CM A-524

UNITED STATES v. Staff Sergeant ROBERT B. WALKER (33089632), Company "C", 811th Engineer Aviation Battalion.	))))))))	Trial by G.C.M., convened at Noumea, New Caledonia, 22 May, 1943. Dishonorable discharge, total forfeitures, confinement for life. United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Staff Sergeant Robert B. Walker, Company "C", 811th Engineer Aviation Battalion, A.P.O. 502, did, in the vicinity of Kilometer #254, Route #1, A.P.O. 502, on or about April 27, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Staff Sergeant Washington Spann, 34096810, Company "C", 811th Engineer Aviation Battalion, a human being by shooting him with a Caliber .45 U.S. Service Pistol.

The accused pleaded not guilty to the charge and specification and was found guilty as charged. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence shows that on the morning of April 27, 1943, accused and deceased, both Sergeants in Company "C", 811th Engineer Battalion, were in charge of work details about one or two miles from the company area (R. 40-41). Just before noon deceased loaded his men on a truck preparatory to going to the company area. Some of accused's detail were also on this same truck. Accused and his driver drove their truck along side of deceased's truck and stopped. Deceased told accused to pick up his own men as he could not take

both platoons. Accused drove off and deceased then ordered accused's men to get off his truck. Accused stopped his truck after having driven about 80 yards and backed up (R.30). Accused, sitting on the front seat, was then approached by deceased who said "You got mad at me awhile ago, get out and lets go". Accused remained in his truck and deceased opened the door and pulled on him "lightly" insisting that he get out and fight (R.30). At this time deceased had an opened G. I. knife in his hand (R.31). Accused then accompanied his truck to the camp area, the truck of deceased going to the north end of the runway to pick up the rest of the men. Upon arriving at his company area accused went to the orderly tent and told First Sergeant Sylvester S. Reese "You can tell Captain Christian he can get ready to take me to Paita because I am going to kill Sergeant Spann". The company clerk tried to stop accused from leaving but he "broke" away and went to his tent (R.14-17). The first sergeant then put his hat and coat on, as it was raining, and approached accused's tent. He testified accused "came to the door and said for me not to come over * * *I turned around toward the officers' quarters intending to notify one of the company officers" (R.14-17). About this time two trucks pulled into the company area and stopped. Deceased was riding in the first truck. He opened the door, slid out, turned around and picked up his hat and started toward his tent, when he met accused (R.31-32). Accused asked deceased a question which various witnesses testified was: "Why did you do me like you did on the field?" (R.37), "Why did you draw a knife on me?" (R.15), and "What did you get on me for out there on the field?" (R.26). Deceased then stooped down, picked up a stick, and raised it about waist high, at which time accused drew from his pocket a .45 caliber pistol and fired at deceased hitting him just above the heart. Deceased grabbed his left side and wheeled around as a second shot was fired which missed and he fell. Deceased then tried to get up. Accused held the pistol as though to shoot again when Private Merril said, "Don't shoot him no more" (R.32, 33, 38). Captain Gideon L. Christian was on the way to mess when he heard two shots fired about "100 to 150 feet" away (R.6). He did not see the shots fired as a truck was between him and accused but the truck moved away immediately and he saw accused with a raised pistol in his hand. The pistol was smoking. He walked toward accused, who was mumbling, and all he heard him say was "Now, you won't cuss me any more" or words to that effect. He ordered accused to hand him the pistol which accused did (R.6-7). He examined accused to determine if he had been drinking but could smell no alcohol on his breath (R.10).

Captain R. Donald Jandorf, a medical officer, arrived "within 30 seconds from the time he was shot". He found a gunshot wound in the chest region overlapping the heart. Deceased died in about ten or fifteen minutes after the examination (R. 11, 13; Ex. B). There was only one gunshot wound (R.46). The body was then sent to the 331st Station Hospital. Captain Jandorf was subsequently sent there upon order of Captain Christian, about one half hour after the shooting, and searched the body before it was removed from the ambulance. In the left pants pocket he found an engineer combination knife with the blade open pointing down (R.46).

Accused elected to take the stand and testify. Because of the nature of such testimony and the gravity of the offense it is thought proper to quote at length the following portion thereof -

> "* * *Sergeant Spann comes out of the truck over to the truck where I was sitting, just like this, and pulls the door open and says 'Why you not answer me'. I said 'I never heard you'. He called me 'You damn liar, you did'. I said 'I never heard you', just like that. I said 'Go ahead Bill', that's Talbert, that's what I call him. He said 'Don't move the truck Bill'. He reaches over with his left hand and cuts the switch off the truck and still insists that I heard him, which I never heard him. If he had said something to me I would have answered him, and he still insists that I heard him. I said 'No, I didn't

hear you' and add on 'I don't want to cause no trouble'. He said 'Shut up', and he said 'You son of a bitch I know your mad come on out'. He had a knife in his right hand, just like that, with the blade open resting along the finger, and I told him, I said 'I'd be a fool to jump out on that knife'. He slammed the door shut, and I said 'Go ahead Bill', and he pulled the door back open again and started saying things again, and I said 'Go ahead Spann I don't want to cause no trouble', so he slammed the door shut again and come back and pull the door open again. I was sitting in the truck just like this, and he grabs me by the raincoat with his left hand had the knife just like that, and said 'You mother fucker you, if you tell Captain Christian or Sergeant Reese anything about this you'll never live to tell anybody else nothing'. He slammed the door shut and said 'Go ahead Bill'. Well, when he started away from the truck going back towards the truck which he comes from -- he went back and still had this knife in his hand and said 'That's the way I do with those mother fuckers. Don't any of them fuck with me', just in those words. Then we leave there, goes on in, and I told the First Sergeant who didn't care if it rained or snowed, and when they came in, I asked him, I said 'Spann why are you going to kill me with the knife and all this stuff' and he said 'You better get to hell out of my face', just like that, and I had a gun in my hand, like this, right along behind me, and when he got out of the truck he didn't slide out of no truck which Sergeant Reese said. He didn't slide out of no truck -- he got out of the truck just like this, with his left hand in his pocket just like that. He tried to walk up to me, and I backed up off him, and he said 'You better get the fuck out of my face', and a stick was lying over there, and he stooped down to get the stick, still having his left hand in his pocket on the knife. He gets the stick like this. There was a little Red Cross sign there and the stick was lying beside the sign. He picks up the stick just like that, still having his hand in his pocket and comes up with the stick just like that, to start hitting me. I had the gun the same way, like that. When he drew back to hit me the gun went off. I didn't pull it off -- it went off. I must have pulled it off. I didn't actually put the gun up and shoot like that. And then he drawed back the stick and the gun went off, and then the gun was still cocked, and I had it like this trying to let the hammer down to keep it from going off, just like this, and it went off." (R.41-42).

Accused admitted having told First Sergeant Reese that "* * *I was going to shoot Spann * * *" (R. 43) and that after having made this statement he went to his tent, "* * *laid down on my bunk about five minutes * * *I got the pistol and came out and at the time I was out there Sergeant Spann came up" (R.45). He stated that the reason he told the First Sergeant he was going to kill deceased was "He drew his knife on me and said he was going to kill me" (R.44). That the deceased said "he was going to kill me with a knife and all that stuff * * *I wasn't going to let him kill me" (R.45).

4. The evidence discloses that a short time prior to the fatal shooting the accused and deceased were in an altercation. At this time deceased, while displaying an open knife and threatening accused, attempted to pull accused from the truck in which he was riding. After this incident accused returned to the company area, announced his intention of shooting deceased, and secured his pistol. Shortly thereafter deceased arrived in the area and was immediately approached by accused "with his hand in his hip pocket" who renewed the prior argument. Deceased, with one hand in his pocket, turned and picked up a stick, but before he had raised it more than "waist high" accused drew his pistol, shot

and killed deceased, and said "Now, you won't cuss me any more". The evidence is clear that at the time of the fatal shooting the accused was the aggressor and was prepared to carry out his avowed intention. Such actions preclude a legal justification for his act. His actions reveal a willful and deliberate purpose to take the life of one of his comrades. The evidence is clear and convincing that accused did, at the time and place alleged, with malice aforethought, feloniously and unlawfully kill Staff Sergeant Washington Spann by shooting him with a .45 caliber pistol.

5. For the reasons stated above the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of the court and the sentence.

_____, Judge Advocate
Col., J.A.G.D.

_____, Judge Advocate
Lt. Col., J.A.G.D.

_____, Judge Advocate
Lt. Col., J.A.G.D.

WAR DEPARTMENT
Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

CM A-531

24 June, 1943.

UNITED STATES v. Second Lieutenant PAUL M. MALASKY (O-1288584), Headquarters Company, 169th Infantry (R).	)	Trial by G.C.M., convened at Headquarters, 43rd Infantry Division, A.P.O. 43, May 3, 1943. Dismissal, total forfeitures, confinement for one year. U. S. Disciplinary Barracks, Fort Leavenworth, Kansas.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the officer named above has been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 64th Article of War.

Specification: In that Lt. Paul M. Malasky, Hq. Co. 169th Infantry having received a lawful command from Capt John F. Healey, Jr. his superior officer to supervise the construction of a dug out shelter, did at Pavuvu, Russell Islands, Solomon Islands Group, on or about March 23, 1943, willfully disobey the same.

The accused pleaded not guilty to the charge and specification and was found guilty as charged. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved the sentence and the confirming authority confirmed the same and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence shows that on March 15, 1943, Captain John F. Healey Jr., in command of Headquarters Company, 169th Infantry, ordered the construction of a bombproof shelter to be used by the regimental staff during air raids. Believing that the work was not progressing with sufficient repidity, on Monday, March 22, he explained its nature and importance to accused and ordered him to supervise the construction. The Captain told accused that he "wanted it completed as soon as possible" (R.4), and "that he should stick with it until

it was completed" (R.6). On Tuesday afternoon, March 23rd, Captain Healey passed the place where the shelter was being built and "saw that the detail was not there working". He saw Lieutenant Hillery and "asked him to inquire of Lt. Malasky where the detail was and why there was no working being done on the shelter" (R.5). Lieutenant Hillery then asked accused "if he had been doing the job. He [accused] said that he hadn't" (R.8, 9) but gave no reason for disobeying the Captain's orders (R.11).

Captain Healey testified -

> "I was in my tent [Tuesday evening]. The accused came to my tent and asked if he might speak to me. I said 'Yes' and asked him to come in. I asked him what was on his mind. The accused said 'It's about this dug out deal. I know I have been ordered to supervise the work and I have disobeyed your orders'. * * * I asked him if he had a reason. He said * * * I have my reasons but I won't give them to you'. I asked him if he felt that I was taking advantage of him. He said 'No.'" (R.5).

The Captain dismissed the accused and the next morning preferred the instant charges against him, and restricted him to quarters.

The accused told his tent-mate, Lieutenant Hillery, that "he didn't blame the Captain, and that he would have done the same thing" (R.12). Lieutenant Hillery further testified that he had passed the area where the shelter was under construction on two occasions on Monday the 22nd and Tuesday the 23rd and did not see the accused at either time. Witness thought that the accused had "been going down sporadically" "to check up" (R.9). Although accused had a "rather messy infection of ring worm" (R.10) on his feet which he was treating with medicine and was not able to go out on patrols, he was not prevented from moving about the area, going to the mess hall and the latrine (R.10).

Sergeant Harold L. Lamarine testified that he was in charge of the work detail and was at the dugout for about half an hour twice each day. He did not see the accused there on either Monday the 22nd or Tuesday the 23rd (R.13). Corporal James V. Gratta testified that on March 24th (after accused had already had his conversation with Captain Healey) he "saw [accused] in the vicinity of the dugout but I didn't know he was in charge." Accused did not "give any suggestions concerning the dugout" (R.15, 16).

The accused elected to remain silent. However, after his conviction, but before the court closed to determine the sentence, accused was sworn and testified that the reason for his actions "was the inactivity of the time. My feet pained me; I hadn't been sleeping well. I didn't want to explain to the Captain about all my troubles. I thought it wasn't necessary. I just told him I wasn't going to do it" (R.20). Accused stated that he went to the dugout once a day and did not know that Sergeant Lamarine was in charge of the detail.

4. The accused, upon his own initiative, confessed to his superior officer that he had willfully disobeyed the lawful order of such officer. Such confession was corroborated by other evidence. The evidence sufficiently establishes the fact that the accused committed the offense alleged. No errors injuriously affecting the substantial rights of the accused appear in the record.

5. For the reasons stated above the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence.

Col., J.A.G.D., Judge Advocate

Lt. Col., J.A.G.D., Judge Advocate

Lt. Col., J.A.G.D., Judge Advocate

1st Indorsement

War Department, Branch Office of The Judge Advocate General, A.P.O.924, 25 June, 1943.

To: Commanding General, USAFISPA, A.P.O. 502.

1. In the case of Second Lieutenant Paul M. Malasky (0-1288585), Headquarters Company, 169th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM A-531).

ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

(Sentence confirmed but execution suspended. GCMO 13, USAFISPA, 24 Jun 1943)

WAR DEPARTMENT
Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

CM A-557

12 July, 1943.

UNITED STATES v. Private KARL M. BOCK (12062137), Port Detachment "C". Private JAMES R. DAVIS (14032287), Company "D", 162nd Infantry.	Trial by G.C.M., convened at A.P.O. 927, 30 April, 1943. As to each accused: Dishonorable discharge, total forfeitures, confinement for ten years. Federal Correctional Institution, Englewood, Colorado.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused were tried upon the following charges and specifications:

CHARGE I: Violation of the 69th Article of War.

Specification: In that Prisoner (private) Karl M. Bock, Port Detachment "C" APO 927, then confined at the Stockade Base Section # 7 and Prisoner (Private) James R. Davis, Co. "D" 162nd Infantry, then confined at the Stockade, Base Section #7, acting jointly and in pursuance of a common intent, having been duly placed in confinement in the Stockade, Camp Warwick, APO 927 on or about February 13, 1943 and February 12, 1943, respectively, did, at the 4th Replacement Depot Area, APO 927, on or about 1400 hours February 20, 1943, escape from said confinement before they were set at liberty by the proper authority.

CHARGE II: Violation of the 93rd Article of War.

Specification: In that Private Karl M. Bock, Port Detachment "C" APO 927, and Private James R. Davis, Company "D", 162nd Infantry, both then confined at the stockade, Base Section 7 acting jointly and in pursuance of a common intent did, at the 4th Replacement Depot Area, APO 927, on or about February 20, 1943, by force and violence, and by putting him in fear, feloniously take, steal and carry away from the person of Private Martin Phelps, Company "E", 4th Replacement Depot, one shot gun, value about $27.00 property of the United States, furnished and intended for the military service thereof; and one pair trousers, khaki, cotton, value about $2.25; one shirt, khaki, cotton, value about $2.17; one belt, web, waist, value about $0.22 and the sum of £10/10/0, value about $33.89, the property of said Private Martin Phelps.

Each accused pleaded not guilty to all charges and specifications and was found guilty as charged, excepting certain articles of clothing amounting to four dollars and sixty-four cents. They were each sentenced to be dishonorably discharged the service, total forfeitures, and to be confined at hard labor for ten years. The reviewing authority approved the sentences and designated the Federal Correctional Institution, Englewood, Colorado, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence shows that on February 20, 1943, the accused were prisoners in Camp Warwick Stockade, Base Section 7, Australia. On this date they were detailed to dig garbage holes under guard of Private Martin Phelps, who was armed with a repeating sawed-off shotgun. About 2 o'clock P.M. while digging the garbage holes, accused Bock suddenly threw a shovel full of dirt on the guard and one of the accused struck him on the side of the head. Accused Davis then grabbed the guard around the neck while Bock took the shotgun (R.6). Bock pumped a shell in the gun and the guard was then forced to go to the river bank about half a mile away where he was ordered to swim the river. When he refused "they threatened to blow my head off -- that was Bock" (R.7). The guard was then forced to "strip" off his clothes. Davis rolled them up and put them under his arm. Bock pointed the gun at the guard ordering him to "* *stand there till they got out of sight* *" (R.7). Then both left, taking with them the guard's clothes, the shotgun, and ten pounds ten shillings of the guard's money [agreed value in currency $33.89] (R.9). When accused had gone "50 yards away" the guard "* *ran back to my Company* *" and reported the escape (R. 7).

Lieutenant Colonel Soderholm testified that upon receiving the report of the escape, at about 2:30 P.M. on the day in question, he took all available men and joined a detail already searching for the escapees. Both accused were captured that afternoon and returned to the stockade. He also testified that no one had issued any orders releasing accused from confinement (R.13).

Major George H. Barrows corroborated Lieutenant Colonel Soderholm's testimony as to the capture of the accused. He further stated that when the shotgun was found the safety lock was off and there was a shell in the chamber (R.14).

Accused each elected to be sworn and testify. They admitted all elements of the crime charged and corroborated guard Martin Phelp's testimony, giving no reason for their acts other than they agreed to "* *take off from the place" (R.22-23).

4. Each element of the offenses alleged was proven by clear and convincing evidence. Accused admitted each act alleged. There are no extenuating circumstances and the findings of the court, and the sentences are fully supported by the evidence.

5. For the reasons stated above the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of the court and the sentences.

[signature], Judge Advocate.
Col., J.A.G.D.

[signature], Judge Advocate.
Lt. Col., J.A.G.D.

[signature], Judge Advocate.
Lt. Col., J.A.G.D.

WAR DEPARTMENT
Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

CM A-564

24 July, 1943.

UNITED STATES v. Private Frank Fisher, Jr., (18165458), 211th Port Company.	Trial by G.C.M., convened at I Island Command, A.P.O. 502, 14 June, 1943. Dishonorable discharge, total forfeitures, confinement for life. U.S. Penitentiary, Leavenworth.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Frank (NMN) Fisher Jr., 211th Port Company, did, at A.P.O. 502, on or about May 2, 1943, forcibly and feloniously, against her will, have carnal knowledge of Louise Mounien.

The accused pleaded not guilty to the Charge and specification and was found guilty as charged. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The Reviewing Authority approved the sentence and designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence shows that on the night of May 2, 1943, at some time prior to 10 P.M., 1st Lieutenant Robert L. Engels, accompanied by Mademoiselle Louise Mounien, parked a "jeep" car on a side road about one-fourth of a mile from the main highway between Vallee des Colons and Coloniale, Route 1, Noumea, New Caledonia. The Lieutenant was standing by the side of the "jeep" and Mademoiselle Mounien was sitting behind the steering wheel (R.19). A reconnaissance truck drove up and three negro soldiers got out, approached the jeep, and accused, the largest of the three, stated to Lieutenant Engels, "We are going to have this woman" (R.5). Lieutenant Engels replied, "No, you are not, she is with me. You had better go and leave us alone" (R.5). Both of accused's companions then stated, "you had her, didn't you?" (Ex. A). Accused then stated, "If we can have this girl, when we leave, I'll lay $20.00 on her" (R.12; Ex. A). Accused then ordered the Lieutenant to "Get that girl out of the jeep." The Lieutenant refused to obey. At this time, "She was whimpering and scared for she grabbed me [Lieutenant Engels] by the arm." (R.13). Accused then redognized

the Lieutenant to be an officer, took the car keys, turned off the car lights and said, "Officer, do you know what a .45 can do to you?" * * * * * "My cock is hard and I'm going to get it soft" * * * * * "Officer walk up and stand in front of the jeep, I am going to count 1-2-3-4" (R.7;8;12; Ex. A). The Lieutenant obeyed this command and told the girl to get out of the car, but she refused. Accused then told his two companions to get Mademoiselle Mounien out of the car. Accused stated:

> "* * * * *Loury says when he grasps the woman by the right hand, "Madamoiselle, zig-zig?" What she says, I don't know, it was in French, and I says, "I don't want to put my hands on her. * * * * * Loury is still holding her hand. I puts my arms around her." * * * * * "So I and Loury lifted her out of the Jeep * * * * *". (Ex. A).

Mademoiselle Mounien resisted the efforts of accused and his companions to lift her out of the car by holding on to the steering wheel but to no avail. The girl testified that she did not cry out "Because I was afraid they would hit me" (R.23) but later testified that she called to the officer for help (R.24), although he testified that she did not (R.14). In any event Lieutenant Engels offered no assistance to the girl who appeared "frightened" and cried (R.9), testifying, "I was under the impression he [accused] was armed, at least I was convinced he was, and was afraid he might hurt the girl or myself, and it wouldn't do us any good. I didn't have anything to fight with - - just had two keys in my hand, so I studied him to be able to recognize him in case I ever saw him again." (R.9).

After having been pulled from the car accused's two companions took her by each arm and walked down the hill into the bush followed by Lieutenant Engels, accused bringing up the rear. About 15 yards from the car they stopped. Mademoiselle Mounien did not walk down the hill "willingly". Accused then pushed the girl to the ground, according to his own statement, "with very little force" (Ex. A), and according to her testimony, "strongly". Accused then "pulled down her panties" and pushed her legs apart, "with very little force" (Ex. A). She did not, of her own free will, "spread her thighs." (R.22). She did not offer more resistance, "Because I couldn't--there were three." She was afraid they might do her injury (R.22). She did not cry out because she was afraid "they would hit me" (R.23). Accused then accomplished his purpose. The victim, "lying still, she didn't move " (Ex. A). Thereafter, each of accused's companions accomplished the same act. The last one, after having accomplished his purpose, gave the victim some money and accused upon being advised that the second one did not have any money stated, "Then I'll go down for double" (R.6) and gave the girl two bills, amount unknown. The girl stated she kept the money, "To revenge myself" (R.25). Accused then offered Lieutenant Engels some money which he refused. While accused's two companions were accomplishing their purpose, accused and Lieutenant Engels were engaged in a casual conversation during which accused asked Lieutenant Engels if he was going to turn him over to the military police. Lieutenant Engels replied, "No". He testified that he was afraid that if he said, "Yes", he might be unable to get to the military police (R.6). The Lieutenant was then asked by accused, "Officer, would you call that rape, we paid her", to which he replied, "No, 'you paid her, what good would it do, I don't know you anyway.' " The evidence disclosed that Miss Mounien spoke and understood very little English. Lieutenant Engels spoke French. The evidence likewise disclosed that neither accused nor his two companions were armed.

Accused and his two companions then walked down the hill toward the town, "walking as fast as we could in order to get away from them" (Ex. A). Seeing the Lieutenant and Mademoiselle Mounien in the jeep, "heading for town", they split up, accused and one companion taking one side of the street and the other one going to the park where the three had agreed to meet, giving as their reason,

"we don't want to get picked up by the MP's" (Ex. A). Accused and his companion then proceeded to the park where they failed to meet the third party. They then walked past the service club, "avoiding the MP quarters," and then caught a ride and returned to camp" (Ex. A). Upon reaching town Lieutenant Engels reported the incident to the military police authorities.

The written confession of the accused was introduced in evidence. As it is, in part, at variance with the testimony of witnesses for the prosecution and in part explains and supplements such testimony, it is deemed essential to set it out in full:

"I, Frank Fisher, Jr., Private, ANS 18165458, 211th Port Batallion, Company D, having been warned of my rights and having had read and explained to me the 24th Article of War, do freely and voluntarily and without promise of reward or leniency or threat of punishment, make the following statements:

On Sunday, May 2, 1943, Loury and I got a pass and came to town. I went to the Service Club and wrote two letters. Loury came in the Service Club about 15 minutes later, he and I went over to the beer garden. Over there, we met another man. We talked about women and screwing. Then we planned to go out to an "off limits" place by the carnival and screw some girl, I don't know her name. On the way to the carnival, we three talked of the girls we knew in the town of Noumea and this girl we intended to screw at the "off limits" place by the carnival. When we got to the carnival, we could not get her. So, we three got together and I said that we will fuck something. The other two agreed. So we walked down the hill to a recon. We got in the recon, there was two colored soldiers in the recon. We got in the recon and rode up the hill. Just a little before we got over this hill, I sees a man and a woman coming out of the bushes. I says, "there is a man and a woman" and demanded the driver to stop. He stops and I says, "we are going to have this woman" and goes over to the side this woman is sitting in the Jeep and flashes my flashlight in the soldier's face and says, "stand still." Then I walks around the Jeep to where the soldier was standing and says, "we are going to have this woman." I says again, "we are going to have this woman" and the soldier says, "suppose she don't want to?" I says, "I will guarentee that I will lay a $20.00 bill on her after we are finished." Before this he says, "she is only a kid." The two smaller fellows says, "you had her didn't you?" I first heard Loury say that. Then I asked him if he had had it. He said, "yes" and I says, "we are going to have her too." I says, "my dink is hard and I am going to get it soft." I don't remember now what we said then. Anyway, I says, "I am going to court 1-2-3-4 and back off" and I did. I had the flashlight in my right hand and I back off pointing down to the ground with my left hand, and before then I had recognized the soldier as being an Officer. Then I said, "Officer, you know what a 45 will do?", but I didn't put my hand in my shirt. I had no gun. I then goes back to where I backed off from and talked with this Lieutenant, trying to get him to get the girl out of the car. He then said something in French, what it was I don't know. She says something else in French, I don't know what that was, but she put her five fingers extended. He says something else, I don't know what that was. She said something, I don't know what it was, but she had her three fingers then extended, with two bent over her little finger. Before that I reached in the Jeep and takes the keys out. The Officer says, "don't take my keys", so I gave them back to him. Then we started talking of who was going to get the woman out of the Jeep. I says, "I can't speak French, neither can the other guys." "You'll have to get her." So Loury was sitting on the ground to my left, the little guy was behind me. So I says, "boys

are you willing?" They says, "yes". Then I don't know just what happened then, but anyway, shortly after that I said to Loury, "Loury, are you yellow?" He said "no" and got up. When I said "boys, are you willing" he got up, but he didn't come over to the Jeep, so he sit back down and I said something to the Officer, I don't know what it was. So, then I looked over at him and says, "Loury, are you yellow?" and he says "no". He gets up, comes over to the Jeep, gets the woman by her right hand. The little guy goes around the other side of the Jeep, what he was doing I don't know. Loury says when he grasps the woman by the right hand, "Madamoiselle, zig-zig?" What she says, I don't know, it was in French, and I says, "I don't want to put my hands on her". Then I talks to the Lieutenant again to get him to get her out, and then I turns the light off, put it in my right hip pocket. Loury is still holding her hand. I puts my arms around her. She never cried, didn't resist any at all. So I and Loury lifted her out of the Jeep, what the little fellow was doing, I don't know. She gets down on the ground. The Officer, before that said something in French, caught her right hand, but don't know what it was. Anyway, Loury and I got her out of the Jeep down on the ground, and the little guy comes around and takes her by the left arm and starts walking on down the hill, which he used a little force, so did I and Loury taking her out of the Jeep. The little guy and the woman was in front. I was behind them, Loury was behind me, the Officer was behind Loury, that put him on the end. Why I know this Officer was on the end, the French girl said something in French, what it was I don't know, but she and the boy stopped and I stopped and looked around and said, "Officer, come on." He said he was coming. We goes on down the hill, partly up the other hill and the little guy and the woman stops, and I stop. Then Loury walks up above me, and the Officer walks up with us, hands in his pockets, stood for a second or two and then sit down. The little guy turned the woman loose. Loury came up and grabbed the woman. He said he was going to screw her first, so he said something and I repeated the same words over, so he turned her loose and he went and sit down. They were all sitting down, there was only two of us standing there, that was the French girl and I. The French girl pulls up her dress and pulls her panties down near her knees. They I lays her down with very little force and she draws her legs up and pulls her pants off. Then I tried to lay down on her, but her legs was too close together. So I pushed them apart with very little force. Then I tried to get it in, but I couldn't, so she puts it in. Before that, she had pulled her panties off and laid them on the ground. I started screwing her, she was laying still, she didn't move. She did not cry, resist, or anything, and when I finished screwing her, I got up. I had no more than got my dick in my pants and started to button them up, before Loury was down there screwing her. So I sit down by the Lieutenant and we was talking of where he was from, he says Newark, and I says, "Newark, New Jersey". He says "yes". We spoke of Chicago, Louis' Chicken Shacks, mostly the one in Chicago, and he knew a little about the one in Detroit. So while talking, the Lieutenant and I, I looks up the hill. I sees a light, so I turns my light on, got up and walked about 5 or 6 yards up the hill. My light was much brighter than the other light and I seen one person, which was a man, either a Javanese or French, I don't know. He had on a brown shirt, with the sleeves short, don't know whether the cuffs were turned under or what, and a pair of light trousers. Anyway, when he sees me, he turns and walks in the same direction that he came from. I watches him. He had a flashlight in his right hand and a black or dark blue raincoat swinging on his left arm. I watches him until he dissappears around a tree and then I turns and walks back where the Lieutenant was, Loury was still screwing her, and we talks some more about Chicago and Detroit, and by that time Loury had finished and the little guy came down, so he layed the woman. Now the Officer, I don't know why he did it, said I looked like a lawyer, so I laughed and said, "have it your way", and it wasn't so very long after then that this other guy had finished and came down the hill to where we were.

He wasn't anymore than 5 feet from us, neither was I at the time I layed the woman. The woman walks down to the Officer and stands so close that her shoulders touch his. Then I thinks of mentioning paying for it, so I put my right hand in my right shirt pocket and gets my wallet. I get a bill but don't take it out. I thought, why I don't know, and asked the little guy if he was going to pay her. He said, "no, he hadn't got paid." So I says, "well, I'll go down for the count of two." I then take the two bills out of my pocketbook. I don't know whether it was two one's, or a five and a one, but I gave it to the woman in her right hand, then she moves her hand up to her bosom. I don't know whether she put the money in there or not. Then Loury gives her a bill, which she takes in her left hand and wads it up. The Officer was then standing there with his right hand in his pocket, the left hand out. One of the fellows mentioned, "what do we owe you?" so I says, "yes, we'll pay you." Then he says, "you don't owe me, you paid the girl" and then somebody I don t know who, but the word was spoken that, "Officer, would you call that rape, we paid her." He said no "you paid the girl." The little guy says, "are you going to tell the MP's?" The Officer again said no "you paid her, what good would it do, I don't know you anyway." So we didn't shake hands with any of them. The Officer and the woman turned to walk away. He had some difficulty in getting back to the Jeep. I heard the small bushes crushing under his feet. He asked me to hold the light so that he and the woman could see how to get back to the Jeep. I holds the light until I figure they was safe, then I turns it off. We don't run down the hill, we walked as fast as fast as we could in order of getting away from them. We walks on down to the main highway, which we call the Nickel dock road. Loury then stops and says, "I think it's best for us to split up." I says, "why?" He says, "didn't you see that Officer and woman in that Jeep heading up town?" "They are going to get the MP's. We agreed. He got on one side of the street, the other guy and I on the same side that we were on. While crossing the street, I said to the little guy, "that Loury and I did go together a lot of times, he knows the ropes." Then we goes on up the street until we come to the Officer's Club, then we turns to our left and goes on to the city. Before departing down there where Loury said he seen the Officer and the woman, we agreed to meet in the park. This little guy and I goes on to the park, it was raining then. We did not see Loury. We looked around for about 10 minutes and the little guy says, "probably he stopped out of the rain." So we walked back up to the corner looking for him, but didn't see him. There was two white soldiers standing there, one had a wristwatch. I asked him if he had seen a colored boy pass here recently. He said no. Then I asked him what time it was. He says 10 till 10. We stands there a second or two and I tells the little guy we are going down and look and then we will go to camp, because we don't want to get picked up by the MP's. So we goes back down to the park, looks, but did not find Loury. So he says, "he wont get caught, he is alright, we had better go on to camp." So we goes out the side entrance of the park to the corner, the little fellow says, "you don't want to go that way. I says, "why?", "you'll pass the MP quarters." So we turns and went up to the next corner and came on back by Service Club and we got to the place where they were erecting a new building, down by the first pill box. We catches a ride. We goes on out near the camp where the road divides, one going to his camp, the other going by mine. So we stopped the truck and we both get off. He told me again that he was from Chicago. I asked him where he was located. He says 362nd. I don't know whether he told me his name or not, but we talked about the woman. He said that we had something good and I said, "oh, it will do." So he agreed to come over to my tent the next day and I told him that I lived in tent 22, the last one in the 3rd row. I said, "come in and ask for Freddie, if I wasn't there." So then he walks on off. I don't know why but my mind tell me to watch him and I did. I stands there with my light on and watches him until he vanishes near the 3rd or 4th tent on the first or second row."

Accused elected to remain silent.

4. Rape is the unlawful carnal knowledge of a woman by force and without her consent (par. 148b, M.C.M., 1928). That the accused carnally knew Mademoiselle Mounien is established beyond question. The only question for the consideration of the Board of Review is whether the act was committed by force and without her consent. The offense is proven when carnal intercourse is effected with a woman without her consent, although no positive resistance of will can be shown (sec. 700, p. 941, Wharton's Criminal Law). It is necessary, however, that she resist to the extent of her ability at the time and under the circumstances (Mills v. United States 164 U.S. 210, 212; par. 148b, M.C.M., 1928).

> "Absence of free will, or non-consent, on the part of the female, may consist and appear in her making resistance until overpowered by physical force; in her submitting because, in view of the strength and violence of her assailant or the number of those taking part in the crime, resistance must be useless or perilous; * * * * *" (p. 678, Winthrop, Mil. Law & Prec.).

> "While the degree of resistance is an incident by which consent can be determined, it is not in law necessary to show that the woman opposed all the resistance in her power, if her resistance was honest, and was the utmost, according to her lights, that she could offer". (sec. 701, p. 944, Wharton, supra).

Whether or not the woman exercised all the resistance within her power under the circumstances, and whether her resistance ceased because it was useless and dangerous or because she ultimately consented is a question for the jury [in this instance, the court-martial] to decide (Mills v. United States, supra; Reg. v. Hallett, 9 Car. & P. (Eng.) 748; Turner v. Pope, 33 Mich. 363).

A consideration of the entire testimony before the court, more especially the statement of the accused, reveals that early in the evening in question he was possessed with the desire to have sexual intercourse. Unable to satisfy his lust at an "off limits" place, accused, saw a man and a woman in the country and immediately announced, "We are going to have this woman". By subterfuge he put her escort in fear. He forceably and against her will removed her from the car. She was then forced to walk into the bush where accused "with very little force" in his words, and "strongly" according to the testimony of the girl, pushed her to the ground, forcibly spread her legs apart, and accomplished his purpose. Accused well knew that he had forced himself upon his victim without her consent and that his giving her money subsequent to the act was not in payment therefor but was an endeavor to exculpate himself. Accused was fully cognizant of his unlawful acts. His question to the Lieutenant asking if his actions constituted rape, and his endeavor to change the nature of his deeds by both giving his victim, and offering the Lieutenant money, together with the inquiry as to whether or not the military police would be notified, all show that his original intentions had been consummated with full knowledge of their subsequent consequences. His attempts to avoid detection when he left the scene likewise were an acknowledgment of guilt.

The victim, a 17 year old girl, testified that she did not consent to the act. Her resistance was limited by fear for her safety because of the number of her assailants. She was on a lonely road and could not expect that her cries for help would be heeded, since her escort, an officer of the army, instead of coming to her aid, was himself so cowed by the accused that he directed her to comply with accused's demands. Having seen the witness before them and heard the evidence adduced, the court was fully warranted in finding that Mademoiselle Mounien did not consent to the assault made upon her. Such findings are conclusive upon the Board of Review. The crime was committed with

coolness and deliberation. There are no extenuating circumstances. The evidence fully supports the findings of the court.

5. For the reasons stated above the Board of Review is of the opinion that the record is legally sufficient to support the findings of the court and the sentence.

JOHN A. STAGG, Judge Advocate.
Col., J.A.G.D. - Absent

Graham J. Chick, Judge Advocate.
Lt. Col., J.A.G.D.

James O. Murphy, Judge Advocate.
Lt. Col., J.A.G.D.

WAR DEPARTMENT
Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

20 July, 1943.

CM A-572

UNITED STATES v. Private CLARENCE V. ROUS (34186638), Headquarters and Headquarters Squadron, 35th Service Group, AAF.	Trial by G.C.M., convened at A.P.O. 710, 1 May, 1943. Dishonorable discharge, total forfeitures, confinement for six months. The stockade, A.P.O. 710.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The Board of Review has examined the record of trial in the case of the soldier named above and submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 86th Article of War.

Specification: In that Private CLARENCE V. ROUS, Hq & Hq Sq., 35th Service Group, being on guard and posted as sentinel, at Charters Towers, Qld., on or about 12 February, 1943, was found sleeping upon his post.

The accused pleaded not guilty to the charge and specification and was found guilty as charged. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for six months. The reviewing authority approved the sentence and ordered its execution but remitted that portion thereof adjudging dishonorable discharge, and designated the stockade, A.P.O. 710, as the place of confinement. The result of the trial was published in General Court-Martial Orders No. 187, Headquarters, United States Army Services of Supply, A.P.O. 501, 29 June, 1943.

3. The record discloses by competent evidence that accused, being on guard and posted as a sentinel as alleged, was found sleeping upon his post.

4. The only question before the Board of Review is the legal sufficiency of the sentence as approved by the reviewing authority. The court sentenced the accused -

> "To be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor * * * for six (6) months."

The action of the reviewing authority in pertinent part, states -

> "* * *the sentence is approved and will be duly executed, but that portion thereof adjudging dishonorable discharge is remitted. * * *"

The action of a reviewing authority in approving a sentence and simultaneously remitting a part thereof is legally equivalent to approving only the sentence as reduced (par. 87b, p. 77, M.C.M., 1928). The legal effect of the action of the reviewing authority in the instant case was only to approve and order executed a sentence involving confinement at hard labor for six months and the forfeiture of all pay and allowances. As a court-martial may not, by a single sentence which does not include dishonorable discharge, adjudge against an accused forfeiture of pay at a rate greater than two-thirds of his pay per month (par. 104b, M.C.M., supra)(which limitation is applicable to the action of the reviewing authority (par. 87b, p. 76, M.C.M., supra)), the sentence as approved is illegally excessive.

The record discloses that the pay of accused is $60 per month, from which there are no mandatory contribution deductions.

5. For the reasons stated, the Board of Review is of the opinion that the record is legally sufficient to sustain the findings but that the approved sentence as reduced is legal only to the extent that it imposes confinement at hard labor for six months and forfeiture of $40 per month for six months.

JOHN A. STAGG, Judge Advocate
Col., J.A.G.D. - Absent.

Carlton J. Shurtz, Judge Advocate
Lt. Col., J.A.G.D.

James O'Murphy, Judge Advocate
Lt. Col., J.A.G.D.

WAR DEPARTMENT

[redacted]

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

A.P.O. 924,
22 July, 1943.

SUBJECT: Record of trial by general court-martial in the case of Private Clarence V. Rous, 34186638, Headquarters and Headquarters Squadron, 35th Service Group.

TO : Commander-in-Chief, Southwest Pacific Area, A.P.O. 500.

1. Inclosed is the record of trial described above and the holding of the Board of Review in this office that the record of trial is legally sufficient to sustain the findings but that the sentence as reduced is legal only to the extent that it imposes confinement at hard labor for six months and forfeiture of $40.00 per month for a like period. I concur in that holding and recommend the necessary corrective action to vacate the illegal portion of the sentence.

2. A form of action effectuating this recommendation, together with a form of general court-martial order publishing such action are inclosed for your convenience in the event that you concur in the action recommended.

ERNEST H. BURT,
Brigadier General, U. S. Army,
Assistant Judge Advocate General.

4 Incls:
Incl. 1 - Record of trial.
Incl. 2 - Holding of Board of Review.
Incl. 3 - Form of action.
Incl. 4 - Form of general court-martial orders.

(So much of sentence as exceeds confinement for six months and forfeiture of $40 per month for like period vacated. GCMO 5, USAFFE, 27 Jul 1943)

WAR DEPARTMENT
Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

27 July, 1943.

CM A-582

UNITED STATES v. Private First Class WILLIAM E. SUGGS (34113985), Headquarters Battery, 129th Field Artillery Battalion.	Trial by G.C.M., convened at Camp Cable, Queensland, Australia, 22 February, 1943. Dishonorable discharge, total forfeitures, confinement for the term of his natural life. United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private William E. Suggs, Headquarters Battery, 129th Field Artillery Battalion, did, at Waterford, Queensland, on or about December 10, 1942, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private George Wascavage, a human being, by stabbing him with a knife.

The accused pleaded not guilty to the charge and specification and was found guilty as charged. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence shows that at 6:00 o'clock P.M. on December 10, 1942, accused and five companions, all artillerymen from the Headquarters Battery, 129th Field Artillery, left camp and went to Logan Village where they had a few beers.(R.35). They then went to Waterford, about 6 miles away, and went to a place called "Sadie's Bar" arriving about a quarter past 8:00 o'clock P.M (R.36). Accused, a left-handed person, had a knife four or five inches long in his left hip pocket, in a scabbard (R.108, 162). Shortly thereafter three

M.P's entered the bar (R. 37). The M.P's were off duty, were unarmed, and were not wearing armbands (R.38). All were drinking beer. After about a half hour the M.P's left to get supper, the six artillerymen remaining at the bar. The three M.P's returned to the bar about 10:00 o'clock P.M. In the meantime the six artillerymen had been drinking beer, eating sandwiches (R.167) and each had a glass of wine; Artilleryman Leary and accused were "talking loud" (R.107). A conversation arose about getting a ride back to camp. A taxi driver in a room back of the bar was interviewed by several members of the group, but refused to drive them back to camp (R.65). Shortly thereafter accused walked up to M.P. Polzin and said "Youse MP's don't do anything right, and youse don't back up what you say" (R.67, 104). Polzin then told accused to "get out" (R.68, 104, 136). Accused and Artilleryman Tyhasky without further argument then left the bar room at about 11:00 o'clock P.M. and went outside to the latrine (R.109-111). Tyhasky stated he was going back to camp and asked accused to go with him but accused refused, stating that he was going to stay and get a ride. Tyhasky then left accused "standing in the middle of the road" and started walking back to camp. At this time Tyhasky did not think accused drunk but he /accused/ was "feeling good".(R.42). About two minutes after accused and Artilleryman Tyhasky had left the bar (R.68) deceased and Artilleryman Hauge were engaged in a conversation in the bar room "in a low voice", when deceased took Hauge by the arm and "led him out" (R.69, 105, 128, 136, 168). At this time Hauge was drunk and deceased told him "You better go outside and get some fresh air" (R.168). When Artilleryman Hauge and deceased reached the steps of the poolroom door (R.168) Hauge heard accused say "Come on out here, you son of a bitch (R.170) and saw him (R.364) as he came "into the light" shining from the poolroom (R.365, 367). Deceased went forward saying "Get your hands out of your pocket" (R.173) and then Hauge heard a "thud" and somebody running on gravel and in a matter of seconds he heard deceased say "I have been stabbed" (R.73, 173). About two minutes after deceased and Hauge had left the bar room, M.P. Polzin stated to M.P. Peduto, "You had better go out and see what's going on" (R.71). Peduto left the bar and went to the door of the poolroom facing the street. The lightsover the pool table shone about eight or nine feet into the street (R. 73, 78). He saw the back of deceased about nine or ten feet away and "at that moment" deceased spun around to his left and with his right hand grabbed his right side, and ran to Peduto saying "I am stabbed" (R.72). M.P. Peduto saw a figure in front of deceased "up to his belt, up to his waistline" dressed in cottons, facing deceased about a "couple of feet" away (R.80) just a little to the left of him (R.89). The light from the poolroom only extended this far. Artilleryman Hauge was wearing green denims clothes (R.108), accused being the only one in complete cotton uniform (R.165). Hauge then walked into the poolroom where he met M.P. Peduto who said to him "Where's the knife?". Hauge replied "What knife?". Peduto then hit him, knocking out several teeth (R.76). Hauge was subsequently relieved of a knife by the M.P's (R.361).

Immediately across the road from the "pub" was an old empty blacksmith's shop about 45 yards from the poolroom door in the Waterford Hotel. Mr. William L. Hanlon, a cattle buyer, had a drove of cattle at the dip yards near the Waterford Hotel, and was spending the night in the blacksmith's shop as it was raining (R.144). The shop was open and there was nothing to obstruct his view of the hotel. The rain stopped about 7:00 o'clock and the stars came out (R.145). Witness could not sleep as men were going in and out of the hotel (R.146). About 11:00 o'clock P.M. witness saw three men come from the hotel, walk out to the road and "the tallish man walked back and said he would get the rest of the boys" or "get to camp boys" (R.147-148). Then he heard someone say "Who's got that knife?", "Take your hands out of your pockets" (R.149) "I have been stabbed" and one man then "ran away towards the bridge" (R.148). Witness stated "It seemed like the same voice that was doing the talking about asking the boys to go home."

Deceased then ran into the hotel and the bar tender, Mr. Gale, after first calling M.P. Headquarters, reporting the incident (R.332), took deceased in the taxi and started for camp. Meeting a military conveyance (R.352) deceased was transferred and carried to a military hospital. Examination showed a stab wound in the upper right abdomen about an inch and a half in length pointing toward the navel and inside about three inches, cutting a portion of the rib margin and also cutting the mescolon and large bowel. Deceased was operated upon but developed pneumonia and died on the 14th December, 1943, death being directly caused by the stab wound (R.15).

Staff Sergeant Sam C. Egan, M.P. Platoon, 32nd Infantry Division, testified that in response to the call of Mr. Gale (R.154) he arrived with a patrol about 12:00 o'clock midnight. Artilleryman Hauge was there at the time and witness took from him a large hunting knife in a scabbard. The area was then searched and five of the original group were found. Accused was found across the bridge from the hotel. Upon being searched no knife or scabbard was found on him. Artilleryman Tyhasky was picked up at 12:30 A.M. about six or seven miles from the scene on the way back to camp. Upon being searched he was relieved of a knife identical with the one seen on accused (R.44).

There was testimony that the six artillerymen were drinking to excess and annoying the bartender because he would sell them no more wine. One stated that knives would be used if he continued his refusal (R.134-140). Although the three M.P's were not drinking to excess (R.315) bad feeling existed between the two groups (R.127). The prosecution introduced in evidence two confessions of accused (Exs. H and I) dated December 19, 1942, and December 22, 1942, respectively. Among other things accused stated therein:

"* * *I remember one of the MP's told me to leave, I think it was the tall one at the extreme left of the bar as you face it. I finished the half glass of beer I had and set the glass on the bar. Then I walked out of the poolroom door onto the street. I was on my way to catch Tyhosky and must have taken eight steps from the door and someone hit me on the back of the head, back and above the right ear. It didn't take over ten seconds for me to get from the bar to where I got hit. Then I stumbled two steps forward out into the road and took my knife out with my right hand. The scabbard was on my belt over my right hip pocket. I turned around holding the knife in my right hand with the hilt near my belt and the point of the blade pointing about straight out. Then some one rushed me with both hands covering my face and his body pushed my body enough to get me off balance and I threw my hands backwards and sat completely down and caught myself with my hands. I didn't see the man at all, I might just as well have had my eyes closed for all I saw - it happened just that fast. Then I got up and ran, throwing the knife as I started running. I couldn't see where I threw it - it was dark - but I threw it to the right as hard as I could into the field opposite the tavern, with my left hand. I ran all the way to the next pub. I hit the bridge on the way. I had one drink in the pub. I remember seeing two sailors there. Then I went outside and sat on the porch for a while. I was sitting on the edge of the road when the MP's came to the pub, then they crossed the bridge to the other pub (Sadie's) I sat there until they came back by and stood up and was trying to thumb a ride and they (MP's) picked me up. It didn't seem like over ten minutes from the time the MP's stopped at the first pub until they came back and picked me up. * * *" (Ex. H).

"I, William Suggs make this supplemental statement. The blow on the back of my head made more of a thud than a slap. It was sore there for a couple days but didnt make any lump or bumps. This sore spot was about 3 inches by one inch above and to the rear of the right ear. I did mention it to the police for the reason before stated, I didnt think there was much to it, and didnt want to be held up from leaving with my battery. The knife and scabbard were on my right hip. As I stumbled forward I brought the knife out of the scabbard with my right hand. I had time only to get it out of the scabbard. I held it with the little finger next to the end of the handle and the thumb and index finger nearest to the blade. The knife was in a position just above my belt line. Just as I turned around the hands came up on my face, finger tips just in the eyes, one hand on each side of the nose. Just at this time I remember his elbows, both of them came on my chest. I felt them when the elbows pushed into my chest one on each side of my chest. This pressure pushed my head and chest backwards. Then his body hit me from my ribs down, and I fell backward to the sitting position, with both hands back of me. The knife was still in the right hand. I didnt say anything, and I didnt hear anybody else say anything after I left the poolroom door. I didnt know Hauge was outside. I didnt hear anybody or see anybody come out. I didnt know until I was picked up by M.P.'s on the other side of the river that anybody was hurt, because he walked away from me back to the tavern.

The blow caused me to quicken my pace. It was not sufficient to daze me or cause me to fall to the ground. I didnt have any idea what it was that hit me. The hit scared me. I didnt have any idea what it was. My idea was to turn around and prevent any further blows. If I had recognized any of the fellows in the pub I would have run, because I have never had any fight with the M.P.'s. I didnt have time to think what I would do. It was surprise and excitement in the dark. I didnt think that anyone was trying to kill. I didnt fear for my life. I thought I might suffer some bodily injury, because if they didnt intend to injure me they wouldnt have jumped on me. I throw a baseball with my left hand and changed the knife from my right to my left hand just as I started to run, and threw it when I had taken approximately five steps. I threw the knife away because I was afraid I had cut him because he came so close to me, and I didnt want to get caught with the knife on. I left the place because I didnt want any trouble. There wasnt any trouble up to the time I left, but there might have been if I hadnt left when they told me. I didnt see anybody on the outside of the pub. As far as I know everybody else was on the inside." (Ex. I).

4. The evidence for the defense to all intents and purposes is the same as that of the prosecution up to the time when the three M.P's arrived at "Sadie's Bar" at the Waterford Hotel, after having returned from eating supper (R. 241). Artilleryman Leary testified that he and Artillerymen Haines and Sanoff were the only ones at the bar when he heard a door open. Prior to this time "Suggs was getting noisy" (R.261). Leary walked from the bar into the poolroom when deceased came in with his hands clapsed over his belt in front. Leary asked "What's the matter?" Then someone hit him, completely knocking him out (R.249). When he came to, Haines and Sanoff were over him and Hauge was standing nearby, bleeding at the mouth with some of his teeth knocked out (R.249-250). He then, with Haines and Sanoff, went outside and seeing the M.P's from the station coming they ran and were all subsequently picked up by the M.P's. (R.250). Sanoff was sitting in the poolroom drunk when the incident occurred. He remembers nothing except hearing Artilleryman Leary ask what was wrong. He did not recall being hit by anyone (R.274). At no time during the evening did he observe any trouble between the two groups (R. 280). When he heard shots he ran and was subsequently picked up by the M.P's (R.277).

Artilleryman Haines was in the bar room when he heard someone hollering about someone being stabbed (R.296). He went from there to the poolroom and saw Leary lying near the pool table. At this time Hauge came in from the outside with his mouth bleeding (R.301). Accused was picked up by the M.P's while standing on the porch of the hotel (R.306). Witness stated that Hauge and Sanoff were definitely drunk (R. 309).

Accused elected to make an unsworn statement. He stated that he was positive that he did not cut anybody. That the two previous statements he signed (Exs. H and I) were "brought out in such a way" that it was misunderstood what he had intended to say. He threw his knife away because he realized what he might have done, but he did not mean he thought he did it. That the man who hit him could not have come from the "pub" as he would have seen him. That after Tyhasky left him he returned to the "pub" and saw it was 10:30 o'clock. That he left in not over ten minutes thereafter and when he reached the "pub" beyond the bridge it was twenty minutes to eleven.

5. "Murder is the unlawful killing of a human being with malice aforethought"* * *

"Malice aforethought. - Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before the commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. (Clark)

"Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused:

An intention to cause the death of, or grievious bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation): knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grevious bodily harm is caused or not or by a wish that it may not be caused; intent to commit any felony * * *". (par. 148a, M.C.M., 1928).

Artilleryman Hauge heard accused say "Come on out here you son of a bitch". He saw accused and recognized him. He saw deceased approach accused saying "Get your hands out of your pockets" and immediately he heard a "thud" and deceased say "I am stabbed". He then heard someone running. M.P. Peduto saw a man "up to his belt - up to his waistline" dressed in army cottons. Accused was so dressed. Mr. Henlon heard a voice say "Take your hands out of your pockets" and "I have been stabbed" and then saw a man as he ran away towards the bridge", thus corroborating Hauge's testimony, who, though intoxicated, definitely testified to the facts fully proven by other witnesses. All other five artillerymen are accounted for as not being near the scene of the crime except Hauge who was dressed in green denims. He was just outside the door some ten feet or more from both accused and deceased.

Accused himself supplies any questionable evidence. He admits drawing his knife and being in close contact with a person, subsequently proven to be deceased. He admits running "toward" the bridge and throwing away his knife. He testified that the knife scabbard was attached to his belt but when apprehended it was not found on him, the inference being that he likewise dispossessed himself of this evidence. While denied by the accused that he had his knife in his left hand, it was established that he was left-handed and the physical facts are clearly susceptible that deceased was stabbed by a left-handed person. Accused admits he threw the knife away with his left hand. Accused had had no trouble with deceased. He had had words at the bar with M.P. Peduto, who was standing in the poolroom door and was clearly visible. Even though his remarks were addressed to M.P. Peduto, if he killed deceased in the manner alleged he is equally guilty.

The evidence is sufficient to support the findings of the court that deceased met his death from a stab wound in the abdomen at the hands of the accused. There is no evidence that Wascavage provoked the accused, or gave any cause for the unlawful assault upon him. The record contains sufficient evidence to support the findings of the court that the homicide was committed by accused under such circumstances as to, in law, constitute malice aforethought. Such an act constituted murder in violation of Article of War 92.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence.

JOHN A. STAGG - Absent, Judge Advocate.
Col., J.A.G.D.

Arthur J. Lentz, Judge Advocate.
Lt. Col., J.A.G.D.

James B. Murphy, Judge Advocate.
Lt. Col., J.A.G.D.

WAR DEPARTMENT
Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

CM A-584

20 July, 1943.

UNITED STATES v. Second Lieutenant Raymond J. Desjardins (0-1698200), Headquarters, Americal Division.	Trial by G.C.M., convened at Headquarters, Americal Division, A.P.O. 716, 7 June, 1943. Dismissal.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Raymond J. Desjardins, then of Troop A, Mobile Combat Reconnaissance Squadron, now attached to Headquarters, Americal Division, did, at Guadalcanal, Solomon Islands, on or about March 21, 1943, gamble with Corporal Robert M. Melendez and Technician 5th Grade Gilman M. Iverson, both of Troop A, Mobile Combat Reconnaissance Squadron.

Specification 2: In that Second Lieutenant Raymond J. Desjardins, then of Troop A, Mobile Combat Reconnaissance Squadron, now attached to Headquarters, Americal Division, did, at Guadalcanal, Solomon Islands, between December 25, 1942, and January 19, 1943, gamble with Corporal Charles E. Kaltenbach, now of Headquarters Company, 1st Battalion, 132d Infantry, then of Troop A, Mobile Combat Reconnaissance Squadron.

Specification 3: In that Second Lieutenant Raymond J. Desjardins, then of Troop A, Mobile Combat Reconnaissance Squadron, now attached to Headquarters, Americal Division, did, at Guadalcanal, Solomon Islands, between February 25, 1943, and March 6, 1943, gamble with Corporal Charles E. Kaltenbach, now of Headquarters, 1st Battalion, 132d Infantry, then of Troop A, Mobile Combat Reconnaissance Squadron.

CHARGE II: Violation of the 95th Article of War.

Specification 1: In that Second Lieutenant Raymond J. Desjardins, then of Troop A, Mobile Combat Reconnaissance Squadron, now attached to Headquarters, Americal Division, did, at the bivouac area of Troop A, Mobile Combat Reconnaissance Squadron, on or about October 28, 1942, accompany Corporal Lloyd G. Brunsvold, Troop A, Mobile Combat Reconnaissance Squadron, on

a visit to a notorious Javanese prostitute, at Ouaco, New Caledonia, for immoral purposes.

Specification 2: (Finding of not guilty)

Specification 3: (Finding of not guilty)

Specification 4: (Finding of not guilty)

The accused pleaded not guilty to all charges and specifications and was found guilty of Charge I and its three specifications and guilty of Charge II, Specification 1, except the word "notorious". He was sentenced to be dismissed the service. The reviewing authority approved the sentence and the confirming authority confirmed it. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence shows that accused was a member of Troop A, Mobile Combat Reconnaissance Squadron, from October 29, 1942, to June 7, 1943. That from January 19, 1943, to March 6, 1943, the unit was located at Guadalcanal, Solomon Islands. Between February 25 and March 6, 1943, accused engaged in a gambling game, to-wit, "poker", with Corporal Charles J. Kaltenbach and other persons with limits of one dollar ante and two dollar bets (R.29). Between December 25, 1942, and January 19, 1943, accused engaged in a gambling game with Kaltenbach, to-wit, "cribbage", near Hill Number 27, Guadalcanal, Solomon Islands, in which game accused won from Corporal Kaltenbach the sum of thirty-five dollars (R.32). On or about March 21, 1943, accused approached a party of enlisted men at Guadalcanal, Solomon Islands, who were engaged in a game of "poker". He asked to be allowed to sit in the game. His request was granted and he joined the game. The limit was one dollar ante and a five dollar bet (R. 11-13). The evidence concerning these three specifications of Charge I was undisputed.

On or about October 28, 1942, the unit of which accused was a member was located at Koumac, New Caledonia (R.33). On or about this date accused approached Corporal Lloyd G. Brunsvold, a member of accused's unit, asking him if he knew a girl whom they could go and see at night. Corporal Brunsvold replied in the affirmative. After supper accused called at the Corporal's tent in a "jeep". They drove seven or eight miles to the town of Ouaco (R.20-21). Corporal Brunsvold knew the house to be one occupied by prostitutes, having been there on previous occasions. The accused went in first and stayed some five or ten minutes and upon his return the corporal went in. The corporal admitted having intercourse while in the house (R.22). This testimony is uncontradicted. The accused elected to remain silent (R.49).

The evidence is clear and convincing that accused did, at the times and places alleged, commit the acts as set forth in the specifications of which he was found guilty. Gambling with enlisted men is clearly a violation of Article of War 96. His conduct in going to a house of prostitution with a corporal of his command is not that of an officer and a gentleman. It is true that the conditions under which accused was living were hard and taxing but not to such an extent as to excuse his conduct.

The evidence fully supports the court's findings of guilty. The sentence of dismissal is mandatory upon conviction of a violation of Article of War 95.

4. For the reasons stated above the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of the court and the sentence.

JOHN A. STAGG, Judge Advocate.
Col., J.A.G.D. - Absent

Nathan J. Roberts, Judge Advocate.
Lt. Col., J.A.G.D.

James A. Murphy, Judge Advocate.
Lt. Col., J.A.G.D.

(Sentence ordered executed.

GCMO 16, USAFISPA, 4 Aug 1943)

WAR DEPARTMENT
Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia

Board of Review

29 July, 1943.

CM A-602

UNITED STATES v. Private Edward R. Lowry, (36174135), 211th Port Company.	Trial by G.C.M., convened at I Island Command, A.P.O. 502, 14 June, 1943. Dishonorable discharge, total forfeitures, confinement for life. United States Penitentiary, Terre Haute, Indiana.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Edward R. Lowry, 211th Port Company, did, at A.P.O. 502, on or about May 2, 1943, forcibly and feloniously, against her will, have carnal knowledge of Louise Mounien.

The accused pleaded not guilty to the Charge and specification and was found guilty as charged. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The Reviewing Authority approved the sentence and designated the United States Penitentiary, Terre Haute, Indiana, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence shows that on the night of May 2, 1943, at some time prior to 10 P.M., 1st Lieutenant Robert L. Engels, accompanied by Mademoiselle Mounien, parked a "jeep" car on a side road about one-fourth of a mile from the main highway between Vallee des Colons and Coloniale, Route 1, Noumea, New Caledonia. The Lieutenant was standing by the side of the "jeep" and Mademoiselle Mounien was sitting behind the steering wheel (R.19). A reconnaissance truck drove up and three negro soldiers got out, approached the jeep, the largest of the three (Fisher), stated to Lieutenant Engels, "We are going to have this woman" (R.5). Lieutenant Engels replied, "No, you are not, she is with me. You go on and leave us alone" (R.6). "He was talking to me and said, "My cock is hard, and I intend to get it soft." * * * * * "We are going to have this woman" and I said, "No, you are not." I said to her, "Stay in the jeep". Fisher then said, "Officer, do you know what a .45 can do to you"? * * * "I want that girl out of the jeep" * * * "I will count three". I said, "She is not going with you." Accused at this time was down behind the jeep (Ex. A). Fisher then said to accused, "Are you yellow"? and told him [accused] to get the girl out of the

jeep. Accused, and another soldier, then went to where Mademoiselle Mounien was sitting behind the steering wheel and accused said to her, "Mademoiselle, zig-zig." (Ex. A). Accused testified she said, "No" (Ex. A), although the victim stated they said nothing to her (R.24). Fisher then ordered the Lieutenant to "come up and stand in front of the jeep. I'll get the girl." Fisher and accused then took her from the jeep, the third soldier at the same time pushing her (Ex. A).

Mademoiselle Mounien resisted the efforts of accused and his companion to take her from the jeep by holding on to the steering wheel and, "I hit him" (R.20), but she was powerless to prevent them taking her out of the jeep" (R.20). She had no opportunity to run away before she was taken into the bush and was "afraid they would hit me" (R.22). She told the officer she was "afraid". "She was pretty frightened. She grabbed me [Lieutenant Engels] by the arm when standing by the jeep, and she was sobbing a little bit" (R.13). The officer at no time offered her any assistance (R.23). He testified, "Well, I was afraid for the safety of the girl and myself. They might do something drastic and we wouldn't be able to get to the military police." (R.7). After having been taken from the jeep, accused and his smaller companion (R.20) made her walk about 15 yards into the bushes (R.21). Lieutenant Engels followed, Fisher bringing up the rear. She testified that she was "pulled" into the bushes, where the larger soldier (Fisher) pushed her to the ground, pulled off her panties, forced her to spread her legs by hitting her on the thighs (R.22), and accomplished his purpose (R.22). During this time, accused and his other companion were about a yard away sitting on the ground. When the first one had finished, the victim tried to get up but could not as "the other one [accused] came quickly." (R.25). He then accomplished his purpose as did also the third soldier(R.26). When the last soldier had accomplished his purpose he handed the victim some money (R.6) and one of the soldiers being asked by Fisher, "Are you going to pay the girl" replied, "No". Fisher then said, "I'll go down for double" and gave the girl some money (R.6). The victim stated she kept the money because, "I was angry at them, and I got my revenge" (R.22). After the incident one of them said to the Lieutenant, "You can't call it rape, because we paid the girl" (R.6-41), and then asked the Lieutenant if he was going to turn them in to the military police. The Lieutenant replied, "No." "I didn't want to do anything so I could get down to see the military police." (R.2).

The evidence disclosed that Miss Mounien spoke and understood very little English. Lieutenant Engels spoke French. It is likewise disclosed that neither of the three negro soldiers was armed. After the three negro soldiers left, Lieutenant Engels drove to town and reported the incident to the police and then took Mademoiselle Mounien to the hospital (R.29).

Accused elected to take the stand and testify. He admitted being one of the soldiers involved and of having asked the victim, "Mademoiselle zig-zig", to which she replied, "No." He assisted Fisher in getting the victim out of the jeep and admitted holding the victim's arm and taking her into the bushes (Ex. A). He had an argument with Fisher as to which of them would first have the girl but finally agreed that he [accused] would be the second one. Accused then sat down on the ground about four feet away with his back to Fisher and the victim (R.33). After Fisher had accomplished his purpose accused stated, "I went up to the woman and [Fisher] came back to where the officer was" (R.31). Accused then accomplished his purpose (R.33-4) and it was a "matter of seconds before the other soldier [the third one] got there" (R.34). Accused testified that the victim did not resist, (R.34) that when he had finished he gave her a dollar (Ex. A) and the victim said, "Thanks" (R.35). Accused denied any mention of a conversation relating to a .45 pistol and stated that when Lieutenant Engels was talking with Fisher the Lieutenant said, "There she is, she leads her own life. If she wants to do anything she can." (R.31). Accused admitted he was not drunk, but stated that he had slept off a drunk that afternoon (R.35). Accused with his two companions then left the scene and returned to camp.

4. Rape is the unlawful carnal knowledge of a woman by force and without her consent (par. 148b, M.C.M., 1928). That the accused carnally knew Mademoiselle Mounien is established beyond question. The only question for the consideration of the Board of Review is whether the act was committed by force and without her consent. The offense is proven when carnal intercourse is effected with a woman without her consent, although no positive resistance of will can be shown (sec. 700, p. 941, Wharton's Criminal Law). It is necessary, however, that she resist to the extent of her ability at the time and under the circumstances (Mills v. United States 164 U.S. 210, 212; par. 148b, M.C.M., 1928).

> "Absence of free will, or non-consent, on the part of the female, may consist and appaar in her making resistance until overpowered by physical force; in her submitting because, in view of the strength and violence of her assailant or the number of those taking part in the crime, resistance must be useless or perilous; * * * " (p. 678, Winthrop, Mil. Law & Prec.).

> "While the degree of resistance is an incident by which consent can be determined, it is not in law necessary to show that the woman opposed all the resistance in her power, if her resistance was honest, and was the utmost, according to her lights, that she could offer". (sec. 701, p. 944, Wharton, supra).

Whether or not the woman exercised all the resistance within her power under the circumstances, and whether her resistance ceased because it was useless and dangerous or because she ultimately consented is a question for the jury /in this instance, the court-martial/ to decide (Mills v. United States, supra; Reg. v. Hallett, 9 Car. & P. (Eng.) 748; Turner v. Pope, 33 Mich. 363).

From the evidence it appears that accused, with two companions, by concerted action, in turn ravished Mademoiselle Mounien, while her escort, a lieutenant in the Army stood idly by, attempting to excuse his reprehensible conduct by stating that he was "thinking about our safety". Accused admitted that he assisted in forceably removing her from the car after she had refused to consent to his request. He assisted in taking her to the bush where one of his companions (Fisher) pushed her to the ground and without her consent removed her panties, caused her to spread her legs apart, and accomplished his purpose. After Fisher had finished, accused, who had been sitting nearby, went to the victim so quickly that she could not arise and he accomplished his purpose. The third followed, "in a matter of seconds".

That the victim accepted money from the accused after the act is not a condonation of the offense and constitutes no defense thereto (sec. 707, Wharton's Criminal Law), except insofar as it may be considered evidence of prior consent.

The record contains evidence that force was employed by the three assailants acting toward a common end and that the victim did not consent. While the degree of resistance is an incident by which consent may be determined, whether or not the victim exercised all the resistance within her power under the circumstances is a matter solely for the court-martial to decide (Mills v. U.S., supra.). The court, having before it the witnesses and the evidence as to the force used and the resistance on the part of the victim, found accused guilty as charged. There being substantial evidence in the record upon which the court could predicate its findings, such findings are conclusive.

5. For the reasons stated above the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of the court and the sentence.

JOHN A. STAGG (Absent) Judge Advocate.
Col. J.A.G.D.

Lt. Col. J.A.G.D. Judge Advocate.

Lt. Col. J.A.G.D. Judge Advocate.

WAR DEPARTMENT
Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

6 August, 1943.

CM A-619

UNITED STATES v. Staff Sergeant LANFORD HALL (6956175), Company "D", 25th Medical Battalion.	)))))))	Trial by G.C.M., convened at Guadalcanal, Solomon Islands, 26 June, 1943. Dishonorable discharge, total forfeitures, and confinement for ten years. Federal Correctional Institution, Englewood, Colorado.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Staff Sergeant Lanford Hall, Company "D", 25th Medical Battalion, did, at Guadalcanal, Solomon Islands, on or about February 22, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one, Private First Class Corvil W. Madsen, a human being, by shooting him with a .45 calibre pistol.

The accused pleaded not guilty to the charge and specification. The court found accused not guilty as charged but guilty of manslaughter in violation of Article of War 93. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of ten years. The reviewing authority approved the sentence and designated the Federal Correctional Institution, Englewood, Colorado, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. Immediately after arraignment the defense suggested that the accused was not mentally responsible at the time of the offense and called as witnesses First Lieutenant Albert M. Sherman, M.C., and Captain Donald E. O'Brien, M.C., who in conjunction with Captain Stanley Peal, M.C., were appointed to determine the sanity of accused. The board held that "He was insane before the crime, at the time of the crime, and at the present time", and recommended -

"A. Patient is not mentally competent to stand trial at this time.
B. Evacuation to General Hospital for further observation."
(Def. Ex. A, p. 3).

This report is dated March 17, 1943. The prosecution then called Lieutenant Colonel James C. Fox Jr., M.C., and Major Merrill Moore, M.C., who with Major Warren T. Brown, M.C., were appointed by paragraph 6, Special Order No. 58, 39th General Hospital, dated April 23, 1943, to examine into the sanity of accused. The board met in pursuance to the foregoing order, and on May 5, 1943, made its findings, viz:

"(a) The mental condition of the soldier at the time of the offense:

The available evidence indicates that Staff Sergeant Lanford (NMI) Hall, 6956715, Co. D, 25th Medical Bn. was sane, but was in a depleted physical and nervous condition, still sick with a fever (presumably malaria) which rendered him at that time of the offense, (on February 22, 1943) especially susceptible to the provocation to which he was subjected.

(b) The mental condition of the soldier at the time of the examination:

Staff Sergeant Lanford (NMI) Hall, 6956715, Co. D, 25th Medical Bn. was found to be sane, but of low average intelligence, and a specially sensitive temperament.

6. The board agreed to incorporate the individual examination reports of the members in the general report of the board.

7. RECOMMENDATIONS OF THE BOARD.

The Board recommends that Staff Sergeant Lanford (NMI) Hall, 6956715, Co. D, 25th Medical Bn. be discharged from the hospital since he is not in need of any further specific medical treatment."
(Pros. Ex. B).

The court determined the accused to be sane (R.28).

"It is the function of the court to consider the report of the board and accord to it that weight and credence to which, in the judgment of the court, it may be entitled." (CM 128252, Dig. Ops. JAG, 1912-40, sec. 395(36)).

The court having settled this issue the question becomes academic and the Board of Review finds nothing in the record upon which the court's findings should be disturbed.

4. The evidence shows that on February 15, 1943, the accused was mess sergeant for the 25th Medical Battalion located at Guadalcanal, Solomon Islands. On this date Lieutenant William J. Bailey, M.C., was appointed mess officer for the battalion. Interviewing accused that afternoon in his [accused's] tent, he noticed that accused's "* *face was flushed, his eyes were a little sunken into his head,* * and he seemed to be in a high fever* * I asked him the names of the cooks * * and he started to write the names down for me, but he was having some difficulty. He was hesitant in his speech and seemingly had a difficult time remembering the names of the boys working in the kitchen" (R.74). His temperature was taken and found to be 104.5 (R.75). Accused was then sent to the hospital marked "observation malaria" (R.74). A "smear" was taken from accused but was considered unsatisfactory and no definite diagnosis was ever made (R.75).

While still a patient in the hospital accused, on the morning of February 22, 1943, told his company commander that he was feeling well enough to "start to do some work" (R.33). He went to his tent about 10:00 A.M. and found deceased and others drinking. At this time deceased was under the influence of intoxicating liquor (R.48). Accused told them to "break the party up" but it continued "off and on all day, up to the shooting" (R.49).

About 3:00 o'clock that afternoon accused came in the kitchen tent carrying a hammer and cross-bar from a mosquito net. He was mad and said "I would like to catch the guy that tore this mosquito bar down and I will blow his God-damn

brains out" (R.37). Deceased replied "I'd like to be around just to see what would happen". Accused replied "There won't be much to it. I'll blow his God-damn brains out" (R.38-39). Deceased then said to accused "I see you have the pots well baked too" (R.39). Accused and deceased continued in conversation, deceased "kidding him about the kitchen and about the pots being black and very well done" (R.44-46). Accused then took a G.I. .45 caliber pistol from a holster which was lying on the table (R.51), threw a shell in the chamber and fired at deceased, who was standing approximately 25 feet away, one time (R.52), the bullet entering just below his left clavicle and making its exit from the deltoid region of the right shoulder causing the death of deceased within fifteen minutes (R.34). Accused then went to the quarters of Captain Wealty Good, his company commander, handed him the pistol saying, "Captain, I've done shot a man" (R.31).

The prosecution introduced in evidence (R.67) a confession of accused which follows:

> "On February 22, 1943, at approximately 830, Pfc. Madsin, and Pvt. Louis A. Lamke, 20914058, were at my tent, and were drinking what appeared to be alcohol. Madsin was giving Lamke alcohol and it was making him drunk, when seeing this I asked Madsin to leave. He left at this time but was around off and on during the entire morning. The last time he came back he came to the kitchen and started cursing me and telling me I was slaving the boys to death. After carring on in such a manner for about 15 minutes, I told him to take off again. He ignored me and acted as though he wanted to get rough and was still cursing me. At this time I lost control of myself and shot Madsin. That is about all there was to it."
> (Ex. D).

Accused elected to remain silent. The defense called Captain Eugene H. Silverstone, M.C., accused's former company commander, who testified that he was the one who recommended that accused be appointed mess sergeant. He stated accused did considerable "day dreaming" and during conversations would "stop and stare off into space" (R.68), and "frequently had a fixed smile." Witness considered accused "a borderline mental case" (R.69). Private Kenneth D. Klick testified that he lived in the tent with accused and Private Lamke (R.72). That on the day of the shooting deceased was "in and out of the tent" and he, Lamke, and deceased were drinking G.I. alcohol (R.73). Accused reported this to the mess officer (R.75). Captain Wealty Good, accused's company commander, testified that accused was an efficient mess sergeant and "extremely conscientious and a hard worker" (R.32). When accused came to him after the shooting he [accused] was "extremely upset and nervous and appeared to be on the verge of shock" (R.32). Private Theodore M. Byk testified that accused was a nervous and irritable person and "impressed me as a sort of a cowboy from the west, because he wore boots always and usually walked around with his own .45." (R.36).

> "He wasn't cheerful during the time I worked under him, because nothing seemed to work out right, and everything would go wrong. We had a lot of patients to feed and had nothing to feed them with. We didn't have any pots, and the stoves weren't in running order. Sometimes we just worked on two, and they were always breaking down on us. Everything in general was upset over there around the kitchen.
> * * *
> Q. Did Hall ever seem angry and impatient with the kitchen help?
> A. He was sort of angry that day, anyway." (R.37).

Accused was very angry because someone had torn his mosquito net. He was of a nervous and irritable temperament (R.36, 37, 39, 41, 45, 58, 59, 60, 61) and peculiar in his ways. Deceased was "kidding" accused and although under the influence of intoxicating liquor, just prior to the shooting the conversation between them was "just natural speaking" (R.47).

5. The evidence is clear and convincing that accused did, at the time and place alleged, shoot and kill deceased with a G.I. .45 pistol. That he was in a state of physical debility and of a nervous temperament and also angry at having his mosquito net torn down is clearly established by the evidence. However, such condition in no manner justified him in taking the life of one of his tormentors who was standing twenty-five feet away and offering him no physical harm. The court, after careful consideration, found him to be sane, and by their verdict took into account all mitigating circumstances and found him guilty of manslaughter as it had a legal right so to do (CM 165268, Dig. Ops. JAG, 1912-40, p. 310). The evidence fully warrants such findings.

6. For the reasons stated above the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

JOHN A. STAGG, Judge Advocate.
Col., J.A.G.D. - Absent.

Nathan J. Patch, Judge Advocate.
Lt. Col., J.A.G.D.

James P. Murphy, Judge Advocate.
Lt. Col., J.A.G.D.

WAR DEPARTMENT
Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

August 15, 1943.

CM A-624

UNITED STATES v. Private First Class LELAND H. WILES (19051683), 8th Service Squadron, 45th Service Group.	)	Trial by G.C.M., convened at Headquarters, Base Section 3, 27 May, 1943. Forfeiture of all pay and allowances due.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The Board of Review has examined the record of trial in the case of the soldier named above and submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 84th Article of War.

Specification: In that PFC Leland H. Wiles, 8th Service Squadron, 45th Service Group, did at 45th Service Group, APO 923, on or about 17 October, 1942, wrongfully dispose of by loaning to a civilian, a United States Army Automatic Pistol, caliber .45, model 1911, serial number 594156, of the value of approximately twenty eight dollars ($28.00), issued for use in the military service of the United States.

CHARGE II: Violation of the 94th Article of War.

Specification: In that Leland H. Wiles, PFC, 8th Service Squadron, 45th Service Group, did, at 45th Service Group, APO 923, on or about 17 October, 1942, feloniously take, steal and carry away, a United States Army Pistol, model 1911, caliber .45, valued at approximately twenty eight dollars ($28.00), the property of the United States Government, furnished and intended for the military service thereof.

The accused pleaded not guilty to the charges and specifications and was found guilty as charged. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved the sentence, remitted that portion thereof adjudging dishonorable discharge, forfeiture of all pay and allowances to become due and confinement at hard labor for one year, and ordered the sentence, as thus modified, executed. The result of the trial was published in General Court-Martial Orders No. 222, Headquarters, United States Army Services of Supply, 27 July, 1943.

3. The record discloses by competent evidence that accused committed the offenses alleged.

4. The only question before the Board of Review pertains to the legality of the sentence as ordered executed by the reviewing authority. The court sentenced the accused -

> "To be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for one (1) year."

The action of the reviewing authority in pertinent part states -

> "* * *the sentence is approved, but that portion thereof adjudging dishonorable discharge, forfeiture of all pay and allowances to become due and confinement at hard labor for one (1) year is remitted * * *".

5. The action of the reviewing authority in approving a sentence and simultaneously remitting a part thereof is legally equivalent to approving only the sentence as reduced (par. 87b, M.C.M., 1928; MS, Comp. Gen., Jan. 4, 1923, cited in 15 Comp. Gen. 646; subpar. 10i, AR 35-2460, May 21, 1942). The effect of the action of the reviewing authority in the instant case was to approve and order executed a sentence limited to the forfeiture of all (1) pay and (2) allowances due.

"Under paragraph 104b, M.C.M., 1928, and paragraph 1, AR 35-2460, a court may not, by a single sentence which does not include dishonorable discharge, adjudge against an accused a forfeiture of allowances as distinguished from pay" (sec. 402(8), Dig. Ops., JAG, 1912-40). Accordingly, at least so much of the sentence ordered executed as orders the forfeiture of allowances is illegal.

Where a sentence as ordered executed does not include dishonorable discharge, forfeitures may not exceed, in rate, two-thirds of his pay per month, or, in amount, two-thirds of his pay for six months. The forfeiture ordered herein of all pay due on May 27, 1943, the date of the sentence of the court, accordingly, no dishonorable discharge being imposed, may not in any event be in an amount greater than two-thirds of the soldier's pay for one month (sec. 402(10), Dig. Ops., JAG, 1912-40). However, each monthly forfeiture is charged against the monthly pay of the enlisted man beginning with the first day of the month in which the sentence is promulgated (subpar. 1b, AR 35-2460, May 21, 1942) as distinct from the date of imposition by the court-martial. In the instant case, since the sentence was approved on 27 July, 1943, and promulgated on that date, any effective partial forfeiture would be a charge only against the pay which accrued to accused on and after the first day of July 1943. The sentence ordered executed, however, manifestly did not affect such pay since it specifically was limited to the pay due the accused on 27 May, 1943, the day sentence was imposed by the court-martial. As the ultimate sentence under consideration did not include dishonorable discharge, the forfeiture ordered executed legally could not affect pay accrued prior to 1 July, 1943, and as no pay subsequent to that date was ordered forfeited, the accrued pay of the soldier was not liable to forfeiture.

6. For the reasons stated the Board of Review is of the opinion that the record is legally sufficient to sustain the findings but that the sentence as ordered executed is illegal.

JOHN A. STAGG, Judge Advocate
Colonel, J.A.G.D. - Absent.

Nathan Shute, Judge Advocate
Lt. Colonel, J.A.G.D.

James B. Murphy, Judge Advocate
Lt. Colonel, J.A.G.D.

WAR DEPARTMENT

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

A.P.O. 924,
19 August 1943.

SUBJECT: Record of trial by general court-martial in the case of Private First Class Leland H. Wiles (19051683), 8th Service Squadron, 45th Service Group.

TO: Commander-in-Chief, Southwest Pacific Area, A.P.O. 500.

1. Inclosed is the record of trial described above and the holding of the Board of Review in this office that the record of trial is legally sufficient to sustain the findings but that the sentence as mitigated and ordered executed is illegal. I concur in that holding and recommend the necessary corrective action to vacate the illegal sentence.

2. A form of action effectuating this recommendation, together with a form of general court-martial order publishing such action are inclosed for your convenience in the event that you concur in the action recommended.

ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

4 Incls:
Incl. 1 - Record of trial.
Incl. 2 - Holding of Board of Review.
Incl. 3 - Form of action.
Incl. 4 - Form of general court-martial orders.

(Sentence vacated. GCMO 6, USAFFE, 24 Aug 1943)

WAR DEPARTMENT
Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

14 August, 1943.

CM A-628

UNITED STATES v. Private First Class ARTHUR NATHANIEL JONES (34251424), 636th Ordnance Ammunition Company, Detachment #3.	)	Trial by G.C.M., convened at Headquarters, Base Section 3, A.P.O. 923, 10 June, 1943. Dishonorable discharge, total forfeitures, confinement for life. United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private first class Arthur Nathaniel Jones, 636th Ordnance Ammunition Co., Detachment #3 did, at Columboola, Ordnance Depot, on or about April 10, 1943, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill one T/4 Eddie Garfield, 636th Ordnance Ammunition Co., Detachment #3, a human being by shooting him with a rifle.

The accused pleaded not guilty to the charge and specification and was found guilty as charged. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence for the prosecution shows that on the morning of April 10, 1943, accused, with several other members of the 636th Ordnance Company, was engaged in a "crap game" at the motor pool, Columboola, Queensland (R.5). Sergeant Garfield approached the crowd and told them they should be working, saying he would stop the game. The Sergeant then ordered the men to "go to work" but the game continued (R.6). Accused then said "to go ahead, he [Sergeant Garfield] wasn't any good, and it made the Sergeant mad" (R.6). Garfield then reached down and picked up the dice and accused hit him. Witness Crosby testifies that Garfield hit accused first, knocking him down. Accused got up saying "I'm

going to tell the Lieutenant, I will even tell the Captain, and I will get your stripes for this" (R.8). The fight between accused and deceased continued and after having been once separated both parties picked up bricks but were further restrained from continuing the fight. Garfield then said "I should finish you now and I wouldn't have to be going around afraid of you later" (R.9) and "Don't do anything you'll be sorry for" (R.10). Accused said "That's all right, you have done me wrong and I'll get even with you" (R.9) and walked away.

Lieutenant Charles Landis, accused's commanding officer, testified that deceased reported to him at the orderly room that he [deceased] "had a little trouble at the motor pool and stopped a crap game, but that it would be all right as far as he knew now" (R.12). There had been some previous trouble (R.15) in the Detachment, the result of which prompted witness to issue an order that all rifles, knives, shotguns, twenty-two caliber rifles and ammunition were to be turned in. On the morning in question this was being done and Sergeant Frazier was checking them in to the supply room. Witness, accompanied by deceased, met accused coming toward the supply room carrying his rifle at "port arms". He took the rifle from him with "no difficulty" (R.12). Having investigated the trouble that morning down at the motor pool he then and there attempted to get accused and deceased to shake hands but accused "wasn't willing to do so" (R.13). Witness then handed the rifle to Sergeant Frazier who checked the number (R.13), at which time accused walked over and placed his hand on the barrel near the rear sight (R.17). Sergeant Frazier said to accused "Where the hell are you going with the rifle?" Accused "indicated toward the supply room with his head". Frazier released the rifle and accused looking toward deceased "sort of grimaced with his mouth and just shut his eyes" and fired from the hip (R.17). Deceased was hit in the stomach, with injury to the liver, stomach, duodenum, and pancreas, from which injury he died the following day (R.4).

Immediately after the shot was fired Lieutenant Landis disarmed accused and upon examination the rifle was found to contain one empty cartridge and four live ones (R.22).

Accused elected to remain silent and the defense introduced no testimony.

4. The specification alleges that the accused with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation killed the deceased by shooting him with a rifle.

The act of the accused in obtaining his rifle from Sergeant Frazier to turn it in to the supply room and then deliberately pointing it at deceased and shooting him manifests a state of mind comprised within the meaning of the term "malice aforethought", the existence of which is corroborated by his facial expression of anger, his refusal to shake hands with deceased immediately before the shooting and his prior remark that "I'll get even with you". Despite the fact that accused and deceased had fought just prior to the shooting, there is no evidence that the fatal wound was inflicted in the heat of sudden passion caused by adequate provocation. No element of self-defense appears in the record. The prosecution's evidence is convincing that the act of accused was done as alleged, and every element of the offense is present, fully warranting the court's findings of guilty of the Specification and the Charge.

5. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence. A sentence either of death or of imprisonment for life is mandatory upon a conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by sections 273 and 275 of the Criminal Code of the United States (18 U.S.C. 452, 454).

JOHN A. STAGG, Judge Advocate
Col., J.A.G.D. - Absent

Nathan H. Chute, Judge Advocate
Lt. Col., J.A.G.D.

James R. Murphy, Judge Advocate
Lt. Col., J.A.G.D.

WAR DEPARTMENT
Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

20 August, 1943.

CM A-652

UNITED STATES v. Private WILLIE ANDREW, (38199298), Company "B", 902d Air Base Security Battalion.	Trial by G.C.M., convened at Headquarters, USAFISPA, 13 June, 1943. Dishonorable discharge, total forfeitures, confinement for life. United States Disciplinary Barracks, Fort Leavenworth, Kansas.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 63rd Article of War.

Specification: In that Private WILLIE ANDREW, Company "B", 902d Air Base Security Battalion, did, at APO 502, on or about 30 May 1943, behave with disrespect toward Second Lieutenant JASON C. BERGER, Headquarters Company, Service Command, his superior officer, by saying to him "Shut your God-damn mouth or I'll kill you" or words to that effect.

CHARGE II: Violation of the 64th Article of War.

Specification: In that Private WILLIE ANDREW, Company "B", 902d Air Base Security Battalion, did, at APO 502, on or about 30 May 1943, strike Second Lieutenant JASON C. BERGER, Headquarters Company Service Command, his superior officer who was then in the execution of his office, on the face, body and legs with his hands and feet.

The accused pleaded not guilty to the charges and specifications and was found guilty as charged. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence for the prosecution shows that on May 30, 1943, First Lieutenant Jason C. Berger was, at about 5:30 PM, driving a peep car on the Anse Vata Road, New Caledonia, near the bivouac area of the 130th Quartermaster. A 2½ ton truck suddenly stopped immediately in front of him. Lieutenant Berger drove alongside the truck and stopped. Accused was driving and with him were Corporal Willie J. Baker and three small children, one of whom was seated in accused's lap. Accused had no authority to use this truck (R.43). Lieutenant Berger asked accused if he knew it was against the rules to ride children in the truck and accused replied that he did not (R.37-38). He then told accused to take the child off his lap but accused, making no reply and not obeying the Lieutenant's instructions, engaged the gears and drove off (R.6). The Lieutenant followed the truck about 100 yards and stopped it, again telling accused to take the child off his lap. Upon being asked where he was going with the children accused replied that he was taking them home. The Lieutenant again told accused "All right, take the child off your lap and take the children home immediately" (R.7).

About "four turns" down the road the Lieutenant again stopped the truck, giving accused an iron leg from the body of the truck, which had fallen off, and again ordered him to take the children home. Accused drove his truck about half a mile to the end of the road, turned into a field and stopped. Accused got out of the truck and approached Lieutenant Berger who had stopped his "peep" about 25 yards away, and said "This is where they live". There was no home close by. Lieutenant Berger then got out of the "peep" and took the number of the truck at which time accused struck him in the face with his fist, knocking him down and hitting him "thirty-five or forty times". Accused kicked him, straddled him and pummelled him and when he [Lieutenant Berger] got up accused knocked him down again and continued to strike him. The Lieutenant hollered for "help" and accused said "Shut your God-damn mouth or I'll kill you" (R.8). He also stated "he wanted to kill me and all other white officers interfering with Negro affairs" (R.11). Lieutenant Berger had a .45 automatic but it was unloaded and he had no extra ammunition. At no time did he attempt to use it in any manner. During the struggle Lieutenant Berger's leg was broken (R.8). Most of this time Corporal Willie J. Baker was present, but did not assist the Lieutenant although the Lieutenant said to him "Soldier, stop this man from beating me and help me" (R.11). Accused then ordered the Lieutenant to get in the jeep, and with accused driving they returned to the Anse Vata Road. While returning, the Lieutenant testified:

> "A. First of all he told me that if I cried out he would slit my throat. I suggested that he turn on the lights because it was getting dark and he was traveling at an excessive rate of speed. He told me to shut my God-damn mouth. A moment later he told me to turn on the lights. I leaned over to turn on the lights but instead of doing that, I pretended they wouldn't work, and then I turned off the ignition, seized the keys and took them out of the Peep.
>
> Q. What did the accused do?
> A. He told me to turn on the ignition.
>
> Q. What did you do?
> A. I jumped out of the Peep into a ditch and dragged myself up to the nearest tent, yelling for help." (R.8).

Assistance arrived and the Lieutenant was taken to the hospital where an examination showed "bruises, superficially about the face and eyes, especially on the right side. His left leg was quite painful and swollen about the ankle. An X-ray was taken immediately and disclosed a fractured ankle". (R.15).

The prosecution introduced the confession of accused which briefly summarized is as follows:

On the afternoon in question, accused, Corporal Baker and Private Mitchell were drinking in a house near "Nickel Docks". Leaving the house in the truck he was stopped by the Lieutenant three times, during which time he had turned in a side road trying to dodge the Lieutenant. When the road ended in a dead end he turned

into a field and stopped the truck, at which time he told the Lieutenant "it looks like your trying to follow me and I'm trying to dodge you. After I said this I hit him with my fist along side his head". The Lieutenant hollered for help and "I started to chocke him so that he'd quit hollerin". He ordered the Lieutenant to get in the peep and he /accused/ drove toward the area where the Lieutenant jumped out. Accused then went to camp, changed clothes "so the M.P.'s or he (Lt.) wouldn't know me if they seen me", and returned near "Nickel Dock" looking for Corporal Baker so that he could get his truck. He returned to "where the truck was in the ditch" and upon being asked by an M.P. if that was his truck replied "No". Returning to the M.P. station where Corporal Baker had been taken he then admitted that it was his truck.

Accused admitted on the stand that he signed the confession.

Accused elected to take the stand and testify.

On the afternoon in question, accused, Corporal Willie J. Baker, and Private Sam Mitchell were at a house in Noumea called "Mamies". All were drinking "Australian whiskey" (R.31) or rum (R.33). They had drinks out of "more than one bottle" (R.31). About a quarter to five, accused, Corporal Baker, Private Mitchell and the three children got in the truck and drove off, Private Mitchell getting off at his camp area (R.31). The accused, himself, largely corroborated the testimony of other witnesses up to the time the truck stopped in the field where the incident occurred. He testified:

> "I could see him in the mirror and I was wanting to know why he was following me and I turned off and he drove up behind me and got out like he was going to take the number of my truck. I didn't want him to turn me in and when I called him he told me he was sorry he came down there and then we went to fighting." (R.38).

He told Lieutenant Berger to get in the peep and drove back toward town because:

> "I was going to take him to the forks of the road and take the wires off his Jeep so he couldn't get back before I did. I didn't want him to get the number of my truck and wanted to get out before he did." (R.39).

He knew that he had done wrong by having children in the truck and "I didn't want it to get back to Captain Peters" (R.40). He admitted that he struck the Lieutenant and that when he did so, he had done wrong. He denied kicking the Lieutenant during the fight and stated he never said "Shut your God-damn mouth or I'll kill you" or that he "wanted to kill Lieutenant Berger and all white officers interfering in Negro affairs" (R.39). He was not angered at Lieutenant Berger and had never seen him before and hit him because "I just wanted him to get away from my truck". When the Lieutenant jumped out of the peep on the way back, accused went to camp. Accused admitted he was "pretty tight" but "I never been so drunk I don't know what I was doing" and that he knew Lieutenant Berger was an officer (R.43) Also that he had no right to be driving the truck.

Captain Gus S. Peters, accused's company commander, and Sergeants Robert L. Smith and Jesse Joyner testified that accused was a good soldier, doing his work well, and had never received any company punishment (R. 34, 35, 36).

4. The evidence for the prosecution and the admissions of accused clearly establish the assault as alleged. There are no extenuating circumstances. Accused was not drunk, he knew the person assaulted to be an officer, the attack was unprovoked and carried out in a most brutal manner. Every element of the offense was established by clear and convincing evidence. The crime is a most serious one, striking at the very foundation of military discipline. The court was fully warranted in its findings and the sentence is appropriate to the offense charged and proven.

5. For the reasons stated above the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of the court and the sentence.

JOHN A. STAGG, Judge Advocate.
Colonel, J. A. G. D. - Absent.

Judge Advocate.
Lt. Col., J. A. G. D.

Judge Advocate.
Lt. Col., J. A. G. D.

1st Indorsement

War Department, Army Service Forces, Branch Office of the Judge Advocate General, A.P.O. 924, 22 August, 1943.

To: Commanding General, USAFISPA, A.P.O. 502.

1. In the case of Private Willie Andrew (38199298), Company "B", 902d Air Base Security Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM A-652).

ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 19, USAFISPA, 1 Sep 1943)

WAR DEPARTMENT
Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

23 August, 1943.

CM A-654

UNITED STATES v. Technician 5th Grade ALPHONSE BUTLER (38004588), Private DAVID JACKSON (36391010), Private LAWRENCE SMITH (37201405), and Private WILLIE L. THOMPSON (34277479), (also known as THOMSON), all of Company C, 828th Engineer Battalion.	Trial by G.C.M., convened at Headquarters, III Island Command, APO 932, 23 July, 1943. As to each accused: Dishonorable discharge, total forfeitures, confinement for ten years. The III Island Command Guardhouse.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The Board of Review has examined the record of trial in the case of the soldiers named above and submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused were each tried upon the following charge and specification:

CHARGE: Violation of the 66th Article of War.

Specification: In that Technician Fifth Grade Alphonse (NMI) Butler and Privates David (NMI) Jackson, Lawrence (NMI) Smith, and Willie L. Thomson, all of Company "C", 828th Engineer Battalion did, at APO 932, on or about July 9, 1943, acting jointly and in pursuance of a common intent, voluntarily join in a mutiny which began in Company 'C', 828th Engineer Battalion, against the lawful military authority of 1st Lieutenant CHARLES W. GRAVES, the commanding officer thereof, and did, with intent to subvert and override, for the time being, in concert with each other, refuse to do their assigned duty, as they were ordered to do by their said commanding officer, Lieutenant GRAVES, who was then in execution of his office.

All accused pleaded not guilty to the charge and specification and were found guilty as charged. They were each sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for ten years. The reviewing authority approved the sentences and ordered their execution but suspended the execution of so much thereof as pertains to dishonorable discharge, and designated the III Island Command Guardhouse as the place of confinement. The result of the trial was published in General Court-Martial Orders No. 34, Headquarters, III Island Command, 11 August, 1943.

3. Prior to pleading to the general issue, accused Private Lawrence Smith made a motion for severance. The motion was properly denied.

4. The evidence discloses that accused Butler, Jackson, and Thompson on July 9, 1943, were cooks acting under Sergeant Senie I. James, the mess sergeant of Company C. They were supposed to be on duty in the mess hall at 2 A.M. that date. The night before Butler had said "I drilled today and I'm not going to cook and drill too because we are entitled to some time off" (R.11) or words to that effect, and they each evidenced an intention not to work. Accordingly, the mess sergeant awoke, personally, each of them and they refused to report for duty (R.7,8). Later in the morning the matter was referred to the company commander, Lieutenant Graves, who had Butler, Jackson, Thompson, and about six other cooks (R.31) brought before him and asked each of them why they refused to work that morning. "Each man, each cook and cook's helper replied * * * that they did not feel that they should be forced to perform their duties and cook in the kitchen, or whatever their duties were in the kitchen on their duty days which is every other day". They each wanted to be assigned to field duty. The Lieutenant explained to them the need for military training, and asked "if there was any more to be said". There being no questions, he "dismissed the entire group" (R.18) and the cooks left. A few minutes later the mess sergeant reported that of the nine, Butler, Jackson, and Thompson still refused to go back to the kitchen and these three were again brought before Lieutenant Graves, who testified -

> "* * * I had them lined up before me -- in front of my desk -- and I told them, I made the statement, 'I thought all of this trouble was finished,' or words to that effect, and one of them replied, 'No, sir, it isn't'. I then re-explained to them why they were required to take this training program, asked them what their grievances were again, as I had done before, and they again made the statement that they did not feel that they should go into the kitchen to cook and also be required to fall out for a two hour training program. Most of the answering was done by Alphonse Butler, who at one point made the statement that, 'We will not go back into the kitchen and cook until our terms are met,' or words to that effect, using the specific word, 'terms'. I then explained to them that I was their superior officer and that I had the right to give them an order to go back into the kitchen and perform their duty and they stated something to the effect that they would if they did not have to fall out for training. I told them that they did have to fall out for training and that they did have to perform their duties in the kitchen. One of them made the statement that he would rather go to the guardhouse. There was considerable talking back and forth and most of the speaking was done by Alphonse Butler. He referred to the group, using the word, 'we'.
>
> Q. Did either of the other two speak up and say that, or show definite indications to the effect that Butler was speaking for the group?
> A. No, sir, the other two nodded their heads in assent to everything he said and occasionally said, 'yes, sir' or 'no, sir' whatever the appropriate answer would be.
> * * *
>
> TJA: Did you give the accused Alphonse Butler, David Jackson and Willie L. Thomson a direct order at that time to return to the kitchen to work?
> A. Yes, I did.
>
> Q. And what was their answer?
> A. They said that they would not go.
> * * *
>
> TJA: And then what was done?
> A. I explained to them that I would be forced to place them before a court-martial for their actions if they did not obey. I again restated my order to them, I stated that it was a direct order, and again they refused to go.

Q. Pardon me, when you say 'they' to whom do you refer?
A. Butler, Jackson and Thomson. The answering to these questions had been done by Alphonse Butler; confirmation of them was, in my impression, by a nod of assent by the other two. Walking away from my desk I then asked David Jackson if he refused to obey the order and if he understood that it would be a court-martial and he said, 'yes'. I then asked Thomson the same question, and he replied 'yes'. I then told the First Sergeant to place them under arrest." (R.18, 19).

A few minutes later (R.19, 23), Private Lawrence Smith, a bugler, the fourth accused, came into the orderly room, saluted the Lieutenant, and said, "May I speak to you sir" (R.19, 43). The Lieutenant replied in the affirmative and Smith said "Sir, I refuse to take military training" or words to that effect (R.19). Upon being told that "he would be required to take military training with the rest of the men and if he refused it would mean going to the guardhouse", accused Smith answered, "Sir, I would like to go to the guardhouse with the other men" (R.19). At this time the other three accused, then in arrest, were standing outside the orderly room. Smith was taken to the guardhouse with the other three.

Accused Butler took the stand as a witness and admitted his refusal to obey the order of Lieutenant Graves. Witness denied, however, that he used the word "terms" and testified that he did not speak for either Jackson or Thompson when those three were before the Lieutenant. Accused Jackson and Thompson each denied that he had received an order by Lieutenant Graves to return to the kitchen and testified that he heard no conversation between Butler and the officer. Neither witness had had any conversation with Accused Smith with reference to military training (R.37).

Accused Smith testified that at no time did he have any conversation with the other three accused concerning military training (R.43); that he told the Lieutenant that he refused to march because being a bugler, he did not think that he was supposed to perform such duty (R.44, 45). He had overheard a conversation that morning between the First Sergeant and the mess Sergeant to the effect that the cooks did not show up for work because "they think it's too much on them to work and drill too" (R.44). He admitted saying that he would "rather go to the guardhouse" than march, but denied saying that he wanted to go to the guardhouse with the rest of the accused. There is no evidence that Smith was given any direct order by the Lieutenant at this time.

4. Mutiny is the -

"concerted insubordination, or concerted opposition or resistance to, or defiance of, lawful military authority, by two or more persons subject to such authority, with the intent to usurp, subvert, or override such authority, or to neutralize it for the time being. (par. 417, M.C.M.; par. 136, M.C.M., 1928; Dig. Op. J.A.G. 1912, p. 123; Davis, Military Law, p. 390). Persistent concerted disobedience of lawful command, or persistent concerted refusal to do duty, presents an evidentiary case of mutiny." (sec. 424, Dig. Ops. J.A.G. 1912-40).

The act of mutiny clearly proven on the part of Butler, Jackson, and Thompson, was their concerted neglect to report for duty and then the concerted refusal of the three to obey the order of the Lieutenant to return to their work until their "terms" were met. They were then placed in arrest and the crime was concluded. It was after such time that accused Smith told the officer that he would not march and desired to join the others in the guardhouse. The mutiny having already been concluded, he cannot be charged with participating jointly with the others therein, in the absence of other proof that he joined them in such unlawful act. There is no evidence in the record of a concert of action on the part of accused Smith with the other accused to override military authority or neutralize it for the time being. The actions of accused Smith in approaching the officer, saluting and saying "May I speak to you sir", and then stating his supposed grievance, instead of evidencing an intent "to override military authority" shows on the contrary a recognition of such authority. His conduct

in saluting and asking permission to speak to his commanding officer to state a grievance is in marked contrast to that of the other three accused who made unwarranted "terms" and upon such being refused jointly defied military authority. The record is devoid of evidence that accused Smith was a party to such actions. He may have had knowledge of such but no evidence was produced that he became a party thereto, or that any order was given him which he disobeyed.

Under the circumstances proven the misconduct of Accused Smith did not constitute joining in a mutiny nor an offense necessarily included therein (sec. 424, Dig. Ops. J.A.G., supra).

5. While the specification materially departs from the prescribed form set forth in the Manual for Courts-Martial, it is deemed sufficient to allege an offense, and to appraise the accused of the offense of which they were to be tried.

6. For the reasons above stated the Board of Review is of the opinion that the record of trial is legally sufficient to sustain the findings of guilty as to accused Technician Fifth Grade Alphonse Butler, Private David Jackson, and Private Willie L. Thompson and their several sentences, but legally insufficient to support the findings of guilty and the sentence as to Accused Private Lawrence Smith.

JOHN A. STAGG - Absent, Judge Advocate.
Colonel, JAGD.

Murray Lehrer, Judge Advocate.
Lt. Colonel, JAGD.

James D. Murphy, Judge Advocate.
Lt. Colonel, JAGD.

WAR DEPARTMENT

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

A.P.O. 924,
26 August 1943.

SUBJECT: Record of trial by general court-martial of Technician 5th Grade Alphonse Butler (38004588), Private David Jackson (36391010), Private Lawrence Smith (37201405), and Private Willie L. Thompson (34277479), all of Co. "C", 828th Engineer

TO : Commanding General, U.S.A.F.I.S.P.A., A.P.O. 502.

1. Inclosed is the record of trial described above and the holding of the Board of Review in this office that it is legally sufficient to support the findings of guilty as to General Prisoners Butler, Jackson and Thompson, but legally insufficient to support the findings of guilty and the sentence as to Smith. I concur in that holding and recommend the necessary corrective action to vacate the findings and sentence relative to Smith.

2. A form of action effectuating this recommendation is inclosed for your convenience in the event that you concur in the recommendation.

3. If the action recommended is taken it is requested that by indorsement hereon the record of trial, the holding of the Board of Review and the signed action be transmitted to this office, together with eight copies of the G.C.M.O. promulgating your action.

ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

3 Incls:
Incl. 1 - Record of trial.
Incl. 2 - Holding of Board of Review.
Incl. 3 - Form of action.

(Findings and sentence respecting Private Smith vacated.
GCMO 20, USAFISPA, 3 Sep 1943)

WAR DEPARTMENT
Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

30 August, 1943.

CM A-655

UNITED STATES v. Private THEOPHILUS C. SHOPE (33080360), Airdrome Squadron, 38th Bombardment Group (M).	Trial by G.C.M., convened at Port Moresby, New Guinea, 15 February, 1943. Dishonorable discharge, confinement for one year, forfeiture of $28.54 per month from 15 February, 1943, to 2 July, 1943. The Stockade, U. S. Advanced Base, APO 929.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The Board of Review has examined the record of trial in the case of the soldier named above and submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following pertinent charges and specifications:

CHARGE I: Violation of the 61st Article of War.

Specification: In that Private Theophilus C. Shope, Airdrome Squadron, did, without proper leave, absent himself from his organization at A.P.O. 922 from about 5 PM 24 October, 1942, to on or about 27 October, 1942.

CHARGE II: * * * *

CHARGE III: Violation of the 65th Article of War.

Specification: In that Private Theophilus C. Shope, Airdrome Squadron, did, at APO 922, on or about 24 October, 1942, behave in a disrespectful manner toward Technical Sergeant William M. Shepard, Airdrome Squadron, a noncommissioned officer who was then in the execution of his office, by using profane language "you son of a bitch" or words to that effect.

CHARGE IV: Violation of the 94th Article of War.

Specification: In that Private Theophilus C. Shope, Airdrome Squadron, did at APO 922 on or about 24 October, 1942, knowingly and wilfully apply to his own use and benefit one Ford Truck of the value of about $2400, property of the United States, intended for the military service thereof.

The accused pleaded guilty to the specification and Charge I and not guilty to all the other charges and specifications. He was found not guilty of Charge II and its specification, guilty of all the other charges and specifications, and was sentenced to dishonorable discharge, confinement at hard labor for one year, and forfeiture of $28.54 per month for a like period. The reviewing authority approved only so much of the sentence as provides for dishonorable discharge, confinement for one year, and forfeiture of $28.54 per month from 15 February, 1943, to the date of the action, 2 July, 1943, and ordered the execution of the sentence except that the execution of the dishonorable discharge was suspended. The Stockade, United States Advanced Base, APO 929, was designated as the place of confinement. The result of the trial was promulgated in General Court-Martial Orders No. 196, Headquarters, United States Army Services of Supply, 2 July, 1943.

3. The record discloses by competent evidence that the accused did, at the times and place alleged, commit the offenses of which he was found guilty.

4. The only question for consideration by the Board of Review pertains to the legality of the forfeiture ordered executed by the reviewing authority. The court, as stated above, sentenced the accused to be dishonorably discharged, confined at hard labor for one year, and to forfeit $28.54 per month for a like period. The action of the reviewing authority, in pertinent part, reads:

> "* * *only so much of the sentence as provides for dishonorable discharge the service, confinement at hard labor for one year and forfeiture of $28.54 per month from February 15, 1943, to the date hereof is approved. The execution of that portion thereof adjudging dishonorable discharge is suspended. As thus modified, the sentence will be duly executed."

The sentence of the court was imposed on 15 February, 1943, and was promulgated by general court-martial orders dated 2 July, 1943, the date of the action of the reviewing authority.

5. It is obvious that the general court-martial in this instance was not aware of the legal consequences of its sentence; particularly was it not aware of the fact that a soldier who is actually dishonorably discharged ceases being a soldier and earns no pay. This conclusion is manifest from the fact that the court imposed dishonorable discharge upon the accused and also a forfeiture per month for twelve months, a sentence impossible of accomplishment so far as the forfeiture is concerned. Despite the court's ignorance in this regard the sentence imposed clearly indicates that it did not intend a forfeiture of any part of the pay and allowances which had accrued to the accused's credit up to the date of imposition of sentence; neither did the court clearly indicate an intention to forfeit any part of the pay and allowances "to become due", which expression pertains to the period from the date of imposition of sentence to the date of final action thereon by the reviewing authority. In the absence of a clear indication of a specific intention to apply a partial forfeiture of pay to the period of time last referred to, and because pay cannot be forfeited by implication by reading something into the sentence the court did not put there (sec. 402(9) Dig. Ops., JAG 1912-40), effect must be given to subparagraph 6d AR 35-2460, May 21, 1942, which expresses the fact that a sentence of dishonorable discharge and forfeiture of pay becomes effective as to the forfeiture upon the date of approval of the sentence as evidenced by the date of the general court-martial order. Accordingly, in the instant case the forfeiture became effective on 2 July, 1943, and was chargeable against Shope's monthly pay beginning with the first day of that month (subpar. 1b AR 35-2460). Since no pay accrues to a soldier in confinement under sentence of dishonorable discharge (suspended) from the day following the date of the court-martial order promulgating the sentence, it is clear that the only pay which Shope has forfeited under his sentence is that for the two days of 1 and 2 July, 1943.

6. For the reasons above stated the Board of Review is of the opinion that the record of trial is legally sufficient to sustain the findings but that only so much of the sentence ordered executed is legal as provides for dishonorable discharge (suspended), confinement at hard labor for one year, and the forfeiture of $4.32.

JOHN A. STAGG - Absent, Judge Advocate
Colonel, JAGD

Arthur J. Roberts, Judge Advocate
Lt. Colonel, JAGD

James P. Murphy, Judge Advocate
Lt. Colonel, JAGD

WAR DEPARTMENT

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

A.P.O. 924,
30 August, 1943.

SUBJECT: Record of trial by general court-martial in the case of Private Theophilus C. Shope (33080360), Airdrome Squadron, 38th Bombardment Group (M).

TO : Commander-in-Chief, Southwest Pacific Area, A.P.O. 500.

1. Inclosed is the record of trial described above and the holding of the Board of Review in this office that the record of trial is legally sufficient to sustain the findings but that only so much of the sentence ordered executed is legal as provides for dishonorable discharge (suspended), confinement at hard labor for one year, and the forfeiture of $4.32. I concur in that holding and recommend the necessary corrective action to vacate the illegal portion of the sentence as ordered executed.

2. A form of action effectuating this recommendation, together with a form of general court-martial order publishing such action are inclosed for your convenience in the event that you concur in the action recommended.

ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

4 Incls:
Incl. 1 - Record of trial.
Incl. 2 - Holding of Board of Review.
Incl. 3 - Form of general court-martial orders.
Incl. 4 - Action sheet.

(Sentence vacated in part in accordance with recommendation of Assistant Judge Advocate General. GCMO 7, USAFFE, 10 Sep 1943)

WAR DEPARTMENT
Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

23 August, 1943.

CM A-661

UNITED STATES v. Private First Class MELVIN M. HAMILTON (32097871), Battery "G", 76th Coast Artillery (AA).	Trial by G.C.M., convened at Headquarters, IV Island Command, APO 708, 14 July, 1943. Dishonorable discharge, total forfeitures, confinement for two years six months, IV Island Stockade.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The Board of Review has examined the record of trial in the case of the soldier named above and submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private First Class Melvin M. Hamilton, Battery "G", 76th Coast Artillery, (AA), did at or near Battery "G", 76th Coast Artillery, (AA), on or about May 9, 1943, wrongfully manufacture, introduce and sell various quantities of intoxicating liquor to various members of the armed forces.

Specification 2: In that Private First Class Melvin M. Hamilton, Battery "G", 76th Coast Artillery, (AA), did at or near Battery "G", 76th Coast Artillery, (AA), on or about May 9, 1943, wrongfully convert to his own use property of the value of about $100.00, property of the United States, furnished and intended for the military service thereof.

The accused pleaded not guilty to the charge and specifications. He was found guilty as charged and sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a term of five and one half years. The reviewing authority approved the sentence but remitted three years of the confinement thereof, and suspended that portion providing for dishonorable discharge. The IV Island Stockade was designated as the place of confinement. The result of the trial was published in General Court-Martial Orders No. 5, Headquarters, IV Island Command, APO 708, August 11, 1943.

3. The only question for consideration by the Board of Review is the legal sufficiency of Specification 2 of the Charge and the sentence.

A specification must "so inform the accused as to the precise offence attributed to him that he may intelligently admit, deny, or plead specially to the same; and may be enabled to plead his conviction or acquittal upon any subsequent prosecution on account of the same act" (Winthrop, Mil. Law & Prec., Chap. X, p. 132). In the instant case accused is not appraised of the nature, character, value, or quantity of the government property which he is alleged to have converted to his own use. This he is entitled to know that he may prepare to meet the issues when faced with them upon trial. If the specification be faulty in its inception, no subsequent testimony can restore to it legality. That which is void ab initio remains so. Pleadings "must advance their positions of fact in an absolute form, and not leave them to be collected by inference and argument only" (Winthrop, supra, p. 135). So, also, where one is charged with wrongful conversion "it is proper that the quality, quantity, number, kind, value, denomination, etc., of the moneys or articles stolen, appropriated, etc., should be specified sufficiently clearly to identify the same, although the utmost exactness is not required" (Winthrop, supra, p. 139). In a military case, therefore, it is, in general, defective pleading to allege in the specification merely that the accused did commit the offense indicated in the charge - the specification, in its statement of facts, should set forth such facts as will be sufficient, if proved, to sustain not only the specific charge in contradiction to any other, but also such charge in its entirety (id. p. 139, 150).

The specification in question contains none of the foregoing requisites. The "quality, quantity, number, kind, value, etc." of the government property alleged to have been converted by accused is not mentioned. By stipulation it was agreed that certain articles therein listed, property of the United States, of the value of $55.00, were taken by the military police on May 9, 1943, "from the area of Battery 'G', 76th Coast Artillery (AA), near gun positions No. 2 and 3". Were he to be subsequently tried on a specification setting forth the articles enumerated in the stipulation (R.19) he could not plead former jeopardy for it is not shown in the record that these articles are the ones which the present specification alleges to be of the value of about $100.00, and the ones which are the subject of the instant charge. The accused, not having been properly charged in Specification 2, has not been placed in jeopardy as to this offense and cannot so plead in bar to any future action, should the same be instituted.

4. The evidence for the prosecution is conclusive that accused did, at the time and place alleged in Specification 1, manufacture, introduce, and sell intoxicating liquor to various members of the armed forces. Such conduct is to the prejudice of good order and military discipline and is a violation of Article of War 96. No punishment is provided in the table of maximum punishments (par. 104c, M.C.M., 1928) for such offense. The sentence as ordered executed is deemed appropriate therefor. The record fully sustains the findings of the court as to this specification and the sentence.

5. For the reasons above stated the Board of Review is of the opinion that Specification 2 of the Charge is fatally defective, and the findings of the court thereon are void. However, the record of trial is legally sufficient to support the court's findings of guilty of the Charge and Specification 1, and the sentence.

JOHN A. STAGG - Absent, Judge Advocate.
Colonel, JAGD

[signature], Judge Advocate.
Lt. Colonel, JAGD

[signature] Judge Advocate.
Lt. Colonel, JAGD

WAR DEPARTMENT

[redacted]

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

A.P.O. 924,
25 August 1943.

SUBJECT: Record of trial by general court-martial in the case of Private First Class Melvin M. Hamilton (32097871), Battery "G", 76th Coast Artillery (AA).

TO : Commanding General, U.S.A.F.I.S.P.A., A.P.O. 502.

1. Inclosed is the record of trial described above and the holding of the Board of Review in this office that Specification 2 under the charge is fatally defective and that the finding of guilty thereof should be vacated. I concur in that holding and recommend the necessary corrective action to vacate the finding in question.

2. A form of action effectuating this recommendation is inclosed for your convenience in the event that you concur in the recommendation.

3. If the action recommended is taken it is requested that by indorsement hereon the record of trial, the holding of the Board of Review and the signed action be transmitted to this office, together with eight copies of the G.C.M.O. promulgating your action.

ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

3 Incls:
Incl. 1 - Record of trial.
Incl. 2 - Holding of Board of Review.
Incl. 3 - Form of action.

(Finding of guilty of Specification 2 vacated. GCMO 18, USAFISPA, 30 Aug 1943)

WAR DEPARTMENT
Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

22 August, 1943.

CM A-663

UNITED STATES v. Private JOE R. PHILLIPS (36148959), Detachment of Patients, 118th General Hospital.	Trial by G.C.M., convened at Headquarters, Base Section 3, 8 June, 1943. Dishonorable discharge, total forfeitures, confinement for six months. Round Mountain Detention and Rehabilitation Center, APO 923.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The Board of Review has examined the record of trial in the case of the soldier named above and submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Joe R. Phillips, Private, Detachment of Patients, 118th General Hospital, APO 927, formerly Private, Co. "B", 738th Military Police Battalion, APO 923, did, at APO 923, on or about December 5, 1942, feloniously embezzle by fraudulently converting to his own use a money order of the value of $10.00, the property of T/4 Robert L. Riebling, Hq. & Hq. Detachment, 738th Military Police Battalion, entrusted to him by the said T/4 Robert L. Riebling.

Specification 2: Disapproved.
Specification 3: Disapproved.

The accused pleaded not guilty to the charge and specifications. He was found guilty as charged. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for a term of four years. The reviewing authority disapproved the findings of guilty of Specifications 2 and 3, and approved only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months. That portion of the sentence providing for dishonorable discharge was suspended. The Round Mountain Detention and Rehabilitation Center, APO 923, was designated as the place of confinement. The result of the trial was published in General Court-Martial Orders No. 259, Headquarters, United States Army Services of Supply, 31 July, 1943.

3. The only question presented to the Board of Review for its consideration is the sufficiency of the evidence to support the court's findings of guilty. The entire evidence on the question at issue follows:

DIRECT EXAMINATION

Questions by Prosecution:

Q. State your name, grade, organization, and station?
A. Sergeant Robert L. Riebling, 738th Military Police Battalion, Camp Whinstanes.

Q. Do you know the accused in this case?
A. Yes, sir.

Q. What is his name?
A. Pvt. Joe Phillips.

Q. Is he in the military service of the United States?
A. Yes, sir.

Q. On or about 5 December, 1942, was Phillips a member of the 738th Military Police Battalion?
A. Yes, sir.

Q. On that date what was his duty with the Battalion?
A. Mail Orderly.

Q. On the 5th of December, 1942, did you give Phillips any money?
A. I gave him a Mail Order.

Q. For what purpose did you give him that Order?
A. To be cashed.

Q. What was the value of the Order?
A. Ten Dollars.

Q. Did he return any money to you?
A. Yes, sir, he did. I received the money for that on the first day of this month.

Q. Did he return the money to you in December?
A. No, sir.

Q. Did you find out anything about it until the first of this month?
A. No, sir.

Q. Did he make any explanation to you?
A. No, sir.

Q. Did you question him as to what happened to the Mail Order?
A. No, sir, I didn't.

Q. Is this your signature?
A. Yes, sir.

Q. Will you read that statement over and refresh your recollection?
The statement was then read by the witness.

Q. Did you at any time after the 5th December, question the accused about your money?
A. Yes, sir, I did.

Q. Did he give it to you?
A. No, sir.

CROSS EXAMINATION

Questions by Defense:

Q. You say you asked Phillips about the Money Order?
A. Yes, sir, I did.

Q. What did you ask him?
A. I asked him if he got it cashed.

Q. What was his reply?
A. He said he didn't have a chance to cash it.

Q. Do you know how long it was after you asked him for it again?
A. No, sir.

Q. Was it a matter of days?
A. It couldn't have beem very long.

Q. And what was his reply?
A. He didn't have a chance to cash it yet.

Q. And you asked him several times and the answer was the same?
A. Yes, sir.

EXAMINATION BY COURT

Questions by Court:

Q. Did I understand you to say you gave him the Order to be cashed?
A. Yes, sir.

Q. At that time you gave him the Order did you arrange that he was to cash it and return the money to you?
A. Yes, sir.

Q. You didn't give him permission to take this money for his own use?
A. No, sir.

Q. What time did you say this money was returned to you?
A. On June 1st of this month.

Q. 1943?
A. Yes, sir.

Q. You didn't ask him what had become of the money between December and June?
A. No, sir.

Q. Did you ask him for the money on June 1st?
A. No, sir, I never asked him about it for about two months.

Q. Did he give you the money voluntarily on June 1st?
A. I got it through the mail from him.

REDIRECT EXAMINATION

Questions by Prosecution:

Q. Has Phillips been with the 738th Military Police Battalion since December until June of this year?
A. I couldn't answer that question sir, for I don't know.

REEXAMINATION BY COURT

Questions by Court:

Q. Did you try to find Phillips between the last part of December and the first part of June?
A. No, sir, I didn't.

Q. Were you able to contact Phillips between January 1st and the first day of June? Could you have got in touch with him in any way?

A. I could have, but I didn't.

Q. Where was he?
A. He was in the hospital at the time.

Q. What hospital?
A. 42nd General Hospital.

Q. He was in town and you could have got in touch with him?
A. Yes, sir. " (R.4, 5, 6).

Accused is charged with embezzling the money order. The evidence is clear that accused received the money order in a lawful manner. Its return was never demanded of him by the owner. From January 1943, to June 1943, accused was a patient in the hospital. The owner testified that he could have gotten in touch with him at any time but that he did not (R.6).

Embezzlement is "the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it had lawfully come" (par. 149h, p. 173, M.C.M., 1928). The proof required is threefold: The intrusting of the property as alleged; the fraudulent conversion, or appropriation; that such conversion, or appropriation, was with fraudulent intent.

In the instant case we have only the first requisite present. There is not a scintilla of competent evidence to support the other two remaining requisites. The fact that accused remitted to the owner an amount equivalent to that of the money order might raise a surmise or conjecture that he cashed the money order and appropriated the proceeds thereof to his own use, but surmises and conjectures are not sufficient upon which to base a conviction (CM 220061, Barnes). Accused was lawfully in possession of the property in question. No time limit was imposed for its return or for the proceeds thereof, and no overt act upon accused's part is established. No demand was made by the owner for the return of the money order although accused was available, in the hospital, at all times.

4. The record containing insufficient evidence necessary and essential to prove accused guilty, as alleged, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of the court and the sentence.

JOHN A. STAGG - Absent, Judge Advocate.
Colonel, J.A.G.D.

Charles J. Colombo, Judge Advocate.
Lt. Colonel, J.A.G.D.

James B. Murphy, Judge Advocate.
Lt. Colonel, J. A. G. D.

WAR DEPARTMENT
Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

5 September, 1943.

CM A-663

UNITED STATES v. Private JOE R. PHILLIPS (36148959), Detachment of Patients, 118th General Hospital.	Trial by G.C.M., convened at Headquarters, Base Section 3, 8 June, 1943. Dishonorable discharge, total forfeitures, confinement for six months. Round Mountain Detention and Rehabilitation Center, APO 923.

ADDENDA to
HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The statement of facts contained in the opinion of the Board of Review herein, dated 22 August, 1943, is amended by inserting on page 4 thereof, at the conclusion of the recitation of the testimony of Sergeant Riebling, the following:

> Accused sent to Riebling a money order for $10.00 by letter dated May 16, 1943, reading as follows:
>
> > "Please find inclosed $10.00 money order for the one you give me. Sorry I forgot it. Hope you see fit to drop charges as soon as possible. Thanks a lot." (Ex. I).
>
> In Specifications 2 and 3 the accused was charged with, on or about 19 December, 1943, embezzling $80.00, the property of Corporal Goscinski, and, on or about 15 September, 1942, embezzling £25, the property of T/5 Grade Norbert P. Najdowski, respectively. The reviewing authority disapproved the findings of guilty of Specifications 2 and 3.

2. All of such evidence was considered by the Board of Review in reaching its conclusion. However, it having been called to the attention of the Board of Review that such evidence might not have been so considered, although not deemed essential to be included in the statement of facts for a proper determination of the question at issue, for the sake of clarity only, this addenda is made to the opinion.

JOHN A. STAGG - Absent, Judge Advocate.
Colonel, J.A.G.D.

Walter J. Roberts, Judge Advocate.
Lt. Colonel, J.A.G.D.

James P. Murphy, Judge Advocate.
Lt. Colonel, J.A.G.D.

WAR DEPARTMENT

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

A.P.O. 924,
24 August 1943.

SUBJECT: Record of trial by general court-martial in the case of Private Joe R. Phillips (36148959), Company "B", 738th Military Police Battalion, APO 923.

TO : Commander-in-Chief, Southwest Pacific Area, A.P.O. 500.

1. Inclosed is the record of trial described above and the holding of the Board of Review in this office that the record of trial is legally insufficient to sustain the findings of guilt. I concur in that holding and recommend the necessary corrective action to vacate the illegal sentence.

2. A form of action effectuating this recommendation, together with a form of general court-martial order publishing such action are inclosed for your convenience in the event that you concur in the recommendation.

ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

4 Incls:
Incl. 1 - Record of trial.
Incl. 2 - Holding of Board of Review.
Incl. 3 - Form of action.
Incl. 4 - Form of general court-martial orders.

(Sentence vacated. GCMO 8, USAFFE, 19 Sep 1943)

WAR DEPARTMENT
Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

31 August, 1943.

CM A-665

UNITED STATES v. Private ERNEST MELONAS (20607123), Medical Detachment, 132nd Infantry.	Trial by G.C.M., convened at Headquarters, Americal Division, APO 716, 28 July, 1943. Dishonorable discharge, total forfeitures, and confinement for ten years. Execution of sentence suspended.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The Board of Review has examined the record of trial in the case of the soldier named above and submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 75th Article of War.

Specification: In that, Private Ernest Melonas, Medical Detachment, 132nd Infantry, did, at Guadalcanal, Solomon Islands, on or about December 26, 1942, run away from his assigned unit which was then engaged with the enemy, and did not return thereto until January 9, 1943, at which time the engagement had been concluded.

The accused pleaded not guilty to the charge and specification. He was found guilty as charged, and sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for ten years. The reviewing authority approved the sentence but suspended its execution.

3. The evidence for the prosecution shows that on or about December 18 or 19, 1942, the 132nd Infantry went into combat at Guadalcanal, Solomon Islands (R.20). Accused was a "company aid" man of the Medical Detachment (R.6) of Company B, of this regiment. His duties were to render first aid to both sick and casualties of his company. Accused performed these duties until some time between the 20th and the 24th of December when he was sent back to the rear area "to get a grip on himself". Accused was in a nervous and exhausted condition. "He was suffering from war-neurosis. His nerves were shot" (R.16). He was complaining of nausea and showed signs of malaria. The battalion surgeon "thought a day or two of rest would snap him out of it and that he saw signs of the man becoming overly nervous. In other words he was exhausted and did not have the grip that he should have had" (R.23).

Accused returned to the medical detachment about 24 December, 1942. Captain Stotz, M.C., testified that accused "was the same as when I saw him back in the area" (R.19). Accused was nervous and sick and there were signs of malaria (R.36). Major Belmonte, M.C., testified that he saw accused and "asked him how he felt. He replied that he felt shaky. I told him to go get a good days rest because he was going up to the line the next day. His condition did not appear to warrant a return to the rear" (R.22).

On or about December 26, 1942, Company B called for an aid man and accused was missing. He was found on January 9, 1943, in a tent about a mile and a half in the rear by Staff Sergeant Vaupell who had heard that a medical man was in that locality. The sergeant testified that when he saw accused, accused was "nervous and jittery * * * As soon as I found him he went to pieces * * * He broke down and cried" (R.13). When asked shortly afterwards to explain his absence accused said "something about being tagged by the 101st Medical Regiment". There was no record in Company B that such had occurred nor does the record contain any evidence of accused's actions during his absence. On January 10 or 11, accused was sent to the hospital with "fever of malaria" (R.20).

Captain Stotz testified that accused had been assigned to his organization since prior to its departure from the United States and that he had never noticed any condition in accused that indicated mental instability (R.41). The Captain further testified that he saw accused for ten or fifteen minutes when he [accused] reported back to his unit on about 24 December. On that occasion there was no sign that accused was "insane" (R.17) and he "never had any reason to believe that he is insane before or after coming here"(R.18); that he did not "qualify as a psychiatrist, but as a general medical practioner I would say that he was sane" (R.19).

Major Belmonte testified that accused was transferred to his organization about 15 January, 1943. Between that date and the time of the trial nothing had occurred which would lead him to think that accused was mentally unbalanced (R.39).

The accused elected to remain silent.

The defense called as witnesses 1st Lieutenants Forbes Burgess and Samuel Burak, the members of the board who examined the accused to determine his sanity pursuant to a letter to the Commanding Officer, 7th Evacuation Hospital, APO 913, dated May 18, 1943. Lieutenant Burgess identified the report of the board, introduced in evidence and marked Defense Exhibit "A". The report in pertinent part follows:

"1. * * *

2. A review of his past history reveals that in July, 1941 while at Camp Forrest, Tennessee, he had a 'nervous breakdown' and was hospitalized for a period of two months. Also, previous to his induction on March 4, 1941, he had been nervous, jittery and unable to concentrate for about a period of six months.

3. In regard to the incident leading to his alleged desertion he states that late in December, after being in the front lines for 3-4 days, he became weak, nervous and suffered from nausea and vomiting. He was sent back to the Regimental Aid Station for two days where he claims he continued to be jittery, tremulous, could not sleep and had no appetite. Upon reporting back to Capt. Stotz he was told to return to Company B as an Aid Man. He was nervous at this time, and remembers digging himself into a fox-hole at the C.P. of Company B. He recalls having Christmas dinner with the Company and remembers making several drives with them the next day until they hit some pillboxes. From then on, things are hazy and he recalls nothing more, except for a few isolated incidents until a Sergeant found him

in a different Company area in the rear. He has no idea as to how he got there, or what took place during the intervening approximate two week period. At the time that he was found he was highly nervous, shaking, nauseated and vomiting. During the time that this information was obtained from the patient he manifested intense emotional excitement, apprehensiveness, marked tremor, and other evidences of emotional instability. Repeated attempts with psychotherapy have failed to bring back any recollections for his period of amnesia.

4. After a careful review of the evidence submitted, and after seeing this patient at numerous interviews over a period of two weeks, the examiner has arrived at the following opinion: This soldier gives evidence of emotional instability and nervous traits of character which have been present since prior to his induction into the Army. At the time of commission of the alleged act of desertion it is felt that he did not have the retention of his full mental faculties, due to the fact that he was under severe mental strain and highly emotional, which led to the development of an acute hysterical amnesia, precipitated by his underlying anxiety state. In is further felt that this man was not responsible for what occurred during the alleged period of desertion as he did not have control of his mental faculties and reasoning power. It is believed that the above should be considered as strong, extenuating circumstances in any charges brought against this soldier."
(Ex. A).

He further testified -

"It is my opinion that at that time he was suffering from a severe anxiety state. I cannot say exactly when it started but I believe that he was suffering from amnesia which was precipitated, of course, by this underlying anxiety state. This condition has been established for a considerable time as a result of static amnesia, however I do not know what time it started. He did not have full control of his mental faculties and was not able to distinguish right from wrong. I believe that he should not be held responsible for his actions during that period". (R.25).

* * *

"Q. * * * In civilian life would this be sufficient to have him committed to an asylum?
A. No. He might be put there temporarily until he recovered from amnesia. As long as he is in this amnesia state he should be confined or under close supervision in some way because he does not know what he is doing. In civilian life he would be placed in a hospital or a mental institution if found in that condition.

Q. In your opinion is the man fit for military duty?
A. No, sir." (R.26).

* * *

"Q. In your opinion, when a man is in the mental condition as you say in your report about this man, is he partially, fully, or not responsible for his actions while in that state of mind?
A. Well, I think when you say he is not fully responsible you cover it." (R.28).

Lieutenant Samuel Burak qualified as an expert psychiatrist, having engaged in this type of work exclusively for the past seven years. He fully subscribed to all opinions set forth in the report marked Exhibit "A" and testified that the report was written jointly by Lieutenant Burgess and himself (R.31). He further testified -

> "Q. From your observation and examination of the accused, over a period of two weeks, have you reached an opinion as to the mental condition of the accused on or about December 26, 1942?
> A. I have.
>
> Q. What is that opinion?
> A. I believe that Private Melonas was suffering from a severe anxiety state brought on by emotional strain and that this emotional strain finally led to hysteria and amnesia, or loss of memory, which period of amnesia lasted three weeks. During that period he was not responsible for his actions and did not have control of his senses." (R.31-32).

4. Immediately after arraignment and prior to accused's plea of not guilty, the defense moved for a continuance until August 16, 1943, (a matter of 19 days), on the ground that material evidence was not available for his proper defense. The court was advised that efforts had been made and interrogatories proposed to be sent to Camp Forrest, Tennessee, for medical records which would show that accused had been confined in a hospital at that camp for three months for a mental illness. Such interrogatories were not sent upon advice of the Division Staff Judge Advocate who suggested a radiogram in lieu thereof. No reply to the radiogram had been received as of the date of trial. The court denied the motion, the President stating -

> "There is no reasonable cause shown for the continuance of the trial. The grounds as called for in the application does not apply to paragraph 52b which has been read to the court. The condition of the accused sometime prior to the alleged offense is not necessary. The court will continue." (R.4b).

The record does not disclose that the court was aware of the fact that an examination had been made by a Board of Examiners as to accused's sanity, and if not so aware of such fact, the motion for a continuance should have been granted. It is realized that speedy trials are essential for the proper administration of military justice and that it is the duty of the court to perform this function to the end that the guilty shall receive sure and swift punishment and the innocent set free. But nothing shall be done wherein an accused may be deprived of his constitutional right to have his day in court and to present any evidence which is necessary and essential to his proper defense. In the instant case accused was many thousands of miles from the place where important evidence he alleged to be to his benefit was located, and a bone fide effort to secure the same through military channels having been made, simple justice demanded that the continuance of less than three weeks should have been granted. However, the question becomes academic in view of the findings by the Board of Examiners who state in their report (Ex. A) that they gave consideration to such evidence.

5. The question presented to the Board of Review for its consideration is the sufficiency of the evidence to sustain the court's findings of guilty as alleged. Accused's sanity having been placed in issue, its proper determination by the court is essential to give legality to its findings, for if accused be mentally irresponsible at the time of the alleged offense he cannot be held accountable therefor. On this question the Manual for Courts-Martial, 1928, directs that -

> "Where a reasonable doubt exists as to the mental responsibility of an accused for an offense charged, the accused cannot legally be convicted of that offense * * *". (par. 78, M.C.M., 1928).

This provision places the burden of ultimate persuasion with reference to the mental responsibility of accused upon the prosecution and recognizes the fundamental principle that all men are deemed innocent until proven guilty (par. 219, M.C.M., 1921). On this point the United States Supreme Court has made the following authoritative pronouncement:

> "* * * Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disapprove the facts. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime.* * * "
>
> " * * *
>
> "If insanity is relied on and evidence given tending to establish that unfortunate condition of mind, and a reasonable well-founded doubt is thereby raised of the sanity of the accused, every principle of justice and humanity demands that the accused shall have the benefit of the doubt" (Davis v. United States, 160 U.S., 469, cited in James, CM 116694).

In the determination of the type and extent of mental derangement or disease which will relieve one of criminal accountability the Manual for Courts-Martial, 1928, provides -

> " * * *A person is not mentally responsible for an offense unless he was at the time so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right" (par. 78, M.C.M., 1928).

Similarly, Winthrop states -

> "To constitute a defence on the ground of insanity, it may be made to appear, * * *, on the other hand, that though aware of the nature and consequences of his act, as well as of its wrongfulness or its illegality, he was prompted by such an uncontrollable impulse as not to be a free agent" (Winthrop, Mil. Law & Prec., reprint 1920, p. 294).

In CM 116694, James, The Judge Advocate General cited the following language with approval -

> "Men, under the influence of disease, may know the right, and yet be powerless to resist the wrong. The well-known exhibition of cunning by persons admitted to be insane, in the perpetration of an illegal act, would seem to indicate comprehension of its evil nature and legal consequences, and yet the power of self-control being lost from disease, there can be no legal responsibility."

Likewise, in CM 124243, Harris, The Judge Advocate General held that evidence showing acute melancholia or emotional insanity presented a valid defense against the offense charged. Although this just and humanitarian doctrine is not recognized in all jurisdictions, it is definitely a part of our military law (CM 223448, Riesenman).

In the light of the foregoing authorities whether the prosecution has discharged its duty to prove that accused was mentally responsible at the time of the alleged act must be determined from the evidence as found in the record.

The Board of Medical Examiners duly appointed by competent authority reported -

> "In is further felt that this man was not responsible for what occurred during the alleged period of desertion as he did not have control of his mental faculties and reasoning power" (Ex. A).
>
> "He did not have full control of his mental faculties and was not able to distinguish right from wrong" (R.25, underscoring supplied).

Furthermore, each member of the board testified that it was his opinion, after personal examination, that accused was not mentally responsible for his acts at the time in question and should not be held accountable therefor. It therefore follows that accused was unable to either distinguish right from wrong or to adhere to the right. One of the members of the board qualified as an experienced psychiatrist, and the other as an expert of the medical profession. There is no evidence introduced by the prosecution to negate the findings of the board of medical officers. Captain Stotz testified that for the period prior to 24 December he had never noticed any condition in accused that indicated mental irresponsibility and believed him to be sane at that time. The witness qualifies his opinion, however, by further testifying that he did not examine the accused "from a psychiatric standpoint". Major Belmonte expressed no opinion as to the mental responsibility of accused from 26 December, 1942, to 9 January, 1943, but only for a time subsequent to the offenses herein alleged. Giving full credence to the statement of these two witnesses that they noticed nothing in the actions of accused to indicate that he was unbalanced, it is observed that neither of them testified that the accused was so free from mental defects as to be able to "adhere to the right" at the times under consideration. As to this phase of the mental irresponsibility of accused, the testimony of the medical experts stands uncontradicted. In fact, the testimony of Captain Stotz and Major Belmonte and other witnesses for the prosecution with reference to the physical and nervous condition of the accused immediately prior and subsequent to his disappearance that "he was suffering from war-neurosis - his nerves were shot - he was nervous and quite exhausted - he was nervous and sick and there were signs of nausea - he was nervous and jittery, he broke down and cried " confirms the opinion of the medical board as to the emotional instability of the accused and tends to corroborate the positive and definite conclusion of the medical board.

The Judge Advocate General has stated in a closely parellel case (CM 223448, Riesenman) -

> "* * * the record presents no satisfactory explanation why the clearly expressed and deliberate opinion of these experts, [board of medical officers], whose unimpeached and unprejudiced testimony presents prima facie proof that the accused was unable to adhere to the right * * * [at the time of this offense] should have been rejected by the court. Concerning the duty of the court-martial to consider such testimony, it has been said that:
>
> > ' * * * While it is the function of the court as triers of fact to consider the report of the board and accord to it that weight and credence to which, in the judgment of the court, it may be entitled, yet since the report of the board, supported by other evidence, was unimpeached by the prosecution, it is prima facie proof of mental derangement and the court could not entirely disregard such evidence * * * ' (CM 128252, Reppberger).
>
> "
>
> Furthermore, Mr. Justice Harlan, in the case of Davis v. United States, cited above, concluded with the following obvations:

'* * * No man shall be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them, by whomsoever adduced, is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged.'

"In view of the standards definitely established by the foregoing authorities and the rule of law which places the burden of ultimate persuasion on the prosecution to show that the accused could adhere to the right * * *[on the date of offense alleged], we are impelled to the conclusion that the prosecution, not only failed to discharge this burden of proof, but also failed to rebut the positive findings of the Medical Board appointed to determine the mental condition of the accused. Accordingly, the findings of guilty and the sentence should be disapproved. * * * "

6. For the reasons above stated the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of the charge and the specification thereunder, and the sentence.

JOHN A. STAGG - Absent, Judge Advocate.
Colonel, J.A.G.D.

[signature], Judge Advocate.
Lt. Colonel, J.A.G.D.

[signature] Judge Advocate.
Lt. Colonel, J.A.G.D.

WAR DEPARTMENT

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

A.P.O. 924,
3 September, 1943.

SUBJECT: Record of trial by general court-martial in the case of Private Ernest Melonas (20607123), Medical Detachment, 132nd Infantry.

TO : Commanding General, U.S.A.F.I.S.P.A., A.P.O. 502.

1. Inclosed is the record of trial described above and the holding of the Board of Review in this office that the record of trial is legally insufficient to support the findings of guilty of the charge and the specification thereunder and of the sentence. I concur in that holding and recommend the necessary corrective action to vacate the findings and the sentence.

2. A form of action effectuating this recommendation is inclosed for your convenience in the event that you concur in the action recommended.

ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

3 Incls:
Incl. 1 - Record of trial.
Incl. 2 - Holding of Board of Review.
Incl. 3 - Action sheet.

(Findings and sentence vacated. GCMO 26, USAFISPA, 7 Oct 1943)

WAR DEPARTMENT
Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

10 September, 1943.

CM A-675

UNITED STATES v. 1st Lieutenant JOHN M. ATKINSON (0-330934), Service Command, APO 709, on special duty with Service Command, APO 932.	Trial by G.C.M., convened at APO 932, 5 August, 1943. Dismissal.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the officer named above has been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 93rd Article of War.
(Finding of not guilty)

CHARGE II: Violation of the 95th Article of War.

Specification: In that 1st Lt. John M. Atkinson, Service Command APO 709 on special duty with Service Command APO 932, was, at APO 932, on or about July 13, 1943, guilty of conduct unbecoming an officer and a gentleman by being drunk in the Officers' Club.

CHARGE III: Violation of the 96th Article of War.

Specification: In that 1st Lt. John M. Atkinson, Service Command, APO 709 on special duty with Service Command APO 932, was, at APO 932, on or about July 13, 1943, drunk and disorderly in the Ordnance Company area.

The accused pleaded not guilty to all charges and specifications. He was found not guilty of Charge I and its specification and guilty of Charges II and III and the specifications thereunder, and sentenced to be dismissed the service. The reviewing authority approved the sentence and the confirming authority confirmed the same. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence shows that accused, a member of Service Command stationed at Guadalcanal, Solomon Islands (R.44) was, on 13 July, 1943, on special duty with the Service Command stationed at Efate, New Hebrides. That evening accused, in company with Lieutenant Orville E. Galyon, left the Ordnance Area about six o'clock P.M. to dine at a place known as "Francois", being joined there by Lieutenant Robert J. Wedner. At dinner accused had some type of liquor. Finishing dinner the three of them went to the Officers' Club arriving there about 8 o'clock P.M. (R.14). At the Club most of the officers were drinking. Many quantities of drinks, consisting mostly of hard liquor, were placed on the table and consumed at will. After nine o'clock accused was "boisterous * * * was excessively drunk. He fell out of his chair. * * * His conversation became incoherent." (R.5). Major Paul I. Donnelly testified "He started giving me some nasty remark and I overlooked it realizing that he had been drinking * * * and when I got up to leave he stood up and lost his balance and fell over and pulled the table on top of him". Accused was under the influence of whiskey; was not rational, and there was no continuity in his thought process (R.35, 36). He fell to the floor (R.38); was drunk and in a stuporous condition (R.43). Accused left the Club in a jeep about 10:45 P.M. to return to the Ordnance area with Lieutenant Wedner. Going from the Club to the jeep he fell over a chair and was picked up by Lieutenant Wedner, who helped him in to the jeep (R.15). On the way back to the Ordnance area "He weaved about a bit and held around my shoulder to keep from falling out" (R.21). Arriving at the Ordnance area Lieutenant Wedner, with the assistance of Lieutenant Day, took accused to his [accused's] quarters and put him to bed (R.16). Accused immediately "jumped up again * * * started searching in his field equipment * * * feeling up and down the wall * * * until finally he came to something * * *" and "he then stopped his searching" (R.17). Upon being asked by Lieutenant Wedner what he had, accused replied, "I have a gun" and that he was going to shoot the Lieutenant. Lieutenant Wedner testified "* * *I heard it click and I started to move myself and the gun went off and hit me in the wrist * * *" (R.18). Witness then grappled with accused and with the assistance of Lieutenants Day and Pavalko disarmed accused. Lieutenant Wedner then went to the hospital accompanied by Lieutenant Day. At the hospital Lieutenant Wedner stated "This whole thing was an accident" (R.24). From the hospital Lieutenant Day notified Captain Munger of the incident and was ordered by Captain Munger to return to the detachment and "see that Lt. Atkinson was taken care of and watched -- placed under guard" (R.6). Returning to accused's tent, Lieutenant Day accompanied by Lieutenant Rector found accused was not there. In company with other officers they began searching the area. Hearing a call "Halt! Halt! or I'll shoot" they ran down the hill and found accused backed up against a mess kit washing rack, surrounded by two enlisted men of the guard, clad only in his shorts and covered with mud "from head to foot". Accused was then given a bath and put to bed and placed under a guard (R.7).

Prior to the shooting Lieutenant Floyd D. Rector, whose tent was near that of accused, was awakened by the singing of accused, Lieutenant Day and Lieutenant Wedner. About 15 minutes later he heard a shot, and immediately Lieutenant Wedner said "God-damn it, you've shot my arm off" (R.26). He immediately went to accused's tent, gave first aid to Lieutenant Wedner and took accused's automatic .45 pistol back to his own tent and placed it in his trunk locker (R.26-7). Examination showed the pistol jammed with an empty cartridge, with live ones in the clip. Returning to accused's tent, with the assistance of Lieutenant Pavalko, accused was put to bed. Later that night he heard a noise like something "beating on a tin can with a hard object". Upon returning to accused's tent he found him kneeling at the head of his cot "as though he was hiding from me" (R.28). He found that apparently the noise had been caused by the accused beating on an insecticide can with an M.9 rifle grenade. A subsequent examination of the grenade showed that the firing pin had been "pulled". Fortunately the grenade proved to be a "dud" (R.28).

Accused elected to remain silent. By stipulation the defense introduced in evidence statements showing that accused was an expert in the repair of fire-control instruments, the knowledge necessary for such being attained only by a high degree of specialization, accused being "the only person having such knowledge in this area." His ratings were all "excellent". Also, statements of accused's former and immediate commanding officers, all of whom spoke of accused in the most commendatory terms were introduced. Major Charles Lawrence, M.C., was called and testified that the nature of accused's precision work and mental concentration

incident thereto over a period of 18 months was calculated to make one become "more or less nervous * * * and apprehensive", (R.45) and in answer to a hypothetical question recounting accused's actions for the entire evening in question, stated "I would assume his state of mind to be that of an alcoholic" (R.18).

Captain Gaylon, recalled, testified that he was with accused from the time they arrived at the Officers' Club until they left. That accused was "drunk"; in a "stuporous condition"; "numb"; that accused "came down here from Guadalcanal * * * and had an atmosphere about him of wanting to relax a little." He was sort of "jumpy" and to a certain extent "tense" (R.43).

4. The evidence is clear and convincing that the accused did, at the time and places alleged commit the acts set forth in Charges II and III, and the specifications thereunder.

That he was drunk at the Officers' Club is unquestioned.

> "Drunkenness alone may constitute a violation of A.W. 95, where it is alleged as the sole offense, unaccompanied by any allegation or proof of disorderly conduct." (sec. 453(12), Dig. Ops. JAG, 1912-40).

> "It is a mistaken notion that the Army can be disgraced, or discredited, by the misconduct of one of its members only if that misconduct is seen by outsiders." (CM 202846, sec. 453(10), Dig. Ops. supra).

The court by its findings determined that accused's conduct as alleged in Charge II and its specification at the Officers' Club was unbecoming an officer and a gentleman. There is evidence in the record which supports such findings.

It is equally true that he was drunk and disorderly in the Ordnance area, and had it not been for the prompt action of one of his fellow officers in advising the guards not to shoot, and the fortuitous circumstances of the rifle grenade being a "dud", accused would, most likely, not be alive today.

The evidence is clear that accused had been an efficient and valuable officer. However, the evidence is equally clear to support the court's findings of guilty and the Board of Review finds nothing in the record warranting that such findings should be disturbed.

5. For the reasons above stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of the court, and the sentence.

Colonel, J.A.G.D., Judge Advocate.

Lt. Col., J.A.G.D., Judge Advocate.

Lt. Col., J.A.G.D., Judge Advocate.

WAR DEPARTMENT
Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review | 15 September, 1943.

CM A-687

UNITED STATES v. Corporal Virgil O. Banks Jr. (38043346) and Private First Class Edward Nevers (38053171), both of Company F, 29th Quartermaster Regiment; and Technician 5th Grade Millard Cauthen (34060538), Private First Class George Stillwell (34060138), and Private Haywood Williams (34039786), all of Company G, 48th Quartermaster Regiment.	Trial by G.C.M., convened at APO 922, 1 June, 1943. As to each accused: Dishonorable discharge, total forfeitures, confinement for life. United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused were tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Edward Nevers, Private First Class, Company "F", 29th Quartermaster Regiment, Virgil O. Banks Jr., Corporal, Company "F", 29th Quartermaster Regiment, George Stillwell, P.F.C., Company "G" 48th Quartermaster Regiment, Heywood Williams, Private, Company "G", 48th Quartermaster Regiment and Millard Cauthen, Technician 5th Grade, Company "G" 48th Quartermaster Regiment, did, at Townsville, Queensland on the 13th day of April, 1943, jointly and concertedly, with malice aforethought, willfully, deliberately, feloniously, and unlawfully, and with premeditation, kill one Charles E. Rawes, Technician Fourth Grade, 3481 Ordnance Company, a human being, by striking him on the head with a push broom and by kicking him on the head and body with their feet.

Each accused pleaded not guilty to the charge and specification and was found guilty as charged. They were each sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentences and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The competent evidence for the prosecution shows that on April 13, 1943, the deceased, T/4 Charles E. Rawes, left the house of Miss Kathleen Burrows, 18 Plant Street, West End, Townsville, at about a quarter past eleven o'clock P.M., presumably to return to his camp area at Stuart Creek (R.61). He returned about fifteen minutes later and asked Miss Burrows for his gun and flashlight, stating he was "going to kill some of those son of bitches, meaning the negroes". At this time the pistol was loaded and ready to fire (R.63). Deceased then went to the entrance of the area of Company G, 48th Quartermaster Regiment, and stated to the sentry, Private James Brooks, that he wanted to see the Sergeant of the Guard, saying "some colored soldiers up the street wanted to jump on me". When asked by the sentry if the colored soldiers had hit him, deceased replied, "No, they didn't hit me. They tried to jump me. I want the Sergeant of the Guard to bring the soldiers that just went in and to bring them back up here." At this time the deceased drew his pistol and pointed it at the sentry telling him to "back up" (R.80, 82). While this was happening all five of accused were standing from eight to fifteen feet away from deceased but took no part in the affair (R.83, 84). Corporal Allen came up at this time and deceased asked him if he was the Sergeant of the Guard. Allen replied that he was not and deceased then said to Allen that he wanted to see the Sergeant of the Guard (R.85). Private Junius E. Joseph, who had accompanied Corporal Allen to the scene, picked up the sentry's rifle, and "stuck it in his /deceased's/ side and told him to drop the gun" (R.119). Corporal Allen then disarmed deceased and with Private Joseph returned to the camp area, the former carrying deceased's pistol (R.85).

Deceased then began to "rassle" with accused Nevers who threw him to the road, deceased falling "on his back with his legs bent at the knees and in the air and his elbows resting on the ground and his two hands in the air" (R.86). Accused Nevers then ran to the sentry box which was about twenty feet away and got a "push-broom", which was admitted in evidence as Exhibit "E" and described by a witness as follows:

> " * * * a pretty heavy broom * * * the handle of the broom is four foot two inches from where it fastens to the base to the end; the broom across the butt of the face of the broom where the straws are fastened is sixteen inches; the thickness of the broom at which the bristles or the straws are fastened into are one and three fourths inches; the base of the broom across is approximately five inches; the straws to the broom come to seven or eight inches" (R.71, 72).

He returned and struck deceased on the head with it, while deceased was in "a position on his hands and knees with his face downward" (R. 87, 89). Accused Nevers then threw the broom down and went away. Private Brooks, the sentry, testified that "immediately" thereafter the other four accused " * * * kicked the white soldier that was laying on the ground. * * * They was kicking him between his legs and then they kicked - seems to me like they was kicking him all over." (R.88).

Upon being asked if he could see any particular one of accused kicking deceased, he replied "Well they had their backs to me when they first started to kicking him. They were all huddled up together and they came around him with their backs to me and I couldn't tell what particular one was kicking him."

"Q. At the time the four accused were kicking him did you see him do anything?
A. No, Sir - he didn't do nothing but lay down there then whilst they were kicking him."

Shortly thereafter the four accused left and went in the direction of camp (R.88).

Deceased then crawled across the road to a ditch from which he was later picked up and taken to the 12th Station Hospital. Upon arrival at the hospital an examination showed deceased to be in a coma, suffering from a severe intracranial and intracerebral hemorrhage. His condition was such that "an operation was not indicated in any sense, as it was doubtful the patient would survive the trip to the operating room" (R.22). He had severe lacerations and bruises about his face; a cut and bruises over his right eyebrow and on the right side of the head over the temporal region; a cut in the center of the forehead; bruises over the left eyebrow; the lips very thickly swollen and a small penetrating wound about one inch in depth under the shoulder blade four inches from the spinal column.

Captain Kenneth R. Cross, M.C. testified -

"Q. In view of the findings you previously have stated to the court, would the injuries to the body as indicated by the findings you have just submitted be contributive to the cause of the death of Charles E. Rawes.

A. They may have contributed but they don't play a very major role.

Q. In your opinion would the blow delivered to the right hand side of the head of Charles E. Rawes have rendered Charles E. Rawes in the state of shock?
A. Yes.

Q. In your opinion would any blows delivered to the body of Charles E. Rawes after the blow to the right hand side of the head be contributive to that state of shock?
A. I can't say that they did or didn't. My opinion is that they would." (R.41).

Deceased died the next morning at 9:50 A.M. from "an intracranial hemorrhage or intracranial hemorrhages as a direct result of fractures of the skull" (R.35).

The defense introduced no testimony and each accused elected to remain silent.

4. The record of trial presents two questions for the consideration of the Board of Review, viz:

a. What was the causal connection between the severe blows inflicted, first by Nevers, and subsequently by the other four accused, and the death of deceased?

b. Does the evidence support the court's findings that the several accused acted with malice aforethought?

The evidence is uncontradicted that accused Nevers struck the deceased on the head with a push-broom, the very nature of which, considering the manner of its use, would likely cause death or grievous bodily harm. The evidence sustains the conclusion that the primary cause of death was produced by this blow. "Immediately" thereafter the four accused began kicking the critically injured deceased "all over". The nature of deceased's many injuries found on his body fully warranted the court in inferring that those imposed by the group were mortal and were a contributing cause of deceased's death, although not such as to vary the effects of the first injury to the extent that it could be said that a new circumstance intervened, which in itself, produced the primary cause of the death and to which the death is attributable. From the evidence the court could properly infer that the latter assault augmented the primary cause of death and death ensued, not as a result of either one of the mortal wounds, but as the result of both.

> "If a person inflicts an injury upon a person and death results from such injury combined with * * * another injury, previously inflicted, such pre-existing weakness effects no break in the chain of causation, even though the person killed was likely, or even sure, to die in the near future (par. (e), sec. 25, Miller on Criminal Law.)

> "Where the act or acts which intervene after the happening of the defendant's act are committed by persons acting independently of the defendant, there is much uncertainty in the cases as to whether or not the defendant's act can still be considered proximate. * * * If, in fact, the first wound was a mortal wound, then it would seem that it must have been contributing to the death at the time of its occurrence. There is no difficulty or absurdity involved in finding that the acts of both persons contributed to the death and that both are guilty thereof, even though they were not acting in concert. The better reasoned cases so hold. Of course, if the death or other injury is attributable entirely to the independent intervening act * * * then the causal connection is broken and defendant's act is not the proximate cause." (par (f), sec. 25, Miller, supra).

> " * * * if the effect of the circumstances intervening between the pistol wound and the death was merely to prevent any recovery that might otherwise have taken place, or to aggravate or hasten the effect of the pistol wound, that wound might still be considered the cause of the death, and indictable and punishable as such." (Gray, C.J., Commonwealth v. Costley, 118 Mass. 1, 27).

It follows from the foregoing authorities that the court was fully warranted in finding that each of the several assaults were causally connected with the death of deceased and that all of the accused are responsible therefor.

The evidence is susceptible of no other conclusion but that the accused acted with malice aforethought.

> "Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The

use of the word 'aforethought' does not mean that malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time that the act was committed. (Clark)

"Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; intent to commit any felony. * * * " (sec. 148a, M.C.M., 1928).

At the time of Nevers' use of the push-broom he was under no necessity to inflict any blow, certainly not the mortal one he did, for any purpose whatsoever including that of self-defense. He had successfully defeated whatever intention his opponent may have had in attacking him, assuming that the deceased initiated the affray with Nevers; the deceased was apparently quite helpless, causing Nevers to be in no such danger of great bodily harm as would justify him in going after a weapon, bringing it back, and applying it with such force against the deceased's head as to fracture his skull. Clearly the group of four had no grounds whatsoever for their assault. There are no circumstances pertaining to the assaults committed in this case warranting the relief of any one of the accused from the consequences of acting with malice aforethought.

From the evidence it is difficult to perceive the basis for the court's finding that the actions of accused Nevers and the other four (whose actions among themselves were joint) were joint and concerted as alleged, particularly as mere presence at the scene of a crime is not sufficient evidence to warrant such a finding (sec. 451(3), Dig. Ops., JAG, 1912-40). Inasmuch as each of the accused may be legally held responsible for the death of deceased under the specification whether their actions were joint and concerted or several, a consideration of such finding by the Board of Review becomes academic.

5. For the reasons above stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of the court, and the sentences.

John C. Stone, Judge
Colonel, J.A.G.D. Advocate

Nathan J. Roberts, Judge
Lt. Col., J.A.G.D. Advocate

JAMES B. MURPHY, Judge
Lt. Col., J.A.G.D. Advocate
- Absent.

WAR DEPARTMENT
Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

26 September, 1943.

CM A-698

UNITED STATES v. First Lieutenant PAUL R. BRAUTIGAN (0-334201), Infantry, 902nd Air Base Security Battalion.	Trial by G.C.M., convened at Noumea, New Caledonia, 9 August, 1943. Dismissal, total forfeitures, confinement for one year. United States Disciplinary Barracks, Fort Leavenworth, Kansas.

23 May 1946 TJAG, ASK.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the officer named above has been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant PAUL R. BRAUTIGAN, Infantry, 902d Air Base Security Battalion, APO 502, was at APO 502, on or about 30 May 1943, drunk in uniform in a public place, to wit: Rue Jean Juares and Rue Georges Clemenceau, APO 502.

Specification 2: In that First Lieutenant PAUL R. BRAUTIGAN, Infantry, 902d Air Base Security Battalion, APO 502, did, at APO 502, on or about 7 June 1943, wrongfully and unlawfully sell intoxicating liquor to an enlisted man, to wit: Private Jack Conte, United States Marine Corps, APO 502.

Specification 3: In that First Lieutenant PAUL R. BRAUTIGAN, Infantry, 902d Air Base Security Battalion, APO 502, did, at APO 502 on or about 11 June 1943, wrongfully and unlawfully sell intoxicating liquor to an enlisted man, to wit: Chief Carpenter's Mate William Richardson Massey, Receiving Station, APO 502.

Specification 4: In that First Lieutenant PAUL R. BRAUTIGAN, Infantry, 902d Air Base Security Battalion, APO 502, did, on or about 30 May 1943, wrongfully and unlawfully introduce intoxicating liquor for sale into the Second Battalion, 362d Engineer Regiment Area, APO 502.

Specification 5: (Disapproved)

Specification 6: In that First Lieutenant PAUL R. BRAUTIGAN, Infantry, 902d Air Base Security Battalion, APO 502, did, at or near Hotel Central, APO 502, on or about 6 June 1943, drink intoxicating liquor with an enlisted man, to wit: Technician Fifth Grade Robert L. Ficenic, Company "C", 130th Quartermaster Regiment, APO 502.

CHARGE II: Violation of the 95th Article of War.

Specification 1: In that First Lieutenant PAUL R. BRAUTIGAN, Infantry, 902d Air Base Security Battalion, APO 502, did at APO 502, on or about 30 May 1943, wrongfully influence and cause an enlisted man, to wit: Technician Fifth Grade Robert L. Ficenic, Company "C", 130th Quartermaster Regiment, APO 502, to solicit and consumate the sale of intoxicating liquor for the personal profit and gain of the said First Lieutenant PAUL R. BRAUTIGAN.

Specification 2: In that First Lieutenant PAUL R. BRAUTIGAN, Infantry, 902d Air Base Security Battalion, APO 502, did at APO 502, on or about 5 June 1943, wrongfully influence and cause an enlisted man to wit: Seaman Second Class R. A. McCurry, Naval Barracks, APO 502, to solicit and consumate the sale of intoxicating liquor for the personal profit and gain of the said First Lieutenant PAUL R. BRAUTIGAN.

Specification 3: (Disapproved)

The accused pleaded not guilty to the charges and specifications and was found guilty as charged. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for a period of two years. The reviewing authority disapproved the findings of guilty as to Specification 5, Charge I, and Specification 3, Charge II, and approved the sentence, but remitted one year of the confinement thereof. The confirming authority confirmed the sentence, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The competent evidence shows that at about two o'clock in the morning of May 30, 1943, Private First Class Charles E. Major, 209th Military Police Company, and Boilermaker First Class M. H. Wilcox, United States Navy Shore Patrol, found the accused, in uniform, asleep, slumped over the wheel of a "Recon" car parked at Rue Jean Juares and Rue Georges Clemenceau, in the city of Noumea, New Caledonia. It took about five minutes to wake him. When awakened, accused turned on the ignition switch and said in a low voice "Are you ready". Private Major turned the switch off. This performance was repeated several times (R.15, 18). Accused had a strong odor of alcohol on his breath. He was intoxicated and in a drunken stupor (R.16, 20). Accused had no trip ticket for the vehicle and was taken to the Military Police station. (R.15).

The accused as a Special Service officer was the director of "South-Sea Scandals" in which Technician Fifth Grade Robert L. Ficenic was his assistant and an actor therein (R.26, 27). On several occasions during the production of that show Ficenic and accused drank intoxicating liquor together. (R.22, 27). One of those occasions was in the presence of a young lady on about the 6th of June in a small cafe about two blocks from the Central Hotel (R.23, 24).

About the 12th of June the accused and Ficenic were on their way to the Hickson Theater when they passed a group of soldiers. The accused asked Ficenic if he "* * would ask them if they wanted to buy some whiskey and they said yes". They took "one of the fellows" to accused's tent and accused sold him two bottles of Schenley's whiskey for $45.00 (R.22, 23, 26). Ficenic did not know the name of the soldier to whom the whiskey was sold (R.24).

Seaman Second Class R. A. McCurry met accused in the Red Cross building the latter part of May. Accused told him he was selling whiskey in order to buy an engagement ring. McCurry testified he was the contact man. At the request of accused he would "* * see the boys and ask them if they wanted to buy liquor". Through him as a "contact" some Schenley's whiskey was sold to "two marines for $30.00 and on another occasion to some negroes on Route #1 and some negroes parked in a car". Except in the case of Chief Massey, accused made the sales and took the money. For his services McCurry received no money but was given a bottle of whiskey. In making the contacts they rode around in a "peep" (R.32, 33).

Some time between the 5th and 10th of June Private Salvatore A. Conte, United States Marine Corps, went to a private house in Noumea and asked McCurry where he could get some liquor. Pursuant to the arrangement between McCurry and accused the former introduced Conte to accused who was there and sold him a quart of "Schenley's" for $20.00 which accused took from his car. Conte paid accused $14.00 and promised to pay $6.00 to McCurry for accused. Two days later Conte paid the $6.00 to McCurry (R.28, 30, 34).

About the 11th or 12th of June, Chief Carpenter's Mate William R. Massey, United States Naval Reserve, as the Chief Special Investigator of the Shore Patrol, devised a plan "* * to get the ring of bootleggers* *" (R.41). Massey went to McCurry in the Red Cross building and asked if he could get him some liquor. He gave McCurry $20.00 to buy whiskey. McCurry went to accused for the liquor and told him it was "* * for a Chief, but I didn't say Massey". McCurry gave accused $20.00, got the liquor and gave it to Massey (R.34, 36, 40).

About the 6th of June the accused with McCurry took some liquor to the area of the 362nd Engineers. Accused contacted a negro by the name of Baskit who had formerly been a driver for him, and asked him if he could sell some liquor there. Baskit told him to come back, which accused did. No sales were made because "the price of the liquor was too high" (R.35, 39).

By stipulation a written confession of accused was admitted in evidence. As it corroborates and supplements the case for the prosecution it is deemed essential to set forth the pertinent parts thereof. Accused admitted:

"1.* *

2. That I was drunk in a public place, in uniform, to wit: Rue Jean Juares and Rue George Clemenceau, APO 502 on or about May 30, 1943.

3. That I wrongfully and unlawfully sold intoxicating liquor to the following enlisted personnel to wit; Pvt Jack Conte, USMC, APO 502 on or about 7 June 1943, Chief Carpenters Mate William Richardson Massey, USN, Receiving Station, APO 502 on or about 11 June 1943.

4. That I introduced intoxicating liquor for sale into the 2d Battalion 362d Engineer Regiment Bivouac Area, APO 502 on or about 30 May 1943.

5.* *

6. That I did drink intoxicating liquor with an enlisted man to wit: T/5 Robert L. Ficenic, Company C, 130th Quartermaster Regiment, APO 502 on or about 6 June 1943.

7.* *

8.* *

9. That I wrongfully influenced and caused, at APO 502 on or about 30 May 1943, an enlisted man to wit: T/5 Robert L. Ficenic, Company C, 130th Quartermaster Regiment to solicit and consumate the sale of intoxicating liquors for my personal profit and gain.

10. That I wrongfully influenced and caused, at APO 502 on or about 5 June 1943, an enlisted man to wit: Seaman second class A. McCurry, U.S.N. to solicit and consumate the sale of intoxicating liquor for my personal profit and gain." (Ex. C).

4. Evidence appears in the record that the accused did commit the several offenses of which he now stands convicted.

The evidence discloses a plan and course of action on the part of accused to sell intoxicating liquor at a profit, using government vehicles, with an enlisted man and a seaman of the United States Navy as his "contact" men. Pursuant to that course of action accused introduced and offered for sale intoxicating liquor in the area of the 362nd Engineer Regiment and sales of liquor were made to Private Conte and Chief Massey.

The evidence reveals that Chief Massey devised a plan to catch those selling liquor to enlisted men and in furtherance thereof did purchase intoxicating liquor for $20.00 from accused through McCurry, for which sale accused now stands convicted. Accused voluntarily and willingly sold the liquor for profit. Under such circumstances the sale did not amount to entrapment.

"* *However, it does not constitute an unlawful entrapment merely to afford one an opportunity to violate the law.* *

A government officer or agent may procure evidence of an unlawful sale of intoxicating liquor by purchasing, offering to purchase, or expressing a willingness to buy the same, where the seller is ready and willing to make the sale. In fact, where it appears that the seller is acting voluntarily and that the government officers are acting on reasonable grounds to believe that he is violating the law, their conduct in going beyond the point of merely offering to purchase the liquor has been upheld; they may, under such circumstances, induce or solicit the sale for the purpose of prosecuting the seller,* * " (Corpus Juris Secundum, par. 45a, p. 102).

That such sales were made in one instance to a private in the Marine Corps and in another to a petty officer of the Navy and not to enlisted men of the Army is immaterial. The course of conduct by accused was reprehensible and contrary to good order and military discipline. There is evidence in the record upon which the court did properly predicate a finding that such behavior on the part of accused was unbecoming an officer and a gentleman.

5. For the reasons above stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of the court, and the sentence as reduced.

_____, Judge Advocate.
Colonel, J.A.G.D.

_____, Judge Advocate.
Lt. Col., J.A.G.D.

JAMES B. MURPHY- Absent , Judge Advocate.
Lt. Col., J.A.G.D.

1st Indorsement

War Department, Army Service Forces, Branch Office of the Judge Advocate General, Melbourne, Victoria, 29 September, 1943.

To: Commanding General, U.S.A.F.I.S.P.A., A.P.O. 502.

1. In the case of First Lieutenant Paul R. Brautigan (O-334201), Infantry, 902nd Air Base Security Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM A-698).

ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 24, USAFISPA, 4 Oct 1943)

WAR DEPARTMENT
Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

24 September, 1943.

CM A-709

UNITED STATES v. Private DOROTEO TRUJILLO, (38148554), Company F, 161st Infantry.	Trial by G.C.M., convened at Guadalcanal, Solomon Islands, 16 July, 1943. Dishonorable discharge, total forfeitures, confinement for twelve years. United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Doroteo Trujillo, Company F, 161st Infantry did, at the Bivouac Area of Company F, 161st Infantry, APO #25, on or about June 30, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Private Ferdinand Heckel, a human being, by shooting him with a rifle.

The accused pleaded not guilty to the charge and specification and was found guilty as charged. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, but reduced the period of confinement to twelve years, and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The competent evidence for the prosecution discloses that in the early hours of the morning of June 30th, 1943, at Guadalcanal, S.I., at the suggestion of the deceased, Private Ferdinand Heckel, who wanted to see a friend (R.6, 33), the deceased, Private Ernest A. Wanna, Private John J. Richter, and accused, all members of Company F, 161st Infantry, set out from their area to go to the area of Company K across the Nalimbu River. Deceased

had some liquor in a jug and they were all drinking (R.7, 34). Accused stayed at the river bank and did not go to the K Company tents (R.6, 36).

By the time they had recrossed the river on their return, Wanna was drunk and could only remember certain incidents that had occurred (R.14, 15). Richter was drunk, "barely navigating", and staggering to the extent that deceased had to help him along (R.35, 36). Accused was "slightly intoxicated" (R.38-9) and "was feeling pretty good" (R. 7). Deceased, who had been drinking all evening, was "pretty drunk", "staggering and stumbling" (R. 7, 8, 38). Deceased called accused "a dirty Mexican and things like that", and told him "to go away" (R.8, 15). Accused did not leave. Deceased "got mad", struck accused (R.8), tackled him, and threw him to the ground (R.9). Wanna grabbed deceased who then desisted from further striking accused. Accused then went alone to the company area (R.9, 16, 17).

"A few minutes before four o'clock" in the morning Private Charles H. Ray, a tentmate of accused, was awakened by the latter. Ray testified "He told me to stay awake, and if I heard a couple of shots it would be him getting rid of Heckel" (R.19), or it might have been "If you hear a couple of shots it will be me getting rid of Heckel, or Heckel getting rid of me" (R.21). As witness was only partially awake at the time he could not be certain exactly what accused said.

Deceased complained that he had broken his leg (R.9, 46), and upon arriving at his bivouac area, went with Wanna and Richter to the tent of the medical attendant, Private Wendell L. Jorgenson. Jorgenson noted that the time was about 3:15 in the morning. He examined deceased, who had merely "abraded the skin in back of his knee", and applied a bandage (R.46). At that time deceased was "wholly intoxicated". He was staggering and "it would have been pretty hard" for him to walk without assistance (R.46). At that time both Wanna and Richter were "just feeling pretty good" (R.47).

Wanna left deceased with the medical attendant and while going towards his own tent saw accused standing on the side of accused's tent, with an M-1 rifle in his hands (R.10). Wanna asked accused what he was doing with the rifle and accused answered "I'm going to just scare him [Heckel] " (R.11) and further said that the gun was not loaded. Wanna told accused to go to bed and accused "told me to go to bed, and then he says to mind my own business" (R.11). Wanna then saw deceased coming out of the medical tent with Jorgenson and went to them. He and Jorgenson each put an arm around deceased and, supporting him, took him to the rear of his tent where they were met by Private Eugene J. Busteed. Jorgenson and Wanna turned deceased over to Busteed's care and left (R.47).

Private Busteed was a tentmate of deceased. Others in the tent were Sergeant Wood, and Privates Kaulitzka and Mastez. Busteed had been awakened about 3:30 in the morning by someone yelling across the street (R.30). He arose and went to the latrine behind the tent and was returning when he saw deceased, Wanna and Jorgenson (R.23). Deceased was drunk, stumbling, and staggering, so he put his arm around him to help him back to the tent (R.24). As they were entering the tent from the rear deceased yelled "Sergeant Wood" and then three shots were fired in rapid succession from about the center of the tent (R.25). "Heckel braced himself" and, as Busteed released his hold, fell over backwards upon the tent floor (R.26). Although it was dark within the tent, Busteed recognized the silhouette of accused as the person standing in the tent at the place from which the shots were fired, and recognized the voice of accused when he then said "that if he could see him [Heckel] 'I would kick his teeth in'" (R.51).

Private Michael A. Kaulitzka had also been awakened by the yelling across the company street (R.44). He too had heard deceased say "Sergeant Wood" and then heard the three shots fired (R.41). Both he and Busteed heard Sergeant Wood tell accused to give him the gun and accused's answer, "Here it is , Sergeant" (R.43).

The Sergeant and accused then left the tent together, walking towards the tent of the First Sergeant. On the way they passed Jorgenson, the medical attendant, going to the tent they had just left in response to a call from Busteed, and also Captain Rodger R. Bankson, the Commanding Officer of Company F, who had set out to investigate the shooting. The Captain asked Wood what had happened and accused answered "I just shot Heckel" or "I just shot at Heckel" (R.58). Upon instruction from the Captain they went to the orderly room where the Captain joined them within a short time (R.57). Captain Bankson asked accused "why he did it. His reply was very clear, but I couldn't possibly quote it" (R.57). Accused was perfectly calm . He searched for a pencil and a V-mail blank and wrote a letter.

Later in the morning accused talked with Private Ray and several others about the incident. Ray testified that "He told me that before they got to the bivouac area Heckel had hit him several times, and threatened to kill him, and called him several names" (R.20). "* * * Heckel said to Trujillo that he 'wouldn't be living by morning'. Then Trujillo said, 'I wanted to get him first', or something like that" (R.22).

When Captain Sion F. Sherrill, M.C., about 4:15 in the morning, examined Heckel, he was already dead from a "rather large, gaping" gunshot wound at the base of the left side of the neck or where the neck joins the shoulder (R.53).

Cross-examination of witnesses for the prosecution revealed that deceased was of turbulent nature and had a very bad reputation in the company (R.62) particularly when he had been drinking. At such times he was a "mean" drunk and wanted to fight (R17, 44). His face was scarred from many fights (R.50). The Captain considered deceased a "dangerous man" when he was drinking and he frequently became intoxicated (R.62, 63). He was "the one element against peace and sobriety" in the company (R.62) and had been diagnosed as a chronic alcoholic (R.55). Captain Bankson had in the past taken disciplinary action against deceased (R.60) and had initiated steps looking towards his reclassification. (R.61).

An oral confession to the investigating officer was reduced to writing and admitted in evidence and is as follows:

> "I was supposed to be on beach patrol but have been having bad headaches. I was to go on sick call on Wednesday. I asked Corporal Grissom to be excused so that I could take some headache medicine and go to bed. He excused me and got a substitute. I went to bed and at about two o'clock AM Heckel came and told me to go with him. I said no, the Captain is after you and Wanna for drinking. It won't be good. I don't want to go. But Heckel said, 'Never mind the Captain' and kept telling me he wouldn't cause any trouble. I was beginning to be afraid of him, he was so big, so finally I went with him. We went down the beach road to the Nalimbu River. Heckel had been drinking. He said he was going to Company 'K' for some more liquor. My head was still aching so I told him I would stay here and wait. I waited on this side of the river. He was gone quite a while and I went to sleep. When he came back he woke me up. He had a gallon bottle of alcohol they called torpedo juice. It was almost half full. He told me to take a shot, but I would not drink with him. Heckel was getting mad so I took a sip. It burned my mouth, so I didn't drink any more. We started back toward the company. Heckel had been drunk earlier in the day. He started to call me a dirty Mexican and a dirty bastard and other names and slapped me twice hard. I told him to quiet down and that I would take him home. I told him to forget about it and that I would see him in the morning. He said, 'You dirty Mexican bastard, you might as well as see me now'. I

said you can't call me a dirty Mexican. I am fighting for the United States the same as anybody else'. He said, 'Your no good, your a dirty Mexican bastard and you are worse than a spy'. About that time he knocked me down and jumped on me. He said, 'I'll kill you, you son-of-a-bitch, you won't live till morning'. This happened on the road in the rear of position 32. I expected to meet our patrol about that time but didn't, so I told Heckel I was going to tell the Captain about it. He called me a dirty son-of-a-bitching stool pigeon and about that time tried to slap me again but didn't do it because I took off for camp. He yelled to me, 'I'll see you tonight, you dirty bastard.' So I left him behind and came home by myself. He had threatened to kill me and I was scared so I came in and loaded the M-1. I am supposed to have one clip of ammunition for the patrol. I woke up Charles Ray, who is in charge of my tent, and told him if he heard a couple of shots it would be me getting rid of Heckel or Heckel getting rid of me so he would know what happened and could tell the Captain. I went up to Heckel's tent so I could keep an eye on him. I wanted to know what Heckel was going to do. He wasn't there so I waited by the rifle rack. He was talking to somebody outside the tent. I was inside waiting. About that time he came in smoking. I recognized him. I said Heckel and he said 'Yea, you dirty bastard' and started towards me, so I shot him - three shots. Sergeant Wood in Heckel's tent woke up and said, 'Who is it?' I told him it was I and gave him the gun. I didn't aim. It was just snap shooting from the hip. He shouldn't talk like that about me and call me a dirty Mexican like that when I am fighting for the United States." (Ex. B).

In his unsworn statement to the court, accused repeated, in substance, the facts set out in his confession. Several witnesses for the defense offered testimony respecting the bad reputation of the deceased and his penchant for fighting. They also testified that accused was a very good soldier. "He just does what he is told, with no arguments. He is quite a kidder sometimes, but doesn't cause any harm, and is more or less jolly" (R.68). On cross-examination Captain Bankson testified that accused "is a very good basic soldier with good morals and a quiet character; a good worker" (R.63).

There was attached to the record of trial a recommendation for clemency concurred in by all members of the court-martial stating in part "* * *The members do not feel that the circumstances attending the commission of the crime were such as to reduce it to manslaughter, yet do earnestly and sincerely believe that the letter of the law is much too harsh in the instant case" and recommended that so much of the sentence as involves confinement in excess of twelve years be suspended. Captain Bankson, in a separate request for clemency asked that the period of confinement be reduced to five years. His petition stated, inter alia, that accused had "committed himself admirably in combat" and that if he could be "paroled for further combat duty" he "would be pleased to have him serve in any organization under my command".

4. That the accused intentionally killed the deceased is clearly established by the evidence.

The record presents the questions, however, as to whether or not at the time of the shooting a. the accused reasonably believed he was in immediate danger of death or grievous bodily harm from deceased; b the accused acted in the heat of passion. The record contains evidence that at least one hour intervened between the time deceased assaulted and threatened accused and the homicide. A sufficient time elapsed for the hot blood which such actions might have engendered in accused to have cooled. If the accused truly was in fear of his life or of grievous bodily harm several means of self protection were available to him other than securing his rifle, going to the tent of deceased and there lyind in wait for his return. Although the record contains

evidence both of provocation and of threats by the deceased, whether or not sufficient circumstances exist to establish that the accused acted in self defense or in the heat of passion is for the court to decide as a question of fact (Allison v. United States, 160 U.S. 203; Brown v. United States, 256, U.S. 335; CM A-260, Hill). Having had before it all the witnesses and heard their testimony, the court-martial determined that the accused committed the homicide unlawfully and with malice aforethought. The record contains evidence upon which such findings could properly be predicated.

5. Accordingly, for the reasons above stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of the court, and the sentence.

_____, Judge Advocate
Colonel, J.A.G.D.

_____, Judge Advocate
Lt. Col., J.A.G.D.,

JAMES B. MURPHY-Absent, Judge Advocate
Lt. Col., J.A.G.D.

WAR DEPARTMENT
Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

2 October, 1943.

CM A-710

UNITED STATES v. Private First Class Isaac J. Washington, (34028241), 228th Quartermaster Company (Salvage Collecting).	)	Trial by G.C.M., convened at Guadalcanal, Solomon Islands, 26 July, 1943. Dishonorable discharge, total forfeitures, and confinement for ten years. Federal Correctional Institution, Englewood, Colorado.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Isaac J. Washington, 228th Quartermaster Company, did in the company area, APO 709, on or about July 9, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Corporal Bernard Tillman, 228th Quartermaster Company, a human being by shooting him with a pistol.

The accused pleaded not guilty to the charge and its specification and was found not guilty of the charge but guilty of a violation of Article of War 93, and guilty of the specification except the words "with malice aforethought", "deliberately", "and with premeditation", of the excepted words, not guilty. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for ten years. The reviewing authority approved the sentence and designated the Federal Correctional Institution, Englewood, Colorado, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence discloses that at about 7:30 o'clock in the evening of July 9, 1943, in the area of the 228th Quartermaster Company, Guadalcanal, Solomon Islands, the accused, with the deceased, Corporal Tillman, and several enlisted men were playing poker. The game was being played on the ground between the tents about forty yards from accused's tent and in an opposite direction about forty-five yards from Tillman's tent (R.6, 7). Tillman had lost all of his money, and borrowed some from one of the men in the game. Tillman

lost that and then asked accused to pay him some money accused owed him. Accused told him he could not because he was losing. Tillman then borrowed money from both Sergeant Sellers and Corporal Carroll and lost that money. Tillman again asked accused for money and accused who had $6.00 left told him to wait "until I was winning". Tillman then said "I will have what you have or else". Tillman then grabbed accused by the collar and pushed him to the ground and kneeled on him. Accused stated that Tillman struck him. They were separated and Tillman again knelt down near accused and swore at him and said "* * * have my money in the morning early or meet me right", "* * * you are the first little * * * that ever got off anything on me and lived", and left the group. Several minutes later accused also departed (R.6, 11, 15, 19, Ex. D).

Private Guillory, who witnessed the altercation, went to Tillman's tent and found Tillman there (R.8, 20). Guillory testified

> "While I was in the tent talking to him, he was getting ammunition out of his pack. I told him just to forget the whole thing. He had a clip and reached over and got his rifle. He didn't seem to pay any attention to what I was telling him, so I walked outside and around the side of the tent." (R.22). "* * * when I bent over under the ropes and was talking to him * * * he loaded it" (R.23).

At that time Tillman was seated on a barracks bag between the center of the tent and the door. He then placed the rifle against the barracks bag and the center pole of the tent (R.24, 29). Thereafter witness saw Tillman reach for the gun, and becoming alarmed he started to run. When he had gone some fifteen or twenty yards he heard a shot fired (R.24, 29), after which someone hollered "Tillman's been shot." Witness did not see anyone with a gun other than Tillman (R.25). It was five to fifteen minutes after Tillman and accused had left the poker game when the shot was fired (R.6, 15).

Private Kage who was lying in bed in the tent heard a conversation between Guillory and Tillman and what sounded like a clip being loaded in a rifle. Within a few minutes he heard the shot and Tillman shout, "Oh". Kage ran out of the tent to see who fired the shot but saw no one and then returned as Tillman was falling from his position on the barracks bag to the floor (R.32, 34). First aid was administered to Tillman who was later moved to the hospital where Captain K. D. Terrell, M.C., pronounced him dead due to a gunshot wound in the right chest (R.42, 55).

During the time Captain Maurice Gottlieb was administering first aid to Tillman, he was informed that accused wished to speak to him. He sent Lieutenant Joseph D. Gallagher to find out what accused wanted. Lieutenant Gallagher went to accused and asked him what was on his mind. Accused answered "I don't want the captain blaming anybody else. I did it". Lieutenant Gallagher then asked accused "Did you shoot Tillman" and he answered "Yes sir" (R.54). Later Captain Gottlieb asked accused why he had done it and he replied, "Two years ago I told Corporal Tillman if he ever grabbed me by the neck again I would shoot him" (R.51, 55). Accused was then taken to the orderly room where he made a written statement (R.51), which is in part as follows:

> " * * * I took a .45 Cal. single shot revolver which I bought from a Seebee and went to Corporal Tillman's tent. Corporal Tillman was sitting on his floor by his barracks bag. I stood in the doorway, aimed at Corporal Tillman and fired. I walked away and gave the revolver to Corporal Fletcher, who was Charge of Quarters." (Ex.D).

Cross-examination of witnesses for the prosecution revealed that deceased weighed approximately 190 pounds whereas accused weighed about 150 pounds (R.9, 13). The deceased had the reputation of being the "bully" of the Company (R.10, 26).

Accused elected to take the stand and testify. He testified to the events and altercations at the poker game substantially the same as other witnesses had testified; he further testified that he knew deceased was the "bully" of the company and stated:

> " * * *Corporal Tillman got up and grabbed me on the collar and shook me around, and Corporal Carroll and Sergeant Sellers came out and took him off me. Then Tillman started away from the game and told me I was the only little * * * that ever got away with anything like that. Corporal Tillman said that. Sergeant Sellers told him to go on and leave me alone. He came back and grabbed me again by the neck and struck me. Sergeant Sellers and Corporal Carroll took him off me. Then, after a minute or so, he left. When he left he told me,' * * , get my money by to-morrow morning, or meet me right'* * * ." (R.56)
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> " * * *
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> " * * * I was afraid of him."
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> " * * *
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> "I was on my way to the orderly tent to turn him in to the Corporal of the Guard. I was afraid he would try to get me. I passed Corporal Tillman's tent and I sees him in there, and Private Guillory was talking to him. He was loading his rifle."
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> " * * *
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> " * * * I then got scared that he might shoot me. I goes back to my tent and goes down in my barracks bag and get the forty-five caliber out. When I come back around he was sitting on a barracks bag. His rifle was leaning up against the pole. He seemed as if he was tying up his shoes. I didn't know where he was going. I walked over in front of his tent and that is when he reached for his rifle."
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> " * * *
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> "* * * When I came up in front of the tent the second time, this time just as I looked in there he seen me and went and reached for his rifle." (R.57)
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> "* * *
>
> "* * * When I seen him reach for the rifle I figured he must be going to mess me up. I was scared." (R.58).

Accused had his pistol in the side pocket of his jacket and "at the same time he reached for the rifle I put my hand in my pocket, pulled it out and fired it." (R.68). "I was scared. I figured that was the only possible chance I would have to save my own life." (R.59). "* * * I didn't have any killing in my mind. I wasn't thinking of killing or nothing. I was scared of him. I didn't know what to do." (R.65).

4. The accused was found guilty of voluntary manslaughter.

Voluntary manslaughter is homicide committed in the heat of sudden passion caused by provocation (par. 149a, M.C.M., 1928).

That the accused intentionally killed the deceased is clearly established by the evidence.

The accused attempted to excuse his actions on the grounds of self

defense. The record contains evidence that five to fifteen minutes elapsed between the time deceased assaulted and threatened accused and the homicide. If accused was in fear of his life or grievous bodily harm several means of self-protection were available to him other than securing his pistol and going to the deceased at a time when he knew deceased had loaded his rifle.

Whether or not the accused, at the time of the homicide, acted in the heat of sudden passion caused by provocation or in self-defense believing he was in immediate danger of death or grievous bodily harm from deceased are questions of fact to be determined by the court-martial (Allison v. United States, 160 U.S. 203; Brown v. United States, 256, U.S. 335; CM A-260, Hill, CM A-709, Trujillo).

The court-martial by its findings determined that the homicide was not excusable but that it was committed in the heat of sudden passion caused by provocation. The record contains evidence upon which such findings could properly be predicated (CM 152797, cited under A.W. 50½, p.216, M.C.M., 1928).

5. For the reasons stated above the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of the court and the sentence.

_____, Judge Advocate.
Colonel, J.A.G.D.

_____, Judge Advocate.
Lt. Col., J.A.G.D.

JAMES B. MURPHY - Absent, Judge Advocate.
Lt. Col., J.A.G.D.

WAR DEPARTMENT
Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

28 September, 1943.

CM A-714

UNITED STATES v. Private First Class Thomas (NMI) Fauntleroy, (332282-15), 578th Ordnance Ammunition Company.	Trial by G.C.M., convened at Base Section No. 3, A.P.O. 923, 17 August, 1943. Dishonorable discharge, total forfeitures, confinement for life. United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria. Australia.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Thomas Fauntleroy, 578th Ordnance Ammunition Company, did, at Goodna, Queensland, on or about 9 July, 1943, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Jean May Surman.

The accused pleaded not guilty to the charge and specification and was found guilty as charged. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The competent evidence for the prosecution discloses that Jean May Surman, housewife, with her two children, a boy of six and a girl of three, arrived by train in Goodna, Queensland, about seven o'clock in the evening of 9 July, 1943. They were walking to their home about a mile away when a "big black man" in American army uniform came up to them and asked if he could carry her bag. She "told him to go away and leave us alone". He then spoke to the child and tried to "grab" Mrs. Surman. She screamed and ran. (R.4). After she had gone about fifty yards the man grabbed her around the neck from behind, hit her across the face with his hand, and "threw" her over a fence. She got up and ran but her assailant caught her again. Although she tried to escape from him she tripped on the grass and was prevented from eluding him. She testified that "He put me down and got on top of me * * * [He] removed my panties and sanitary towel," and without her consent penetrated her person (R.5). After he had

accomplished his purpose the man "got up and ran away". Mrs. Surman at no time identified accused as her assailant whom she described only as "a tall man"; "a big black American soldier" (R.12).

Mrs. Surman immediately went to the house of Mrs. Lilian Jones, about a quarter of a mile away, the nearest house to the place where she had been assaulted. Because the house was closed and the piano and radio were being played, she had been unable to hear noises from the outside. Mrs. Jones testified that when Mrs. Surman arrived her mouth was bleeding; her hair was "all tussled"; she was crying and trembling. Mrs. Surman said-

> "Mrs. Jones, something terrible has happened, a nigger got me in the paddock. * * * he tore my underclothes off, and I have no stockings on, or shoes. * * * "

The two women then went down the road and Mrs. Surman pointed out the place where the colored man had thrown her over the fence. They went through the fence and picked up a pair of torn bloomers which the assaulted woman identified as belonging to her. She also pointed to the place in the paddock "where he knocked me over" (R.7).

At approximately seven-thirty in the evening Police Constable Alfred Wallace Shailer, in charge of the Goodna Police Station, received a complaint from Mrs. Surman that she had been raped by a negro wearing an American military uniform. He went to the place indicated by her as the place where the assault had occured and there found a ladies black hand bag. Continuing along the road he saw another Police Constable with three negroes on the side of the road. Shailer told accused, the tallest of the three negroes, that a woman was raped in the vicinity of the Goodna railway station about seven o'clock that evening. Accused said, "I didn't rape no woman". At that time Shailer noticed that the fly of accused's trousers was open and that he had dust on the bottom of his trousers and on his boots. Accused stated that he had arrived in the town by truck about four o'clock that afternoon and had spent the evening "walking about". Neither he nor the other two colored soldiers showed any signs of intoxication. Accused was taken to the police station (R.8).

Detective Sergeant of Police, Samule Henry Cooke, arrived at the police station about nine o'clock and began interrogating accused. During the course of the questioning accused made a number of contradictory and admittedly false statements.

Detective Cooke testified-

> " * * *
>
> "After I warned the accused I said 'What woman were you with?' and he said 'The woman with the two children' * * * I said 'Where did you meet her tonight?' and he replied 'Over by the highway'. I said 'Where is that?' and he replied 'Over near the railway station'.
>
> "* * *
>
> "* * * I said to him 'The policeman that brought you here told me he found a lady's hand-bag in a paddock about two hundred yards from the station?' and the prisoner replied 'Yes, it was about there I rode her'. I said 'What do you mean, did you have intercourse with her?' and he said 'Yes'.
>
> "* * *
>
> "* * * I said to the prisoner 'What happened to the two children?' and he said 'When I carried her over the fence by the highway they

ran away, calling out 'Mummy, Mummy'.

"* * *

"I said 'When you put her over the fence, did the woman scream out?' and he said 'Yes'. I said 'When you put her over the fence what happened?'. He said 'She tried to run away and I got hold of her and put her on the ground and tore her panties off'. I said 'Did you have sexual intercourse with her there?' and he said 'Yes, I got into her and when I finished I got up and ran off on the highway.' " (R.10,11).

The pair of panties worn by the woman and the khaki trousers and shirt and the underpants worn by the accused that evening were examined by a bacteriologist. Human blood was found on the panties but no spermatazoa. Spermatazoa were found on accused's several garments. The bacteriologist testified that "there was some blood on the underpants but it was insufficient to say if it was human blood or not" (R.12). Doctor Cooney, another witness, whose testimony was admitted by stipulation, stated that accused's trousers and underpants when examined by him on the Friday night in question showed unmistakable evidence of blood and what appeared to be dried seminal emission (Ex. A). The same witness also examined Mrs. Surman that evening and found that she had suffered slight lacerations and bruises (Ex. B).

On behalf of the accused, a First Sergeant and a Staff Sergeant each testified that accused's record in the company was "very good". The accused, after being advised of his rights, elected to be sworn and testify under oath. He denied having seen the woman and the two children. Accused stated that at about six thirty in the evening he had been in a bar on the highway when some Australian soldiers began "fooling" with him so he walked out to the road. About three or four hundred yards up the road he met some other colored soldiers and talked with them. He decided to return to camp and believing that an approaching truck was an army vehicle, waived it down. The truck stopped and the driver, a civilian, said that a woman had been raped that evening by a colored soldier. The other colored soldiers ran away but accused voluntarily remained. The accused was taken to the police station and later taken to view the scene of the crime. Accused denied having committed the crime and testified:

"* * * I told this Sergeant 'You said you are looking for a big black fellow, but I didn't do it', and they were trying to put it over on me. * * * There was four of them there, and three of them had a pistol, and I told them not to shoot me in here and they took me out and threw me in the back of a '39 Ford coach'. So they took me down the road, two got in the back with me and this other officer, and the driver were up front, and they carried me up the highway and through a bridge and came into a field. They left my shoes in the office, so when they took me to this field it took about fifteen minutes, and I was half stewed and they made me get out and these three stood with me. The other fellow went up to turn the car around and this fellow said 'You black nigger, if you don't tell us who raped this woman you won't get back in the car', and I said 'I didn't rape no woman'. He said 'If you don't say you raped her, I will shoot you', and I said 'If that saves my life I will say 'yes', and they took me and brought me back to the doctor. * * * I didn't rape no woman" (R.16).

4. Rape is defined as the unlawful carnal knowledge of a woman by force and without her consent (par. 148b, M.C.M., 1928). That her assailant penetrated her person was competently proved by the direct evidence of Mrs. Surman (sec. 674, Underhill, Criminal Evidence), corroborated by the admission of the accused. The record is silent as to the degree of resistance interposed by the woman at the time of the consumation of the criminal act. There was in

evidence and for the consideration of the court-martial the fact that the assailant was a large man, sufficiently large in fact to have thrown her over a fence; she tried to flee and called for help; he struck her, tore her underclothing from her body, accomplished his purpose, and then ran away. Immediately after the assault she was bleeding at the mouth, her hair was in disorder, and she was crying and trembling. She immediately made complaint. Such evidence, together with the testimony of the woman that she did not consent to the act, is sufficient to predicate the finding that the carnal knowledge was consumated by force.

The unlawful act having been established by the testimony of Mrs. Surman, the testimony of Mrs. Jones as to the former's physical condition and her account of what had transpired, told to her immediately thereafter, were admissable in corroboration thereof (sec. 727, Wharton, Criminal Evidence; sec. 667, Underhill, Criminal Evidence).

Mrs. Surman was unable to identify the accused as her assailant. The identity of the accused as the guilty man was established by his admission to the police officer; his relative size; the fact that he was found in the vicinity of the crime a short time after it was perpetrated; and the condition of his clothing. Accused under oath testified that his admissions to the police officers were made under duress, because he was in fear of his life, and were not true. Defense counsel did not in his cross examination of the police officers pursue the contention that the admissions were made under coercion and duress and introduced no witnesses other than the accused himself in proof thereof. The determination of the credibility of the accused and the weight to be given to all or any part of his testimony was the province of the court-martial (sec. 395 (56), Dig. Ops., JAG 1912-40). Thus the court was privileged to give no credence to the contention of accused that his admissions were made under duress. From the entirety of the evidence the court could properly find that the accused committed the offense charged.

5. Accordingly, for the reasons above stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of the court, and the sentence.

[signature], Judge Advocate
Colonel, J.A.G.D.

[signature], Judge Advocate
Lt. Col. J.A.G.D.

JAMES B. MURPHY-Absent, Judge Advocate
Lt. Col. J.A.G.D.

WAR DEPARTMENT
Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

CM A-729

4 October, 1943.

UNITED STATES v. Private Walter J. Huddleston, (34145974), 91st Quartermaster Company (Railhead).	Trial by G.C.M., convened at Headquarters US Advanced Sub-Base "D", A.P.O. 929, 13 August, 1943. Dishonorable discharge, total forfeitures, confinement for life. United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Walter J. Huddleston, 91st Quartermaster Co. (Rhd), did, at A.P.O. 929, on or about 9 April, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Henry C. Smith, Private, 91st Quartermaster Company (Rhd), a human being by stabbing him with a knife.

The accused pleaded not guilty to the charge and specification and was found guilty as charged. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The competent evidence shows that on the early morning of April 9th, 1943, accused and deceased were in a working detail unloading 150 pound bags of salt at Number 1 Warehouse, Port Moresby, New Guinea. The weight of the salt required two men to handle each bag. Accused and deceased were working as a team. Deceased was larger than accused and weighed about 75 pounds more (R.17). Accused told deceased to use both hands on the bag. Deceased replied "he could pick up with one hand what Huddleston could with two hands." (R.10). An argument developed and accused "shook his finger" in deceased's face and then hit him on the nose with his fist, drawing blood. Deceased called accused "a son-of-a-bitch", grabbed him, put his [accused's] head between his [deceased's] knees and

"rained blows on the shoulder and back of his neck" (R.11).

The fight was stopped by Corporal William H. Tate who was in charge of the detail. Accused who then seemed to be in a "dazed" condition left, and Corporal Tate ordered deceased to leave. Within about 15 minutes accused returned to the warehouse with a .30 caliber rifle (R.11), cocked and loaded with four rounds of live ammunition. He asked where deceased was and looked in the truck and warehouses for him. Corporal Tate and a sergeant then attempted to disarm accused but were told "if we didn't want to get hurt we better stand back." At this time accused " * * * made threats to the extent that he would get him [deceased] if it was the last thing he did." Accused then left and Corporal Tate reported the incident to the first sergeant who, with Corporal Tate, met accused returning from the warehouse and disarmed him (R.12-24). Accused at this time stated "No matter what you do to me, I'm going to kill him." (R.24). The first sergeant then ordered accused to his quarters, with instructions to remain there. These events transpired at about 6.30 AM on the day in question. Later that morning accused was observed sitting on his bunk "crying" (R.26). About 12.30 PM the same day accused entered the tent of deceased who was asleep on his bunk with a mosquito net over him (R.36). Accused had "frowns on his face, and was blowing * * Like an angry man." (R.32). He stabbed deceased in the left chest with a "mess-kit knife", the wound penetrating the heart. Private Arnold E. Belcher, a tent mate of deceased, caught accused by the arm and "pulled him back". During this scuffle deceased's cot was overturned and he fell to the ground. He arose and walked about 25 or 30 yards and fell. Accused then left the tent and picked up a spade and went to the orderly room. While on the way he was heard to say "I got him - I got him." (R.40). Upon being asked by Corporal Tate if he realized what he had done he replied " * * * he did, and hoped that he had killed him." Corporal Tate testified that at this time accused "seemed to be taking it calmer than I myself was." (R.40).

Deceased was carried to the 135th Regimental Hospital and was found to be dead upon arrival. An examination showed that death was caused by a "penetrated wound in the chest to the left of the sternum."(R.7). An autopsy revealed a "perforating wound of (a) pericardium; (b) Right ventricle, hemopericardium extensive." (Pro. Ex. "A").

The accused elected to be sworn and testified that he had finished the fifth grade at school. That before the fight started at the warehouse deceased called him a vile name and that he then shook his finger in deceased's face saying " * * * Smith don't talk about my mother." (R.44). Deceased hit him on the head and mouth causing swelling and bumps. He denied remembering getting his rifle but admitted that there was "a bunch around me and taking the gun." He further denied any recollection of having stabbed deceased and first was made aware of it after he was under arrest and told by Sergeant Cooper that he had stabbed deceased (R.46).

Major James O. Cromwell, M.C., was called as a witness for the defense and qualified as an expert in psychiatry and neuro-psychiatry. Witness had examined accused and found him to be in group IV which placed him as a moron. He further testified that most morons could "distinguish right from wrong even in war conditions." (R.53). In answer to hypothetical questions as to one's actions after having been struck blows on the head witness stated "I don't think a man could think or plan an action during this state." (R.49). Witness's conclusion was "The fact that he [accused] eventually recalled sufficient memory makes us feel that there was nothing abnormal about his state of memory. A simple memory loss would not have any particular bearing on the responsibility on the point of view of insanity so far as his ability to determine right from wrong and adhere to the right." (R.50).

By stipulation the report of Lieutenant Colonel S. A. Challman, M.C. Neuropsychiatric Consultant Surgeon, USASOS, who had also examined accused, was introduced as Prosecution's Exhibit "C". The conclusions arrived at were:

"Private Huddleston is found to be sane and mentally responsible for his actions, in that he is free from mental defect, disease, or derangement and is able to distinguish right from wrong in reference to the particular actions with which he is charged and is found able to adhere to the right. His moderate mental deficiency cannot be considered as influencing his mental responsibility."

4. "Murder is the unlawful killing of a human being with malice aforethought.* * *

* * * *

"Malice aforethought.- Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. (Clark.)

"Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; intent to commit any felony. * * * (par. 148a, M.C.M., 1928).

5. The evidence is clear that immediately after the altercation at the warehouse between accused and deceased, accused returned with a loaded rifle looking for deceased, declaring at that time that he would get him if it was the last thing he ever did. Having been thwarted in his immediate design, five or six hours later he entered the tent of his sleeping victim and inflicted upon him a mortal stab in the heart and exclaimed immediately thereafter "I got him - I got him.". Every essential element of the crime of murder is present in the instant case. Nothing is left to conjecture or circumstance.

It is noted that the Trial Judge Advocate misstated the law with reference to the burden of proof in insanity cases in advising the court -

" * * * that lack of competency is a matter for proof by the defense that the presumption is that a man is sane and is competent. This is the burden on the defense."

When the issue of accused's mental responsibility is raised the prosecution is required to prove beyond a reasonable doubt that accused could distinguish right from wrong and adhere to the right (par. 78a, M.C.M., 1928; CM 223448, Rieserman). However, the erroneous statement by the Trial Judge Advocate on this issue did not prejudice the substantial rights of the accused as there was sufficient evidence to sustain the court's findings. Even though accused be of a low grade of mentality his acts in planning and carrying into execution his crime bespeak that of a mind fully capable of mental responsibility. The psychiatrists likewise testified that he could not only distinguish right from wrong but could adhere to the right. His fancied wrongs at the hands of deceased furnish no excuse or just provocation for his acts, done not in the heat of passion, but cooly and deliberately with malice aforethought. The evidence fully sustains the findings of the court and seldom is the crime of murder so conclusively proven.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence. A sentence either of death or of imprisonment for life is mandatory upon conviction of the 92nd Article of War. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by Sections 273 and 275 of the Criminal Code of the United States (18 U.S.C. 452, 454).

_____, Judge Advocate.
Colonel, J.A.G.D.

_____, Judge Advocate.
Lt.Col., J.A.G.D.

_____, Judge Advocate.
Lt.Col., J.A.G.D.

WAR DEPARTMENT
Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

CM A-750

1 November, 1943.

UNITED STATES v. Major Edwin S. Hunter (0-290389), Infantry.	))))))	Trial by G.C.M., convened at Headquarters, Base Section No. 3, U.S.A.S.O.S., A.P.O. 923, 31 July, 1943. Dismissal.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charges and specifications.

CHARGE I: Violation of the 93rd Article of War.

Specification: In that Major Edwin S. Hunter, did, at Headquarters, Base Section 3, APO 923, on or about the 15th day of June, 1942, feloniously embezzle by fraudulently converting to his own use One Thousand Dollars ($1,000.00), currency of the United States, the property of Captain Paul Davis, A.C., entrusted to him for the said Captain Paul Davis, A.C., by 1st Lt. Robert L. Price, A.C., and 2nd Lt. Henry G. Newman, A.C.

CHARGE II: Violation of the 96th Article of War.

Specification 1: In that Major Edwin S. Hunter, did, at Headquarters, Base Section 3, APO 923, on or about the 1st day of April, 1943, in his testimony before a Board which met pursuant to Par. 9, Special Orders #77, dated 18 March, 1943, Headquarters, Base Section 3, APO 923, did make under oath statements in substance as follows, to the question "Did they give you any money", answer "No, I don't remember them giving me money or envelope", and to the question "Did they have the money" answer "No, I don't recollect seeing the money", which statements he did not then believe to be true.

Specification 2: In that Major Edwin S. Hunter, did, at Headquarters, Base Section 3, APO 923, on or about the 17th day of December, 1942, in his testimony at an investigation made by the Inspector General of Base Section 3, APO 923, conducted pursuant to verbal orders of the Commanding Officer, Base Section 3, APO 923, make under oath statements in substance as follows, to the question "Is it possible then, that the money was left with you", answer "No, Sir, the money was not left with me", and to the question "Did you ever see the money or count the money that Lt. Price requested you to hold" answer "No, I did not, Sir", and to the question "Did Lt. Price or any other officer turn over to you $1, 000.00 in American currency for safekeeping" answer "No, sir", which statements he did not then believe to be true.

ADDITIONAL CHARGE: Violation of the 96th Article of War.

Specification: In that Major Edwin S. Hunter, did, at Headquarters, Base Section 3, APO 923, on or about the 10th day of April, 1943, in his testimony before a Board which met pursuant to Par. 9, Special Orders #77, dated 18 March, 1943, Headquarters, Base Section 3, APO 923, did make under oath statements in substance as follows, to the question "I believe you stated that you did not see the money at all", answer "I have not seen it", and to the question "Did you personally or acting as an agent give or arrange to give the $1,000.00 to Chaplain Scanlon?", answer "No, Sir", and to the question "Did you at any time give Chaplain Scanlon $1,000.00?", answer "No, Sir", which statements he did not then believe to be true.

The accused pleaded not guilty to all the charges and specifications. He was found not guilty of Charge I and its specification and guilty of Charge II and its specifications and guilty of the Additional Charge and its specification. He was sentenced to be dismissed the service of the Army of the United States. The reviewing authority approved the findings of guilty of Charge II and its specifications and approved the findings of guilty of the Additional Charge and only so much of its specification as involves a finding of guilty that accused under oath made the statement in substance as follows: "To the question, 'I believe you stated that you did not see the money at all', answer 'I have not seen it', which statement he did not then believe to be true." The reviewing authority approved the sentence. As thus approved, the confirming authority confirmed the sentence. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The competent evidence for the prosecution shows that some time between January and March, 1942, Captain Paul F. Davis, of the Air Corps, left with Captain Robert L. Price at the latter's office in Brisbane, Queensland, a sealed envelope containing $1000 in American currency, principally of large denominations. The envelope was placed in the office safe. In mid-June, 1942, upon checking the contents of the safe preparatory to moving the office Lieutenant Henry C. Newman found the envelope containing the money. Lieutenant Newman and Captain Price counted the money and together took it to the office of the Personnel Officer, Major Edwin S. Hunter, the accused.

Captain Price testified that "We didn't know where Captain Davis was, and we told Major Hunter the story, and he counted it [the money] and we left it there with Major Hunter" (R.9). Lieutenant Newman testified that "We asked the Major [Hunter] if he would take the money and attempt to locate the person it belonged to. * * * he said he would take the money" and try to locate Captain Davis (R. 11, 12). Major Hunter counted the money in their presence(R. 8, 9, 11) and was told by Price and Newman that it was the property

of Captain Davis (R. 10, 12). Captain Berry was present at the time and they all jokingly talked "about splitting the money" (R. 8, 11). Captain Price and Lieutenant Newman left the money with Major Hunter and took no receipt therefor (R.12).

Captain Berry testified that he recalled Captain Price and Lieutenant Newman coming to the Personnel office with money in an open envelope which they wanted to turn over to Major Hunter. He "believed" that the money was counted at the time and it might have been laid on the desk (R. 14, 15) and testified that Major Hunter said that he "didn't feel that he should take the money like that because he was a Personnel Adjutant * * * and stated he didn't wish to receive the money. I don't know whether or not he received it at that time" (R. 14).

A letter dated 17 June 1942, signed by the accused, was sent to the Commanding General, U. S. A. A. S., S. W. P. A., APO 501, requesting information of the "present location of Captain PAUL F. DAVIS, AC". That letter stated in pertinent part, "Information is desired to communicate with officer in regard to letter left by him at this Headquarters". The letter was returned by 1st indorsement stating "No record of this officer at this headquarters" (Exh. E). The record discloses no further effort on the part of accused to locate Captain Davis.

On 17 December, 1942, accused was sworn and testified in the course of an investigation conducted by Colonel Charles Cooper, IGD, "into the loss of personal funds the property of Captain Davis" (R. 17). With respect to the statements made by the accused during the investigation, Colonel Cooper testified in part as follows:

"Q. Will you tell the court whether or not you asked [Major Hunter] the following question ' Is it possible then that the money was left with you'?
A. I did.

Q. And what was his answer to that question?
A. 'No, sir, the money was not left with me'.

Q. Did you ask him the question 'Did you ever see the money or count the money Lieutenant Price requested you to hold'?
A. Yes, I asked that question.

Q. And what was his answer?
A. 'No, I did not, sir'.

Q. And did you ask him during the investigation the following question 'Did Lieutenant Price or any other office_ turn over to you one thousand dollars in American currency for safe-keeping'?
A. I did.

Q. What was his answer to that question?
A. 'No, sir'." (R. 18).

Upon cross-examination Colonel Cooper read the following questions propounded to Major Hunter and the answers of that officer incorporated in the report of the investigation:

Question: Did you [Major Hunter] ever see the money or count the money that Lieutenant Price requested you to hold? Answer: No, sir, I did not.

Question: Did you ever place it on your desk and count it?
Answer: No, sir.

Question: Did you ever say I could have quite a party on $1000 or words to that effect? [Answer:] In a kidding joke to Capt. Berry I believe I did make such a statement.

Question: Do you remember when that statement was made? Was it made at the time and in the presence of Lieutenant Price, or was it made a later date? Answer: I do not remember.

Question: Did Lieutenant Price or any other office_ turn over to you $1000 in American currency for safe-keeping? Answer: No, sir.

Question: Is there anything else you would like to say in connection with this matter that might throw any light on what happened? Answer: No, sir, I have made every honest effort to locate the money when it has been brought to my attention.

Question: Just what efforts have you made in this connection? Answer: I have tried to remember where the safes were in case someone might have put it in the safe. I have tried to check the different files, and the different pieces of furniture of the office that were moved about in the other offices.

Question: Is there a doubt in your mind as to whether or not you actually took the money. In other words, is it possible you took the money and put it away so safely that you have forgotten where you put it? Answer: No, not me, as far as I am concerned.

Question: What do you mean by 'not me'? Answer: I do not believe I have any doubt in my mind, sir.

Question: You are absolutely sure that you never received the money? Answer: I am absolutely sure. (R. 19, 20).

Captain James B. Berry Jr. testified that at about the same date that the Inspector General started his investigation, and as a result thereof, for several days he, accused, and a file clerk searched the office desks and files (R. 15,35) in an effort to locate the money, but to no avail. "Within a week or so" after Colonel Cooper had concluded his investigation, (about 15 February, 1943(R.17)), Captain Berry went to accused 's apartment and was advised by accused that he [accused] had found the money "in the 201 files of Haines" (R. 15, 16). At that time accused "pulled an envelope from his pocket and showed me the money, and I told him the best thing he could do would be to turn it in right away and get rid of it" (R. 15). Accused answered that "he would return it in a few days, for if he turned it in right away, they would think we had been attempting to hide it" (R. 15). Witness spoke to accused "several times" about the matter; "any time I thought of it, I would ask him about the money" (R. 16). Accused "seemed to be worried about returning it" and witness asked Chaplain Scanlon if he [witness] should report it. The Chaplain told witness to return the money and witness informed accused "to give me the money and I would give it to Chaplain Scanlon, and he would return it. Then a few days later I heard it had been returned" (R. 16). The money was returned "a couple of months" after accused had first spoken to Captain Berry about the money (R. 16).

On 22 March, 1943, Colonel Cooper received from Major (Chaplain) George W. Scanlon one thousand dollars in American currency principally in large denominations, with the following written statement:

> "I certify that I am turning over $1,000.00 (one thousand dollars) American currency, to Colonel C. F. F. Cooper, Inspector General, belonging to Capt. Paul Davis, United States Army Air Forces, which money came to me in my capacity as a Catholic Priest, and in the fulfilment of my clerical duties." (Exh. A).

Chaplain Scanlon testified that he received the money on about March 21, 1943, but, claiming ecclesiastical privilege, refused to divulge the name of the person giving it to him. He testified that he would not accept money from a civilian to turn over to the Inspector General; that he did not know nor had he ever met Captain Price or Lieutenant Newman; he knew both Major Hunter and Captain Berry, and

that the former was of his faith (R. 32; Exh. I). Captain Berry categorically denied giving the money to the Chaplain (R.36).

Brigadier General Donaldson, Commanding General, Base Section No. 3, U.S.A.S.O.S., by paragraph 9, Special Orders No. 77, dated 18 March, 1943, appointed a board of three officers under the provisions of the 105th Article of War "to fix responsibility for loss of the $1000.00 personal funds of Lt. Col. PAUL F. DAVIS AC" (Exh. A to Defense Exh. I). On 13 April, 1943, First Lieutenant Lewis F. Shull was added to the board (Exh. B to Defense Exh. I). The board held its first meeting on 1 April, 1943, concluded its hearings on 1 May, 1943, and filed its report on 15 May, 1943.

Major George W. Stout was a member of the board appointed to conduct the investigation. As the recorder thereof he administered the oath to accused prior to accused testifying before it. With reference to the questions propounded on 1 April, 1943, by the board to accused and his answers, Major Stout testified:

"Q. Will you read the question and answer on Question 11?
A. 'Colonel Coxe: Did they have the money?' Major Hunter: No, I don't recollect seeing the money'.

Q. Will you turn to Question 13 and read the question and answer?
A. Question by Colonel Coxe: 'Did they give you any money?' Major Hunter: No, I don't remember them giving me money or envelope.

Q. To whom did he refer by them or they?
A. The air corps officers who were supposed to have given him the money." (R. 28) * * * Captain Price and Lieutenant Newman (R. 29).

At page 23, Defense Exhibit I, the report of the board, there appears the following question propounded to accused about 10 April, 1943:

"Q. 185 Col. Coxe. I believe you stated that you did not see the money at all.
Maj. Hunter. I have not seen it."

4. The accused elected to remain silent. Major Louis Kerstein M.C., appeared as a witness for the accused and testified that he had treated him with several drugs, among them sulfa-diozine, from 7 April, 1943, for "a week or so" for an acute sinus condition. That sulfa drugs would "cause a person not to function as well as he would before taking the drug" (R. 37) and "will impede all the functions of the nervous system" (R. 38). That during this time he noted that accused was "quite irritable and upset about some difficulty he was going through * * * he was never able to carry on a conversation as he had done previously" (R. 38-9). There was no testimony introduced, however, from which it could be inferred that accused was not mentally responsible. Lieutenant Colonel Robert McLear, A.G.D., testified that he had served with accused in 1934 and that "He was the best Second Lieutenant in that camp" (R.40). Colonel George H. Dietz, Q.M.C., testified that accused was "very conscientious" in his work and that he had heard "nothing to the contrary about his truth and veracity until this trial. * * * I have never heard or known of anyone to speak any way but favorably of him in the way he performed his duties." (R. 42).

On motion of the defense counsel, saving, however, all objection previously made by him to its validity, the proceedings of the board of officers were admitted in evidence as defense Exhibit I (R.42).

5. The gravamen of the three specifications of which accused was found guilty is false swearing. The Manual for Courts-Martial, 1928, delineates four essential elements of proof necessary for conviction thereof, viz:

"(a) That accused was sworn in a proceeding or made an oath to an affidavit; (b) that such oath was administered by a person having authority to do so; (c) that the testimony given or the matter in the affidavit was false, as alleged; and (d) the facts and circumstances indicating that such false testimony or affidavit was willfully and corruptly given or made." (par. 152c, p. 191).

Counsel for accused forcibly contended, during the course of the trial, in argument at the conclusion thereof, and by brief attached to the record, that accused could not legally be found guilty of false swearing before a board of officers as alleged in specification 1 of Charge II and the specification of the Additional Charge for the reason that the evidence in the record establishes that the proceedings of the board were void ab initio. Counsel for accused based such conclusion upon the fact that the board was appointed under the provisions of Article of War 105 "to fix responsibility for loss of personal funds of an officer" and -

a. As the loss was not occasioned or accompanied by riotous or disorderly conduct, the board of officers was without jurisdiction and its report is a nullity (sec. 463(3), No. 6, Vol. II, Bul. JAG);

b. A like sum of money as that alleged to have been lost was recovered subsequent to the appointment of the board, but prior to its initial meetings. The reason for which the board was appointed no longer existing, all its subsequent proceedings were "moot and void";

c. The personnel of the board was increased from three to four members, a number in excess of that provided by Article of War 105.

Pursuant to AR 210-10, December 20, 1940, the Commanding General, Base Section 3, U.S.A.S.O.S., was empowered to appoint a board for the purpose of investigating the loss of funds entrusted to an officer of his command without regard to Article of War 105, and the recorder of a board so appointed was authorized to administer oaths (A.W. 114; par. 12, AR 420-5, May 20, 1940). The fact that the order appointing the board may have improperly stated the authority under which it was appointed is immaterial and did not divest such board of the right to meet, swear witnesses, hear testimony, and report its findings and conclusions as ordered by the commanding officer.

The evidence clearly establishes that the accused was sworn first by an Inspector General in an investigation conducted by him and later by the recorder of a military board. Thus the first two elements of the required proof are satisfied.

The testimony furnishing the bases of the balance of the required proof is conflicting. Captain Price and Lieutenant Newman testified that they brought the money in question to the office of the accused; they informed accused that it was the property of Captain Davis and asked him to locate that officer; Major Hunter counted the money; they left the money with the Major and took no receipt therefor. Captain Berry remembered that the two Air Corps officers came to the office of Major Hunter for the purpose of leaving a sum of money, but he could not recall whether or not the money was in fact left there at the time. Immediately thereafter, on 17 June, 1942, a letter was written over Major Hunter's signature to higher authority requesting information as the the present location of Captain Davis "in regard to letter left by him at this Headquarters". The letter was returned with the indorsement "No record of this officer at this headquarters". The record discloses no subsequent efforts on the part of Major Hunter to locate Captain Davis. Major Hunter in his testimony on 17 December, 1942, before the Inspector General stated that he remembered Captain Price and Lieutenant Newman had been to his office with the money, but he testified that he did not see the money, did not count it, and did not receive it. In his testimony before the board of officers on or about 1 April and 10 April, 1943, Major Hunter testified that he did not remember seeing or receiving the money.

The testimony further reveals that shortly after the Inspector General had concluded his investigation, accused told Captain Berry that he had found the money in the 201 file of one Haines. Captain Berry suggested to the accused that the money should be returned but accused stated that "he would return it in a few days, for if he returned it right away, they would think we had been attempting to hide it". Captain Berry on several occasions talked to accused about the return of the money and even sought the advice of Chaplain Scanlon who also suggested its return. Three days after the board of officers was appointed to fix the responsibility for the loss of the money and about two months after the accused had found it, a like sum was given to Chaplain Scanlon and by him turned over to the Inspector General. The Chaplain would not reveal who had given him the money. The Chaplain did testify, however, that he had never talked to and did not know Captain Price and Lieutenant Newman; that he knew both Captain Berry and the accused and that only the latter was of his faith. Captain Berry denied having given the money to the Chaplain.

The Manual for Courts-Martial, 1928, states that "where a witness swears that he does not remember certain facts when in fact he does, he commits perjury, if the other elements of the offense are present"(par. 149i). In like manner, if a witness falsely swears that he does not remember certain facts, he commits the crime of false swearing, if the other elements of that crime are present. It is the province and the duty of the court to determine the credibility of witnesses and what weight, if any, should be given to their testimony (sec. 395 (57), Dig. Ops. JAG, 1912-40). From the very nature of the transaction, and the subsequent conduct of the accused, the court could properly predicate a determination that the sworn testimony of the accused alleged in the specifications as modified by the approved findings, was false and willfully and corruptly given.

6. For the reasons above stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of the court as approved, and the sentence.

[signature], Judge Advocate.
Colonel, J.A.G.D.

[signature], Judge Advocate.
Lt. Colonel, J.A.G.D.

JAMES B. MURPHY, Judge Advocate.
Lt. Colonel, J.A.G.D. - ABSENT

1st Indorsement

War Department, Army Service Forces, Branch Office of the Judge Advocate General, A.P.O. 924, 2 November, 1943.

To: Commander-in-Chief, Southwest Pacific Area, A.P.O. 500.

1. In the case of Major Edwin S. Hunter (0-290389), Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM A-750)

[signature]
ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 10, USAFFE, 5 Nov 1943)

WAR DEPARTMENT
Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

14 October, 1943.

CM A-757.

UNITED STATES v. Major Herbert S. Kamsler, (0-207483), Adjutant General's Department, Headquarters XIV Corps.	Trial by G.C.M., convened at Noumea, New Caledonia, 25 August, 1943. Dismissal from the service.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Major (then Lieutenant Colonel) HERBERT S. KAMSLER, Adjutant General's Department, Hq. XIV Corps, APO 709, did, at Headquarters USAFISPA, APO 502, on or about March 16, 1943, in the course of an official investigation by Colonel JOHN T. McLANE, Inspector General's Department, make under oath a statement in substance as follows: "I did not sell beer or liquor to enlisted men", which statement he did not then believe to be true.

Specification 2: In that Major HERBERT S. KAMSLER, Adjutant General's Department, Hq. XIV Corps, APO-709, did, at the 9th Station Hospital, APO 502, on or about May 16, 1943, in the course of an official investigation by Colonel W. I. SHERWOOD, Inspector General's Department, make under oath a statement in substance as follows: "I have never sold it (meaning thereby beer, scotch whiskey, gin and brandy) to a single enlisted man", which statement he did not then believe to be true.

The accused pleaded not guilty to the charge and specifications and was found guilty as charged. He was sentenced to be dismissed from the service. The reviewing authority approved, and the confirming authority confirmed, the sentence. Pursuant to Article of War 50½ the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The competent evidence for the prosecution discloses that Warrant Officer (jg) Richard M. Burke, then a staff sergeant, in July, 1942, purchased three bottles of gin from accused, paying him between $1.25 and $1.75 a bottle (R.6). Warrant Officer (jg) Bart J. Connolly, then a master sergeant, on eight occasions from about March 18, 1942, until about the middle of July of that year purchased from the accused a case of Scotch whiskey, four bottles of gin and four bottles of brandy. He paid accused $1.25 a bottle for the gin, $1.50 a bottle for the brandy, and $42.00 a case for the whiskey (R.8). Master Sergeant James R. McAllister, during May and June, 1942, (R.11) made "eight or nine, possibly ten" purchases from accused of Scotch whiskey and gin (R.10). Technical Sergeant John D. Watson, "possibly a half dozen times" during April and May, 1942, purchased gin and brandy from accused and paid him $2.00 and $2.50 a bottle, respectively, for the same (R.12). Master Sergeant Courtney C. Hood on one occasion in June or July, 1942, purchased two bottles of Dewar's White Label Scotch Whiskey from accused for $3.00 (R.13). All of these enlisted men were members of Headquarters, Americal Division, and the respective sales were made at A.P.O. 502.

On March 16, 1943, the accused was ordered to appear at the office of Colonel McLane, Inspector General, U.S.A.F.I.S.P.A. There he was duly sworn, advised of his rights under Article of War 24, and interrogated with reference to "his entire career while he was at APO 502" (R.14). Technician 4th Grade James J. Herbert, a stenographer who was then present and took stenographic notes of the proceedings, testified that -

> "Colonel McLane asked the accused if he had ever been admonished for selling liquor to officers and enlisted men and the accused refused to answer, saying that that was a different investigation. The Colonel then told the accused that he would have to answer the question and the accused said he had been admonished. Then the Colonel asked the accused if he had gotton Father Dunford to intercede on his behalf for selling beer and liquor to officers and enlisted men. The accused said that he did get Father Dunford to intercede but he had never sold liquor to enlisted men of the Americal Division." (R.15; 36).

Colonel William I. Sherwood, IGD, succeeded Colonel McLane as Inspector General, U.S.A.F.I.S.P.A. He noted that the files in the case of the accused revealed affidavits of enlisted men of the Americal Division to the effect that they had purchased intoxicating liquor from accused although he had testified to the contrary before Colonel McLane. Accordingly, on or about May 16, 1943, Colonel Sherwood interrogated the accused at the 9th Station Hospital in an endeavor to determine the truth or falsity of such testimony. Colonel Sherwood testified in pertinent part -

> " * * * I * * swore Major Kamsler as a witness and warned him of his rights and he acknowledged that he understood his rights as a witness. I asked him if he was physically and mentally able to testify and he said he was. I then asked him forty-three questions. Seven of the forty-three questions dealt with his sale of liquor to enlisted men. I told Major Kamsler that I had affidavits from five enlisted men to the effect that they had procured liquor from him through a sale. I presented the matter to him seven different times, each time a little differently but always to the same point. Seven times Major Kamsler denied ever having sold intoxicating liquor to enlisted men. I kept presenting the question to him so as to establish beyond a doubt that he understood the question. * * * * . (R.19)
>
> " * * * *

"I recall very clearly the questions and they all dealt with the subject if the Major had ever sold intoxicating liquor to enlisted men. One time I told him that I had five affidavits from enlisted men to the effect that they had purchased intoxicating liquor from him. Another time I asked Major Kamsler to please refresh his memory and to think back to the time when he was with the Americal Division and with the Service Command, APO 502 to make certain whether he did or did not sell intoxicating liquor to enlisted men. The seven questions were of that same tenor, clearly spoken, * * * . (R.20).

" * * * *

"In each of the seven instances Major Kamsler clearly stated that he denied that he had ever sold intoxicating liquors to enlisted personnel. (R.20).

" * * * *

" * * * Another time he said, 'It was the custom at my headquarters for officers on all occasions to make it possible for enlisted men to obtain beer.' It was specifically beer. Then he said, 'If you call that selling intoxicating liquors to enlisted men, then I sold liquor.' I said, 'I'm not speaking of beer. In the affidavits forwarded it was whiskey, brandy, and gin' and his answer was, 'I still deny it. The questions that I asked were definite and his answers were definite." (R.20-21).

Technician Herbert, upon being recalled, corroborated the testimony of Colonel Sherwood and further testified that the Colonel had not qualified his questions with respect to the time the sale of liquor was made to enlisted men but specifically asked the accused if he had sold liquor while Adjutant of the Americal Division and accused said that he had not (R.36; 37).

Accused elected to be sworn and testified that in October, 1942, he held the grade of Lieutenant Colonel. He stated that at that time he was subjected to an investigation by a Colonel Long and the several enlisted men who testified for the prosecution in the instant case were also interrogated and their statements were reduced to writing. He further testified that as a result of that investigation he was given a reprimand in punishment for his actions (R.24; 28). On February 4, 1943, he received an admonishment for some other and unrelated offense (R.29). In the early part of February, 1943, he requested to be returned to the United States on "rotation of officers". The request was not favorably considered and on about 15 March, 1943, he was assigned to the "Quartermaster Office". That "after staying there for a while I felt that just because I was asking to go home on rotation of officers I was getting kicked around". Accordingly, he sent a letter directly to General Thompson, Commanding General U.S.A.F.I.S.P.A. (in the absence of General Harmon) reciting the facts. The next morning he was ordered to report to the office of the Inspector General. There Colonel McLane advised him that he was going to investigate "my activities during my entire period of service at APO 502". Accused testified that Colonel McLane "said, 'Did you sell liquor to officers or enlisted men and I said not to enlisted men' * * * * " (R.24). Accused stated that subsequent to this investigation, on 22 March, 1943, he received an administrative admonition and on 12 April, 1943, was reduced to the grade of Major (R.25, 26). On April 17, 1943, he embarked for Guadalcanal. While on the ship he developed a fever which was diagnosed as malaria. Accordingly, he did not disembark but was returned to the 27th Station Hospital and from there transferred to the 9th Station Hospital (R.22, 23). When interrogated there by Colonel Sherwood "I had just about reached my limit of capacity and I told Colonel Sherwood I didn't mind what they did just so it was over, I was just mentally, physically, morally, and spiritually whipped" (R.25).

On cross examination accused admitted that he had stated under oath to both Colonel McLane and Colonel Sherwood that he had not sold intoxicating liquor to enlisted men and that at the time he made those statements he knew that he had sold liquor to them (R.27).

In explanation of his denial that he had sold intoxicating liquor to enlisted men, accused testified that he "understood" the questions asked by Colonel Sherwood pertained "to what took place after my first punishment" in October, 1942 (R.28). Accused had sold liquor to no one subsequent to that time and testified "I felt, in making that reply to Colonel McLane, that I had not sold liquor to enlisted men after I had been punished"(R.24). He further testified that he did not feel "any consciousness of guilt" with reference to the instant charges (R.25). He admitted, however, that he fully understood the questions asked him by both the Inspectors General and that nothing was said by Colonel McLane which would "qualify" his questions and accused did not "qualify" his answers (R.28, 29). Accused further admitted that Colonel Sherwood had mentioned the affidavits of the five enlisted men, but that such fact did not indicate to him to what period of time the questions pertained (R.29).

Major William W. Edwards, M.C., a member of the Disposition Board which examined accused at the 9th Station Hospital testified that -

> " * * * At the time we reviewed Major Kamsler's case we thought that he was laboring under great mental stress. He was quite emotional and he had certain obsessions. He was subject to bits of crying and bits of depression and had various complaints which might have been suggestive of some ocular lesion. In our opinion Major Kamsler had, what the medical board terms, a psychoneurosis." (R.33).

On cross examination the medical officer testified that accused was able to distinguish right from wrong and that he was capable of doing right (R.34).

4. The evidence for the prosecution establishes, and the accused admitted, that he stated under oath to both Colonel McLane and Colonel Sherwood, Inspectors General, in the course of official investigations conducted by them in March and April, 1943, respectively, that he had not sold intoxicating liquor to enlisted men. The evidence further establishes that accused had, in fact, sold intoxicating liquor to enlisted men prior to October, 1942. He attempted to justify his statements by contending that as he had been punished by reprimand in October, 1942, following an official investigation of his sale of liquor, his statements to Colonels McLane and Sherwood pertained only to times subsequent thereto, during which period he had sold no intoxicating liquor. The questions of the Inspectors General were not so qualified. The accused was specifically interrogated with reference to the entire period that he was stationed at APO 502 and while he was an Adjutant of the Americal Division, which period antedated October, 1942. The determination of the credibility of the accused and the weight to be given to all or any part of his testimony was the province of the court-martial (sec. 395 (56), Dig. Ops., JAG 1912-40). The court was privileged to give no credence to the contention of the accused that his statements pertained only to times subsequent to October, 1942. From the entirety of the evidence the court could properly find that the accused committed the offenses charged. It should be noted, however, that the specifications allege that accused falsely denied having sold beer and intoxicating liquor to enlisted men. The evidence establishes that such false statements were made with reference to "intoxicating liquor" such as whiskey, gin and brandy, but not with reference to beer. This variance is believed immaterial. The gravamen of the offenses is the false swearing by the accused during the course of official investigations. Such conduct is unbecoming an officer and a gentleman and may properly be charged as a violation of Article of War 95, for which dismissal from the service is a mandatory sentence.

The question of accused's mental responsibility was inferentially presented by the testimony of Major Edwards, M.C. He did not testify, however, that accused was at any time mentally irresponsible. The court, by its findings, properly determined that accused was mentally responsible both at the time of the commission of the derelictions charged and at the time of the trial.

5. For the reasons stated above the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of the court and the sentence.

_____, Judge Advocate.
Colonel, J.A.G.D.

_____, Judge Advocate.
Lt.Col., J.A.G.D.

_____, Judge Advocate.
Lt.Col., J.A.G.D.

1st Indorsement

War Department, Army Service Forces, Branch Office of the Judge Advocate General, A.P.O. 924, 15 October, 1943.

To: Commanding General, USAFISPA, A.P.O. 502.

1. In the case of Major Herbert S. Kamsler, (O-207483), Adjutant General's Department, Headquarters XIV Corps, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this care are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM A-757).

ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 28, USAFISPA, 19 Oct 1943)

WAR DEPARTMENT
Army Service Forces
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

29 October, 1943.

CM A-772

UNITED STATES v. Private HARRY WICKS JR. (18044758), 228th Quartermaster Company (Salvage Collecting).	Trial by G.C.M., convened at Guadalcanal, Solomon Islands, 23 September, 1943. Dishonorable discharge, confinement for life. United States Penitentiary, McNeil Island, Washington.

HOLDING BY THE BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 92nd Article of War.

Specification: In that Private Harry Wicks, Jr., 228th Quartermaster Company (Salvage Collecting), did, at APO 709, on or about September 1, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Private First Class David C. Birthright, 228th Quartermaster Company (Salvage Collecting), a human being by shooting him with a rifle.

CHARGE II: Violation of the 93rd Article of War.

Specification 1: In that Private Harry Wicks, Jr., 228th Quartermaster Company (Salvage Collecting), did, at APO 709, on or about September 1, 1943, with intent to commit murder, commit an assault upon Private First Class Cleveland G. Turner, 228th Quartermaster Company (Salvage Collecting), by willfully, deliberately, feloniously, unlawfully, with premeditation, and with malice aforethought, shooting the said Private First Class Turner in the arm and back with a rifle.

Specification 2: In that Private Harry Wicks, Jr., 228th Quartermaster Company (Salvage Collecting), did, at APO 709, on or about September 1, 1943, with intent to commit murder, commit an assault upon Private First Class Tom Jackson, 228th Quartermaster Company (Salvage Collecting), by willfully, deliberately, feloniously, unlawfully, with premeditation, and with malice aforethought shooting the said Private First Class Jackson in the buttocks with a rifle.

The accused pleaded not guilty to the charges and specifications and was found guilty as charged. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority disapproved so much of the findings of guilty of specification 1, Charge II, as pertains to the words "and back", and approved the sentence. The United States Penitentiary, McNeil Island, Washington, was designated as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence discloses that at about 11:00 o'clock in the night of 1 September, 1943, several games were in progress in the "gambling area" of the 228th Quartermaster Company, Guadalcanal, Solomon Islands. The games were illuminated by lamps made from bottles of kerosene with wicks upon the tables. The "gambling area" was located between two rows of tents. In one of those rows and adjacent to the "gambling area", the tent of Private First Class Tom Jackson was located. Directly opposite and in the other row of tents which bounded the "gambling area" was a tent with a tree by its side. The tent of accused was located several tent rows to the rear of the last mentioned tent (R. 8, 10; Ex. A; B). The accused was participating in a dice game, when Private First Class Cleveland G. Turner, a spectator, asked accused for the twelve dollars which accused owed him saying "How can you shoot craps when you can't pay me". Accused answered that he did not have the money but would get it for him in a few minutes. Turner then grabbed accused by the collar with one hand, holding a knife in the other hand at his side, cursed him, and said "I'll cut your God-damn throat". Private First Class David C. Birthright and other soldiers interceded, Birthright telling Turner he would pay the twelve dollars for accused. Birthright paid the money and accused left shortly thereafter, going to his tent (R. 7, 18; 25, 45, 53). During the altercation, Turner did not strike or cut the accused. Turner and Birthright, at the latter's suggestion, moved to another gambling game in the same area (R.53).

At an undefined time between ten and forty-five minutes later, the accused, who had secured his rifle from his tent, stood near the tree mentioned above, called out "Hey Clickie", (Turner's nickname) and fired one shot. He again called out "Hey Clickie" and fired twice more (R.7). As the result thereof Birthright was shot through the head and his death ensued; Jackson, who was asleep in his tent, received a superficial wound on his hip and Turner was shot through the arm (R.34, 35, 50; Ex. D). At the time of the shooting, Birthright and Turner were near to each other at a place in an approximate line between the accused and the cot upon which Jackson was sleeping (R. 13; Ex. A). Immediately after the third shot Private Scott Anthony ran up behind accused and grabbed his rifle as accused was pulling the bolt back (R. 37, 39). The accused was taken to the orderly room and turned over to the Charge of Quarters, and later to the Provost Marshal (R. 26, 37).

Less than one hour after the shooting the accused was advised of his rights and made a sworn written statement before Second Lieutenant Emile A. Service, Jr., which in part is as follows:

"* * *

'On September 1, 1943, when I was shooting craps with Mr. Sgt. Kinnon, Pvt. West Jackson, and several other soldiers whose names I cannot recall now, Pvt. 1Cl. Cleveland Turner approached me and asked for $12.00 which I owed him. I told him I would pay him in the morning. Pvt. 1Cl. Turner grabbed me by the collar and called me vulgar names. With one hand on my collar, he made a motion with his other hand toward his trouser's pocket. When I saw Pvt. 1Cl. Turner draw a knife from his pocket I called to Pvt. Wesley Gray, to whom I had given a twenty dollard bill a few minutes earlier and asked him to give Pvt. 1Cl. Turner $12.00 from the $20.00. Pvt. 1Cl. Turner released me, closed his knife and I believe he returned the knife to his pocket. While Pvt. 1Cl. Turner was doing this, someone who I cannot recall, paid Pvt. 1Cl. Turner the $12.00. At this moment, I thought Pvt. 1Cl. Turner was making a break for me. He came toward me but I am not sure he had his knife out again or not. I ran over to my tent which is about 35 or 40 yards from the table where we had been gambling and I can't remember what happened. I know I picked

up my springfield rifle and I guess I returned with it to the place where we were gambling. I aimed my rifle at Pvt 1Cl. Turner and fired three shots I think. I don't remember what happened after that except I was walking up Maples Drive toward Lunga Beach and someone took me to the Military Police Orderly Room Tent.

'Pvt. 1Cl David Birthright never made any threatening statement toward me or offered bodily violence of any sort whatsoever during the entire time I knew him.

'I had had several drinks of liquor over at Mica Engineers during the evening of September 1, 1943. When I returned to the 228th Q.M. Co. camp and, I was not drunk but I could feel some effects from the liquor I had been drinking'.* * *"(R.65; Ex.E).

On 7 September, 1943, after having been advised of his rights, accused made a second sworn written statement before the Investigating Officer, Lieutenant Colonel George W. Coffman, Jr. which in part is as follows:

"1.* * *

2.* * *

3. I was shooting at Pfc Cleveland G. Turner ASN 37052958, 228th Q.M. Co., APO # 709, and I was scared. I did not intend to shoot Pfc Tom Jackson ASN 34007025, 228th Q.M. Co., APO # 709, or Pfc David C. Birthright ASN 37053099, 228th Q.M. Co., APO # 709. I knew of several cases where Turner had cut other people and I didn't want to take any chances of his slipping up and cutting me. I had been drinking before with Turner and had borrowed money from him and we were supposed to be friends. This was the first trouble or argument I had ever had with Turner.

4. I knew Turner had been drinking altho I did not see him drinking, I can just tell when a man has been drinking. I wouldn't say he was drunk he had just been drinking.

5. I had had quite a bit to drink but was still able to get around. I was not intoxicated. I bought a half gallon of raisin jack over at the 481st Port Battalion, I do not know the name of the person I bought it off of. I had drunk quite a bit of it, I dont know exactly how much.

6. Turners knife that I had seen was a pocket knife with a pretty long blade I dont know exactly how long. He had me by the collar with his left hand and the knife in his right hand down by his side and saying something, using vulgar names and threatening remarks.

7. When Turner released me I stood up there for a minute and one of the boys told me to go on. Then I seen Turner looked like he was walking toward me so I took off. That's when I went around to my tent and got my rifle. I was scared that Turner might attack me again and I didn't want to take any chances. Then I hunted Turner up and fired at him. I saw two or three guys standing around and the first shot I intended to shoot up in the air to scare them away so I wouldn't hit anybody else, but I was standing close to the tent and I guess my foot slipped when I went to shoot the first shot. I didn't know that my first shot hit anybody, I called Turners name 'Clickie' so he would answer and I could be sure of shooting at him instead of some one else. And then I fired two more shots. I'm pretty sure I fired three times. I remember all this and knew what I was doing except I didn't know I hit anybody else, I only intended to shoot Turner. I intended to shoot and kill Turner to keep him from slipping up on me and cutting me with his knife. He was a pretty dangerous fellow. I dont believe in taking chances on those kind of people. I never hurt anybody myself and I dont want anybody cutting me.

8. I couldn't say how long it was after Turner threatened me with his knife that the shooting happened, all I remember is saying to myself, 'I better break him up now or it'll either be my life or some body elses,' and going to get my rifle and coming back to find Turner to get him.

9. A fellow came up and grabbed me and said dont shoot any more, I told him I wasn't going to shoot no more and gave him my rifle. Everybody got excited and I guess he turned me loose. I wasn't aiming to run away. I was intending to come on to the stockade. I was walking on down to the stockade and ran into Master Sergeant Edward Kinnon, ASN 6916524, 228th Q.M. Co., he asked me who did the shooting and I said I did and he said well lets go right on up here to Lt. Clark at the Military Police Headquarters, and I said OK.

10. I didn't ever see Birthright, I just saw Turner. It did look like somebody else was standing up there by the table, thats why I intended to shoot high so I wouldn't hit anybody else besides Turner. I was about 15 or 20 feet away from Turner and Birthright when I shot. It was a starry night, light enough to see objects. Candles were lit and some kerosine wicks were burning on the tables. I'm not sure of the time but it was late in the evening when the shooting happeded. After shooting the first shot everybody ran away and I didn't figure I hit any innocent person. I didn't see anybody fall when I shot the first time, just seen Clickie Turner start to run and then I fired two more times at Clickie.

11.* * *
12.* * *
13.* * * ." (R.69; Ex. G).

Evidence as to the sobriety of accused on the night of the shooting was elicited from several witnesses during the trial. Sergeant Kinnon smelled whiskey on accused's breath and in his opinion accused was "* * Not too drunk", he staggered and did not talk "* * like he usually talked" (R.30). It was the opinion of Lieutenant Service, Sergeant Chatmond, Corporal Buggs, and Privates Grier and Turner that accused was not drunk (R. 76, 17, 42, 46, 54).

On behalf of the accused several witnesses testified that Turner had a general reputation for turbulence and fighting. It was generally known among the company that Turner had been convicted by a Special Court-Martial of an assault with intent to kill with a pocket knife, (R. 72, 80, 84, 92; Ex. I). Witnesses for the defense recounted the same events as those testified to by witnesses for the prosecution with reference to the assault by Turner upon accused during which Turner displayed a knife and threatened to cut accused's throat.

On the evening of the shooting Private Joseph V. Morine sold accused two quarts of "raisin jack", a drink made of raisins, sugar, and water and allowed to ferment. On cross-examination Morine testified that he, himself, drank a half gallon of "raisin jack" and it did not make him drunk (R.83). Other witnesses for the defense testified that accused had previously been in trouble in his company and upon each of those occasions his indulgence in intoxicating liquor was partly responsible therefor.

The accused elected to remain silent (R.93).

4. The evidence established that Turner, upon refusal of accused to repay a loan of twelve dollars, seized accused by the collar, holding a knife by his side, cursed and threatened that he would cut accused's throat. Birthright interceded and paid the money after which accused left. Turner neither struck or cut accused at that time. Turner was a man of bad general reputation and had been previously convicted of an assault with intent to kill with a pocket knife. Within ten to forty-five minutes accused returned to the scene of the altercation with an admitted intention to shoot and kill Turner. In furtherance of that intention he fired his rifle at Turner three times, and as a direct result killed Birthright and wounded both Turner and Jackson.

Accused intended to kill Turner. Such intention constitutes malice, and co-existing with the acts causing the injuries or death, as the case may be, is malice aforethought, even though the acts were unpremeditated. The specific intent constituting the malice aforethought, existing as it was at the time of the shooting, follows the bullets and is imputed to the killing of Birthright and the wounding of both Jackson and Turner.

"Murder is the unlawful killing of a human being with malice aforethought.* *

"Malice aforethought. - Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before the commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed (Clark).

"Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; intent to commit any felony.* *" (par. 148a, M.C.M., 1928).

"If a man shoots at another with the intention of killing him (and such killing if consummated would be murder), and kills a bystander or another, he is guilty of murder of the person killed, whether the killing of the latter was due to a mistake as to his or her identity, or to recklessness in the aim of the one doing the killing." (U.S. v. Hart, 162 F 192) (sec. 452, Title 18, U.S.C.A., p. 327).

"* * where the accused, intending to murder A, shoots at and wounds B, mistaking him for A, he is guilty of assaulting B with intent to murder him; so also where a man fires into a group with intent to murder some one, he is guilty of an assault with intent to murder each member of the group." (par. 149l, M.C.M., 1928).

If accused, as contended, was in fear of his life or grievous bodily harm, several appropriate means of self-protection were available to him other than securing his rifle and returning for the purpose of shooting Turner. Whether or not the accused, at the time of the homicide, acted in the heat of sudden passion caused by provocation or in self-defense believing he was in immediate danger of death or grievous bodily harm from Turner are questions of fact to be determined by the court-martial (Allison v. United States, 256, U.S. 335; CM A-260, Hill; CM A-709, Trujillo; CM A-729, Huddleston).

The court-martial by its findings determined that the homicide was murder and that each of the assaults was accomplished with intent to commit murder. The record contains evidence upon which such findings could properly be predicated.

5. For the reasons stated above the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of the court as approved and the sentence.

_____, Judge Advocate.
Colonel, J.A.G.D.

_____, Judge Advocate.
Lt. Colonel, J.A.G.D.

JAMES B. MURPHY, Judge Advocate.
Lt. Colonel, J.A.G.D. - ABSENT.

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

CM A-796

3 November, 1943.

UNITED STATES v. Captain CLYDE B. WATKINS (0393499), 5th Cavalry.	)	Trial by G.C.M., convened at A.P.O. 201, 12 October, 1943. Dismissal.

HOLDING BY THE BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the officer named above has been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charges and specifications

CHARGE I: Violation of the 64th Article of War.

Specification: In that Captain Clyde B. Watkins, 5th Cavalry, did, at APO 201, on or about 26 September 1943, wrongfully and unlawfully strike Lt Col Harry W. Cooper, his superior Officer, who was then in the execution of his office, in the face with his fist.

CHARGE II: Violation of the 96th Article of War.

Specification 1: In that Captain Clyde B. Watkins, 5th Cavalry, was, at APO 201, on or about 26 September 1943, drunk and disorderly while in uniform.

Specification 2: In that Captain Clyde B. Watkins, 5th Cavalry, did, at APO 201, on or about 26 September 1943, behave in an unseemly, degrading, and insubordinate manner towards Lt. Col. Harry W. Cooper, his superior officer, who was then in the execution of his office, by using derogatory, insulting and defamatory language, to wit "Cooper, you are a chicken shit son of a bitch, and I don't like you", and offered physical violence to his person by the remark "I am going to whip your ass whether you are a Colonel or not", or words to that effect.

The accused pleaded not guilty to both charges and all specifications thereof and was found guilty as charged. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The Reviewing Authority approved the sentence. The confirming authority confirmed the the sentence but remitted the forfeiture adjudged. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch

Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. On Sunday night, 26 September, 1943, at about 9 o'clock, Lieutenant Colonel Harry W. Cooper, S-3, 5th Cavalry, and Major Raymond B. Carleton, the Adjutant, were sitting in the former's tent talking. A vehicle drove up, stopped nearby, and Captain Clyde Watkins, the accused, came to the door of the tent (R.7,43). He was greeted by both officers and the Colonel asked him to be seated. Colonel Cooper testified that accused's "uniform was in a very disorderly condition, the fly of his pants was unbuttoned, the cap on his head cross-ways. * * * His speech was rather impaired, stammered and was very incoherent". He was carrying a bottle of gin (R.7,25) which was about two-thirds empty and "was in a very drunken condition". Major Carleton described him as being "unsteady on his feet. * * * He was not in the possession of his normal faculities and I believe you consider that drunk" (R.44). Major Carleton left within a few minutes and went to his own tent.

Colonel Cooper and accused talked about "different subjects pertaining to the status of training in the Regiment". Accused took several drinks from the bottle of gin, offering a drink each time to the Colonel which he refused. (R.9). At times accused's voice became "very loud and disorderly" and the Colonel admonished him to quiet down so that he would not disturb Colonel Hoffman, the Regimental Commander, who was in a tent about twenty-five feet away. Colonel Cooper testified that certain of his remarks with reference to the training of accused's troops "antagonized" the latter. The Colonel told him that "if he had any greviences that he wanted to take up with me he should go home sober up and come back when he was in a condition to iron the matter out" (R.8). Accused arose from the cot on which he was sitting, and in the presence of Captain Howard F. Doughton, who had come into the tent, cursed the Colonel, in substance as alleged in specification 2 of Charge II, and struck him on the side of the face causing him to stumble over a chair (R.8,21,42). The Colonel then grabbed the accused, threw him to the floor and held him there until he agreed to behave and return to his own tent. Upon being released accused again started to fight.

Major Carleton in his own tent not more than ten yards away heard accused talking loudly and curse the Colonel. He heard Colonel Cooper tell accused to leave and then sounds like that of a scuffle between them. He went to the tent and tried to quiet the disturbance. In his presence accused cursed both Colonel Cooper and Captain Doughton. The Colonel ordered accused out of the tent. Major Carleton also, in his official capacity as Adjutant, ordered him to quiet down and leave. After the exchange of a few more words, Colonel Cooper and Major Carleton, each holding one of accused's arms, walked him out of the tent and to his vehicle. Upon reaching the vehicle, accused remembered that he had left his cap in the Colonel's tent and said that he was going to return for it. Colonel Cooper offered to get the cap for him and accused again cursed him using similiar words to those alleged in specification 2 of Charge II. Colonel Hoffman then appeared and ordered the arrest of accused (R9,24).

At the direction of Colonel Hoffman, Major Francis S. Crane, the Regimental Surgeon, examined accused a short time thereafter. It was his opinion that accused was drunk (R.27).

Lieutenant Colonel Gines Perez, a witness for accused, testified that he was with accused in the town of New Castle until about three o'clock in the afternoon of the day in question and that during that time accused's behavior was excellent. Captain Norvell R. Stark was with them. He saw accused as late as 7:45 in the evening and although accused had had "some drinks" he was sober. Captain Stark gave accused a bottle of gin which was about half full (R.33). Lieutenant Ralph E. Hill, executive officer of accused's troop, testified that he saw and talked to accused about eight o'clock that

evening with reference to the welfare of the troop (R.35).

Accused elected to be sworn as a witness in his own behalf. He testified that on Sunday evening, about eight o'clock, while going to visit certain officers, he passed Colonel Cooper's tent. The Colonel invited him to come in and asked him to be seated (R.36,39). They began to talk in a "friendly way", principally about training. He stated, inter alia:

> [The Colonel] preceeded in an unofficial way to degrade my troop and myself. * * * Evidently he thought I was getting a little out of order and he grabbed me and I thought he was playing with me and the next thing he had his arm around my neck and I was on the floor. * * * He asked me if I wanted to get up and behave, and I said it was up to him as he started the fray. * * * As I was getting up he jerked me by the shoulder and I stumbled in to a light that was in the center of the tent and knocked it over. * * * Major Carleton came into the tent and gave me a direct order to go to the bantam and I did so." (R.37, 38).

Accused testified that previously the Colonel had not given him a direct order to leave but had told him "to get the hell out. * * * I didn't think it was [an official order] in that manner and I told him" (R.38). He further admitted upon cross-examination that he had a bottle of gin with him when he entered the tent but he testified that neither he nor the Colonel had anything to drink during their conversation. He further testified that no blows were struck by either of them but that both the Colonel and he had used profane language (R.39,40).

4. It is the province of the court-martial to judge the credibility of the witnesses and to weigh the evidence (sec. 395 (56) Dig. Ops., JAG 1912-40). It was privileged to disregard all, or any part of, the testimony of accused which was in conflict with that of other witnesses. The court had for its consideration substantial evidence upon which to predicate its findings that the accused committed the several offenses alleged.

5. Accordingly, the Board of Review is of the opinion that the record is legally sufficient to support the findings of the court and the sentence.

Judge Advocate.
Colonel, J.A.G.D.

Judge Advocate.
Lt. Colonel, J.A.G.D.

JAMES B. MURPHY Judge Advocate.
Lt. Colonel, J.A.G.D. -ABSENT

1st Ind.

ARMY SERVICE FORCES, BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL, A.P.O. 924, 4 November, 1943.

To: Commander-in-Chief, Southwest Pacific Area, A.P.O. 500.

1. In the case of Captain Clyde B. Watkins (0393499), 5th Cavalry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM A-796)

ERNEST H. BURT,
Brigadier General, U. S. Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 11, USAFFE, 7 Nov 1943)

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

25 November, 1943.

CM A-815

UNITED STATES v. Private ELLIS RIDDLE (34322007), 1943rd Quartermaster Company Truck, (Avn)	Trial by G.C.M., convened at Noumea, New Caledonia, 30 September, 1943. Dishonorable discharge, total forfeitures, confinement hard labor for life. U.S. Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Ellis (NMI) Riddle, 1943rd QM Co. Trk (Avn) 6th Service Group, APO 502, c/o Postmaster, San Francisco, California, did, at APO 502, on or about July 8, 1943, forcibly and feloniously, against her will, have carnal knowledge of Madame Bonem.

The accused pleaded not guilty to the charge and specification and was found guilty as charged. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The competent evidence for the prosecution discloses that Madame Bonem and her husband, Kasiman, both Javanese natives, were walking along a country road about three and a half miles north of Plaines des Gaiac, New Caledonia (A.P.O. 502), about 10:30 o'clock in the morning of 8 July, 1943. Accused, accompanied by another soldier, both colored, were riding along that road in a weapons carrier. They stopped behind the natives and got out of the vehicle. Accused, holding a hunting knife in his raised hand, three times asked the woman to "zig zig" (R.7), which words are used by the natives to signify sexual intercourse. Although neither of the natives could understand English, they understood accused's meaning and the woman refused his demand. She testified through an interpreter that-

"He took me by the arm and brought me in the brush. * * * First, he put me on the ground, second he took away my pants; lifting the sarong he took out the pants * * * . He entered and did everything as in a normal sexual relation." (R.6,11).

She further testified that during the entire time "* * * I was crying in a high voice. * * * I didn't resist. I was under the influence of the knife" (R.10,11). Her clothes were not torn; "only some of the skin on my leg".

Kasiman, the woman's husband, testified through the interpreter that he did nothing to prevent the assault which he witnessed from a distance of about six yards, although he heard his wife crying, because "I was afraid I should be stabbed" (R.13).

About five minutes after accused took the Javanese woman into the brush another army vehicle containing Technical Sergeant Samuel Legan and five other American soldiers approached along the road. Kasiman stood in the path of the oncoming vehicle, and waiving his arms (R.30), caused it to be stopped about 300 or 400 feet from accused's weapons carrier which had been moved down the road by Private Jamerson, accused's companion. (R.32). He then by gestures indicated the drawing of a knife across his throat, said "Kanacka zig zig", pointing to the brush, and tried to cause the newly arrived soldiers to go into the brush (R.26,27,30,31,35,38). The soldiers could not understand the thought that the Javanese was endeavoring to convey and although they heard what were described as "sighing noises" (R.20); "brush crackling" (R.30); "a noise off the road like someone crying and groaning" (R.34); "groaning in the brush" (R.38), they did nothing. No more than five minutes later (R.28,35,39) the Javanese woman came out of the brush. "* * * she had a pair of white shorts on her left leg and holding them with her left hand" (R.38). "* * * she was sighing and sobbing pitifully" (R.20,30). "She seemed frightened" (R.25). There was a noise from the brush as though someone was walking away from them and accused emerged from the brush near his weapons carrier. He got into the vehicle and drove up the road to the place where the Javanese and the soldiers were standing (R.21,24, 35,38).

Sergeant Legan asked accused "what was going on and he said he didn't know" (R.25,38). Accused stated that he had gone into the brush to defecate (R.28,30,38). The accused was asked what outfit he was in but he refused to answer, saying that the Sergeant already knew (R.25,41). Technician 4th Grade Porter, one of the soldiers, made note of the number of the weapons carrier (R.41). Both the Javanese man and woman by signs and by pointing to the knife that accused was wearing indicated that accused had forceably taken the woman into the brush and had assaulted her (R.21,38,40). Accused talked to the Javanese in a tongue not recognized by the other soldiers, and which the accused said was French (R.40) and then stated to the others that "the Javanese wanted to forget, that everything was all right" (R.27); "that they were willing to forget, why didn't we" (R.30). The natives indicated that they did not want accused to leave but that they wanted to see the Captain (R.25). Accused stated that he would take them to the base but they refused to go with him (R.38). Accused and his companion then left in their weapons carrier, Sergeant Legan telling them that they would all meet at the main road. When the Sergeant, his companions, and the Javanese reached the main road accused and his vehicle could not be seen. They then went to the soldier's camp and the Provost Marshal was notified (R.39). The Javanese were then taken to accused's camp, where the woman, from a distance of about fifty yards, pointed out the accused as the man who had assaulted her (R.39).

On behalf of the accused, Captain J.M. Golden (R.42), and First Lieutenants O. Beasley (R.43) and H. Harper (R.44), each testified that accused was a good soldier. A map of the road where the offense was alleged to have been committed was introduced. Witnesses testified that they had passed accused's weapons carrier on that road on the morning of 8 July, 1943. From the testimony it could be concluded that accused's vehicle was in that locality but a short time.

Private First Class Nathan Jamerson testified that on the morning in question he was riding in the weapons carrier with accused. They passed the Javanese and the accused "asked them if they wanted a ride" (R.64). Accused and witness rode about one hundred feet further when accused stopped the truck and said that he was going to relieve himself. Accused got out and went into the brush (R.57). Witness also got out of the truck and walked back about 45 or 50 feet where he saw a Javanese man. The native said something that witness could not understand. Witness heard another truck approaching and went to move the weapons carrier out of the way. He was called back by one of the newly arrived soldiers. While he was talking to the soldiers and the Javanese man, a Javanese woman came out of the brush. "* * * she looked like she was crying" (R.57). Witness testified that he had not seen the woman previously nor had he seen accused display his knife or talk to her at any time (R.58). Within a few minutes after the woman appeared and not more than four or five minutes after accused entered the brush, he came out (R.59). Witness heard accused say "they wanted to forget" but he did not know to what those words referred (R.60, 63).

Accused testified in his own behalf that at the time alleged he and Jamerson were riding in the weapons carrier. They passed a Javanese man and woman who were walking as though they were frightened. The man "was waiving his hand like he wanted a ride and I said, 'No ride ' " (R.67). Accused drove on and then stopped his vehicle and said that he had to relieve himself. He stated that he got out of the truck, went into the woods and relieved himself. From the woods he heard another truck drive up and stop. When he came out of the woods one of the soldiers said to him, "This man said that you done raped her". Witness testified that he answered "No, not me, * * * I didn't rape her, I just came down here and how could I. * * * If she thinks I did I'll take her back to my company * * *" (R.67,68). It was agreed that they would all go to the Provost Marshal. Accused testified that he waited in his truck at the entrance to the main road but the others did not come so he went for the mail and then returned to his company (R.58,68). Accused admitted that he wore a knife but denied having showed it to the Javanese (R.68). He further denied that he had had sexual intercourse with the woman and denied being able to speak any language other than English (R.68,69). Accused testified that he did not say that the Javanese were willing to forget the incident, but stated that he had said to the other soldiers " 'If you are accusing me of that, forget it; I didn't do it' " (R.70).

4. It appears from the testimony of the witnesses for the prosecution that the accused, against the will of a native Javanese woman caused her to go with him into the brush and there submit to his desires. Accused under oath denied the commission of the offense. It is the province of the court-martial to determine the credibility of the witnesses and what weight, if any, should be given to their testimony (sec. 395 (56) Dig. Ops. JAG., 1912-40). Thus the court was privileged to disregard all, or any part of, the testimony of accused in conflict with that of other witnesses.

Although the record is silent as to the extent and character of the resistance of the woman at the time of the consumation of the unlawful act (save that she was crying in a loud voice) the resistance required of a woman to establish her lack of consent depends upon the circumstances. In the instant case the accused had brandished a knife and by pantomime had indicated that he would use it upon the woman. Her husband, who was then present, was so cowed by the presence of the knife in the soldier's hand that he did not go to the assistance of his wife. There is no consent to the act where the victim ceases resistance under fear of death or other great bodily harm. (sec. 450, Vol. II, No. 8, Bull. JAG., Aug. 1943).

All the facts and circumstances appearing in the record surrounding the commission of the unlawful act constitute substantial evidence from which

the court-martial could properly determine that the accused carnally knew the native woman by force and without her consent.

5. Accordingly, it is the opinion of the Board of Review that the record of trial is legally sufficient to sustain the findings of the court and the sentence.

Colonel, J.A.G.D. Judge Advocate.

Lt. Col., J.A.G.D. Judge Advocate.

JAMES B. MURPHY Judge Advocate
Lt. Col., J.A.G.D.,-ABSENT

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia

CM A-821

1 December, 1943.

UNITED STATES v. Private MILLARD GREEN (35473509), Company "D" 63rd Quartermaster Laundry Battalion.	Trial by G.C.M., convened at Noumea, New Caledonia, 4 October, 1943. Dishonorable discharge, total forfeitures, confinement for life. United States Penitentiary, McNeil Island, Washington.

HOLDING By the BOARD OF REVIEW
STAFF, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial of the soldier named above has been examined by the Board of Review and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Millard Green, Company "D", 63rd Quartermaster Laundry Battalion, APO 3850, c/o Postmaster, San Francisco, California, did at Service Command Casual Camp, APO 502, on or about July 17, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Rexford F. Locke, Company "A", 24th Battalion, 6th Replacement Depot, APO 502, a human being, by stabbing him with a knife.

The accused pleaded not guilty to the charge and specification and was found guilty as charged. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and designated the United States Penitentiary, McNeil Island, Washington, as to the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. In the late afternoon of 17 July, 1943, a sergeant of Company "Q", 3462nd Ordnance Battalion was put to bed in his tent near the mess hall in an intoxicated condition by Privates Rexford F. Locke, the deceased, and Joseph Rubano (R. 15-24). Private Rubano threw some water on the sergeant and then left the tent with deceased who was going for some more water. Deceased returned with the water and entered the tent (R. 17). At this time the drunken

sergeant was singing (R. 51). Accused, who was standing about 10 feet outside the tent, said "That Son-of-a-bitch should be dead." Deceased came out of the tent, approached accused and said "Don't call him a Son-of-a-bitch, he's a very good man" (R. 15). Accused "pulled" a kitchen paring knife (Ex. 3), stabbed deceased in the heart, then backed away saying "Don't come any damn closer" (R. 15). Deceased had made no attack on accused, did not have his fists "doubled up" (R. 19) and was unarmed. (R. 33). A lieutenant ordered that the fight be stopped and Staff Sergeant Harold F. Mudd grabbed accused's wrist (R. 38). Accused then handed the knife to Private Lawrence Shoen (R. 27) and was taken to the orderly room. Upon being there questioned by 1st Sergeant James W. Patterson he stated "that the man [deceased] had advanced as if to strike him and he stabbed him", and that "he would have done the same thing ordinarily under any situation if the man were going to strike him" (R. 36). Accused at this time was "a little nervous", appeared slightly "keyed up" but was "coherent" (R. 37). Accused, upon being shown the knife in question [Ex. 3] by 1st Lieutenant Fred L. May Jr., admitted to him that it was the knife with which he stabbed deceased (R. 22). Deceased was taken to the 902nd Air Base Security Hospital where he died shortly after arrival. An autopsy revealed the death resulted from "internal hemorrhage and cardia tamponade, caused by a penetrating wound." (R. 12, Ex. 2).

The evidence for the defense shows that accused, with several other soldiers spent the afternoon preceding the event in question in Noumea, New Caledonia (R. 49) drinking Australian beer (R. 41). About 5:30 or 6:00 o'clock P.M. accused seemed "pretty high" (R. 41) and talked in a "heavy voice" but was not drunk (R. 43). Technician Fifth Grade Donald H. Zimmerman had known accused for a year and saw him at the time of the homicide "squared off" with deceased and "it looked like the starting of a fight" (R. 45). Accused and deceased were about three feet apart at this time. Witness saw nothing in deceased's hands when accused struck the blow, and he [witness] upon being ordered by Lieutenant Holben to "break it up" grabbed accused and saw him hand a knife to someone [Pvt. Shoen (R.27)] (R. 47).

Lieutenant Richard C. Holben and Captain Carlos L. Young testified that accused was a member of their organization and had been for approximately one year. That he was amenable to discipline, a good soldier, and had never been called up for discipline (R.60). Up to the time of the incident in question he had "always been very peaceful. You would never know he was around" (R.62).

Accused elected to be sworn and testified that he was 22 years of age and had been in the Army over a year (R. 48-9). On the date in question he had been in the town of Noumea from about 10:00 o'clock A.M. until about 4:30 P.M. during which time he consumed about 6 or 7 bottles of beer. While he felt the effects of the beer, he was not drunk (R. 50). Upon returning to camp he changed clothes and started for the movies. On the way he stopped by a tent near the mess hall and while engaged in a conversation with a corporal he heard someone in the tent trying to sing. Accused then said "What's wrong, is he dying?" Deceased then came up and said "That's a hell of an attitude to have of a man", accused replying "What do you mean"? Deceased replied "Just that, you Son-of-a-bitch." He further testified that when accused called him the name that he took out the knife and "when he was backing me up I had the knife in my fingers and when I was at the cans he jumped. *** I saw he was going to beat me up and I wanted to defend myself" (R. 54). He further testified that while accused's arms were at his side his fists were doubled up and that although there were ten or fifteen men around he was afraid that accused "was going to beat" him up. Accused did not know deceased "by name or sight" (R. 49), and he was a "complete stranger" to him, and he had no "ill feelings" toward him (R. 52).

4.

"Malice aforethought. - Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life.

The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. (Clark).

"Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; intent to commit any felony.* * *" (par. 148a, M.C.M., 1928).

5. The evidence is undisputed that the accused did, at the time and place alleged, inflict upon deceased a mortal wound by stabbing him in the heart. While the accused testified that he was in fear of being "beaten up" the record contains no evidence from which he could reasonably presume great bodily harm was about to be inflicted upon him. There is substantial evidence in the record from which the court could determine that the homicide contains all elements essential for a conviction of murder in violation of Article of War 92.

6. The charge sheet shows that accused is 21 years, 10 months of age and that he was inducted into service on 9 September, 1942, at Cincinnati, Ohio, for the duration plus 6 months.

7. For the reasons above stated it is the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of the court and the sentence.

/s/ John A. Stagg, Judge Advocate.
Colonel, J.A.G.D.

/s/ Lawrence J. Roberts, Judge Advocate.
Lt.Col., J.A.G.D.

/s/ James B. Murphy, Judge Advocate.
Lt.Col., J.A.G.D.

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review
CM A-848

28 December, 1943.

UNITED STATES v. Private HAYWARD E. WILLIAMS (37084516), Medical Detachment, 2nd Battalion, 54th Coast Artillery.	Trial by G.C.M., convened at Headquarters, IV Island Command, A.P.O. 708, 2 December, 1943. Dishonorable discharge, confinement for two years. United States Disciplinary Barracks, Fort Leavenworth, Kansas.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private Hayward E. Williams, Medical Detachment, Second Battalion, 54th Coast Artillery, did, at the camp area of Headquarters Battery, Second Battalion, 54th Coast Artillery, on or about November 7, 1943, wrongfully introduce into camp a harmful and dangerous, habit-forming, narcotic, to wit: 1 Syrette, 1½ grain, Solution Morphine Tartrate.

Specification 2: In that Private Hayward E. Williams, Medical Detachment, Second Battalion, 54th Coast Artillery, did, at or near the area of Headquarters Battery, Second Battalion, 54th Coast Artillery, on or about November 7, 1943, have in his possession 250, 3¾ grain capsules, more or less, of a non-narcotic, habit-forming drug, to wit: Sodium Amytal, said drug not having been ordered by a medical officer of the Army.

The accused pleaded not guilty to the Charge and specification 1, and guilty to specification 2. He was found guilty as charged and sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two years. The reviewing authority approved the sentence and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement.

Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The record discloses that prior to the time of the offense alleged accused was a non-commissioned officer in the medical detachment of the 2nd Battalion, 54th Coast Artillery, with the rank of duty sergeant. At the time of the offenses alleged he had been reduced to the grade of a private.

On the 6th day of November, 1943, accused was found near the stockade gate seemingly in a drunken condition and "about passed out". Accused was taken into the mess hall where he dropped a flashlight in which were found two capsules. At this time accused "couldn't talk clearly or distinctly and he was staggering and falling all over the place" but alcohol could not be smelled on his breath (R.13). Accused was observed in a similar condition by other witnesses on another occasion about the same time (R. 7, 14, 15). Subsequently a search was made of accused's possessions.

A syrette bearing the label "Solution of Morphine Tartrate ½ grain in 1.5cc" (Ex. 1) was found in his field pack, some blue capsules were found in his gas mask (R. 7), and a small can and two pasteboard boxes containing in all about 250 blue capsules were found in his first aid kit (R.16). The capsules found in the flashlight and in accused's equipment were examined by Lieutenant Commander Beauchemin, Medical Corps, United States Navy, a medical laboratory expert, and found by him each to contain about 3¾ grains of sodium amytal (R.10). That witness described sodium amytal as a non-narcotic habit-forming drug (R.11). He testified that an overdose would produce "a period of excitement" which would manifest itself by loss of judgment, incoherence of speech, probability of some yelling and a little exhilaration before deep sleep envelops. The symptoms would resemble to a layman those of over-indulgence in alcohol (R.11). He further testified that "more than six capsules a day or more than 3 or 4 at one time" would constitute a mild overdose sufficient to produce excitement (R.12).

Private Calloway, a member of the same detachment as that of accused, testified that his [Calloway's] medical kit contained all authorized articles and that he was not issued with blue capsules similar to those found in accused's equipment and introduced in evidence (R. 19).

Captain William A. Ralbovsky, D.C., 2nd Battalion, 54th Coast Artillery, was in charge of the medical detachment for the period from October 26 until November 14 or 15 in the absence of the medical officer, Captain Kissinger, who, at the time of the trial, had been evacuated from A.P.O. 708 (R. 22). Captain Ralbovsky testified that sodium amytal capsules are one of the items of the medical stock of the battalion (R.24); that one medical chest contained syrettes of morphine tartrate (R. 26); that all habit-forming drugs were "always kept under lock and key in the field desk" (R.24); and that an inventory check showed no blue capsules of sodium amytal or morphine tartrate syrettes to be missing. In answer to the question "Are capsules of that sort [sodium amytal] authorized as part of the first aid kit carried by enlisted men?" that officer testified, "Not to my knowledge, no" (R.25). He further testified that as commanding officer of the medical detachment he had not at any time authorized accused to have in his possession any of the drugs alleged in the specifications (R.26).

The accused introduced in his defense but one witness other than himself. Sergeant Burgess testified that he was familiar with the contents of the

medical kits of non-commissioned officers; that such kits contained opium tablets (R. 27, 29); that he took in accused's non-commissioned officer's medical kit some time in August when accused was reduced in grade, and later issued to him a private's kit. Accused was not present when his kit was taken in. On cross-examination Sergeant Burgess testified that no syrettes similar to that introduced in evidence as Exhibit 1 (R.29) nor sodium amytal capsules (Exs. 2, 3, 4; R. 30) were contained in the field kits of non-commissioned officers.

Accused testified in his own defense that when he was the senior non-commissioned officer, Captain Kissinger, the medical officer, gave him syrettes of morphine as a part of his equipment (R. 31). That subsequent to his reduction in grade he was not present when his kit was taken away and he was not given the opportunity of turning in all his equipment (R. 31). With reference to the sodium amytal capsules accused testified that -

> "It was in the last week of October I happened to pick them up in the side of the road by the 44th Base aid station. I took them to the show with me and then put them away * * * I saw them lying in the gutter. * * *[in] a bottle partially broken at the end. * * *Ever since we came on the island he [Captain Kissinger] told us that if we saw anything that could be used in the medical detachment he would gladly receive it and I knew we could use it even if it was a non-narcotic drug. * * *[as] All of our equipment was lost on the Coolidge. * * * I took them and put them in my barracks bag. Then after realizing there was a hole in the bottle I put them in the boxes until Captain Kissinger would come from the hospital." (R. 31, 32).

On cross-examination accused was asked whether he had been convicted of a crime. Defense counsel objected to the question but upon the announcement by the Trial Judge Advocate that the crime was one involving moral turpitude the court directed that it be answered and accused admitted the same. Thereupon there was received in evidence a copy of special court-martial orders revealing that accused had been found guilty of two violations of the 96th Article of War, one specification alleging attempted sodomy and the other, the wrongful taking and using of a pistol, property of the United States and intended for the military service. The findings were approved by the reviewing authority and the sentence imposed ordered executed. Accused was then asked the following questions:

> "Q. Williams, on your previous trial did you take the stand in your own behalf?
> A. No, sir, not at the first trial.
>
> Q. Did you at all?
> A. No." (R.33).

4. In the first specification it is alleged that accused did "* * * wrongfully introduce into camp a harmful and dangerous, habit-forming, narcotic, to wit: 1 Syrette, 1½ grain, Solution Morphine Tartrate."

"Introduce" has been defined as "* * *To lead or bring in; contrive the entrance of; conduct or usher in * * *" (p. 529, Webster's Collegiate Dictionary). It follows that the gravamen of the offense charged in the quoted specification is not the unauthorized possession of the drug but the wrongful bringing of the same into the camp. Pertinent is the opinion of The Judge Advocate General (with reference to authorized punishment) that the offense of possession of intoxicating liquor is separate and distinct from, albeit closely related to, the offense of introducing intoxicating liquor into quarters, station, or camp, for sale (sec. 454 (81), Dig. Ops., JAG, 1912-40).

There is no evidence in the record that accused introduced the drug into the camp. The evidence reveals merely that accused was found in possession of a syrette containing, according to its label, ½ grain of morphine tartrate. A syrette of like kind is contained in certain Army medical chests (R.26). The conclusion that accused introduced the narcotic into the camp may not legally be founded solely upon the circumstance of his possession of the same, assuming that possession of the described syrette is sufficient to establish possession of its purported contents. In order to justify conviction upon circumstantial evidence, such evidence must not only be consistent with guilt but also inconsistent with innocence and exclude every reasonable hypothesis except that of guilt (sec. 451 (64), p. 143, Vol. II, Bull. JAG; sec. 453 (9), p. 238, id; sec. 451 (37), p.311, id). The possession of a drug of a type found in Army medical chests by accused, a member of the medical detachment, at a camp situated at A.P.O. 708, is with reference to the crime of "introducing" the drug into the camp equally consistent with the innocence of accused as with his guilt. Certainly every reasonable hypothesis except that of guilt of the crime charged is not the necessary conclusion from the fact of possession alone. Nor may the presumptions in law provided by the "Narcotic Drugs Import and Export Act" (sec. 171, et seq., Title 21, U.S.C.A.) and the Act of December 17, 1914 (38 Stat. 788, 789), as amended (sec. 3224, Title 26, U.S.C.A.), arising out of the illegal possession of narcotic drugs be here invoked as such statutes do not pertain to the offense alleged in the specification now under consideration.

Although the Board of Review may be convinced of the guilt or innocence of an accused it must look solely to the record as made at the trial and from that alone base its conclusions as to the legal sufficiency of the record. If a record be legally insufficient by failure of proof essential to conviction of the offense charged, or if such proof relate to another separate and distinct offense not lesser included therein, the Board has no alternative but to apply the law applicable thereto (CM 197408, McCrimon). As there is no substantial evidence in the record upon which a finding that accused introduced the narcotic drug into the camp as alleged can be predicated, the Board of Review is of the opinion that the record is not legally sufficient to support the findings of guilty of specification 1 of the Charge.

5. The second specification alleges that accused did "have in his possession 250, 3¾ grain capsules, more or less, of a non-narcotic, habit-forming drug, to wit: Sodium Amytal, said drug not having been ordered by a medical officer of the Army".

The specification is in the form (No. 148) suggested at page 255 of the Manual for Courts-Martial, 1928, and is understood by the Board of Review to allege that the accused, without having been so ordered by a medical officer of the Army, had a habit-forming drug in his possession. Such specification alleges conduct to the prejudice of good order and military discipline. Witnesses for the prosecution testified that they found two capsules containing sodium amytal in accused's flashlight and about 250 capsules of the drug in a tin and two pasteboard boxes in accused's field pack. Sodium amytal was described by an expert witness as a non-narcotic habit-forming drug. The record discloses that the drug was not contained in the field pack issued to enlisted men of the medical detachment. Captain William A. Ralbovsky, D.C., testified that from October 26 until November 14 or 15 he was in charge of the medical detachment and that as commanding officer thereof he had never authorized accused to have any of the drugs in his possession.

In the opinion of the Board of Review the proven unauthorized possession by the accused of sodium amytal established prima facie the commission of the offense charged. The burden to go forward with evidence in explanation why his possession of the drug even though unauthorized was nevertheless legitimate and thus exculpate himself from the offense established then passed to the accused. In explanation of his possession of the drug accused stated in

substance that "in the last week of October" he found the capsules in a broken bottle lying in the gutter near the 44th Base aid station. That he recognized them as a non-narcotic drug and put them in his field pack to give to Captain Kissinger, the medical officer who was then in the hospital.

It is noted that "in the last week of October", at which time accused claimed to have found the drug, Captain Ralbovsky was in charge of the medical detachment in the absence of Captain Kissinger. By accused's own testimony he admitted knowledge of the nature of the contents of the capsules found by him but offered no explanation why he did not hand them over to the officer then in charge of the medical detachment. Coupled therewith, the record contains testimony, hereafter discussed, from which the court could conclude that accused, about the time the sodium amytal was discovered in his possession, evidenced the effects of an overdose of the drug. "* * * an accused who takes the stand 'may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence, in which he participated and concerning which he is fully informed, without subjecting his silence to the inferences to be naturally drawn from it'" (Johnson v. United States, 63 S. Ct., 549, 553).

It is the province and duty of the court-martial to determine the credibility of the accused and what weight should be given to his testimony (sec. 395 (56), Dig. Ops., JAG, 1912-40). Thus the court was privileged to disregard all, or any part of, the testimony of accused.

In the opinion of the Board of Review the record contains substantial evidence that accused had a habit-forming drug in his possession wrongfully, and from such evidence the court could predicate its finding of guilty.

It is noted that the accused pleaded guilty to specification 2 but not guilty to the Charge and specification 1. In view of the opinion of the Board of Review that the evidence adduced is sufficient upon which to predicate the finding of guilty of specification 2 of the Charge, it is not necessary to determine the legal effect of the apparent contradictory pleas in the instant case.

6. The record presents the question whether prejudicial error was committed (a) by the receipt in evidence of testimony with reference to the physical condition of accused about a day preceding that on which the drugs were found in his possession, and (b) by the receipt in evidence of proof of prior convictions.

The record discloses that on or about November 6, accused was seen by several witnesses acting as though he were drunk but that they could smell no alcohol upon his person. The medical expert testified that an overdose of sodium amytal would evidence symptoms resembling to a layman that of overindulgence in alcohol. Such evidence with reference to the physical condition of accused was properly admissible upon direct examination for the purpose of establishing knowledge on the part of the accused that the drugs were in fact in his possession, (par. 112 b, p. 112, M.C.M., 1928; sec. 183, Underhill, Criminal Evidence; sec. 349, Wharton's Criminal Evidence; U.S. v. Sebo, 101 F. 2d 889). The evidence is clearly admissible in rebuttal of accused's testimony that after having found the sodium amytal capsules he retained them in his possession for the sole purpose of turning them over to the medical officer.

There was admitted into evidence a copy of a special court-martial order showing that accused had been found guilty of two violations of the 96th Article of War - one, an attempt to commit the crime of sodomy, and the other, the wrongful taking and using of a pistol, property of the United States, furnished and intended for the military service. On cross-examination, accused was asked whether he testified at the prior trial and answered in the negative. The credibility of a witness may be impeached by proof of the conviction of a crime involving moral turpitude (par. 124 b,

p. 133, M.C.M., 1928). Attempt to commit sodomy is punishable in like degree as for the principal offense (sec. 402 (1), p. 61, Vol. II, Bull. JAG) and is a crime involving moral turpitude. Although procedural niceties for the admission of proof of conviction of such a crime were not strictly observed in the instant case, no prejudicial error was committed thereby. The failure to exclude from the consideration of the court evidence of the conviction of an offense not involving moral turpitude was error. Likewise, the questions propounded to the accused with reference to his testifying in his own behalf at the trial resulting in his prior conviction were error. In view of the proper admission into evidence of proof of conviction of a crime involving moral turpitude it cannot be said that either of the mentioned errors so prejudiced the accused as to have violated his substantial rights.

7. The maximum allowable punishment for the offense alleged in specification 2 is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. The specification does not allege, nor has the accused been found guilty of, illegal trafficking in narcotics or other habit-forming drugs in violation of Federal law. Incarceration in a Federal prison or reformatory is not authorized (sec. 454 (73), Dig. Ops., JAG, 1912-40; par. 5 d, AR 600-375, 17 May, 1943).

8. For the foregoing reasons the Board of Review is of the opinion that the record of trial is not legally sufficient to sustain the findings of guilty of specification 1, but is legally sufficient to sustain the findings of guilty of specification 2 and the Charge and to sustain so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year at a place other than a Federal penitentiary, reformatory or correctional institution.

[signature], Judge Advocate
~~Colonel, J.A.G.D.~~

[signature], Judge Advocate
Lt. Col., J.A.G.D.

[signature], Judge Advocate
Lt. Col., J.A.G.D.

1st Ind.

Army Service Forces, Branch Office of The Judge Advocate General, A.P.O. 924, 30 December, 1943.

TO: Commanding General, IV Island Command, A.P.O. 708.

1. In the case of Private Hayward E. Williams (37084516), Medical Detachment, 2nd Battalion, 54th Coast Artillery, attention is invited to the foregoing holding by the Board of Review that the record of trial is not legally sufficient to sustain the findings of guilty of specification 1, but is legally sufficient to sustain the findings of guilty of specification 2 and the Charge and to sustain so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. This holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence, modified as heretofore indicated.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM A-848).

Ernest H. Burt

ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review
CM A-866

18 January, 1944.

UNITED STATES v. Private FELIX C. MENDOZA (38046488), 360th Quartermaster Company (Composite) (Service Detachment).	Trial by G.C.M., convened at Headquarters, Base Section No. 3, U.S.A.S.O.S., A.P.O. 923, 17 November, 1943. Confinement for life. United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charges and specifications:

CHARGE I: Violation of the sixty-first Article of War.

Specification: In that Private Felix C. Mendoza, 360th Quartermaster Company (Composite), (Service Detachment), did, without proper leave, absent himself from his unit at Camp Rocklea, Brisbane, Queensland from about 1300 hours, 8 July, 1943, to about 1300 hours, 13 July, 1943.

CHARGE II: Violation of the ninety-second Article of War.

Specification: In that Private Felix C. Mendoza, 360th Quartermaster Company (Composite) (Service Detachment) did, at 299 Boundary Street, West End, Brisbane, Queensland, on or about 12 July, 1943, forcibly and feloniously, against her will, have carnal knowledge of Miss Mary Eleanor Dean, 299 Boundary Street, West End, Brisbane, Queensland.

The accused pleaded not guilty to the charges and specifications. He was found guilty as charged and sentenced to be dishonorably discharged the service; to forfeit all pay and allowances due and to become due; and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The competent evidence for the prosecution shows that on the afternoon of July 12, 1943, at about 4:00 o'clock, P.M. Miss Mary Eleanor Dean was resting in her home at 299 Boundary Street, Brisbane, Queensland, Australia. Hearing a knock on her door she answered it and an American soldier, subsequently

identified as accused, asked her a number of questions, among others, for a "drink of water". He tried to come into the house but Miss Dean told him "to stay outside and I would get him the water". Returning with the water she found accused "not there". She then shut all the doors so "he couldn't get in" and laid down. Shortly thereafter she saw accused coming through the garden and soon he was "trying the back door", and the next thing she knew "he was in my room". She was then knocked to the floor and told by accused that he was a "Jap spy" and would "kill me if I called out". He then made Miss Dean go through the house and open the doors, during which time accused asked her "where was my husband ** * *" "when will he be coming home", and if anyone else lived in the house with her. She did not state to accused that she had no husband but replied that he would return "any time". She told accused that "another woman" lived with her, and accused asked "if she was young and when would she be home". Witness replied that she "didn't know". He then took Miss Dean to her bedroom and ordered her to take her dress off. Witness offered accused all her money if he would "leave me alone". Accused then asked for the money, witness replying, "How much". Accused replied "£5". Accused then committed rape on Miss Dean, telling her that he would "kill me if I called out". At one time "he kissed me on the cheek". After the act, he again demanded money and was given 9/6, and after talking with witness telling her he was in the Navy he asked her "Do you know me?". Witness replied "I don't". Accused then said, "Did you ever see me before?". Witness replied "No". Accused then left the house (R.4 and 5). Miss Dean weighed 105 pounds, was 84 years of age, and testified that accused's actions were against her consent and that her lack of resistance was from fear of being killed by accused who told her such would be the case if "I called out or did anything"(R.6).

The police were notified and at 7 P.M. on the same day, Constable William Leo Hocken arrived at Miss Dean's home, and took possession of a bloodstained blanket from the bed, a petticoat and a pair of bloomers. The latter two articles were never identified as belonging to Miss Dean. A subsequent examination of these three articles showed them to be stained with human blood, the blanket showing evidence of semen (R.11). An examination of Miss Dean by Dr. Jack M. Thompson, M.D., disclosed a slight shoulder injury and a tear in the hymen in the vulva, showing clear evidence of sexual relations (R.10).

Miss Emily E. Dickenson testified that her home was "just a house" from the home of Miss Dean. That accused came to her home on Thursday or Friday night before the incident in question asking for the address of a "Mrs. Walker". He called again at another time seeking the same information. On the afternoon in question she saw accused in this locality and saw him "go up the stone steps" leading to Miss Dean's house (R.13).

On the morning of July 15, 1943, Sergeant John Rizzeri of the American Provost Marshall's Office, Brisbane, and Constable Cornelius J. Holt, of the Australian Police, went to the home of Mrs. Mary Brown on John Bright Street. While there Mrs. Brown gave them a field jacket, a shirt and a pair of trousers (R.16) with bloodstains on them. Later that day accused was apprehended and carried to military headquarters. Accused admitted these articles belonged to him and were left with Mrs. Brown to be laundered. He claimed the bloodstains came from a cut on his hand but the Constable testified that the cut "did not appear to be a fresh cut. It appeared to be quite old" (R.17). From there he was taken to the Australian C.I.B. by Plainclothes Constable William Leo Hocken, and interviewed by him relative to the alleged crime. At first accused denied all knowledge of the crime claiming to have been at a picture show from 3 P.M. to 10 P.M. on the day of the crime. Upon further questioning accused admitted that on the day in question he had had sexual relations in a house "somewhere near where Mom and Pop Walker live" (R.20). Accused was then returned to the office of the American Provost Marshall where he was placed in a lineup with eight other soldiers, some of whom were Mexicans, the same nationality as that of accused (R.19, 20, 21). He was there identified by two women who had seen him in the vicinity of the crime, after which Miss Dean was called in. Looking at accused she said "this is very much like the man". She was then requested and repeated, in substance, her testimony, supra, after which accused was asked: "You have heard what this woman said. Have you anything to say for yourself? Accused replied, "No, everything this

lady said is true" (R.21). Sergeant Rizzeri corroborated, in substance, the testimony of Constable Hocken, particularly as regards accused's admission of the crime of which he was charged, stating that after Miss Dean had related her story before him [accused] he replied "The lady is right" (R.18, 19). During this time there was nothing to indicate anything strange in accused's behavior (R.22).

Second Lieutenant Leon A. Schmitt, 360 Quartermaster Company, identified a morning report showing accused A.W.O.L. from July 8, 1943, to July 13, 1943. This witness further testified that he had known accused approximately six months. That the duties of accused were primarily to keep the mess gear cleaned. The reason he was not given other jobs was that he was "not too dependable". He had never noticed anything about accused which he would consider "abnormal" (R.23-4).

Accused elected to take the stand and make an unsworn statement. He stated that he went to the fifth grade in school but could not pass his subjects. His father did not like him and "used to beat me up and put me away from home when I went to school". He spent three months in a C.C.C. camp and then washed dishes in a hotel. His brothers didn't like him so he stayed with some white people who treated "me real nice" (R.25). He likes the Army for it "always paid me and everything". Upon being asked: "Explain to the court whether the evidence before, that came up, that you kissed her on the cheek, did she resist in any way?" he replied, "No, she didn't. At first she did. Then after, then she didn't say anything. She didn't say 'Get' or nothing."

" * * * *

Q. How much time did you spend at the house, at the lady's place?
A. I don't know. About - - - I don't know. Just a little while. Just a little while. I remember.

Q. Did you hit the woman at all?
A. No, I didn't do anything. No.

Q. Did the lady walk to the bed by herself?
A. Yes, she walked to the room.

Q. She laid down by herself?
A. Yes. I didn't force her or hit her, or nothing. But once she got up, you know, like you intended to get up." (R.26).

Accused made no mention nor denied the charge of having been absent without leave as alleged in Charge I, specification 1.

4. The issue of accused's sanity was raised. A Board of Medical Examiners was appointed to determine this issue. Its report was admitted in evidence by stipulation (R.26).

"FINDINGS: After a thorough examination of the patient and study of his clinical record, the Board finds that the following condition exists in the case of Private Mendoza: Border line mental deficiency. Mental age nine years and six months.

The Board is further of the opinion that Private Felix C. Mendoza is sane and accountable for his acts, and no further benefit or information can be obtained by further hospitalization.

RECOMMENDATIONS: In view of the above and findings of the Board, the following recommendation is made:

THAT Private Mendoza be returned to a full duty status."

5. "Rape is the unlawful carnal knowledge of a woman by force and without her consent." (p. 165, M.C.M.)

It is seldom that the evidence in a case is so conclusive as in the one at issue. All of the elements of the crime are present and proven. The identity of the accused, with his admissions of guilt, is undisputed. There is no element of excessive drinking by accused or other mitigating circumstances involved. A man shown to be mentally capable of determining the serious purport of his actions and clearly accountable for his acts is charged with the deed. The resistance of Miss Dean, a frail 84 year old woman, in the light of accused's statement that he would kill her if she "called out" is sufficient to satisfy all requirements of the law.

> "Whether or not the woman exercised all the resistance within her power under the circumstances, and whether her resistance ceased because it was useless and dangerous, or, because she ultimately consented is a question for the jury [in the instant case the court-martial] to decide" (Mills vs. United States, 164 U.S. 210, 212; Turner vs. Pope, 33 Mich. 363, C.M. A564, Fisher, This Board, 24 July, 1943).

That accused did at the time and place alleged commit the crime of rape upon the person of Miss Mary Eleanor Dean, in the alleged manner is clearly established. The court was fully warranted in so finding.

6. For the reasons above stated the Board of Review holds the record legally sufficient to support the findings of guilty of the accused, as alleged, and the sentence.

Colonel, J.A.G.D. Judge Advocate.

Lt. Col, J.A.G.D. Judge Advocate.

Lt. Col., J.A.G.D. Judge Advocate.

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

15 January, 1944.

CM A-885

UNITED STATES v. Sergeant MOSES RUSSELL (34030304), Company F, 96th Engineer Regiment (GS).	Trial by G.C.M., convened at Headquarters, U.S. Advanced Base A, APO 928, 17 September, 1943. Dishonorable discharge, confinement for life. United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial of the soldier named above has been examined by the Board of Review and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Sergeant Moses Russell, Company "F", 96th Engineer Regiment (GS), did at U.S. Advance Sub-Base "A", APO 928, on or about 15 June, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Private Cleophus Glover, Company "F", 96th Engineer Regiment (GS), a human being, by striking him on the head and forehead with an instrument or weapon the nature of which is unknown.

The accused pleaded not guilty to the charge and specification and was found guilty as charged, "except the word 'Sergeant', substituting therefor the word 'Private'". He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. Shortly after breakfast in Company F, 96th Engineer Regiment, located at APO 928, Milne Bay, New Guinea, on 16 June, 1943, a little native boy, Onna Gana, found the body of deceased, Private Cleophus Glover, on the beach near the motor pool. He reported the incident to Private Charlie Johnson, the "motor pool man", who, in turn, notified the Sergeant of the Guard (R.5, 25). Shortly thereafter, Captain William H. Schwalbert, the company commander, accompanied by First Sergeant Leander H. Scott, went to the place where the body of Private Cleophus Glover (R. 64, 104) had been found.

The nude body was lying face down on the beach, about high water mark, the face pressed down in the sand, the arms extended over the head, partially covered with sand and driftwood behind a partially buried log (R. 6, 36, 105). Near by was found a pair of trousers and a black belt. A pair of underdrawers was attached to the trousers, both apparently having been pulled off inside out. There were found very near the body a pair of low quarter civilian shoes and a sweat shirt both identified as the property of deceased (R. 40, 66). There was also found a towel, a cook's apron, apparently blood-stained and similar to the one accused had been seen wearing from time to time (R. 41, 122, 128, 130, 140, 278), and a gas mask, size M-2, filled with rocks. A subsequent check disclosed that this mask was the size issued to deceased (R. 163) and was the only one missing in the company. The body was found near the gasoline dump of the motor pool, approximately 100 yards from accused's tent. A guard was placed over the body and ordered to see that "those objects were not touched" (R. 6). The military police were then notified.

Major Henry H. Stelman, M.C., of the 8th Portable Hospital, examined the body about 1:30 P.M. on the same day and was of the opinion that the cause of death was a fracture of the skull caused by blows (R. 71). He assumed that death had occurred less than 13 hours prior to his examination (R. 71).

An autopsy was performed by Captain John D. Hicks, of the 110th Casualty Clearing Station, Australian Army. Captain Hicks testified that from his examination it was his opinion that death would not have been caused instantly from the blows appearing on the head and skull but that deceased would have lost consciousness immediately. He stated that the blows could have been inflicted by a machete (Pros. Ex. R) if the flat side had been used but he would have expected something heavier, more like an axe to have been the instrument used (Pros. Ex. H), and that death could have occurred by a blow from the flat side of this axe. The injuries would have prevented the man from walking. No water was found in the lungs and it would have been impossible for the wounds to have been self-inflicted. It was his opinion that the cause of death was an extensive fracture of the skull when the instrument came in contact with the head over the left eye -

> "* * * he met something which was moving with momentum. * * * and with it an extensive fracture of the skull, splitting it, also with force." (R. 117).

(The written autopsy is to be found in the front of the record).

The record discloses no direct evidence as to the manner in which the deceased met his death. The prosecution relies solely on circumstantial evidence to establish the guilt of the accused.

The deceased was last seen alive about 11:00 P.M. on 15 June, 1943, in, or near, the tent occupied by accused, deceased, and Private McRae. At about 6:00 P.M. on this date Private George T. Sales met accused near his (accused's) tent and accused stated that he was going to kill a mother-fucker. Private Sales said, "You shouldn't talk like that". Accused replied, "You just watch what I said; I am going to kill a cock-sucker and it won't be long". At this time accused had a machete and was cutting a piece of wood about the size of a pencil with it (R. 218).

About 10:30 P.M. on 15 June, 1943, T/5 James Robinson, a member of accused's unit, passed this tent and heard accused say "God-damn you; I have been intending to cut your mother-fuckin' throat, and this is a good time to do it" (R. 179). At that time he saw only accused and deceased in the tent. Witness subsequently testified that when he heard accused use these words "it didn't seem he was angry or meant it or anything like that" (R. 191).

About 11:30 or 12:00 that night, Private Sales, who occupied the tent next to that of accused, was awakened by a noise coming from accused's tent. It sounded like "someone had falled over a box, and like someone threw a pair of boots down. * * * like someone was kicking stones and like scraping against the tent pole." Witness then went back to sleep but awakened again at about 2:00 o'clock from a "troubled dream". He pushed the mosquito bar back and saw a man coming down the beach. It was a bright night with a full moon. As the man approached witness's tent he recognized him as the accused and he was "wet from the waist down". Accused then was seen by this witness to enter his (accused's) tent and about five minutes thereafter emerge with a bundle in his right hand, supporting it with his left hand. Something was "dangling in the back like an arm sleeve" (R.225). He then proceeded to the beach "to the first big tree" when he was lost from sight (Pros. Ex. A). Witness then went outside of the tent and observed accused step out -

> "* * * about two paces from under the tree into the bright ray of the light, and he takes this pack or something and reached in the water. He was standing in the water half way to his knees, and he gets something like dirt or stones, and I see him three times put it in and take it out, and it seemed like he had enough in the pack, and he put it on his hip and stepped out about two steps in the water, at least to water above his knees, and he reached down in the water with it until the water came up to his chin, and he put his feet down like he was stepping on the pack. I don't know if it was on the pack or not, but he reached back down and got the pack and pulled it up even with his waist and stepped back and looked towards me, and a few seconds later he went up the bank in a hurry, probably just the ordinary walk, but it seemed like he was in a hurry, and he goes down the side of the beach to about 25 yards before he gets to the second big tree, so I couldn't see him anymore. The bank had a bend in it there." (R. 226).

The scene was in the immediate proximity of where the body of deceased was subsequently found.

Accused, shortly thereafter, returned to his tent and in about five minutes witness heard a noise in accused's tent "like someone stepping on stones" (R. 227). Accused then emerged from his tent carrying "something white in his arms or hands" and returned to the beach. About half an hour later accused again passed witness's tent this time wearing a khaki shirt and camouflaged fatigues, going toward the beach. "He was in a great hurry, almost in a trot." He returned in about five minutes and he "seemed to be wet from the knees down" (R. 227-8). Accused then wandered around the immediate area, stopping at times and placing both hands on his hips, and then returning to his own tent. Accused approached the tent from which witness was making these observations and asked Private Jordan, a tent-mate of witness's, for a match, then returned to his own tent (R. 230). The observations of accused by this witness covered a period of about two hours (R. 223, 231).

T/5 James Robinson awakened on the night in question at about 2:30 or 3:00 A.M., as was his habit, to respond to a call of nature. He saw accused standing near a tent next to his (accused's) own, stoop down and pick up something, and carry it toward the latrine (R. 181). The moon was bright and he definitely recognized the person as accused. At that time accused had on a full khaki uniform. At 5:30 A.M. this witness again saw accused walking toward the gasoline dump near where deceased's body was found. He did this "a couple of times". At this time accused was wearing a khaki shirt and camouflaged pants.(R. 182).

Onna Gana, the little native boy who first discovered the body of deceased, was living with the 96th Engineer Regiment, Company F. He spoke good English and knew the personnel of the company, including accused. He occupied a "pup tent" in the motor pool area. Prior to reveille he three times saw accused near the motor pool "walking around; walked down there and come back. Last time I saw him he was going and I never see him again" (R. 24; Pros. Ex. A).

Private William Mosley was on guard duty on the morning in question. Between 5:00 and 6:00 o'clock witness observed accused coming from his (accused's) tent wearing a camouflaged pair of pants and a khaki shirt. Accused went to the latrine and then to his tent. He stayed there about 10 or 15 minutes and then went to the orderly room with something under his right arm. At this time he was wearing camouflaged fatigues. When he returned he had on khakis. He again went by his tent and threw something on the clothes line and went from there to the latrine. "He went out there again, and he was wet from here down to his feet. His pants were wrapped around his legs, sticking to him" (R. 304).

On the night of 15 June, 1943, Private Jordan McRae saw accused and deceased in their tent playing cards, for matches, on an extra cot. This witness then retired and slept until 6:00 o'clock the next morning. He was not awakened by accused as was his custom but when he arose he noticed the extra cot missing from his tent (R. 78). Neither accused nor deceased was present. The mosquito bar from accused's bed was missing and neither the cots of deceased nor accused looked as though they had been slept in that night (R. 76). Witness then met reveille and heard accused report Private Glover absent. Upon being asked by Staff Sergeant Lindsay the whereabouts of Private Glover, accused replied "the latrine or somewhere" (R. 77, 91). At this time accused was wearing a khaki uniform and was wet from his hips down (R. 61, 164, 169, 182, 232).

About 7:30 A.M. on 16 June, 1943, Private Clarence Morrison, the latrine orderly, was preparing to burn out the latrine with distillate. Upon lifting one seat he noticed something smouldering. Upon examination he found evidence of green colored fatigue clothes and also a cot. Witness thought them to be discarded equipment and attempted to further destroy them (R. 161, 321). About 9:00 o'clock Sergeant Day retrieved from the latrine two pieces of metal which appeared to be a portion of an army cot (R. 157).

At 7:45 A.M. on the same morning, T/4 Yank Fuller, the company carpenter, was directed to go in the jungle and find posts to be used in building a mess hall (R. 151). Passing the latrine and approximately 100 feet beyond it (Pros. Ex. A) witness saw near the trail a large cardboard box (subsequently identified as the one in accused's tent on the preceding day) spotted with blood (R. 46), and containing a barracks bag and clothes. The barracks bag contained some O.D.'s, cotton underclothes, and a khaki shirt. A mosquito net was hanging out of the barracks bag. Witness pulled the bag out of the box and saw "the blood" then put it back. A raincoat with blood on it definitely established as the property of deceased was also found near the box (R. 152, 154).

1st Sergeant Scott, with T/4 Yank Fuller and Sergeant Hamilton, after inspecting these articles discovered by T/4 Fuller then made an examination of accused's tent. They observed three cots in the tent and only mosquito bars on the beds of deceased and McRae. Also an axe, with shiny spots on the foot with a dull finish. "The axe appeared to have been rubbed in the ground * * * it wasn't too clean". (R.99). Sergeant Scott then said "Look there is blood on the ground" (R. 155). Private McRae, who had the day off and was in the tent at this time was ordered to remain in the tent. These witnesses then followed a trail of blood down to the beach (R. 97). Sergeant Scott ordered witnesses and others to "search around the bay" and it was during this

search that deceased's gas mask was found in the water filled with stones (R. 156). Sergeant Scott then ordered guards placed over the various articles discovered and also a guard over McRae and then notified the company commander, Captain Schwalbert. The Captain and Sergeant Scott then went to accused's tent where they found -

> "* * * blood stains on the floor, covered with fresh gravel and sprayed with kerosene or light distillate. I saw blood stains on a wooden box in the center of the tent. I found a barracks bag, a cardboard box and a green raincoat in a swamp in back of camp. The barracks bag was full of blood stains; the raincoat had dried blood stains on it" (R. 5).

The Captain then sent for all members in the adjacent tent and also accused. He placed accused under arrest. He ordered a searching party organized and it was while this search was in progress that he was notified of the finding of the body by the native boy (R. 5).

The military police arrived about this time and took over the investigation. 1st Lieutenant Jack H. Kelakian, 813rd M.P. Company, testified, in substance, the same as other witnesses as relates to the body, the condition of accused's tent, and the articles found during the investigation. He further testified that when he visited the tent of accused he observed a large spot of blood at least 3 inches in diameter between the bunks of the two cots and the tent pole. An axe, machete and bayonet were found under or near accused's bunk, which was resting on a raised platform (R.13). He also took from accused's rear pocket an extra overseas cap which appeared to have blood stains on the "forward part" (R. 51). Captain Schwalbert followed the trail of blood from accused's tent to the beach, a distance of approximately 30 or 40 feet (R. 45).

Certain statements and actions of accused both prior and subsequent to the homicide are material to the question at issue and should be noted.

(a) Private William Mosley testified that -

> "I was talking to Sgt. Russell. I was laying on my bunk, and he was laying on his. We had a conversation about different 'scary' things, so I made a remark about my uncle. He had killed a man some time and he did four years for it, and this man that he killed would come back and worry him, so Russell told me that if you killed a man or anyone that you let him lay flat on his face, [for 48 hours] and he said you woundn't have anything to worry about. Those are the words he told me." (R. 302).

(b) Private Mosley also testified that -

> "Sgt. Russell was sergeant of the guard, [some time during the latter part of May or June] and he put me on guard and Glover and Sales. I was on the same shift with Glover from 2:00 to 6:00 in the morning, so I met Glover coming toward the waterfront, and he was crying. I asked why he said crying, and he said --" (R. 303). (The court did not permit witness to relate what Glover said).

Private Solomon Jordan testified that about three weeks before the homicide he observed accused running up the road and that immediately thereafter he saw deceased crying (R. 282).

(c)
Private George Sales testified that -

> "For a week before Glover was dead, I noticed Sgt. Russell never let Glover work with anyone. He would always have him by himself or he would be close around, and it seemed like

he was watching, and as soon as he said a couple of words to someone, he would come closer, and he would chase Glover away. I didn't see Glover anywhere unless I would go to the latrine and would see him there, and when he would be ready to come back, Sgt. Russell would be standing by it waiting for him, and some time he would go take a shower, and when Glover was half through taking a bath, Sgt. Russell would come down. I didn't see him go to any tent, about a week before Glover was dead.* * *

"On June 14th, Glover came to me and seemed worried and upset. Sgt. Russell came up and chased Glover away. He said, 'Go down to the end of the beach and work down there.' So Glover goes down there and works, and Sgt. Russell said to me that he was an evil cock-sucker ". * * *

"He said he was himself an evil cock-sucker . Then he began to tell me about when he was back in the States, that -- (The court did not permit witness to relate the discussion).

"Then again Glover came to me later in the day. He seemed to be very worried and upset. Sgt. Russell came again and told him to go down to the ditch, which was about half-way from where I was working to the bay, and to take up the slack in the ditch. And he said that we talk too much, and as long as we talk that much he said he was going to work us like he had been working us all the time."

Sergeant Russell did not allow Glover to stay working next to witness for more than a few minutes at any time during that day.

"* * *Sgt. Russell would come close and Glover would say something, and he would chase Glover away.** * He seemed to be very worried and upset" (R. 238). * * * [Sgt. Russell] seemed to be angry the last two days, the 14th and 15th" (R. 272).

Private Sales testified that he had fought two professional fights as a heavyweight weighing over 180 pounds (R. 267), but that he was "just afraid of him [accused]" (R. 270, 275). Deceased was a man of small stature weighing approximately 135 pounds (R. 74).

Private Mosley further testified:

"We was putting a ditch into the ocean on the road from Gili to K.B. Mission, so Pvt. Glover and I were working side by side, talking, so Sgt. Russell seemed like he wanted to know what it was all about, so he moved Glover from beside me, and I got through what I was doing and I went by Glover again, and he came back there and he seemed very angry, and he moved Glover again. So I got through what I was doing, and I went over to where Glover was, and Sgt. Russell told Glover to cut a stump out of the ditch, and Sgt. Russell said, 'Not you', and he told me to work by the other boys, and he sent Glover down by the creek and made him work there by himself until we got through working. * * *

"Four or five days or a week before Glover's body was found on the beach * * * he [accused] seemed to be very queer. It seemed he was jealous of Glover. He didn't want Glover to work with anybody. I don't know the reason. He just didn't want him to work with anybody. * * *

[Sgt. Russell carried a machete with him] Every day for a week before the murder happened. I know he had that machete, no matter what kind of work we were doing." (R. 302).

(d) With reference to accused's actions when it was announced that deceased's body had been found, Corporal Powell L. Green, the medical attendant testified -

"He [accused] just looked like he was a little scared, asking what was up." (R. 176-177).

Corporal Green treated Sergeant Russell on the morning of June 16 -

"The treatment I gave Sgt. Russell was for an abrasion on his left ankle. * * * It had been bleeding * * * it was sort of a wound. * * *It wasn't a skin disease because a skin disease has a tendency of peeling, and this wasn't peeling. It was sort of a scrape." (R. 459).

1st Sergeant Leander H. Scott, Jr., testified -

"He [accused] was very very surprised when the word came to the orderly room that the body had been found. He looked like he had been stricken by a bolt of electricity. He couldn't stay still from that time on. His eyes began to run all over his head. I was sitting at my desk, and I noticed it. That is why I told the guard to take care of the orderly room and not let anyone in or out." (R. 125).

T/5 James Robinson testified -

"At that time, Sgt. Russell was sitting down on the box by the pole in the tent when the news reached the tent that they found the body, and Sgt. Russell looked awful afraid, and almost jumped up on his feet.* * *

"Just when [Tory] Robinson came and called Sgt. Scott, Sgt. Scott said, 'What you want?' He said, 'We have found the body.' When he said that, Sgt. Scott said, 'Captain, they found the body,' and Sgt. Russell looked just like this, like frightened, his eyes was dancing all over his head." (R. 185).

Private Mosley testified -

"* * * I was reporting to him that I had seen Sgt. Russell, and at that time someone came up and told the first sergeant that someone had found the body. Sgt. Russell made a break to jump up. He had his cap on like this, and he made a break to get up ahead of Captain Schwalbert, just like this." (R. 312).

(e) Private McRae testified -

"He [accused] said, 'You talk too much'. He said that he was going to work me because I talk too much. Otherwise, he said he would kill me. * * *" (R. 213).

While on the job on the morning of June 16, 1943, and before the body was discovered, accused repeatedly stated that something was "going on". He was seen about 50 yards away running towards camp but returned a few minutes later again stating that something was "going on". Upon being asked by Sergeant Lindsay that he must have "some kind of reason" to make this remark, accused replied "something about that boy up there missing, and they want to put me in it, I know." (R. 236).

The accused elected to take the stand and testify.

After supper on the evening of 15 June, 1943, deceased having just taken a shower, came into the tent occupied by himself, accused, and Private McRae.

He had a towel around him and a pair of coveralls in his hand, which he threw on the floor and stood on them. Accused was writing, and as his own pen wouldn't write well, he asked deceased for his, which request was granted (R. 326). About 7:30 P.M. accused and deceased began a card game on the extra cot in the tent. The stakes were "for matches" and no money was involved (R. 328). The game was devoid of any argument and no unpleasantness occurred. Several privates came into the tent from time to time. Private McRae went to bed some time before 10:30 PM. about which time the game ended, and accused then went to bed (R. 331). About this time "Coalyard" Williams called deceased from the tent, but deceased returned shortly and turned off the light (R. 333). Accused then lowered the tent flaps facing the road to keep the headlights of passing trucks from shining in his eyes. Shortly thereafter someone came in the tent whom he took to be Glover but witness does not know, for a certainty, whom it was. He did not know if deceased "got into bed that night" (R. 335). Accused then went to sleep about 11:00 P.M. having asked the guard the time. He testified that from this hour until about 4:00 A.M. on 16 June, 1943, he was asleep (R. 336).

Shortly before 4:00 A.M. he was awakened by a centipede in his bed. He arose, left the tent, walked to the beach, relieved himself, and saw Solomon Jordan, who occupied an adjoining tent, strike a match. Accused's matches were damp so he asked for and received a box of matches from Jordan (R. 338). He returned to his own tent, shook his blankets and fell asleep and awakened before reveille. He then went by the clothes line, picked up his khaki shirt and camouflaged fatigues and went down to the creek to wash them (R. 340). While at the creek he attempted to jump across a ditch and "the edge of his pants" (which were rolled up) and his legs got wet. He then returned to his tent, hung his shirt and camouflaged fatigues on the line and went to the latrine. The whistle then blew denoting the time as a quarter to six o'clock.

He stayed at the latrine about five or ten minutes. At this time there was nothing burning in the latrine (R. 341). He then returned to his tent, met the formation at reveille and reported Private Glover absent (R. 343). He returned to his tent, policed it up, and for the first time noticed the extra cot and his mosquito net missing (R. 335). He noticed nothing else except deceased's coveralls which he picked up and put in his (deceased's) bag (R. 344). He then got his Bible, did not face the east as was his usual custom, read a chapter, and then went out on the job. While on the job his foot was hurting him so he returned to his tent.

> "I stood on the side of my bed and pulled off my leggings and went outside the tent and got a towel off the line and went down to the bay and pulled off both shoes and washed both my feet. One had athlete's foot, and the other had a skin disease or something. Then I went to the dispensary and Cpl. Green put something on it, and plastered it up."

He returned to the job for about twenty minutes when he again returned to his tent to get the fountain pen he had borrowed from Glover. When he arrived at the tent Private McRae was there "laying on the bed" (R. 345). He then got a mattock which Sergeant Lindsay had requested and again returned to the job. He separated Glover, Sales, and Mosley from working together because the company commander was passing and he did not want him to see them talking and not working (R. 347). He continued on the job until brought back to camp by the order of his company commander. He specifically denied ever having made the statements to Sales or Mosley, or to anybody that he was "going to kill me a cock-sucker". On cross-examination, he testified that some time in May he took a cook's apron from the clothes line to use as a suspensary as the dispensary had none. That when taking a bath one evening he took the apron off and "when I went to get it it was gone, and I haven't seen the apron any more" (R. 348). He denied making the many trips

to the beach and the latrine and confined his statements largely to being asleep in his tent from about 11:00 P.M. on 15 June to about 4:00 A.M. on 16 June, 1943.

The defense introduced evidence in an attempt to establish the fact that the night was cloudy with intermittent rains. However, this testimony was by no means conclusive and was denied by a number of witnesses.

The record discloses that the alleged "blood stains" were never analysed to determine if they were human blood. Accused, while admitting being in his tent and policing it during daylight hours, denied seeing any blood stains. (R. 431). His testimony, in substance, denied any connection with the crime of which he was charged.

4.

In the instant case the prosecution is called upon to prove that the accused unlawfully killed deceased with malice aforethought, as alleged. The record contains no direct testimony as to the manner of deceased's death or that accused inflicted the mortal wounds. The Trial Judge Advocate announced, and the voluminous record reveals, that the case of the prosecution rested solely upon circumstantial evidence. Circumstantial evidence is proof of facts and circumstances from which the jury may infer other connected facts which reasonably follow, according to the common experience of mankind (20 Am. Jur. sec. 279). Proof by circumstantial evidence is recognized in military law and "may be more convincing than a plausible witness " (par. 112b, M.C.M., 1928). It has been held -

> "Whatever may be established by direct, may be established by circumstantial evidence in criminal cases. Only few convictions could be had if direct testimony of eye-witnesses were required and the rule is one of necessity. * * * When evidence is of sufficient probative force, a crime may be established by circumstantial evidence provided there is positive proof of the facts from which the inference of guilt is to be drawn, and that that inference is the only one which can reasonably be drawn from those facts * * *". (CM 216004, Roberts and Miller).

The Judge Advocate General has further held that where circumstances are relied on entirely to justify conviction, they must not only prove all of the elements of the offense but must at the same time exclude every reasonable hypothesis except guilt (sec. 453 (9), p. 238, Vol. II, Bull. JAG).

The record forges the following chain of circumstances about the accused - Deceased and accused were tent-mates. Some strange relationship existed between them. Accused refused to allow deceased to associate or work with other members of their unit. Accused even watched deceased when the latter was taking a shower. About three weeks before the homicide deceased was seen crying after accused had talked with him. Accused appeared "angry" when he made deceased work by himself on 15 June, 1943. Accused was heard to say the night before deceased's body was found, "Goddamn you; I been intending to cut your mother-fuckin' throat, and this is a good time to do it". On another occasion that evening accused was heard to say that he was going to kill someone.

About a month previous to the homicide accused made the statement that if a murdered man were placed face down for forty-eight hours his murderer would not be discovered. The body of deceased was found in such a position on the shore about 100 yards from his tent on the morning of 16 June. Deceased was last seen alive in the presence of accused about 11:00 o'clock the previous evening. Between midnight of 15 June and reveille the next morning, accused was seen carrying various objects from his tent to a place at or near where deceased's body and certain of his clothing were found. A blood-stained cook's apron, similar to one that accused had previously worn, was found near deceased's body. Stains that resembled blood, partially hidden by oil and gravel, were found in his tent. A path of blood was discernible from the tent to the shore line. Noises, similar to the dropping of shoes and the scraping of gravel, were heard coming from the tent that night. An axe, machete and bayonet were found under accused's cot. A medical officer testified that it was likely that deceased died from a blow from the flat side of an axe. The axe found had the appearance of having been cleaned on one side. On the morning that the body was found accused did not awaken Private McRae, the other occupant of the tent, as had been his custom. Both accused's and deceased's cots did not have the appearance of having been slept in. A cot and a large cardboard box which had been in the tent and accused's mosquito bar and barracks bag, all blood-stained, were found in the jungle behind the latrine. During the night the accused had been seen making several trips to the latrine. He was seen going to the supply room in the direction of the latrine carrying a bundle under his arm, wearing camouflaged pants and returning wearing khaki. At reveille accused's pants were wet from the waist down. He reported deceased absent, saying that he was in "the latrine or somewhere". The medical attendant treated accused on the morning that the body was found for a slight abrasion on the foot which had been bleeding, although accused testified that he was suffering with athlete's foot and a skin disease. After going to work that morning accused returned for the purpose of securing deceased's fountain pen which accused had under his (accused's) pillow. It is a significant fact that prior to the announcement that deceased's body had been discovered that accused repeatedly stated that something was "going on", and that upon being pressed for his reason for this repeated remark he replied "something about that boy up there missing and they want to put me in it, I know". When informed that deceased's body had been found accused "looked like he had been stricken by a bolt of electricity"; "he couldn't stay still"; "his eyes began to run all over his head"; "he looked awful afraid, and almost jumped up on his feet"; "he looked just like this, like frightened, his eyes was dancing all over his head".

Accused denied the actions ascribed to him during the early hours of the morning of 16 June by a number of witnesses, in effect testifying that he had slept through the greater part of the night. Although he had policed up the tent in the morning he had not noticed the blood stains and did not report the absence of the cot.

There is nothing in the record which would ascribe to any of the prosecution witnesses a motive to give perjured testimony or to "frame" accused and their credibility remains unimpeached (with the possible exception of Private McRae, who offered nothing material against accused). It is the province of the court-martial to weigh the evidence and judge the credibility of the witnesses (sec. 395 (56), Dig. Ops., JAG, 1912-40). Thus they might properly disregard all or any of the testimony of accused. The evidence is persuasive that deceased was murdered in the tent occupied by himself, accused and McRae. That accused and McRae could have slept through all of this commotion is too incredulous for belief. Although McRae may have been a sound sleeper, as revealed by the fact that he was almost invariably awakened by accused for reveille, it is possible that McRae's lips were sealed by accused's statement to him a short time prior to the homicide that he talked too much and that he (accused) would

kill him. The court, by its findings, evidently believed the witnesses whose collective testimony wove a web of circumstantial evidence around accused.

From the totality of the evidence the court-martial could reasonably infer, to the exclusion of every other hypothesis, that accused committed the offense alleged. The motive, the method, and the many details connected with this gruesome tragedy are locked in the repository of accused's bosom, but that he is the person guilty of the brutal murder of Private Cleophus Glover is clearly established.

5. For the reasons stated above the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of the court and the sentence.

_____, Judge Advocate.
Colonel, J.A.G.D.

_____, Judge Advocate.
Lt. Col., J.A.G.D.

_____, Judge Advocate.
Lt. Col., J.A.G.D.

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review

13 January, 1944.

CM A-911

UNITED STATES v. Technician Fifth Grade ODIE BUCHANNON (38210358), Headquarters and Service Company 810th Engineer Battalion.	Trial by G.C.M., convened at Headquarters V Island Command, APO 709, 23 November, 1943. Dishonorable discharge, total forfeitures, confinement for life. United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Technician Fifth Grade Odie (NMI) Buchannon, Headquarters & Service Company, 810th Engineer Battalion, did, at APO # 709, on or about October 2, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill one Private Joseph Waller, Company "C", 810th Engineer Battalion, a human being by shooting him with a pistol.

The accused pleaded not guilty to the Charge and specification and was found guilty as charged. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The competent evidence discloses that in the early morning of 2 October, 1943, a dice game was in progress in the company area of Company C, 810th Engineer Battalion, Guadalcanal, Solomon Islands. The accused joined the game about 12 o'clock midnight (R.14). An argument over a side bet of $4.00 developed between accused and Private Genross. Private Miller, who was running the game, in an endeavor to stop the argument, paid accused $4.00. At this time Private Genross "had a bad temper and kept the argument going" (R.14). Accused told Genross "that they were friends" and that he would not take his money. About three minutes thereafter Private Genross left

the game but returned shortly with a flashlight which he shone in accused's face, and demanded his $4.00. Accused got to his feet, and backed away from the dice table, stating to Private Genross, "I tried to be your friend, but you black son of a bitch, I don't like you no how" (R. 10). He then reached in his shirt, pulled out a .45 Army pistol, snapped it, and fired several shots. One of them hit Private Joseph Waller, who was standing near by, in the neck, from which wound he died shortly thereafter (R. 4). Accused then threw the pistol into the mud approximately 200 yards from the scene of the shooting (R. 18), returned to his tent and went to bed (R. 22).

Corporal Harmon Jackson testified that at the time of the shooting "Buchannon looked like he had had something to drink" but "I wouldn't say that he was drunk" (R. 11).

First Lieutenant Edgar L. Hand of accused's company testified that he was awakened about 3:00 o'clock on the morning in question by a series of shots. He went to the area from which the sound of the shots had come and found Private Joseph Waller wounded and lying on the ground. He had the lights turned on, sent for medical aid, and then investigated the shooting. He proceeded to accused's quarters and placed him under arrest (R. 18).

First Lieutenant Joseph S. Straka, the investigating officer, testified that accused admitted to him that he [accused] was present at the crap game at 3:30 A.M. on the morning in question. He admitted that the dispute about the bet resulted in the shooting; that he fired the pistol until it was empty but claimed that he did not intend to shoot anyone (R. 20).

The accused elected to be sworn and testify. He stated that Private Miller was running the crap game and paid accused a $4.00 disputed bet. Private Genross left the game and returned shortly thereafter and "he shines a light in my face and says to me, 'Buchannon, give me my $4,' and I never said anything to Genross. I just got up and draw the gun and fired it in the air to the best of my knowledge" (R. 21). In answer to the question, "What was your purpose in firing into the air?", accused testified -

> "I fired in the air because I didn't wants to hurt Genross and no one else. But I was afraid that Genross would of tried to hurt me and I didn't want to hurt him. And so I fired the pistol to scare him because I didn't want to hurt none of the boys." (R. 22).

On cross-examination accused admitted that Genross made no "move toward hitting * * [him] or anything like that"; that he came to the crap game with a fully loaded pistol concealed in his shirt; and that he fired in the air to scare Genross "because * * [I] was afraid he was trying to do something to me" (R. 22).

4. The evidence is undisputed that accused killed Private Joseph Waller by the discharge of a service pistol inspired by an argument between accused and Genross in which deceased had no part. Genross's actions did not warrant accused drawing a pistol and firing the same. There was no justifiable provocation and no necessity for such action in self-defense. There is testimony that accused was drinking but the proof shows that he was not drunk. Accordingly, such condition may not be considered in mitigation of his offense.

It is the duty of the court-martial to weigh the evidence and judge the credibility of the witnesses (sec. 395(56), Dig. Ops., JAG, 1912-40). Thus they were privileged to disregard all, or any part of accused's testimony, and from the facts find that accused fired the pistol not into the air to "scare" Genross, but to do him bodily harm.

"Murder is the unlawful killing of a human being with malice aforethought.* * *

Malice aforethought may exist when the act is unpremeditated. * * * knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; * * *" (par. 148 a, M.C.M., 1928).

If Genross had been struck by the bullet and died as a result thereof, the court could properly have found accused guilty of murder. Although by chance deceased was the victim rather than Genross, the homicide was an offense of the same magnitude and the court could properly find accused guilty of the crime charged (U.S. v. Hart, 162 F. 192, cf. sec. 452, Title 18, U.S.C.A., p. 327; CM 225249, Hamby).

5. For the reasons stated above the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of the court and the sentence.

[illegible], Judge Advocate.
Colonel, J.A.G.D.

[illegible], Judge Advocate.
Lt.Col., J.A.G.D.

James O'Murphy, Judge Advocate.
Lt.Col., J.A.G.D.

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review
CM A-912

24 January, 1944.

UNITED STATES v. Private EDWARD SAMPLES (39234165), Company A, 920th Air Base Security Battalion.	Trial by G.C.M., convened at Headquarters, V Island Command, 29 November, 1943. Dishonorable discharge, total forfeitures, confinement for life. United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Edward Samples, Company A, 920th Air Base Security Battalion did, at the area of the Malimbu Water Point, Carney Field, APO 709, on or about 29 September 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private William L. Wolfe, 7th Airdrome Squadron, a human being by shooting him with a carbine.

The accused pleaded not guilty to the charge and specification and was found guilty as charged. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence discloses that at about 10:00 o'clock in the morning of 29 September, 1943, accused, with Private First Class Theodore A. Forrest and other enlisted men, started a card game in Forrest's tent. The tent was located close to Malimbu water point near Carney Field, Guadalcanal, Solomon Islands. At that time Forrest purchased a gallon of wine and "left it there for anyone who cared to drink" (R. 6). The soldiers continued the game until evening, eating lunch in the tent. Forrest testified that accused had been "drinking constantly", and that evening "I told him he was a little too high to continue playing. At that time he owed me the sum of $50" (R. 7). They continued playing a game called "tonk" and accused quarrelled over a hand with

Forrest involving a $4 pot and a $12 side bet. Forrest suggested that the dispute be referred to Corporal Davis who was "more familiar with the game" and accused called for Davis three times but he failed to answer. Forrest stated that at that time -

> "* * * I then bowed my head low to look under the flap of the tent in order to call Freddie [Davis] myself. As I was doing so, Sampson [accused's nickname] hit me in the head with a hammer. As I was struggling, I stood up and took one step backwards. He then demanded me not to reach for nothing. At this time the blood was oozing out of my head. I grabbed Sampson and we had a short struggle. I then threw him out of the tent. Sampson was up on his feet again with the hammer in his hand. I rushed him for the second time. I then tried to get his head in a head-lock which by sheer luck he got out of. The hammer then remained in my hand. He backed away then, and after he was a little distance, he said he would be back * * *" (R. 7).

Accused left, going towards his company area. He was given a ride by Private Tom A. Randles, during which time accused told Randles that he had a "little rumble down there" and that he (accused) was going to get even with them because they had taken some money away from him. Upon arriving at his company area accused left Randles and went to the mess hall (R.10).

At about 6:30 o'clock that evening accused borrowed a carbine with a clip containing 15 rounds of ammunition from Corporal Elihu Wiggins stating "Let me have it. Major Harrison is waiting to take me on guard". Accused returned the gun the following morning with four or five rounds of ammunition missing from the clip. Accused said "he shot it up in the air for fun" (R. 11, 12). Both Randles and Wiggins testified that at the times testified to, accused was not drunk (R. 10, 11).

About fifteen minutes later, Staff Sergeant Kenneth G. Klass and deceased left the squadron area for Malimbu water point on a detail hauling water to the 7th Airdrome Squadron. Klass testified that -

> "We went to the water point. I was driving and Wolfe was riding along side of me. As I turned off the main road to go into the water station I heard a shot. I said to Pvt Wolfe, 'Someone's shooting down there.' He made a remark but I don't know what he said. I then went about 35 yards further, and I heard a second shot. I then said to Wolfe, 'Damn, if that wasn't close!' He then made another remark but I didn't understand what he said. I then shifted the truck into second gear and moved along slow. Just as I turned to go into the pipe -- the front of my truck was just under the pipe, when I started to open my door, and a shot came through the wind shield. It sounded like it went off in my ear, but I didn't see which direction it came from. When I saw that he was hit I pulled on the emergency brake to get the truck out of gear, and ran to the 5th Bomb Group transportation lot. And I got 3 fellows and we got in a jeep and came back to the scene. On the way back, about 75 yards from the truck, a colored fellow stepped around the truck to my right and stood by the door. I hollered, 'Hey, guard!' but he didn't answer. So I hollered a second time. He still didn't answer. I hollered a third time, and all he said was 'Ugh!' and looked in the truck and ran back around the front of the truck off into the woods with a rifle in his hand."
> (R. 13).

At that time the lights of the truck were on (R. 15). The bullet struck Wolfe above the left eye and he died as a result thereof in an ambulance on the way to a hospital (R. 13, 15).

After accused left that evening, Private Forrest went to a show. On returning to his tent he saw some empty cartridge shells lying on the floor (R. 7). Forrest further testified that he and the deceased were very good friends and that they ate together at the 7th Airdrome:

"Q. How did you frequently get to and from this airdrome?
A. We generally go out on the road thumbing rides from the passbyers.

Q. What job did Wolfe have in his organization?
A. He used to drive a water truck.

Q. Did you ever ride with him in this water truck?
A. Yes, Sir.

Q. Did he ever bring you back from chow in this water truck?
A. Yes, Sir." (R. 8).

On 4 November, 1943, after having been advised of his rights accused made a statement before the investigating officer, Colonel Willfred R. Higgins, which in part is as follows:

"At about ten o'clock in the morning of September 29, 1943 I went to the Malimbu water point where I started playing cards with Pfc Theodore Forrest who works there. We played until about five o'clock that evening and drank all the time off and on from about ten that morning until then. We drank some kind of wine. About five o'clock I was about $20.00 in debt to Forrest from whom I had borrowed money to keep in the game. He and I got in an argument about a tie hand and I picked up the hammer and hit him on the head with it. We had a scuffle then and we got out of the tent we were playing cards in which was Forrest's tent, during the scuffle. I was mad and pretty drunk and told Forrest I would be back. I walked out to the main road and started toward my company. Soon, I was picked up by Pvt Randles of my company in a truck and he took me to my company area. After supper there I borrowed a carbine M-1 from Cpl Wiggins of my company and a magazine containing cartridges for it. I noticed there were cartridges in it -- this was at about 6:30 P.M. I then went back to the Malimbu water point and it was dark. I went to Forrest's tent and he was not there -- no one was there. There was no light on in the tent or at the water point. I fired about four shots through the floor by Forrest's bunk to scare him. Then I went outside the tent and started to unload the carbine. It jammed, in trying to fix the jam I had the carbine on my knee, it went off into the air in the direction of the Malimbu river. I then tried to remove the next cartridge and had the carbine on my knee but pointed toward the direction of the truck which had come up -- it was a water truck. Again the carbine went off in the direction of the truck and that was the shot that killed Pvt Wolfe. * * * " (Govt. Ex. 1, R. 17).

The accused elected to adopt as his unsworn statement a portion of a statement made by accused to an inspector general. He admitted borrowing the carbine, going to Forrest's tent and firing several shots through the floor. He further stated that he fired the carbine down by the water tank sometime

after 6:30 o'clock and that -

"* * * The carbine hung up (jammed), I were working with the rejector to get it unhung, I were outside after I had fired these shots in the floor and the carbine was pointed in the direction of the truck and after I figured that I had got it unhung, I pulled the trigger to see if it would fire and it went off. I fired another shot after that at the same point but only in a different direction this last shot was out toward the river.

"* * * I have no recollection of opening the door of the truck and looking in and saying 'Ugh'. * * *" (p. 33, 34, 41, Defense Ex. 1, R. 19).

4. The evidence established that accused and Forrest had a quarrel over a card game involving a pot of $4 and a $12 side bet. Accused struck Forrest on the head with a hammer. Forrest threw accused out of his tent, and as accused left he told Forrest that he would be back. On the way to his company area accused told Randles that he had a "little rumble down there" and that he was going to get even with them because they took some money from him. Later accused borrowed a carbine from Wiggins with the excuse that he was going on guard. Accused returned to Forrest's tent where he fired several shots through the floor. A short time later, deceased was fatally shot as he was riding in a cab of a water truck, the bullet entering the cab through the windshield. At that time the truck, with lights on, was nearing a water point in the area of Forrest's tent. Accused in his statement to the investigating officer, admitted that the shot that killed deceased was fired from a carbine which had jammed as he tried to remove the cartridge therefrom while it was on his knee. In his unsworn statement accused stated "I pulled the trigger to see if it would fire and it went off". Deceased as a part of his duties, drove a water truck in his organization. Deceased and Forrest were close friends and ate together at the 7th Airdrome. Forrest had ridden with deceased in the water truck and likewise deceased had driven Forrest from "chow" to the area of his tent.

"Murder is the unlawful killing of a human being with malice aforethought.* * *"

"Malice aforethought may exist when the act is unpremeditated, It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; intent to commit any felony. * * *" (par. 148a, M.C.M., 1928).

"* * * When evidence is of sufficient probative force, a crime may be established by circumstantial evidence provided there is positive proof of the facts from which the inference of guilt is to be drawn, and that that inference is the only one which can reasonably be drawn from those facts.* * *" (CM 216004, Roberts and Miller)

The Judge Advocate General has further held that where circumstances are relied on entirely to justify conviction, they must not only prove all of the elements of the offense but must at the same time exclude every reasonably hypothesis except guilt (sec. 453(9), p. 238, Vol. II, Bull. JAG).

It is the province of the court-martial to weigh evidence and judge the credibility of witnesses (sec. 395(56), Dig. Ops., JAG, 1912-40). Thus they might properly disregard all or any part of the testimony of accused and from all the facts and circumstances surrounding the case find that accused fired the carbine to do bodily harm. If Forrest had been struck by the bullet and died as the result thereof, the court-martial could properly have found accused guilty of murder. Although by chance deceased was the victim of the bullet intended for Forrest the homicide was an offense of the same magnitude (U.S. v. Hart, 162 F, 192, cf. sec.452, Title 18, U.S.C.A., p. 327; CM 225249, Hamby).

The record contains evidence upon which the court could properly infer to the exclusion of every other reasonable hypothesis that the accused did commit the crime as charged.

5. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of the court and the sentence.

, Judge Advocate.
Colonel, J.A.G.D.

, Judge Advocate.
Lt. Col., J.A.G.D.

, Judge Advocate.
Lt. Col., J.A.G.D.

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review
CM A-926

26 January, 1944.

UNITED STATES v. Technician Fifth Grade Julius McCoy (33170771), Company "C", 262nd Quartermaster Battalion.	Trial by G.C.M., convened at Headquarters IV Island Command, A.P.O. 708, 12 January, 1944. Dishonorable discharge, total forfeitures, confinement for 10 years. United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Technician Grade 5 Julius McCoy, Company "C", 262nd Quartermaster Battalion, did, at the area of 122nd Station Hospital, on or about 11 December 1943, unlawfully enter the living quarters of members of the Army Nurse Corps, owned by the United States Government, with intent to commit an offense, to wit, an assault upon the occupants therein.

The accused pleaded not guilty to the charge and specification and was found guilty as charged. He was sentenced to dishonorable discharge, total forfeitures, and confinement for ten years. The reviewing authority approved the sentence and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The army nurses on duty at the 122nd Station Hospital, A.P.O. 708, on 11 December, 1943, the date of the offense charged, were quartered in a U-shaped barracks. The two wings were connected by a covered wooden walkway, giving the building a rectangular appearance with a court-yard in the center. The sleeping rooms, reached by two series of steps rising from the covered walkway, were located on the second floor. They were separated from each other and from the hallway upon which each opened by wooden partitions extending from the ceiling to a point one foot and two inches above the floor, leaving a space of that size open and unobstructed (Exh. 1, 2, 3).

At the time of the offense a dog was tethered in the court-yard near, but not close enough to reach, the covered walkway (R. 15). A wire mesh

fence ten feet high surrounded the building except for a space of twenty-two feet at its rear. No barbed wire was used in the construction of the fence and a person could, if he so desired, either climb under or over it (R. 9, 10).

About 7:30 in the evening of 11 December, 1943, Second Lieutenant Mable Mullins, ANC, was on the second floor of the quarters just described. She heard the dog barking, a door slam, and then footsteps, heavier than usual, coming from the hallway and the two rooms at the end of the hall. Second Lieutenant Ann Marie Morro, ANC, also heard the dog barking and thought that he was "angered" so went out to investigate. Finding nothing unusual on the outside, she went upstairs into the barracks and began a search of the rooms. While in the room occupied by Lieutenants Plourde and Liesenfelt, army nurses, she turned the beam of the flashlight which she was holding toward the floor and saw a man lying partially under the partition which separated the room in which she was standing and the next room and partially under the bed in the latter room. That room was not occupied.

About that time Captain Sidney R. Branson, who had been sitting in the nurses reception room and had been called by Lieutenant Mullins, arrived on the scene. He saw the man under the bed, reached down, grasped him by the shoulder, and then led him into the reception room. The Military Police were notified and the intruder, identified as the accused, was turned over to them. No one had given him authority to enter the barracks (R. 19).

A few minutes after accused was taken into the reception room a knife bearing the name of Lieutenant Peterson, ANC, and positively identified as belonging to her, was found under the bed approximately at the same place where accused had been lying. Nurse Peterson testified that she had last seen the knife at suppertime on the evening of 11 December lying on a desk in her room. Her room was situated almost directly across the hall from the vacant room in which accused and the knife were found. Nurse Peterson testified that she had not taken the knife either to that room or the room occupied by Lieutenants Plourde and Liesenfelt. The two last named nurses testified that they had not used the knife or taken it to their room that evening.

A statement made under oath by accused to Lieutenant Colonel William O. Schlotter, Provost Marshall, and reduced to writing was introduced in evidence. It is in the following words -

> "* * *
>
> I was in the nurses dormitory of the 122nd Station Hospital during the evening of December 11, 1943. I don't know what I was doing in the dormitory except that I was dodging a dog. I was in one of the rooms of a nurse and was under the bed. I heard women talking about my being there while I was under the bed, and crawled out from under the bed when a lady flashed a light on me. From the time I heard the voices until she entered the room it was a short time, perhaps one half minute. I did not know the building was a dormitory when I was outside the fence I crawled under the fence inside the pen and crawled into the building and walked up the stairs, walked through the door into the hall. A dog barked and I fell down and rolled into the room under the bed. I entered the enclosure because I thought I was being attack by a dog. I did not yell or call for help at any time. I knew there were women in the building before I went in and that I had no business in the building." (Ex. E).

No evidence was introduced by accused. He elected to make an unsworn statement to the court in pertinent part as follows:

"Well, sir, at the time I was released from my duties I went over to get a drink. So I obtained a bottle of wine. I drank half of it myself. Well, then, I wandered back to the company. And so it got night on me and I came upon a bunch of cattle. * * * There was a bunch of cattle tangled up somehow or other and so I went to the tree for safety. After leaving the tree I do not know which way I went then. But as it was I went. I was picked up in the dormitory of the 122nd Hospital nurses' quarters. At the time I entered this place I do not remember if the dog was outside or inside. I walked around to the hallway there and saw the light approaching and I went up the steps. Going into the stairway I didn't see anyone. I opened the door and walked in and no one said anything and so I went down the hallway. On my way in the hallway someone came up behind me and soon the door opened and someone said, 'Someone here?' or 'Someone come in here?' or something like that. I said to myself, 'I'm in the wrong place'. I fell down under the bed or something. The Captain, he pulled me out from under the bed. He walked me down to the front of the place and they questioned me there and what was I doing there or something and I said I had no reason to be there, I am sorry, I didn't know I was in this building. So at the Colonel's office they asked me questions for two or three days. I was being questioned concerning that I knowed that the nurses lived there and I said, 'Yes, sir, I know that, but I didn't know it was the nurses building at that time although I know there was a nurses' dormitory there because they were right next to our area there'. * * * I told him several times over that I didn't have any reason. I didn't know what I was doing or how I got in. * * * I told him I didn't have any reason to go in." (R. 24-25).

4. Accused is charged with the offense of housebreaking, defined as "unlawfully entering another's building with intent to commit a criminal offense therein".

"The offense is broader than burglary in that the place entered is not required to be a dwelling house; it is not necessary that such place be occupied; it is not essential that there be a breaking; the entry may be either in the night or in the daytime; and the intent need not be to commit a felony. The intent to commit some criminal offense is an essential element of the offense, and must therefore be alleged and proved, * * *.
The term 'criminal offense' includes any act or omission violative of the Articles of War, which is cognizable by courts-martial, except acts or omissions constituting purely military offenses." (par. 149e, M.C.M., 1928).

The evidence clearly established, and the accused admitted, that he wrongfully entered the nurses' quarters. The only consideration before the Board of Review, therefore, is whether the record contains sufficient evidence upon which the court could predicate a finding that such entry was with the intent to commit a criminal offense therein. Criminal intent, being a state of mind rarely is ever susceptible of direct proof, usually must be inferred from facts testified to by witnesses, such as the acts and statements of accused, and the circumstances developed by the evidence (23 C.J.S., sec. 919). Thus it may be proven by circumstantial as well as direct evidence (sec. 931, Wharton's Criminal Evidence; People v. Wilson, 174 N.E. 398). As in burglary, a closely related offense, the intent is a question for the determination of the jury (sec. 627, Underhill Criminal Evidence); in the instant case for the determination of the court-martial. In seeking the intent "* * * inferences and deductions from human conduct may properly be considered where

they flow naturally from the facts proved. * * *" (sec. 451 (2), p. 188, Vol. II, Bull. JAG). The proof thereof must be sufficient to satisfy a reasonable man when guided by normal human experience and common sense springing from such experience (CM 197408, McCrimon). Applying this test to the record, the Board of Review is of the opinion that it contains ample evidence from which the court-martial could predicate a finding that accused unlawfully entered the nurses' quarters with the intent to commit a criminal offense therein, as alleged.

5. The accused is thirty-eight years of age. Confinement in a penitentiary is authorized (sec. V, W.D. Cir. 291, 10 Nov. 1943).

6. For the foregoing reasons the Board of Review is of the opinion that the record of trial is legally sufficient to sustain the findings and the sentence.

, Judge Advocate.
~~Colonel, J.A.G.D.~~

, Judge Advocate.
Lt. Col., J.A.G.D.

, Judge Advocate.
Lt. Col., J.A.G.D.

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review
CM A-953

15 February, 1944.

UNITED STATES v. General Prisoner EDWARD BRITTLE (NMI).	Trial by G.C.M., convened at Headquarters, IV Island Command, APO 708, 25 January, 1944. Dishonorable discharge, total forfeitures, confinement for seven years six months. The Federal Reformatory, El Reno, Oklahoma.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 93rd Article of War.

Specification 1: In that General Prisoner Edward (NMI) Brittle did, at or near the area of the Small Arms Repair Shop, Ordnance Detachment "A", APO 708, on or about December 8, 1943, feloniously take, steal, and carry away two (2) automatic pistols, caliber .45, M1911, each of a value of about $26.42, being in all of a value of about $52.84, the property of the United States.

Specification 2: (Disapproved by reviewing authority).

Specification 3: In that General Prisoner Edward (NMI) Brittle did, in the area of 3387th Quartermaster Truck Company, APO 708, on or about December 26, 1943, feloniously take, steal, and carry away one pair Calobar Sun Glasses and one leather glasses case, of a total value of about $12.50, and United States currency, to wit, one ten dollar bill, lawful money of the United States, being in all of a value of about $22.50, the property of First Lieutenant Frederick V. Duell.

CHARGE II: Violation of the 94th Article of War.

Specification 1: In that General Prisoner Edward (NMI) Brittle did, at or near the area of Company C, 262nd Quartermaster Battalion (Service), APO 708, on or about December 15, 1943, wrongfully and knowingly

sell to Private Herbert E. Hart one automatic pistol, caliber .45, M1911, of the value of about $26.42, property of the United States, intended for the military service thereof.

Specification 2: In that General Prisoner Edward (NMI) Brittle did, at or near the area of Company C, 262nd Quartermaster Battalion (Service), APO 708, on or about December 15, 1943, wrongfully and knowingly sell to Private Joseph Brown one automatic pistol, caliber .45, M1911, of the value of about $26.42, property of the United States, intended for the military service thereof.

The accused pleaded not guilty to all charges and specifications and was found guilty as charged except the words "$75.00", substituting therefor the words "$40.00", in specification 2 of Charge I. He was sentenced to dishonorable discharge, total forfeitures and confinement for nine years. The reviewing authority disapproved the finding of guilty of specification 2 of Charge I and approved only so much of the sentence as provides for dishonorable discharge, total forfeitures, and confinement for seven years and six months. The Federal Reformatory, El Reno, Oklahoma, was designated as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence discloses that the accused was an ambulatory patient in the 122nd Station Hospital, APO 708. He was permitted to be absent from the hospital except at bed check hours, which were held daily at 6:00 A.M., and 9:30 P.M. (R. 31, 32). The hospital was located about one mile and a quarter from the base ordnance shop at Surrunda Bay and about 150 to 200 yards from the area of Company C, 262nd Quartermaster Battalion (R. 7, 11).

Sometime prior to the 8th of December, 1943, two .45 caliber pistols bearing serial numbers 505906 and 507468 respectively, were received for repairs by Technician Fifth Grade Edwin Canter in the ordnance shop at Surrunda Bay. On that date a search revealed that both pistols were missing. Second Lieutenant Charles F. Coffman testified that he alone as shop officer could authorize the removal of the pistols from the building and that he had given no one authority to remove any pistol therefrom (R. 6, 7). On the 3rd of January, 1944, First Sergeant Raymond E. Jackson, while making an inspection of the area of Company C, 262nd Quartermaster Battalion, found a .45 caliber pistol bearing serial number 505906 in the gas mask of Private Joseph Brown in his (Brown's) quarters. Brown testified that after several days' negotiations he had purchased the pistol from accused for the sum of thirty dollars and then placed it in his gas mask. At this time the accused told Brown that the pistol was government property (R. 12, 13). Private Herbert E. Hart also of Company C, 262nd Quartermaster Battalion, testified:

"It was about the middle of December and I was in the day room and another fellow and he [accused] asked me if I wanted to buy a gun. He said he knew a fellow that had one. I do not know the date. He came from the hospital in his pajamas and we went in a tent and he wanted thirty-five dollars and I gave him twenty-four dollars for the gun." (R. 19).

Hart was questioned by his company commander, Captain Theophile I. Combel, and admitted that he had the pistol (R. 15, 17). At Captain Combel's instruction Hart produced the pistol and gave it to the first sergeant who, in turn, gave it to Major Alvin Moore, Assistant Provost Marshal (R. 17, 19-21). Major Moore and Captain Combel both identified the pistol as bearing serial number 507468 (R. ~~15,~~ 16-17).

The two .45 caliber pistols bearing the serial numbers 505906 and 507468 were received in evidence and bore the inscriptions "Model of 1911. U.S. Army" and "United States Property" (R. 14, 21; Ex. 2, 3).

It was stipulated that "SNL B1, 31 July 1943, Page two now on file at IV Island Service Command Ordnance Office lists the value of a pistol, automatic, cal. 45 M 1911 as $26.42."

First Lieutenant Frederick V. Duell occupied living quarters on a hill between Surrunda and Pallikula Bays approximately one quarter to one half a mile from the 122nd Station Hospital. At about one o'clock on the afternoon of the 26th of December, 1943, Lieutenant Duell placed his sun glasses and a purse containing a ten dollar bill on a small writing desk in his quarters and then went to a beach. The following morning Lieutenant Duell discovered that his sun glasses and the ten dollar bill were missing. The sun glasses had been purchased by Lieutenant Duell in Pittsburg, California, for $12.50 (R. 33-34).

About the 5th of January, 1944, the accused, a general prisoner, was returned from the hospital to the stockade. On the 6th of January, 1944, Staff Sergeant Leonard H. Michel, acting as the Provost Sergeant in charge of prisoners, made a routine search of accused and found a ten dollar bill and two pairs of glasses (R. 35, 46). Thereafter Lieutenant Duell identified one pair of the glasses recovered from the accused as those that were taken from his quarters (R. 33, 36, 37; Ex. 6).

Captain Virgil E. White, base prison officer, and Sergeant Michel both testified that it was not permissible for prisoners to have money on them (R. 36, 40). Sergeant Michel further testified that accused was searched when he left the stockade for the base hospital and no money was found on him (R. 36).

Technician Third Grade William J. Gleich, Technician Fifth Grade Stanley W. Barron, and Technician Fifth Grade William L. Harris testified as defense witnesses that they were respectively ward master, assistant ward master and night attendant in the 122nd Station Hospital. That the accused was always in the hospital when they needed him except when he was absent one night for bed check about the 27th or 29th of November, 1943.

Private Alphonse C. De Marco, of the Provisional Military Police Company, testified that about four months prior to the trial he saw accused with a pair of sun glasses similar to those stolen from Lieutenant Duell (R. 40). General Prisoner Robbie Wynn testified that the glasses identified by Lieutenant Duell as his glasses were the same glasses he saw in the possession of the accused five months prior to trial (R. 42).

The accused elected to remain silent.

4. The evidence is undisputed that two Army .45 caliber pistols of a value of $26.42 each and bearing serial numbers 505906 and 507468, respectively, were stolen from an ordnance shop on the 8th of December, 1943. Each pistol had the words "United States Property" engraved thereon. About the middle of December, 1943, accused sold one of the pistols in question to Private Hart for $24.00 and on another occasion before the 3rd of January, 1944, sold the other pistol to Private Brown for $30.00.

The evidence also established that a pair of sun glasses and ten dollar bill belonging to Lieutenant Duell were stolen from a small writing desk in his quarters on the 26th of December, 1943. On the 6th of January, 1944, the accused was searched and the stolen glasses and a ten dollar bill were found in his possession. At this time accused, as a prisoner, was not permitted to have money on his person. Accused made no explanation of his possession of the alleged stolen articles.

The unexplained possession of recently stolen porperty is sufficient to support a finding of the larceny thereof (sec. 451 (37), Dig. Ops. JAG, 1912-40). Accordingly, the court could properly find accused guilty of the larceny of the pistols and sun glasses.

The ten dollar bill found on the accused was not identified as the bill stolen from Lieutenant Duell.

> "* * *When evidence is of sufficient probative force, a crime may be established by circumstantial evidence provided there is positive proof of the facts from which the inference of guilt is to be drawn, and that that inference is the only one which can reasonably be drawn from those facts.* * **" (CM 216004, Roberts and Miller).

From the pertinent facts the court could properly infer that accused took the ten dollar bill as alleged to the exclusion of every other reasonable hypothesis (sec. 453 (9), p. 238, Vol. II, Bull. JAG). From the entirety of the evidence the court was warranted in finding that the accused committed the several offenses charged, and as approved by the reviewing authority.

5. The Board of Review is of the opinion that the record is legally sufficient to support the findings and sentence.

Colonel, J.A.G.D., Judge Advocate.

Lt. Col., J.A.G.D., Judge Advocate.

Lt. Col., J.A.G.D., Judge Advocate.

1st Indorsement

Army Service Forces, Branch Office of the Judge Advocate General, Melbourne, Victoria, 16 February, 1944.

To: Commanding General, IV Island Command, A.P.O. 708.

1. In the case of General Prisoner Edward Brittle (NMI), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows: (CM A-953).

3. It is noted that the Federal Reformatory, El Reno, Oklahoma, has been designated as the place of confinement. This is incorrect as the Federal Correctional Institution, Englewood, Colorado, is the proper Federal facility, and it is requested that this latter institution be named in the general court-martial orders promulgating the results of the trial; a corrected action sheet is not necessary to effectuate this change.

Ernest H. Burt

ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review
CM A-996

23 February, 1944.

UNITED STATES v. Private THEODORE PATTERSON (34200923), Company "A", 902nd Air Base Security Battalion.	Trial by G.C.M., convened at Noumea, New Caledonia, 29 December, 1943. Dishonorable discharge, total forfeitures, confinement hard labor for life. United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Theodore (NMI) Patterson, Company "A", 902nd Air Base Security Battalion, did, at APO 502, on or about 30 October 1943, forcibly and feloniously, against her will, have carnal knowledge of Georgette Facio.

The accused pleaded not guilty to the charge and specification and was found guilty as charged. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The competent evidence for the prosecution shows that on October 30, 1943, Miss Georgette Facio, an unmarried woman and her two year old and eleven months old children, together with her thirteen year old sister, were living in a house near a surfaced road about two kilometers from Dumbea, New Caledonia. The house had three doors, one of which faced the road. About 10:00 P.M., on the night in question, they were awakened by someone knocking on the front door. At first they did not respond to the knocking but as it continued, they arose, lit a lamp, and asked "* * * what they wanted * * *". The reply was that "* * * they were MP's and wanted to enter the house and find out what was in there.* * *" (R.6-7). Miss Facio told them to come back next morning, that the door would not be opened at night to American soldiers.

The reply was that "* * *if I didn't open the door they would burn the house down and break in the door.* * *" At this time the knocking continued on the front door and someone was at the side door "trying to push through.* * *" Waiting until she heard an automobile coming along the road, witness and her sister then each grabbed a child and started running toward the road, the sister leaving the house first with the older child, and witness following with the younger. At this time "both of them [accused, a tall man, and Johnson, a small man, both colored soldiers] were at the side door. When the sister reached the gate "* * *the small negro grabbed her* * *". The sister testified, "He knocked me down and then he put his hand over my mouth and I bit his finger and he broke my tooth" (R.21,79). The other one grabbed Miss Facio but she broke away, ran to the road, and stopped the automobile by standing in the middle of the road. When the "* * *two soldiers saw the automobile stop * * *they ran behind the house.* * *" The younger sister then ran up the road to the house of Mr. Eggerle (R.21). Miss Georgette Facio testified:

> "* * *When I got there the automobile pulled away and I was left alone there with my baby and I started running after the automobile hollering. I succeeded in getting up to the bridge over the river. As I got to the bridge both of them grabbed me. One reached over and put his hand over my mouth. One of them grabbed me by the arm and started dragging me down to the river, the other one grabbed the baby. One of them had the baby and was handling it pretty rough and the other one asked to take the child then. Then both of them grabbed me and started dragging me down closer to the river, through the rocks and water. One of them layed me down and took everything I had off me. The small one did that. It was at the bottom near the river where he brought me. After he finished having intercourse with me he left and the other one grabbed me by the arm and dragged me further up the creek. He dragged me down to the foot of the tall grass. He helped me up and then he took his shirt off and layed the baby on the shirt. My sister had gone over to the neighbors and I was trying to see if I could see them. From where I was I could see everything that was going on on the road. I looked up and I saw Mr. Eggerle. I saw they had a lamp and a gun and the soldier saw that too and he quickly put his hand over my mouth. I couldn't holler so that they could hear me otherwise they would have found me there. After he got through having intercourse he dressed and grabbed the child and he went to drag me further down the river. He was asking me to go swimming with him in the river. I told him that the river wasn't that far back, that it was further to the front. He didn't stop; he kept dragging me until I succeeded in getting loose. I got loose and I was running down through the grass and rocks and then I succeeded in getting on the highway. I went up the bank where I got down. When I got on the road I screamed and I saw a lot of people on the side of the house. When I broke loose he still had my baby along the river side. When we went looking for the child I followed the river to where we were. Someone called, I didn't know if it was the soldier or an MP and he told me he had the baby and I quickly ran and got my child. He left her sitting all alone there. After I had the child I could hardly walk so one soldier took the baby and the other one helped me. I do not know who they were. When I got on the road there a lot of people and some MP's and they brought me over to the French man's house and I went over there and stayed there. I could hardly walk and I was all scratched and I had a blue mark on my back" (R.7-8).

She further testified that both of the soldiers had intercourse with her that night, the "short" one first and the taller one second. She was clad only in pajamas and a night gown, which was "all torn" when she reached the road after the incident in question.

On cross examination Miss Facio testified that she spoke a "* * *few

words* * *" of English but that she understood the conversation when the soldiers said they were MP's (R.16); she "* * *could not do anything because they were too strong for me"* * *(R.15); "I tried when I was near the river and both of them grabbed me so I could not resist." She did not then scream because, "I was afraid if I screamed he would choke me or harm the child" (R.14). The little dark one "* * *rolled me around." At no time did either of them pay her five dollars about 11:30 AM on the morning before the incident (R.11).

She testified in response to the question: "Did you object to the intercourse prior to that time?", "I could not say a thing he had his hand over my mouth" (R.12).

The next morning witness was examined at the 8th General Hospital by Captain Nathaniel Tatkow, M.C., who found that she had multiple contusions and abrasions of the right thigh. "* * *She was four months pregnant* * * and semi hysterical* * *" (R.41).

Mr. Charles Eggerle testified that on the night in question Miss Facio's sister came to his house asking for help. He and his wife went to the house occupied by the two girls and saw "* * *the little girl [2 years old] sitting on the front porch * * *". He then returned to his house and notified the Military Police. When they arrived:

> "* * *The Military Police and I went and we looked around and we didn't see anything until Georgette Facio came running from the side of the river. She came running and all scared and hollering for her kid. She said that they threw her kid in the bushes near the river. The Military Police looked around and they found the kid sitting on the ground and they hollered to Georgette that the kid was there. They picked up the kid and they had to hold Georgette by the arm to keep her from falling* * *".

Mrs. Eggerle testified that Miss Facio "acted like a crazy person, running towards the road screaming and hollering" (R.38). * * *"She had her leg hurt and she was limping * * *". This witness and Captain R.F. May, Jr, of the 209th Military Police Company, corroborated in substance, the testimony given by Mr. Charles Eggerle.

Captain Gus S. Peters, Provost Marshal I Island Command, testified that since November 8, 1943, he has been Provost Marshal, officially, but unofficially since November 1, 1943. That prior to that time and for one and one-half years accused had been a member of his organization. On November 1, 1943, he had a talk with accused "* * *from the standpoint of a Company Commander* * *". Accused stated to him that "* * *he would give me a few facts about what had taken place the night before * * *". Checking these facts the following day he found a "* * *few discrepancies * * *" and the following morning he again called accused in, fully explained to him his rights, after which accused gave him his statement. (Pros. Ex. 6) (R.28)

First Lieutenant Francis E. Kernan, 223rd Field Artillery Battalion on the 9th of November, 1943, warned accused of his rights, and accused, after having read the statement given by him to Captain Peters, signed it (Pros. Ex. 6). The statement was introduced in evidence. It is substantially the same as the testimony given by accused as a witness in his own behalf and hereinafter discussed.

The defense called as its first witness, Mitchell Johnson who testified that about "* * *two months ago* * *" he was with accused in Noumea, New Caledonia, when they had the boxing matches. He had a drink of whiskey with accused and then he and accused "* * *walked around town for a while and tried to get a ride to the company* * *" (R.49). At 11:00 PM or 12:00 o'clock they were still trying to catch a ride, but it was two or three hours (R.54) before

they succeeded. They arrived at camp at 2:00 AM, going straight to bed. Witness had been drinking rum and lemon extract, but was not drunk (R.50).

Mr. Gonvaux, a fisherman who lived in Dumbea, testified that he had lived in the same house with Georgette Facio but "* * *on another side * * *" for about four months (R.54-55). At this time her sister lived with her. He had seen white soldiers come to the house. On one occasion they came at 8:00 PM and stayed until 2:00 AM. At no time had he ever seen colored soldiers at the house (R.56).

Accused elected to take the stand and testify. At about 2:30 PM on the afternoon of October 30, 1943 he went to the home of Georgette Facio and told her he wanted to "* * *zig-zig* * *"(R.59). She said, "five dollars", which accused gave her. At this time a car stopped in front of the house with a Lieutenant and a Warrant Officer in it. She told him to "come back later". He then returned to camp. No one but Miss Facio was present at the house at this time.

He went into town that night and stayed until after the fights which ended "* * *pretty close to 10:00 o'clock* * *". He had "* * * been drinking pretty heavy* * *" (R.60). He joined Johnson and together they walked to the edge of town and in about an hour or an hour and a half they caught a ride and got off in the immediate vicinity of the house occupied by Miss Facio. Accused knocked on her door but no one answered, although people on the inside could be heard talking. He testified:

> "* * *Anyway, they opened the door and they rushed out. When they ran out I reached for them myself but they went towards the black top and then I went back up the road. I was running and the ground was rough and I fell down. I lost my hat then. In the time I got up and was looking for my hat, Johnson called me from some place down near the bridge. He said "Come on Patterson, I have got it". So I went down there; when I got there, he had this woman but the baby of her's was on the side of the road so I picked up the kid and takes her down the side near the water. When I got there she was telling him "me give you plenty zig-zig, me give you plenty zig-zig"* * *"So I was going to get some myself but when he got through he said someone was shining a light. I didn't see any light and then he left and I didn't see him any more that night* * *".

Accused testified that he did not have intercourse with Miss Facio, but after Johnson had finished he took the baby and assisted her up the bank. She stated to him that "* * *someone was walking though the bushes pretty near us* * *". She then squatted down, quieting the baby, and "* * *speaking something in her language I couldn't understand * * *I thought she wanted to go back to the house* * *". She then "* * *went back down the bank* * *". He called for her to stop but she "didn't stop". Accused then laid the baby down, went back to the house, found his hat, and returned to his camp "* * * which is about four miles, maybe further* * *"(R.61). On cross examination accused admitted signing the confession but stated that the sentence "This statement was obtained without use of duress, and with no promise of immunity" was not seen "* * *until a few days ago * * *", but aside from that he had no criticism of it, and stated that no other correction or change was desired to be made (R.62). On examination by the court accused admitted that when Johnson "* * *got through *** then I started to have intercourse with her * * *". He stated that he "* * *opened my pants to get down on her* * *" where she was lying down with her "* * *clothes drawn up * * *"; she did not say anything when he started; "* * *She didn't indicate that she would like to move* * *"; and when Johnson mentioned a "* * *light being shined* * *I straightened up * * *"(R.73).

The court called Second Lieutenant Phillip B. Shoemaker, 902nd Air

Base Security Battalion, who testified that at about 12:30 AM on the night in question he made a bed check of the entire detachment and that accused and Johnson were missing (R.75).

Miss Georgette Facio recalled by the court, specifically denied saying "* * *me give you plenty zig-zig, me give you plenty zig-zig* * *". She stated that when the light on the road was seen that Johnson had already left and that accused "* * *was on top of me when I saw the light* * *" (R.77). After Johnson had had intercourse with her accused "* * *dragged me towards the river and he had intercourse at the foot of the grass * * * he had the baby in one arm and he was dragging me by the other * * *"(R.78).

5. Rape is the unlawful carnal knowledge of a woman by force and without her consent. (MCM p. 165).

In the instant case the victim positively testified as to all of the essential elements of the crime. The accused admitted his presence, his intention to have intercourse with her and his preparations, but denied the act itself. His defense that such act was to be voluntary on the part of Georgette Facio is refuted, not only by her, but by all of the surrounding facts and circumstances. Accused and his companion attempted to force their way into the home of the victim at a late hour in the night by threats of burning the house if entrance was refused. The two women, with two small children, fled the house clad only in their night clothes. Both were assaulted in their flight seeking safety and help. The victim failed to escape as her younger sister did and was then dragged from the road by accused and Johnson into the bushes and, though four months pregnant, raped by both accused and his companion. It may have been the intention of accused to have intercourse with his victim by peaceful means, but it is clear that he abandoned such, and his subsequent acts have all the essential elements of the crime of rape. It is undisputed that his victim was a woman of loose morals but lack of chastity is no defense when one unlawfully has carnal knowlege of a woman by force and without her consent. There is no haven of refuge for accused in the instant case by reason of the lack of chastity on the part of his victim.

The resistance offered by the victim was sufficient to support the court's findings that accused accomplished his purpose by force and against her will. Her flight from her home, clad only in her pajamas and nightgown; her attempt to secure aid from a passing automobile; her flight after it had passed; her screaming until she reached the bridge on the highway; her screams and struggles while being dragged into the bush; her further struggles when accused dragged her down the bank after Johnson had raped her; her fear for the safety, not alone for herself, but her eleven months old baby who had been handled roughly and her flight and hysterical condition when she finally reached the road after the crime had been accomplished, all constitute evidence to be considered by the court in determing whether she consented to the act charged. The evidence of resistance is sufficient to satisfy all requirements of the law.

> "Whether or not the woman exercised all the resistance within her power under the circumstances, and whether her resistance ceased because it was useless and dangerous or because she ultimately consented is a question for the jury /in this instance, the court-martial/ to decide (Mills v. United States, 164 U.S. 210, 212; Turner v. Pope, 33 Mich. 363; CM A 564, Fisher.)

The court was fully warranted in finding that the accused did, at the time and place alleged, commit the crime of rape upon the person of Georgette Facio in the manner alleged.

6. For the reasons stated the Board of Review holds the record legally sufficient to support the findings of guilty of the accused as alleged, and the sentence.

_____, Judge Advocate
Colonel, J.A.G.D.

_____, Judge Advocate
Lt. Col. J.A.G.D.

_____, Judge Advocate
Lt. Col. J.A.G.D.

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review
CM A-1006

3 March, 1944.

UNITED STATES v. Private First Class FRANK GIVENS (38330929), Company C, 267th Quartermaster Service Battalion.	Trial by G.C.M., convened at Noumea, New Caledonia, 6 January, 1944. Dishonorable discharge, total forfeitures, confinement for life. The United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial of the soldier named above has been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Frank Givens, Company C, 267th Quartermaster Service Battalion, did at APO 502, on or about 15 December 1943, with malice, aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill one Lewis Gory, a human being by shooting him with a rifle.

The accused pleaded not guilty to the charge and specification and was found guilty as charged. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence for the prosecution reveals that on the evening of 15 December, 1943, Privates Frank Givens (accused), Looney Draydon, William E. Hess, and Elery Jones (R. 9, 16), all members of Company C, 267th Quartermaster Service Battalion, stationed at APO 502, were playing stud poker in the tent occupied by accused, deceased, Hess and two other soldiers. The game was for "table stakes", that is, each player was limited in his betting to the money he had upon the table. Private Lewis Gory (deceased), who bore evidences of having been drinking liquor (R. 12, 15, 20, 45), joined the game after it had been in progress for some time. He had played the game previously and knew the rules (R. 11, 17, 45).

During the game, five cards having been dealt, one down and four face up, accused had a pair of eights showing, while deceased had no pair, his highest card being a queen. The other players threw in their hands. Deceased, having bet all of his money on the table, attempted to borrow money from the other players. They refused to lend him the money because of the rules of the game (R. 10, 16, 40). Deceased then took some coins from his pocket and attempted to bet them. Accused said that it was against the rules of the game and suggested that both the hands be disclosed and that the holder of the best hand should take the money (R. 40). Because of the argument Draydon and Jones left the game and went to their tent (R. 12, 17). Deceased's cards were exposed and revealed that he held only a pair of fives and that accused had the better hand. Accused picked up the money, about two dollars, and deceased said "you are taking me" (R. 40). Accused was not angry although deceased appeared to be (R. 10, 17, 40).

Accused and deceased then went to their respective beds (R. 40). The bed of accused was located near the tent door and across the tent from that occupied by deceased. Hess went to the latrine. He returned in a few minutes and noted that accused was sitting on his bed and that deceased was standing by his. He secured a pencil and paper and began to write. Deceased changed his clothes, putting on a pair of coveralls which he took from his barracks bag, mumbling something to himself at the time. What he was mumbling Hess could not understand. Deceased then took down his rifle which was hanging from the wall of the tent by its strap and laid it upon his bed (R. 41). He stood for a few moments, then hung the rifle up again (R. 41) and lay down. After about eight minutes (R. 46) he arose, sat on the side of his bed, and started to put on his shoes (R. 43), saying "I believe I will get me a drink" (R. 42). Accused then got up, secured his rifle, loaded it (R. 44) and said "Lewis you are not going anywhere" (R. 42). Hess told accused to put the rifle down and started towards him, but before he could reach accused, the latter, holding the rifle at his hip (R. 47), discharged it in the direction of deceased who "laid over on his bed" saying "get me, get me" (R. 49). Hess took the rifle from accused's hands and opened the tent door. Accused went out and Hess followed immediately behind him.

Accused went to the tent of Lieutenant Harold B. Miller, the company commander, and told him that "there has been a terrible accident" and that he had shot deceased (R. 51).

After he had been shot, deceased was found "kind of sitting up" on his bed, leaning against "the wall of the tent" (R. 22, 37). His hands were down beside him, and his legs, bent at the knees, were hanging over the side of the cot (R. 51, 74). Deceased had on only one shoe but had not laced it (R. 53). The bullet had entered the front of his body near where the sixth rib meets the breast bone. Its exit was at the back and slightly lower (R. 6). Death immediately ensued from rupture of the heart. Metal parts of the bullet were found imbedded in the blankets on deceased's bed (R. 74).

Accused made a statement to the provost marshall which was introduced as Prosecution's Exhibit 1. In it accused states "* * * Louis Gorey reached for his rifle to shoot me and I beat him to it". The remainder of the statement was substantially the same as the testimony given by accused as a witness in his own behalf and hereinafter discussed.

A number of witnesses for the defense including accused's commanding officer testified that accused was a good soldier and bore a good reputation for truth and veracity.

Accused took the stand in his own behalf and testified substantially the same as did the witnesses for the prosecution with reference to the poker game and the argument begun by deceased over the poker hand. Accused testified, however, that at the conclusion of the game deceased had said "all of you can go to hell, God damn all of you" (R. 61) and that while Hess was absent from the tent to go to the latrine deceased had said "I am going to kill me a son

of a bitch tonight" (R. 67). Accused asked him what he said and deceased answered "you heard me" (R. 67). Deceased then took something out of his barracks bag and put it into his pocket (R. 61). Immediately thereafter Hess returned to the tent (R. 67). Accused testified that:

> "* * * He [deceased] reached up for his rifle and I said Lewis don't mess with that rifle. * * * He looked around and said 'Phoo' and then he reached up for his rifle again * * * and he took his rifle down and I said don't mess with that rifle and then I reached up to get my rifle. About that time I had gotten my rifle and had my hand on the bolt and he still reached for his rifle so I pulled the bolt back and put in a cartridge and walked around in front of my door to the tent and fired the rifle. I whirled around, put the rifle on my bed and went to Lieutenant Miller". (R. 61).

Accused further testified that when he shot deceased the latter was standing up (R. 68) and his hand was upon his rifle (R. 62, 66, 68, 71). Accused "didn't know what he [deceased] was going to do with the rifle" and "didn't know what he had in it" (R. 64). Accused knew that deceased had ammunition in his barracks bag but did not know whether deceased's rifle was loaded or what deceased took from the barracks bag and placed in his pocket. Accused further testified that although he was only two steps from the tent door and could have left the tent or called for help, he did not do so because he was "too scared" (R. 64, 68), and "was afraid he would shoot me in the back when I ran out the door" (R. 62, 66, 67, 71). "I didn't know what he was going to do" (R. 63).

4. The evidence establishes, and the accused admitted, that he intentionally shot deceased with a rifle. Deceased's death ensued therefrom. Accused attempted to excuse the homicide on the ground of self-defense, testifying that because of deceased's threats and subsequent actions he was in fear of his life, and was too afraid to either flee or call out for help.

If the accused reasonably believed that he was in immediate danger of death or grievous bodily harm from the deceased he was justified in using such means as were then available to him including that of killing his assailant in self-defense (Brown v. United States, 256 U.S. 335, 343), but the facts and circumstances which would excuse the killing must be such as to induce the reasonable belief or fear of the existence of such peril of death or great bodily harm (Allison v. United States, 160 U.S. 203, 217; Acars v. United States, 164 U.S. 388, 392). Whether or not sufficient circumstances exist to establish that accused acted in self-defense is for the court to decide as a question of fact (Allison v. United States, supra; Brown v. United States, supra).

Although accused did not demonstrate the depravity of mind or the animus generally associated with one charged with, and found guilty of, murder, the court by its finding determined that he did not act in self-defense. Having so determined, the evidence reveals all of the elements of murder (par. 148a, M.C.M., 1928) and is sufficient for the court-martial to predicate their finding that accused killed deceased as alleged. Either death or life imprisonment is a mandatory punishment for the offense.

5. For the above stated reasons the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of the court and the sentence.

[signature], Judge Advocate.
Colonel, J.A.G.D.

[signature], Judge Advocate.
Lt. Col., J.A.G.D.

[signature], Judge Advocate.
Lt. Col., J.A.G.D.

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review
CM A-1012

16 March, 1944.

UNITED STATES v. Second Lieutenant NICHOLAS T. KLIEBERT (O-1288568), Company D, 172nd Infantry Regiment, 43rd Infantry Division.	Trial by G.C.M., convened at A.P.O. 43, 29 November, 1943. Dismissal.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specifications:

CHARGE: Violation of the 75th Article of War.

Specification 1: In that 2d Lt. Nicholas T. Kliebert, 172d Infantry Regiment, 43d Infantry Division, then of Company "E", 169th Infantry Regiment, 43d Infantry Division, being present with his platoon while it was engaged with the enemy, did at APO 43, c/o Postmaster, San Francisco, California, on or about 18 July, 1943, shamefully abandon the said platoon and seek safety in the rear, and did fail to rejoin it until on or about 21 July, 1943.

Specification 2: In that 2d Lt. Nicholas T. Kliebert, 172d Infantry Regiment, 43d Infantry Division, then of Company "E", 169th Infantry Regiment, 43d Infantry Division, did, at APO 43, c/o Postmaster, San Francisco, California, on or about 18 July, 1943, while before the enemy, shamefully abandon to the enemy a litter train of patients, which it was his duty to defend.

The accused pleaded not guilty to the charge and specifications and was found not guilty of the charge but guilty of Article of War 96; of specification 1 "Guilty, except the words 'Shamefully abandon the said platoon and seek safety in the rear, and did fail to rejoin it until on or about 21 July 1943', substituting therefore respectively the words 'fail in his duty by leaving his platoon without ascertaining whether further resistance to the enemy were possible', of the excepted words 'Not Guilty', of the substituted words 'Guilty'"; of specification 2 "Guilty, except the words 'Shamefully abandon to the enemy a litter train of patients which it was his duty to defend', substituting therefore the words 'fail to defend a litter train of patients in that he withdrew before all reasonable efforts had been made to rescue them.' Of the excepted

words 'Not Guilty', of the substituted words, 'Guilty.'" He was sentenced to be dismissed the service. The reviewing authority approved the sentence and the confirming authority confirmed the same. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence for the prosecution shows that on the 6th day of July, 1943, Captain Richard L. Saillant of the 118th Engineer Battalion, was stationed with his organization near Zanana Beach, New Georgia Island. He had applied for security of a location where a waterpoint was to be subsequently established on the Barike River at the site of a bridge (subsequently designated "Butcher's Bridge") along the Zanana peep trail about 1½ miles behind the front lines (R. 44-45). On 6 July, 1943, accused and his platoon consisting of 36 men (R. 33) were assigned to the Engineer Battalion for this purpose. They were armed with six BARs and M1 rifles and their duties were to establish a perimeter that would defend the waterpoint, when the same was moved in (R. 45). An adequate supply of ammunition was furnished the platoon.

Accused, with the aid of Staff Sergeant John J. Finn, second in command, laid out the perimeter with direct and cross fire lanes duly established for the automatic weapons, pill boxes were dug, and a general defensive position established. The defense was divided into two parts. Accused commanded that part covering Butcher's Bridge and Sergeant Finn a sector a short distance southeast of Butcher's Bridge (R. 32). On the late afternoon of 17 July, 1943, a number of litter patients and walking wounded arrived at this site. The Japs had blocked the road between Butcher's Bridge and Division Headquarters at their rear. Accused accepted these patients, directing that the more serious cases be placed in the pill boxes (R. 10). All during the next day more wounded continued to arrive, totalling about 30 or 40 walking patients and about 16 litter patients (R. 9). All but fifteen were placed in pill boxes, this number being left on litters under a big tree about 15 feet off the trail (R.14). Accused had blankets and shelter-halves furnished the patients (R. 12) and directed that foxholes be dug on each side of the pill boxes for the weapons (R. 34).

About 8:30 or 9:00 P.M. on the night of July 18, 1943, the Japs attacked from the direction of Division Headquarters in a force (R. 6) estimated at between 200 and 300 men. Sergeant Harold O. Ashtown testified that he was squad leader in accused's platoon, that when the attack started he was in a foxhole with two men armed with a BAR and two M1 rifles. The BAR was fired until it jammed and "We got quite a lot of them". They then withdrew as they had been ordered by accused to do, if attacked by a large force, and stayed within the sector until next morning (R. 16-17).

1st Lieutenant Albert Wells, 169th Infantry, one of the litter patients, testified that when the Japs came down the trail and moved across the bridge "that was when the fight started. It continued all night long with several lulls * * * There was shooting all night long" (R. 7). Witness remained in his foxhole, which was about 50 yards from Butcher's Bridge until daylight on 19 July, 1943, when he met "a half-dozen more men out of their holes". The last time he saw accused was at 5:30 P.M. on 18 July, 1943 (R. 7). There being no other officer present witness "took charge of that area".

Sergeant Harry Giliotti, 118th Medical Battalion, was in charge of evacuating patients from the front lines and was accompanying the litter patients. He met accused on the afternoon of 18 July, 1943, and was directed by accused as to where to place the patients. Accused explained to witness the plans for the defense and, though armed, they were directed by accused "not to fire" (R. 10-11). Witness heard firing "at intervals" all night. On the morning of 19 July, 1943, witness looked for accused but could not find him although he "searched every hole in the area". He counted twenty American dead and six dead Japs (R. 12).

Sergeant Joseph Petrowsky, Company B, 118th Medical Battalion, was in charge of the litter section of patients. He talked with accused on the afternoon of 18 July, 1943, relative to the disposal of the litter patients. The next morning he looked for accused but could not find him. Of the patients on the litters witness found eight were dead (R. 14). Accused instructed witness "to do no firing under any circumstances * * * the men on the outer defense would take care of it; we would not have to worry about anything" (R. 14).

Staff Sergeant Adrian J. Demers, Company E, 169th Infantry, testified that he was in accused's platoon at Butcher's Bridge on the night of July 18-19, 1943, acting as platoon guide (R. 66). His mission that night was to "observe and fire". At no time during the night did he receive any message from accused. At about 3:00 A.M. he heard the Japs mumbling in his perimeter. He left his foxhole and crawled across the stream in an effort to contact Sergeant Finn and get help from him. There was very little firing from our own weapons and he "knew that the Japs were taking over" - they were "yelling at one another" inside the perimeter (R. 77), and that the situation was hopeless for all men within the perimeter (R. 77). He searched several foxholes in an attempt to contact Sergeant Finn but when shots landed just above his head he went no further but remained in a foxhole until daylight. Returning the following morning to the place where the litter patients had been left he observed about fifteen of them dead (R. 80).

Private First Class Lamar P. White, 2nd Battalion, Headquarters, 169th Infantry, was in a foxhole on the north side of Butcher's Bridge on the night of 18 July, 1943, with Corporal Tutor, and Privates Stewart and Patterson. When the Jap attack started accused joined them in their foxhole (R. 21). Accused was armed with an M1 rifle. It was bright moonlight and he could hear the Japs "quite a bunch of them * * * drinking water and shooting the litter patients". No firing was done from this foxhole by accused or any of the others but Corporal Tutor threw one grenade (R. 22). He had no knowledge of any telephones in this area (R. 23). At no time did accused leave the foxhole until they all left together. Witness testified that he "figured that everyone who was there that night, from the amount of firing going on, the next morning no one would be alive" and that when he left the foxhole he did not think any one in the area was, at that time, alive (R. 102). When asked to describe the condition of accused just after leaving the foxhole he replied "He seemed to be all right to me", that he was not crying, was not hysterical, and was calm (R. 102-3). About 12:30 or one o'clock this witness suggested "we leave". The others thought "it was a good idea. Lt. Kliebert did not say anything but he left first" as he was "on the left side of the hole and had to leave first". All left their weapons in the foxhole. "The Lieutenant suggested going to the division when we left the foxhole" (R. 22). They crawled (R. 23) for 50 yards, crossed the river, and reached the jungle where they were directed by Corporal Kramer who had left an adjacent foxhole and had joined them together with other members of Company E (R. 22). They walked until about an hour and a half before daylight, then rested until they could get their direction to division headquarters. They traveled all that day and the following night and reached the Headquarters about 12:30 on the 20th of July, 1943 (R. 24).

Private First Class Stewart testified in substance the same as the preceding witness. He further stated that the Japs were killing men "in the hole right next to us" and "we thought we were the only ones left" (R.28), and "we thought they [the patients] were all dead * * *" (R. 29). No shots were fired or weapons discharged from this foxhole (R. 27) although they had ammunition, could see the Japs when they left, and could hear men being killed (R. 30). When they left the friendly firing had slackened off but there were a "few shots" (R. 31).

Staff Sergeant John J. Finn, Company E, 169th Infantry, testified as to the establishing of the defensive perimeter at the point in question and

the placing of the wounded in foxholes. Witness was in charge of the extreme right of the perimeter south of Butcher's Bridge. He had heard that there were Japs between this area and Division Headquarters and had orders from accused "to defend the patients" and "not to fire unless we could actually see a target and had something to shoot at" (R. 38). Witness saw no Japs that night but one of his men was killed and two wounded. He heard much firing both by the Japs and Americans throughout the night. Accused never turned over the command to him (R. 58, 64). Witness saw from 12 to 15 dead patients (R. 65). On the morning of 19 July, 1943 (R. 38) witness took all of his men and went to the bridge where he was joined by the platoon guide and others. Accused not being present witness took charge and found 24 of the platoon of 36 present. He saw four or five Japs dead on the area and "at least ten" Americans (R. 38). At no time during the night of July 18-19 did he receive any word from Lieutenant Kliebert and he next saw him on 21 July at Company B, 118th Engineers, when they shook hands and talked over their different experiences during the night (R. 38). At this time Captain Saillant testified accused did not seem frightened, his speech was coherent; "It was an exciting story told in a forceful manner, and I wouldn't call him calm" (R. 56).

The defense called as its first witness Sergeant Clyde Raulston, Company E, 169th Infantry, who testified that he, with Sergeant Dietlin, occupied a foxhole in the perimeter commanded by accused. The attack started about 9:00 o'clock and for four and one half hours they fired their BAR "practically all of the time". The top was blown off their foxhole leaving them in the moonlight with no protection. He heard no American firing across the creek so they left and went down to the river. He did not report to accused that he was leaving as "I did not know where he was" (R. 84).

Private First Class Earle C. Angell, of the 169th Infantry, testified he occupied a foxhole on the night in question together with three others. They threw about ten grenades. At 3:00 A.M. all guns in their area had stopped firing and the Japs were "going from hole to hole throwing hand grenades and machine gunning the holes" (R. 89). "The Japs had crossed the bridge; had possession of our area" (R. 90). Witness and his companions then left the foxhole and went into the jungle. He knew where accused's position was that night but did not report to him because "the way things looked it did not look as if anyone was left in the area" (R. 90).

Staff Sergeant Joseph D'Alphonso of the 118th Medical Battalion, testified that he was liaison sergeant in charge of the litter patients. About twenty minutes after the attack started accused came "alongside of us and said that he had put a bayonet into a Jap. We could hear the Jap moaning* *" and could see him "very plainly". Accused stayed in that area about half an hour and then went into a foxhole and was seen no more by witness. At this time accused was armed with a rifle (R. 92) and gave orders to them "Don't fire that BAR under any circumstances" (R. 93).

Believing that the Japs "had completely taken over" and "that everyone in the area was either killed or escaped into the jungle", witness, with seven others, left the area at 2:00 A.M. and went into the jungle, and waited there until daylight when they made their way down to the beach. He estimated the number of Japs in the perimeter at the time to be about two hundred (R. 93). Defense called several other witnesses who testified in substance as to the general conditions in accused's perimeter as had other witnesses called by the defense.

Accused elected to be sworn and testify. He was in command of the platoon at Butcher's Bridge on the night in question and established the defense perimeter. He received the litter patients and wounded who came in on July 17-18, 1943, and assumed the responsibility for their defense. Just prior to the starting of the battle he was off the trail and had "dozed off". He was awakened by the firing of a BAR and noticed someone running towards the Bridge. He then noticed a "person coming towards me". It proved to

be a Jap. Accused "pulled out my trench knife, and drove it into his body" and the Jap"* * ran forward approximately 25-30 feet and fell down" (R. 111). Accused then crossed the road and lay on the ground. He saw three Japs looking at the litter patients. Then the BARs opened up and the three Japs ran towards where accused was lying. Accused at this time "became a little excited" and started running. One of the Japs grabbed accused by his trousers but accused "twisted and got loose", turned, and fired his M1 rifle. "I believe, I hit the leading Jap, but don't know if I hit the other two, although all three hit the ground" (R. 110). After looking over the situation for about five minutes accused entered the foxhole occupied by Stewart, White, Tutor and Patterson. It was then about 9:30 P.M. (R. 113). After entering the foxhole accused did not fire. He testified -

> "* * * The Japs had put a machine gun into a tree and fired everytime anyone made any sort of an attempt to move in the hole I was in, and the hole was very much exposed, the moon was very bright to shadow over the hole. Myself and the men in the hole tried dozens of times to get up to fire or observe and this machine gun would open fire and was hitting the parapit of our hole everytime.
>
> Q. Now we come to the time immediately preceding your leaving the hole. What was your estimate of the situation fifteen minutes before you left the hole?
>
> A. Having heard noises to the rear of the attack, in the beginning of the attack, hearing the wounded groan, hearing the Jap attacking the pill boxes in the area, hearing no fire of our own, and only one or two shots from the Japs, seeing the Japs drinking water at the creek, seeing them stand their rifles up against the tree, hearing them jabbering and yelling for all they were worth, and marching through the area in columns, I came to the conclusion that everyone in the area except ourselves had been killed or had left the area." (R. 113).

Private Tutor then said that everybody had been killed or left and "Why, don't we get out of here". Accused told him to wait a minute and that "I would decide what was the best thing to do". They then left the foxhole, accused going first, as he was nearest the edge. They headed northeast, crossed the creek and entered the jungle with the intention of going to Headquarters and reporting what had happened at Butcher's Bridge (R. 114).

On cross-examination accused stated that he carried his M1 rifle with him when he left the foxhole (R. 129). While in the jungle they were joined by two other men and traveled until just before dawn when their compass failed and they got lost (R. 116). They did not reach Division Headquarters that day because they "could not get through on account of the Japs" (R. 116) who still had the road between Butcher's Bridge and Division Headquarters blocked. They were fired upon by snipers located in the trees, and accused estimated that he saw approximately fifty or more Japs during the day. They reached Division Headquarters on the morning of 20 July, 1943. Accused then reported to Captain Saillant (R. 117). Accused estimated the Jap force at about 300 and reported to Captain Saillant that "we had gotten somewhere in the vicinity of 100 Japs" (R. 127).

Accused further testified that Sergeant Finn had the sector southeast of Butcher's Bridge with 19 men, including himself. He did not know where the foxhole was which Sergeant Finn occupied and did not attempt to communicate with him because "The fire was so heavy in the area and I would

have had to go across open ground that was well lit up by the moon in order to do so". That while it would have been possible to have gone a "roundabout" outside the perimeter accused made no attempt to do so. No effort was made by him to communicate with any of his subordinates because he felt all 18 men southeast of Butcher's Bridge had been killed for he heard the Japs "in that vicinity jabbering and no one fired upon them", and they were only "from thirty to fifty to sixty yards away" (R. 128). When he left accused "felt there was no one left alive in the area" but admitted that he made no attempt to contact any of the non-commissioned officers to see if they were alive (R. 130). At the close of the defense's case the prosecution offered in evidence an unsworn statement of accused. It covered to a large extent his testimony given as a witness but varied in certain particulars. In his statement he said:

> "At that time I looked around and saw that my men were firing at targets and getting good results. I also saw five Japanese stand a wounded man against a tree and bayonet him. My men and I fired at these Japs and I saw them all go down. Immediately after this I saw Japanese cutting, hacking and shooting the wounded on the litters and then throwing them off and using the litters to evacuate their own wounded. They would pile on as many as three on a litter. They evacuated towards our front lines.
>
> Soon after this, they attacked the wounded still remaining in the holes. In the process of going from hole to hole, the Japanese arrived at the hole next to mine. With me were, White, Stewart, Tudor and Patterson. I said to the boys, 'I have 8 rounds in my rifle and I am going to get 7 Japs with 7 rounds and use the last one for myself'. One boy said, 'Why do that? It would be best to get out of here and save ourselves'. I then told the fellows it was alright to get out and make a run for it. * * *and said, 'Follow me'.
>
> * * *
>
> When the firing ceased, I arrived at the conclusion that my platoon had withdrawn and I and the four men with me started in the direction of Division Headquarters. I did not know at this time how many casualties there were among my platoon, nor the condition of the wounded men who had been attacked. I left when I saw about 100 Japs, within the perimeter, who were doing close order drill with a harrassed American in their ranks. They were also eating our rations and drinking water from the water point. Some of their rifles were stacked against trees and others had their rifles in their hands. I don't know the time that we left. * * *". (Pros. Ex. B, pp. 2, 3).

4. The court by its findings exonerated accused from shamefully leaving his platoon and shamefully abandoning the litter patients but found him guilty of failing in his duty in leaving his platoon without first ascertaining if further resistance to the enemy were possible, and that he failed to defend a litter train of patients in that he withdrew before all reasonable efforts had been made to rescue them.

The evidence is undisputed, and the accused admits, that he left his platoon about 2:30 A.M. on 19 July, 1943, and went to the rear, arriving there about noon on 20 July, 1943. The court found the accused guilty both of leaving his platoon and likewise failing to defend the litter patients. The gist of the offense of which accused is found guilty is that of leaving his platoon under the circumstances.

At page 624, 2nd Edition, 1920, Winthrop's Military Law and Precedents, it is stated:

"* * * Every available means of holding the post and repulsing the enemy should have been tried and have failed before a surrender or abandonment can be warranted, and, if the same be resorted to on any less pretext, the commander will be chargeable with the offence indicated by the Article. In time of war nothing indeed so fatally compromises the public interests, and nothing is so inevitably made the subject of investigation and trial, as the premature or unnecessary yielding up to the enemy of a fortified post; and when the periods of siege which have in many cases been withstood are recalled, it will be appreciated how possible it may be found to protract a defence under circumstances of extreme privation and difficulty".

At page 726, Winthrop states:

"Neglect to attend drills, or other exercises or duties, not chargeable under Art. 33 [75].

Failure by a commanding officer to be present and properly exercise command."

It follows that an officer is charged with a duty properly to exercise command. In the event he fails to do so and abandons his position before he has exercised every available means of holding the same and repulsing the enemy, he violates one of the fundamental duties he assumes when he becomes an officer.

The testimony is undisputed that accused was in his foxhole from approximately 9:00 P.M. to 2:30 A.M. on the night in question, and that during this time he made no effort whatsoever to contact any of his platoon under his immediate command or those who were in adjacent foxholes, or to seek assistance from the 18 men commanded by Sergeant Finn. There was testimony that men of his own platoon were firing at intervals until approximately daylight. There was also testimony that the 18 men commanded by Sergeant Finn did no firing during the night. Accused gave as his reason for leaving that he thought all of his platoon, other than those in his own foxhole, had been killed and that further resistance would be futile. As the commanding officer of this sector accused was charged with the duty of ascertaining and determining the true situation and not to base his actions on presumptions. That he did not fulfill the duties required of a commanding officer in a situation of this character is evidenced by the fact that during the entire attack by the Japs only one man of his platoon was killed and only two wounded and that the next morning at daylight 24 of his platoon were in the immediate area. Accused admitted that he crawled some fifty yards into the jungle and the testimony was that Sergeant Finn's platoon was only from thirty to fifty yards from accused's foxhole. Accused testified that it would have been possible to have reached Sergeant Finn's platoon by going a "roundabout" but the record is devoid of any evidence that such was attempted. His leaving under these circumstances warranted the court's finding that he did fail in his duty by leaving his platoon without ascertaining whether further resistance to the enemy was possible and in so doing he failed to defend the litter patients, many of whom were killed. Such conduct is clearly contemplated within the provisions of Article of War 96, and the court was fully warranted in so finding.

5. For the reasons above stated the Board of Review is of the opinion

that the record of trial is legally sufficient to support the findings of the court and the sentence.

, Judge Advocate.
Colonel, J.A.G.D.

, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General, Melbourne, Victoria, 20 March, 1944. To: Commanding General, USAFISPA, A.P.O. 502.

1. In the case of Second Lieutenant Nicholas T. Kliebert (O-1288568), Company D, 172nd Infantry Regiment, 43rd Infantry Division, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the filenumber of the record in brackets at the end of the published order, as follows:

(CM A-1012).

ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 4, USAFISPA, 29 Mar 1944)

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review
CM A-1023

25 March, 1944.

UNITED STATES v. Private HENRY B. NEWTON (16040915), Headquarters Company, Base Section No. 3, A.P.O. 923.	Trial by G.C.M., convened at Headquarters, Base Section No. 3, U.S.A.S.O.S., A.P.O. 923, 3 February, 1944. Dishonorable discharge, total forfeitures, confinement for twenty years. The United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW.
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial of the soldier named above has been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Henry B. Newton, Private, Headquarters Company, (Quartermaster Section) Base Section No. 3, did at or near APO 923 on or about 8 January, 1944, forcibly and feloniously against her will have carnal knowledge of Helen Breffni Arnold, a female not his wife.

The accused pleaded not guilty to the charge and specification and was found guilty as charged. He was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence. The confirming authority vacated "* * * so much of the findings of guilty * * * as involves findings of guilty of an offense by accused other than assault with intent to commit rape, at the place and time and upon the person alleged, in violation of Article of War 93." The sentence was commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement for twenty years. The United States Penitentiary, McNeil Island, Washington, was designated as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence for the prosecution shows that about one o'clock on Saturday afternoon, January 8, 1944, accused walked north on Ford Street, Brisbane, Australia (R.11,14). He went into a vacant lot where he remained a short time and then proceeded toward Miles Street (R.14). Long grass and a big tree with low hanging branches were growing on the vacant lot (R.15). Accused continued on to the house of Mrs. Katie Eyres where he inquired for her daughter, Dorie Hodgins. Mrs. Eyres told him that her daughter was sick. He then left, returning along Ford Street past the vacant lot (R.14). Later

that afternoon, accused again went to the Eyres house and inquired for Dorie Hodgins and was again told that she was ill and to call another day. As before, accused went to and from the Eyres house along Ford Street passing the vacant lot (R.14,12).

At about 4:00 that afternoon Mrs. Dorothy Barnes, who was at a house on the opposite side of Ford Street in view of the vacant lot, saw a man she later identified as accused,

> "* * *looking up at the house. He had a little girl with him and I watched, and she seemed to be talking to him. I saw she was friendly. I watched them and they walked down past my place. I don't know what he said, but I saw him point his right hand over towards the tree. Then I watched a little while longer and that is all I saw * * * she had a floral dress. I think the predominant color was green. * * * " (R.14).

Helen Breffni Arnold, a girl six years of age, was presented as a witness by the prosecution. Before being sworn and upon examination by the prosecution, she testified that she did not go to Sunday school but that if one did not tell the truth it is not fair; and "You get a black tongue if you tell stories". The defense objected to the competency of the child as a witness. The objection was overruled by the law member and the child was sworn. She testified that she met accused at a tram stop; "* * * he took me around the corner * * *We went to a bushy place. * * * He took off my panties. * * *The thing the boys have, he rubbed it up and down my tail and spat on me," and that he layed on top of her (R.5). Upon returning home at about 3:30 P.M., Helen was met by her mother Elsie Ann Arnold. Mrs. Arnold had been a general and obstetric nurse for five and one half to six years. She testified that the child's clothes were very dirty and had a most offensive odor. Her panties were on backwards. She observed inflamed contusions in the child's lower vaginal orifice and particles of foreign substance which might have been earth in the interior of the folds of the vagina. Mrs. Arnold further testified that Helen referred to the region of the vulva and vaginal orifice as the "tail" and the rectum as the "sit upon" (R.6,7). The clothes which the child wore on that occasion were received in evidence and later the dress was identified by Mrs. Barnes as being very much like the one worn by the little girl whom she saw with accused (R.7,15). Doctor St. Ledger likewise examined the child but was not called as a witness (R.7). Shortly thereafter Doctor William John Arnold, the child's father, made a further examination and found "* * *definite congestion of the vaginal mucosa leading up to the hymen. There was earthlike substance adhering to the mucosa just inside the entrance to the vagina and a sticky-like a seminal fluid." (R.10). Doctor Arnold stated that it was his opinion, based on his examination in conjunction with, "* * *the story of the child", the congestion in the vagina was due "* * *entirely to interference with the child, caused by the insertion of a man's penis into her vagina" (R.10).

An examination of the child's dress and panties was made by Detective Constable Thomas Martin Bay who was in charge of the police laboratory of the Criminal Investigation Branch, Brisbane, Australia. He found a blood stain on the outside of the fork of the panties and seminal staining containing human spermatozoa on the waistband of the panties and on the left shoulder of the dress (R.21,22).

Captain James N. Palmer, M.C., of the 42nd General Hospital made a neuropsychiatric examination of accused and found him to be of sound mind and responsible for his actions (R.18).

On behalf of the defense, Staff Sergeant Allard L. Bartling, Headquarters Company, Base Section No. 3, testified that he ran the "supply". That he saw accused at Yeronga Park "* * *between the hours of 3:30 and 4:30 or a quarter of five," on January 8, 1944, when accused drew a pair of shoes, that had been repaired for him (R.22). At that time accused appeared sober (R.27).

Accused elected to be sworn and testify. He testified that about 10:30 in the morning of January 8, 1944, he left his quarters in Yeronga Park for town. At 11:30 the bars opened and he went in the Criterion Bar on George Street where he remained until "they had run out of drinks". About 12:30 that afternoon he went to the Australia Hotel where he had several drinks. He was drinking gin, rum, and brandy, but was not drunk when he left there (R.29). He then went along Ford Street stopping at a vacant lot and urinated under a tree with low hanging branches. He then proceeded to the home of Mrs. Eyres and asked for her daughter Dorie (R.29,38). Mrs. Eyres told him Dorie was asleep (R.30,36). He then left and went to the races at Albion Park where he remained for about an hour and a half. While there he took two or three drinks (R.31,35).

Accused then again returned by way of Ford Street to Mrs. Eyres' house, again asking for her daughter Dorie. He was told that she was still asleep and he left saying he would be back "Monday or later" (R.31). He then left, proceeding along Ford Street, and caught a tram at tram stop 24 in Clayfield and went directly to Yeronga Park (R.31). It was stipulated that the average time taken by trams between tram stop 24 in Clayfield and Yeronga Park was forty-three minutes (R.44). Arriving at Yeronga Park, he went to the latrine and then laid down on his bunk a short while (R.31). He went to the supply room and drew a pair of repaired shoes, returning to his bunk for about three quarters of an hour after which he went to mess about five-thirty or a quarter of six (R.32). He was arrested the following Monday and taken to Somerville House Jail. That evening accused was lined up with five M.P.'s for identification. He testified:

> "* * *This civilian police that was along when I was arrested asked the child [Helen Arnold] if anyone was in the lineup she had seen before, if the man was in the line that "bothered you the Saturday before". She said, "No". Then he leaned down and put his arm around her and said something to her I didn't hear, but then he said, "Is there anyone there you think you have ever seen before?", and she pointed at me, and he told her to walk over and touch the one she had seen before, and she came up and touched me."

He testified that prior to his arrest he had never seen Helen Arnold (R.32).

On cross examination accused admitted that he was not telling the truth when he told Colonel Johnson that he did not remember what happened "after three o'clock until about six", January 8, 1944 (R.33,34).

Technician Fourth Class Stephen S. Gorey testified in rebuttal on behalf of the prosecution that at the time Helen Arnold identified accused in the lineup following his arrest:

> "* * *Sergeant Doherty was present, and he said to Helen something to the effect, "These men are brought here for you to look at". Then he said to her, "Do you know any of these men". Helen shook her head. She didn't say anything. Then Sergeant Doherty said to her, "Are any of these men like the man you were with on Saturday?", and she said "Yes". And Sergeant Doherty said, "Which one?". Helen pointed in the direction of Newton. Sergeant Doherty then said, "Helen, will you go and touch the man who is the man you mean?", and she then went forward very timidly and she touched the man Newton on the leg, and then Sergeant Doherty said to her, "Is that the man, is he only like the man, or is he the man?". Then she said "He is the man. * * *
>
> "Well, as the men came out I distinctly asked them to stand naturally, but Newton stood at an exaggerated posture of attention, with his, he made a demonstration with his eyes, looking as though straight up to the sky, in a position which would not show the child his normal facial contour." (R.41).

4. The evidence establishes that a child of six years of age went with accused to a bushy place on a vacant lot where he removed her panties and lay on top of her. The child testified, "The thing the boys have, he rubbed it up and down my tail and spat on me." Her mother testified that by "tail" the child referred to the region of the vulva and vaginal orifice. Accused denied the commission of the offense by testifying that he had never seen the child prior to his arrest and attempted to establish an alibi. Based upon such evidence, the accused now stands convicted of an assault with intent to commit rape.

The child alone testified to certain essential elements of this offense. After preliminary examination, the defense objected to the competency of the child as a witness. The objection was overruled by the law member whose ruling, though not conclusive on the court (A.W. 31), was not objected to by any member of the court and her testimony was received in evidence. The determination of the competency of a child to testify as a witness is within the discretion of the court (Underhill's Criminal Evidence, 4th Ed., p. 722-727; Wharton's Criminal Evidence, Vol. 3, p. 2030; par. 120 b., M.C.M., 1928, p. 124). The record of trial does not reveal that the court abused its discretion in determining that the child was competent to testify as a witness.

The record reveals that the accused removed the child's panties and rubbed his private parts upon her person. There is no evidence that such actions were without the consent of the child. Consent of the person assaulted constitutes a defense to an assault with intent to rape. This rule, however, does not apply where the person assaulted is not of the age of consent within the law; consent, or lack of consent, under such conditions is not an element to be considered, as legally such a person has no will either to resist or to consent (4 Am. Jur. sec. 89, p. 175, sec. 748 Wharton's Criminal Law; p. 311 Miller on Criminal Law). The opinion of The Judge Advocate General, CM. 212056, Smith, has been considered and the Board of Review is of the opinion that it is not in conflict with the principles of law last stated. In the instant case the child assaulted was of tender age and incapable in law of consenting to the assault by accused. From the manner in which the assault was committed the court could properly infer that carnal knowledge was intended. (sec. 451, II Bull. JAG p. 188).

The court had before it accused's defense that he never saw the child prior to his arrest and his alibi. It is the province of the court to weigh the evidence and judge the credibility of the witnesses (sec. 395 (56), Dig. Ops., JAG, 1912-40). Thus they might properly disregard all, or any of the testimony of accused. The record contains evidence upon which a finding that accused did assault the child with intent to commit rape could legally be predicated.

5. For the reasons above stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of the court and the sentence.

Colonel, J.A.G.D., Judge Advocate

Lt. Col. J.A.G.D., Judge Advocate

Lt. Col. J.A.G.D., Judge Advocate

1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General, Melbourne, Victoria, 28 March, 1944. To: Commander-in-Chief, SWPA, A.P.O. 500.

1. In the case of Private Henry B. Newton (16040915), Headquarters Company, Base Section No. 3, A.P.O. 923, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM A-1023).

ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 3, USAFFE, 1 Apr 1944)

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review
CM A-1024.

18 March, 1944.

UNITED STATES v. Captain THEODORE W. EASTLAND (0471475), 91st Replacement Battalion, AAF.	)	Trial by G.C.M., convened at Headquarters, Fifth Air Force, A.P.O. 925, 2 February, 1944. Dismissal.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 96th Article of War.

Specification 1: In that Captain Theodore W. Eastland, presently assigned to 91st Replacement Battalion, AAF, then assigned to 4th Airdrome Squadron, did, between 18 May, 1943 and 4 June, 1943, the exact date or dates being unknown, wrongfully purchase from the Army Exchange or Commissary aboard the U.S.S. Mormacsea while enroute from San Francisco, California to APO 923, for an unauthorized purpose, to-wit, resale, approximately sixteen cases, consisting of fifty cartons each, of American brands of cigarettes, and subsequently, between 4 June 1943 and 3 July, 1943, the exact date or dates being unknown, sell the same to Australian civilians for his own personal profit.

Specification 2: In that Captain Theodore W. Eastland, presently assigned to 91st Replacement Battalion, AAF, then assigned to 4th Airdrome Squadron, did, on or about 4 June, 1943, wrongfully and unlawfully and without payment of Australian customs import duties, bring into Australia for an unauthorized purpose, to-wit, resale, approximately eight cases, consisting of fifty cartons each, of American brands of cigarettes, being tax free and for the use of United States armed forces on foreign duty, and subsequently, between 4 June, 1943 and 3 July, 1943, the exact date being unknown, sell the same to Mrs. A. M. Weller, an Australian civilian, for the sum of approximately two hundred pounds, thereby making a personal profit of approximately one hundred forty one pounds ten shillings, value approximately $465.60 in American currency.

CHARGE II: Violation of the 95th Article of War.

Specification: In that Captain Theodore W. Eastland, presently assigned to 91st Replacement Battalion, AAF, then assigned to 4th Airdrome Squadron, did, at APO 925, on or about 15 November, 1943, with intent to deceive the Commanding General, Fifth Air Force, officially state under oath to Captain Thomas L. Driscoll, Inspector General's Department, Fifth Air Force, that of American cigarettes purchased by him from an Army Exchange or Commissary on board the U.S.S. Mormacsea while enroute from San Francisco, California to APO 923, some were stolen and some he gave away and he took the last nineteen cartons to Sydney; that he never sold any cigarettes to anyone, referring to cigarettes purchased by him from an Army Exchange or Commissary on board the U.S.S. Mormacsea; that he had never had any business dealings with anyone connected with the Albert Hotel in Brisbane; and that he had never purchased cigarettes in case lots from any other officers, all of which statements were known by him, the said Captain Theodore W. Eastland, to be untrue in that the American brands of cigarettes purchased by him on board the U.S.S. Mormacsea were not stolen, given away, or taken to Sydney, but, that he, the said Captain Theodore W. Eastland well knew that he had disposed of approximately eight cases of said cigarettes by selling them to Mrs. A. M. Weller, an Australian civilian and receiving therefor the sum of approximately two hundred pounds, value $645.60 in American currency; in that he did have business dealings with someone connected with the Albert Hotel in Brisbane, to-wit, with Mrs. A. M. Weller, the proprietress thereof, said business dealings being the sale of American brands of cigarettes for the sum of two hundred pounds; and in that he purchased from First Lieutenant Herbert Linne, then assigned to 4th Airdrome Squadron, between 5 June, 1943 and 4 July 1943, the exact date being unknown, one case of American brands of cigarettes for twenty pounds.

The accused pleaded guilty to the charges and specifications and was found guilty thereof. He was sentenced to be dismissed from the service. The reviewing authority approved, and the confirming authority confirmed, the sentence. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence for the prosecution reveals that the accused left the United States on the 17th of May, 1943, on the S. S. Mormacsea, which arrived in Brisbane, Australia on June 4. While on shipboard accused and other passengers were advised to purchase cigarettes by the post exchange officer who stated to them that "there were large profits to be derived from the cigarettes" (R. 11, 12). Accused purchased from the post exchange twenty cases at $22.50 per case, each case containing fifty cartons. Several other officers made purchases. On the wooden side of each case was stenciled the name of the officer to whom it belonged and also the words "tax free". When the ship docked at Brisbane all such cases were taken to Camp Muckley and placed in the store room.

On or about 15 June accused sold to Mrs. Weller, proprietress of Albert Hotel, Brisbane, Queensland, eight of the cases of cigarettes for which she paid him £200 (Ex. 1; R. 14). During the latter part of June,

First Lieutenant Linne, who had also purchased a case of cigarettes on shipboard and which were then in the store room at Camp Muckley, sold his case to accused for $20.

On or about 15 November, 1943, Captain Thomas L. Driscoll, acting assistant Inspector General, conducted an official investigation. Accused, after having been sworn and advised of his rights, stated to Captain Driscoll that he had purchased six cases of cigarettes from the post exchange while on board the S. S. Mormacsea (R. 22) but denied having sold any of them, stating that he had given some away and that some had been stolen. He denied having had any business dealings with anyone at the Albert Hotel, other than the purchase of some beer (R. 23). He specifically denied having purchased any cigarettes in case lots from another officer.

By stipulation it was agreed that an examination of the ship's papers of the S. S. Mormacsea reveals that accused made no declaration of dutiable goods and paid no duty upon cigarettes when the ship entered the port of Brisbane on 4 June (Ex. 3). By stipulation there was also admitted a statement of a senior inspector of the customs service of Australia that -

"* * *

In my opinion if an Officer in the United States Army on the 4th June, 1943, brought cases of cigarettes purchased by him on the U.S.S. Mormacsea through the port of Brisbane and into the Commonwealth of Australia as his personal property without payment of import duties, his act would constitute a violation of the Australian law.

* * * " (Ex. 2).

The court was asked to take judicial notice of paragraph 13, Army Regulations 210-65, 19 March, 1943, paragraph 2, sub-section 2, Army Regulations 30-2290, 13 August, 1928, and War Department Circular 98, 9 April, 1943 (R. 24).

Accused offered no testimony and introduced no witnesses in his behalf.

4. The evidence establishes that accused purchased from the Army post exchange aboard the S. S. Mormacsea while enroute from the United States to Brisbane, Australia, at least sixteen cases of cigarettes containing fifty cartons each. The evidence further reveals that shortly after his arrival in Brisbane accused sold eight of these cases to the proprietress of a hotel at a substantial profit. Because of the number of cartons of cigarettes purchased by the accused from the post exchange and his sale of them immediately after reaching Australia, the court could infer that their purchase was not for the personal use of the officer. Accused by his plea admitted such intent, and further admitted his subsequent sale of the cigarettes to an Australian civilian at a profit. Such conduct is proscribed by Article of War 96.

In the second specification accused is charged with the unlawful and willful importation of cigarettes into Australia without the payment of customs duties. There was introduced in evidence, by stipulation, the opinion of the chief inspector of the customs service of Australia that the importation of "cases of cigarettes" into the Commonwealth as the personal property of an officer of the United States Army without the payment of import duties would constitute a violation of Australian law. As accused by his plea admitted all of the elements of the offense charged, it

becomes unnecessary to determine whether the statement of the inspector of the customs service was a correct interpretation of (or furnished adequate proof of) the law with reference to the importation of goods into the Commonwealth of Australia by American officers.

The evidence clearly establishes that in the course of an official investigation accused made false statements to an Inspector General well knowing that such statements were untrue.

5. Accordingly, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of the court and the sentence.

Colonel, J.A.G.D., Judge Advocate.

Lt. Col., J.A.G.D. Judge Advocate.

Lt. Col., J.A.G.D. Judge Advocate.

1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General, Melbourne, Victoria, 20 March, 1944. To: Commander-in-Chief, Southwest Pacific Area, A.P.O. 500.

1. In the case of Captain Theodore W. Eastland (0471475), 91st Replacement Battalion, AAF, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM A-1024).

ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 1, USAFFE, 22 Mar 1944)

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review
CM A-1032

22 March, 1944.

UNITED STATES v. Captain JAMES E. CRANE (0417942), 91st Replacement Battalion, AAF.	Trial by G.C.M., convened at Headquarters, Fifth Air Force, 28 January, 1944. Dismissal.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 96th Article of War.

Specification 1: In that Captain James E. Crane, presently assigned to 91st Replacement Battalion, AAF, then commanding officer, 4th Airdrome Squadron, did, on or about 30 May, 1943, wrongfully and unlawfully purchase from the Army Exchange or Commissary on board the U.S.S. Mormacsea while enroute from San Francisco, California to APO 923, for an unauthorized purpose, to-wit, re-sale, approximately fifteen cases, consisting of fifty cartons each, of American brands of cigarettes, and subsequently, on or about 8 June, 1943, sell the same to Australian civilians for his own personal profit.

Specification 2: In that Captain James E. Crane, presently assigned to 91st Replacement Battalion, AAF, then commanding officer, 4th Airdrome Squadron, did, on or about 4 June, 1943, wrongfully and unlawfully and without payment of Australian customs import duties, bring into Australia for unauthorized purposes, to-wit, resale, approximately six cases, consisting of fifty cartons each, of American brands of cigarettes, being tax free and for the use of United States armed forces on foreign duty, and subsequently, on or about 8 June, 1943, sell the same to Frederick D. David, an Australian civilian, for the sum of one hundred fifty pounds, thereby making a personal profit of approximately one hundred eight pounds, value approximately $350.00 in American currency.

Specification 3: In that Captain James E. Crane, presently assigned to 91st Replacement Battalion, AAF, did, at divers dates and at divers times during the month of June, 1943, at Brisbane, Queensland, while Commanding Officer of the 4th Airdrome Squadron, wrongfully permit officers and enlisted men of the 4th Airdrome Squadron to use United States Army motor vehicles in the transaction of private business for their personal profit, to wit, the sale of tax free American brands of cigarettes purchased from an Army Exchange, to Australian civilians.

Specification 4: In that Captain James E. Crane, presently assigned to 91st Replacement Battalion, AAF, then Commanding Officer of the 4th Airdrome Squadron, did, aboard the U.S.S. Mormacsea, en route between San Francisco, California, and APO 923, on or about 25 May, 1943, wrongfully borrow $150.00 from Sergeant Emmett J. Hatchell, 4th Airdrome Squadron, an enlisted man then under his command.

CHARGE II: Violation of the 95th Article of War.

Specification: In that Captain James E. Crane, presently assigned to 91st Replacement Battalion, AAF, then Commanding Officer of the 4th Airdrome Squadron, did, at APO 929 on or about 4 November, 1943, with intent to deceive the Commanding General, Fifth Air Froce, officially state under oath to Major Edward D. Markham, Staff Judge Advocate, Advance Echelon, Fifth Air Force, and to Major Charles E. Fulton, Inspector General's Department, Fifth Air Force, that he, the said Captain James E. Crane gave American cigarettes, purchased by him from an Army Exchange, to First Lieutenant Herbert Linne, then Supply Officer of the 4th Airdrome Squadron, to be distributed among the enlisted men of said squadron; that he did not sell any cigarettes; that he never received any monies in return for cigarettes; that he did not advise any personnel to "keep their mouths shut" about matters under investigation by the Inspector General's Department, Fifth Air Force; that he did not receive a written communication from First Lieutenant Thomas J. Roper, requesting that certain American cigarettes purchased by the said First Lieutenant Thomas J. Roper from an Army Exchange, be sold and the monies received as the result of the sale forwarded to the said First Lieutenant Thomas J. Roper, all of which statements were known by him, the said Captain James E. Crane, to be untrue in that he, the said Captain James E. Crane, at no time gave to First Lieutenant Herbert Linne, then Supply Officer of the 4th Airdrome Squadron, any American cigarettes purchased by him, the said Captain James E. Crane, for distribution to the enlisted men of the squadron; in that he sold cigarettes to Frederick D. David, an Australian civilian, in that he did receive the sum of £150/-/-, Australian money, value of $484.20 in American currency, from Frederick D. David, an Australian civilian in return for cigarettes; in that

he did advise Sergeant Emmett R. Hatchell and Technical Sergeant Wayne L. Smith to keep "their mouths shut" about matters under investigation by the Inspector General's Department, Fifth Air Force; in that he borrowed $150.00 from Sergeant Emmett R. Hatchell, an enlisted man of the 4th Airdrome Squadron; in that he did receive a written communication from First Lieutenant Thomas J. Roper requesting that certain American cigarettes, purchased by him, the said First Lieutenant Thomas J. Roper, be sold and the monies received as a result of the same forwarded to him, the said First Lieutenant Thomas J. Roper.

The accused pleaded not guilty to all charges and specifications. He was found guilty of Charge I, specification 1, except the words "approximately fifteen cases", substituting therefor the words "an unknown number of cases"; of specification 2, Charge I, guilty except the words "approximately six cases", substituting therefor the words "an unknown number of cases" and guilty of specifications 3 and 4 of Charge I and of Charge I, and guilty of Charge II and its specification. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and the confirming authority confirmed the same but approved only so much of the findings of guilty of specification 2 of Charge I "as involves a finding of guilty of the specification except the words 'approximately six' and the words 'thereby making a personal profit of approximately one hundred eight pounds, value approximately $350.00 in American currency'". Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence shows that accused was the commanding officer of the 4th Airdrome Squadron, which left San Francisco, California, on 17 May, 1943, on the S. S. Mormacsea, arriving at Brisbane, Australia, on 4 June, 1943 (R. 7). During the voyage the post exchange officer of the ship stated to the officers that cigarettes could be purchased from the exchange in case lot quantities and resold to the Officers' Club in Brisbane and also in numerous other places. The cost price from the exchange was $22.50 per case, each case containing fifty cartons (R. 16).

A number of officers bought approximately sixty-one cases of cigarettes and had their names stenciled on the wooden sides of each case. First Lieutenant Harry J. Dickel, of accused's command, took charge of all the cases of cigarettes so purchased by the officers when they were unloaded from the ship and checked the number of cases against a list given him by the officers of the number of cases each had purchased, the total being sixty-one cases. This also included seven cases purchased for Sergeant Smith (R. 32). The name of accused was stenciled on some of the cases (R. 47). Among others who purchased some of these cigarettes was First Lieutenant Thomas J. Roper of the 4th Airdrome Squadron. He bought eight cases which were stored in the supply room at Camp Muckley along with those purchased by the other officers. Upon being transferred four days after his arrival in Brisbane to Port Moresby he wrote accused to "get rid of my cigarettes" (R. 17). The letter requested accused to get Sergeant Smith to dispose of the cigarettes as he [Lt. Roper] was running out of money. Staff Sergeant Douglas G. Anders, of accused's unit, handled the official mail and heard accused tell Sergeant Smith to sell Lieutenant Roper's cigarettes first "before he sold his own or those of any other officers as Lieutenant Roper was in need of cash" (R.130). Subsequently, accused paid to Lieutenant Roper the proceeds from the sale of one case after having deducted for purchases made by accused for him in Brisbane (R. 20).

In June, 1943, Mr. Frederick D. David, a chemist of Brisbane, was approached by accused who asked his help in disposing of some American cigarettes, which accused stated were brands of Camels, Lucky Strikes, and Chesterfields (R. 55) and were "his property and his privilege and his right, without any incumbrances, to dispose of at will" (R. 54). Accused agreed to "recompense" Mr. David for his assistance. Mr. David made arrangements for the sale of an undetermined number of cases of cigarettes and shortly thereafter gave accused his personal check for £150 (approx. $483.00). Mr. David further testified that the cigarettes turned out to be of the brand "Raleighs" and that he got a "kick-back" on the purchase. Accused never did "recompense" Mr. David for "putting the deal through" (R. 55). The check was introduced in evidence and bore the indorsement of "J. E. Crane" (Pros. Ex. A).

First Lieutenant Herbert Linne was Supply Officer of accused's unit. He testified that at no time did accused ever turn over to him for distribution to the enlisted personnel of accused's unit any cigarettes purchased by him [accused] personally (R. 66).

Technical Sergeant Joe F. Willson, testified that he was supply sergeant for accused's unit. In the supply room were two groups of cigarettes stacked separately, thirteen cases of "organizational cigarettes" and sixty cases belonging to the officers, of which between ten and fifteen cases had accused's name stenciled thereon (R. 139). That accused stated to him to "store them in the supply room and they would be taken care of later. * * * that Sergeant Smith would be coming in from time to time to pick up the cigarettes and to go ahead and let him have them" (R. 140-1). None of the thirteen cases of cigarettes belonging to the unit had any markings thereon (R. 145).

Technical Sergeant Wayne L. Smith, the transportation non-commissioned officer of accused's unit, testified that he used a company weapons carrier to haul cigarettes from Camp Muckley into the city of Brisbane. He made approximately ten or twelve such trips and on one occasion accused was present when he loaded several cases of cigarettes in the weapons carrier. This witness never sold any cigarettes for accused "personally" (R. 81) but on one occasion he was asked by accused if he [witness] had sold any of Lieutenant Roper's cigarettes and upon advising accused that he had sold one case, he then paid accused the proceeds from such sale (R. 76). When the unit moved to Tsili Tsili, New Guinea, witness learned that there was an investigator asking the enlisted men about the "cigarette deal". Witness advised accused of this and accused replied "Just keep still about it and forget about it" (R. 77). A day or two thereafter witness asked accused's permission to go to Nadzab and see "Figarole and find out if he had said anything and if he had made a signed statement to the investigator and if he had not to tell him not to". Accused replied "Maybe it is a good idea. Maybe you had better go on up" (R. 77).

Private First Class Charles M. Figarole, of accused's unit, testified that on two occasions accused was present when cigarettes were loaded on a unit weapons carrier (R. 96) and that on one of these occasions, when the truck was backed up to the supply room "Captain Crane was in the rear standing right next to Sergeant Smith, sir" (R. 100).

Sergeant Emmett R. Hatchell of accused's unit testified that while on the ship coming from San Francisco to Brisbane, Australia, he turned over to accused for safe-keeping the sum of two hundred dollars. Accused, subsequent to the arrival of the ship at Brisbane, borrowed from him of this amount one hundred fifty dollars, stating at the time that when the money was returned to him [Hatchell] it would be doubled. About a week or ten days after the arrival of the unit accused paid Hatchell one hundred pounds (R. 127). Several months later accused had a conversation with this witness relative to the investigation being conducted by the Inspector General's

office during which accused stated to witness "to say nothing of anything about the money, that he had borrowed from me * * * or about the amount I received from him" (R. 125).

Major Charles E. Fulton, I.G.D., of the Fifth Air Force, testified that on the 4th of November, 1943, in company with Major Edward D. Markham, J.A.G.D., Captain Atherton and Corporal Hall, he interviewed accused. After due warning as to his rights accused was sworn and stated that he had purchased five or six cases of cigarettes from the post exchange officer aboard the S. S. Mormacsea, but that he had used approximately a case and a half for his personal use, and the remainder had been given to Lieutenant Linne, the unit supply officer, to be distributed to the men along with the squadron-owned cigarettes. That at no time did he ever receive any monies for the cigarettes nor had he ever sold any(R. 109). Accused denied having ever advised any of the enlisted personnel "to keep their mouths shut and not give testimony in this investigation". He likewise denied having ever borrowed any money from enlisted men nor had he ever received a letter from Lieutenant Roper regarding the sale of his [Roper's] cigarettes (R. 109). Major Markham corroborated the testimony of this witness (R. 101-106).

Mr. John J. R. Crawford, Home Consumption Office, Customs Department, Brisbane, Australia, testified that for forty-three years he had been in the customs service for the Commonwealth of Australia, and at present was Senior Inspector. He had inspected the inward manifest of the S. S. Mormacsea arriving at Brisbane on 4 June, 1943, and that such manifest showed no payment of duty upon any cigarettes by Captain James E. Crane (R. 113).

Witness identified, and the same were introduced in evidence, the Customs Act of 1901-1925 and Statutory Rules No. 210 of the National Security Act 1939-1943 of the Commonwealth of Australia (Pros. Exs. 2 and 3). The Customs Act provides among other things -

> "Goods shall be subject to the control of the Customs as follows: - (a) As to all goods imported -- from the time of importation until delivery for home consumption or until exportation to parts beyond the seas" (Sec. 30) (R. 120).

Witness stated that pursuant to that act a duty of £38/10/- is imposed on each case of cigarettes imported by individuals into the Commonwealth of Australia. He further testified that it was his opinion that the bringing into Australia by individuals of case lots of cigarettes was a violation of the customs laws of the Commonwealth of Australia, unless the import duty was paid thereon.

Accused elected not to testify, and the defense called as its only witness First Lieutenant Herbert Linne, who testified that he had heard Private Figarole state that he had a grudge against accused and that any evidence he might give, if called to testify, would be unfavorable towards accused (R. 151), and "I hope he gets what is coming to him" (R. 153). Witness again stated that accused did not turn over to him any cigarettes for distribution to the enlisted personnel of the unit.

Defense Counsel offered in evidence a letter dated 17 March, 1943, signed by Colonel Bernard T. Castor, recommending accused for promotion. Also a letter of commendation dated 13 November, 1942, signed by Colonel John E. Badle and indorsements of Brigadier General Robert M. Webster, Lieutenant Colonel Robert M. Lee and Captain Homer T. Hill, for energy and efficiency and exceptionally meritorious service which accused had displayed during the Second Army maneuvers, and directing that such letter be attached to accused's efficiency report (Def. Ex. A and B).

4. The record contains sufficient evidence to support the findings of guilty of each charge and specification. There is no question but that accused

purchased cigarettes, from a post exchange and sold some to an Australian civilian at a profit. Specification 1 alleges the sale by accused to Australian "civilians". The record contains evidence as to one sale to an Australian civilian of an undetermined number of cases of cigarettes. Such conduct is a clear violation of Army Regulations 210-65, March 19, 1943, as amended, and is proscribed by Article of War 96. It is clear that accused brought the cigarettes in question into Australia for the purpose of resale and paid no duties thereon. The court had before it the custom laws of the Commonwealth of Australia (Pros. Ex. 2), and the Senior Customs Inspector testified that under such law the duty on each case of cigarettes so imported was £38/10/-, and that accused did not pay such duty. Such interpretation of the custom laws of Australia by the Senior Inspector was properly admitted in evidence.

> "The existence, contents and character of the foreign law must be proved. This may usually be done, in the case of a foreign statute, by reading it from a printed book purporting to contain the statute in question; and which is properly attested or authenticated as a true copy of the statute by the supreme executive authority of the foreign country; or which is otherwise satisfactorily proved to have been published by proper authority and which is shown to have been received as proof of the statute in the courts of the foreign state. * * * A practicing attorney of the foreign state, or some other person, official or otherwise, who has had some practice in the courts of the foreign state, and who is familiar with its laws, may testify to his knowledge or opinion as to what that law is." (sec. 812 (764), Underhill's Criminal Evidence, p. 1485).

> "In an action based on a statute of a foreign country, which must be proved, while the statute itself must ordinarily be proved by a duly authenticated copy, the introduction of such copy does not render inadmissible parol testimony of persons learned in the law of such country to prove the construction placed on the statute by its courts or the unwritten law of the country affecting the right of recovery, to aid the court in correctly construing and applying the statute; and such testimony is peculiarly appropriate and should be received where the statute is written in a foreign language and the copy introduced is a translation." (Mexican Nat. R.Co. v. Slater 115F, 593; aff. Slater v. Mexican Nat. R.Co., 24 S.Ct. 581, 194 U.S. 120).

The evidence is clear that United States Army motor vehicles were used in hauling cases of cigarettes for the purpose of resale. Accused had full knowledge of such acts. The use of government property for private purposes is prohibited and is a violation of Article of War 96. That accused did borrow the sum of $150.00 from an enlisted man is established by the evidence. The fact that the same was repaid with a substantial profit to the lender in no manner detracts from the offense.

The falsity of the official statements made to the Inspector General by accused is proven by competent witnesses and the evidence of such is undisputed other than by accused's plea. The sentence of the court is authorized and the Board of Review finds no grounds upon which the findings of guilty should be disturbed.

5. For the reasons stated above the Board of Review is of the opinion

that the record of trial is legally sufficient to support the findings of the court as confirmed, and the sentence.

, Judge Advocate.
Colonel, J.A.G.D.

, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

1st Indorsement

Army Service Forces, Branch Office of the Judge Advocate General, Melbourne, Victoria, 24 March, 1944. To: Commander-in-Chief, SWPA, A.P.O. 500.

1. In the case of Captain James E. Crane (0417942), 91st Replacement Battalion, AAF, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM A-1032).

ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 2, USAFFE, 26 Mar 1944)

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

21 April, 1944.

Board of Review
CM A-1033

UNITED STATES v. Second Lieutenant REX E. CORLEW (O-1111000), CE, 839th Engineer Aviation Battalion.	Trial by G.C.M., convened at Headquarters, Base Section No. 3, U.S.A.S.O.S., A.P.O. 923, 7 December, 1943. Dismissal, total forfeitures, confinement for two years. United States Disciplinary Barracks, Fort Leavenworth, Kansas.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Rex E. Corlew, 2nd Lt., CE, 839th Engr. Aviation Bn, APO 923, did, ~~at~~ APO 923, on or about 25 October, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Charlie Culver, Pvt, Co C, 839th Engr. Avn. Bn, APO 923, a human being, by shooting him with a pistol.

The accused pleaded not guilty to the specification and the charge and was found, of the specification, guilty, except the words "with malice aforethought, deliberately, and with premeditation", and not guilty of the excepted words; of the charge, not guilty, but guilty of a violation of the 93rd Article of War. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority approved the sentence. The confirming authority confirmed the sentence, but reduced the period of confinement to two years. The United States Disciplinary Barracks, Fort Leavenworth, Kansas, is designated as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence for the prosecution and the defense is so closely related in many aspects that it will largely be treated collectively.

On the afternoon of 24 October, 1943, deceased, Privates Hubert Harrell and William Piner, all of the 839th Engineer Aviation Battalion, met at the colored Service Club near Camp Doomben, Queensland, Australia. At about 6:30 that evening they started drinking (R. 16). Deceased and Private Piner consumed two quarts of wine and each had about three drinks of whiskey. Later in the evening they took a tram and got off near a cafe which deceased and Private Harrell entered . Standing in line, and waiting to be served, was Second Lieutenant Rex. E. Corlew, the accused, also of the 839th Engineer Aviation Battalion. An altercation developed between accused and deceased. One version, as testified to by deceased's companions, was that when deceased went to the counter to order sandwiches, accused "shoved him" in the chest. Another, as testified to by accused and other witnesses was that deceased stepped on accused's foot and accused pushed him back telling him "to be careful" (Pros. Ex. B). Deceased then became very abusive saying to accused "I'll get you sooner or later, we know you, God-damn you; we work in your motor pool." Deceased was restrained from attacking accused by Private Harrell and some other enlisted men. Deceased and his two companions then left the cafe, going toward their camp. Corporal Winlon B. Pelham of the 738th M.P. Battalion, testified that the three "decided to go on up the street, and they were practically out of sight, but not hearing, and they were still shouting and cussing". Accused then left the cafe walking towards Camp Doomben. Corporal Pelham directed some white soldiers to "follow him on up the street and see that the negroes didn't harm the Lieutenant" (R. 70).

As deceased and his two companions approached their camp, Staff Sergeant Warren C. Spameny, the sergeant of the guard, met them "coming up the street" and told them to "quiet down, they were making too much noise, and to behave themselves" (R. 32). They were allowed to enter camp. At this time Private Harrell "wasn't drunk" but "had been drinking", and the other two were "quite drunk" (R. 75). Private Joe Erjavac, a guard, stated that deceased was "drunker than all of them put together" and that when he walked through the gate "he hollered out he was going to kill an officer, or something like that. * * * one of them [deceased and his companions] said he would have a Lieutenant busted to Private " (R. 75). Deceased was "very mad, angry" and Private James E. Lock, one of the guards on duty, testified that he "took * * * as a threat" the statements made by deceased (R. 78).

Shortly after the men entered the gate Sergeant Spameny was notified that accused wanted the men placed under arrest. Deceased and his two companions were arrested and brought to the guard tent. Accused, accompanied by Lieutenant Gabriel L. Nails, then appeared and said he wanted them placed in confinement and held under a charge of being "drunk and disorderly" (R. 35, 73, 74). Deceased began swearing at accused saying that he would kill him and "called him a bastard and a son-of-a-bitch a number of times". Deceased and his companions were very noisy and boisterous, so much so that someone from a tent nearby occupied by officers "stuck <u>their</u> head out and complained about the noise" (R. 86). They refused to go with the guards from the guard tent to the tent where they were to be confined with other prisoners, demanding that they first see their company commander (R. 35, 56). The sergeant of the guard sent for the Officer of the Day, and also endeavored to reach the colored men's company commander (R. 36). Accused left and went to his tent. He borrowed a clip of ammunition from Lieutenant Conroy, one of his tent mates, saying that "he wanted to put two or three men in the guardhouse that he had some trouble with." (R. 64). He secured his pistol, strapped it on, returned to the guard tent and "told them [deceased and Private Piner] to go up to the guardhouse, and they still refused" (R. 37). Deceased and Piner were standing on the board walk in front of the guard tent. Deceased again began swearing at accused. "* * * He made a number of threats that he would kill him * * * [saying] I will kill you, you son-of-a-bitch" (R. 87),

"throwing his hands around " (R. 38, 52, 88), and "there was a lot of arguing back and forth * * *" (R. 33). All three were cursing the accused, using "all kinds of words * * * many times" (R. 36). For ten to fifteen minutes (R. 53) "these colored soldiers continued almost unabated this abuse, this boisterous conduct, and there was no let up in in at all."

Accused told them to keep quiet. Deceased "said that wasn't the Lieutenant's business to tell him to keep his mouth shut, he had a right to talk if he wanted to, he was a soldier in the U.S. Army, and an officer couldn't tell him to shut up" (R. 56). Deceased said something about accused "being scared and he wasn't through with him yet, and he knew him" (R. 58). T/4 Gillis Williams testified "* * * The last thing I heard, Private Culver was pointing at Lieutenant Corlew and he mentioned he would kill him" and called him a number of vile names (R. 87). Accused then drew his pistol, pulled back the slide, and shot the deceased, the bullet entering his abdomen. Deceased had made no motion to carry out his threats (R. 44, 91), he did not "step forward" or "double his fist" (R. 88) but continued to stand on the board walk (R. 89). During all this time, accused , who was standing about 6 or 8 feet away (R. 33, 54, 89; Pros. Ex. D, p. 4) had said nothing (R. 37, 54).

Accused then handed his pistol to Sergeant Spameny, who immediately returned it to accused stating "I was about to let a shot go myself". In explanation of this statement he testified "* * * [they] were getting pretty wild * * * I wouldn't say to shoot and kill him. I would have shot over their heads to quiet them down" (R. 42). Accused waited at the scene of the shooting until the arrival of the Officer of the Day to whom he surrendered his pistol.

At the time of the shooting six or seven members of the guard were in the immediate vicinity. Sergeant Spameny and another guard had secured loaded carbines because "it seemed like the situation might get out of hand. They wouldn't do anything we told them to (R. 34). * * *I thought I may have some trouble with them. * * *They might try to run away or something like that" (R. 45). About forty-five members of the guard were available in the immediate area (R. 36, 44). Neither Sergeant Spameny nor any of the guards present, made any attempt to suppress the conduct of deceased and his two companions. The sergeant stated "* * * we didn't do anything. Just waited on the Officer of the Day to come down. We thought he could handle the situation better than we could" (R. 37, 46). He thought "we could have handled the situation" (R. 42). The sergeant and other witnesses saw no danger of bodily harm being inflicted by deceased (R. 43). One of the guards who was standing about five feet from accused testified that "at that time I didn't see any reason for the Lieutenant to shoot him. All the guards were there, and two of us were armed, and I was in a position to stop him if he did anything" (R. 57, 61).

Deceased was taken to the 172nd Station Hospital where, shortly after his arrival, he died from the effects of his wound (R. 12).

The prosecution introduced in evidence (Pros. Ex. D) a statement given by accused to Major Leslie C. Winters (R. 65) who was conducting an inquest on the day following the shooting. Accused then stated:

> "* * * Then the Officer of the Day had not come back. The Sergeant of the Guard couldn't get them to go to the guard tent. I got scared and nervous, and got my gun out of my foot locker and was going to wait until the Officer of the Day came back. This boy started shaking his fist in my face. I shot him.
>
> * * *

"Q-- Did he do anything more than shake his fist at you?
A-- No.

Q-- How close to you was he at that time?
A-- About 3 or four paces.

Q-- Was he within arms reach?
A-- No.

Q-- Was he in possession of any weapon at that time that you could say?
A-- No, not that I could see.

* * *

"Q-- Was Pvt Culver standing still at the time you shot?
A-- I couldn't say.

Q-- Was he moving forward or backwards or sidewards?
A-- He raised his fist telling me what he was going to do and cussing me and I don't know now what did happen.

Q-- In your opinion was Pvt Culver drunk?
A-- Yes." (Pros. Ex. D, p. 3).

* * *

"Q-- Were you in any fear or actual bodily fear at the time you shot Pvt Culver?
A-- Yes, I was getting scared, I was afraid they were going to follow me off. He kept threatening he was going to get me.

Q-- Although you may have anticipated that Pvt Culver would follow you later on, at that moment were you in any bodily fear?
A-- Yes, I thought he was going to try to fight me again.

Q-- When you said before that he was about three or four paces from you at that time, you meant that he was a distance of 9 to 12 feet away from you?
A-- No, about 8 feet.

* * *

"Q-- Who all was present at the time the shot was actually fired?
A-- The members of the guard, quite a few were there. They were mostly over by the end row of tents.

Q-- Were there some of them standing within as close as two or three feet of you?
A-- Yes.

Q-- How many of the members of the guard were there?
A-- About 12 or 15.

Q-- Were there any men who had made any attempt to restrain Pvt Culver?
A-- Just to talk to him and try to get him to go to the guard tent." (Pros. Ex. D, p. 4).

Accused elected to be sworn and testify. He recounted the incident at the cafe (Pros. Ex. B) and his subsequent ordering the guard at Camp Doomben to arrest deceased and his two companions. He related going first to the guard tent, then leaving and arming himself and returning. The cursing by deceased and the threats were substantially as previously testified to by other witnesses. As to the actuallshooting: "This Culver kept talking to me, walking back and forth, and calling me names. He said, 'I'll get you later, I am going to get you, you son-of-a-bitch', and he started out and threw his hands out, and that is when I shot the boy. I aimed to shoot him low. I was shooting him low. I honestly didn't mean to shoot him high" (R. 109).

"Q. Lieutenant, why did you shoot him?
A. He was fixing to, he was going to get on me. He said he was going to get me.

Q. Did he make any motion toward you, Lieutenant?
A. He made a motion like he was fixing to come, like he was going to step towards me.

Q. Did he advance towards you or not?
A. I didn't wait until he did, but he started to make that motion." (R. 109).

Accused stated that his reason for remaining at the guard tent after the three soldiers had been arrested was because he was "afraid the guards couldn't do anything with them. I knew if I left there they might follow me down to my tent, and I didn't know what would happen. I stayed there until the Officer of the Day came back to see if I could put it down or make sure they were arrested so they wouldn't be too apt to follow me" (R. 111).

On cross-examination accused admitted that neither at the cafe nor at the guard tent did he see deceased with any weapon.

After objection by prosecution to its introduction was sustained, accused made a proffer of testimony that while their organization was stationed in Florida a riot had occurred in which two white officers were shot. Those guilty were never ascertained. Five men were tried but fifty were involved. The remainder of that fifty were still in the Battalion. That although an order had been put out that no man should carry a knife, subsequently two hundred knives were taken from the man. All these facts were known to accused (R. 98).

4. Accused was charged under Article of War 92 with murder. He was found guilty, by appropriate exceptions and substitutions, of the lesser included offense of voluntary manslaughter in violation of Article of War 93. Manslaughter is defined as

"* * * unlawful homicide without malice aforethought * * * where the act causing the death is committed in the heat of sudden passion caused by provocation." (par. 149a, p. 165, M.C.M., 1928).

The evidence is clear that accused deliberately shot deceased causing his death. The only question for consideration of the Board of Review is whether the homicide was committed under such circumstances that it could be considered justified. The record contains no evidence that at the time of the shooting accused was in danger of great bodily harm nor did he have any reasonable grounds so to believe. He admits that at no time did he see deceased in possession of any weapon, and while deceased's conduct in cursing and threatening accused was provocative, and, unquestionably accentuated by his [deceased's]

drunken condition, such conduct furnishes no justification for accused shooting him. There was no physical force, or violence, shown, nor was there even a simple assault committed upon accused, by deceased (par.149l, p.177, M.C.M., 1928). Mere words, however threatening, or insulting gestures, are not in themselves sufficient to create a necessity for taking life (sec. 143, p.256, 26 Am.Jur.). Accused admits that deceased was approximately eight feet away when he shot him, and according to his own testimony "he made a motion like he was fixing to come, like he was going to step towards me". He further testified that he did not wait until deceased advanced toward him but shot him when "he started to make that motion". There is no evidence that any act on the part of deceased was of a character manifestly threatening to life. A number of guards were present, some of whom were armed, but at no time did accused call on them for protection. No element of retreat on his part is shown and the fact that he "intended to shoot low" does not exculpate him for his unlawful act. His plea of self-defense fails under the facts and surrounding circumstances. The record fully supports the court's findings.

5. For the reasons stated above the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of the court and the sentence.

, Judge Advocate.
Colonel, J.A.G.D.

, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

, Judge Advocate,
Lieutenant Colonel, J.A.G.D.

1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General, Melbourne, Victoria, 23 April, 1944. To: Commander-in-Chief, SWPA, A.P.O. 500.

1. In the case of Second Lieutenant Rex E. Corlew (O-1111000), CE, 839th Engineer Aviation Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:
(CM A-1033)

ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 4, USAFFE, 26 Apr 1944)

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review
CM A-1042.

3 April, 1944.

UNITED STATES v. Private FRANK HESTER JR., (34060348), Company "F", 96th Engineer (GS) Regiment.	Trial by G.C.M., convened at Headquarters, Base "A", U.S.A.S.O.S., A.P.O. 928, 29 January, 1944. Dishonorable discharge, total forfeitures, confinement for life. The United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its opinion, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Frank Hester, Jr., Company "F", 96th Engineering (General Service) Regiment, USASOS, APO 928, did, at the Stockade, US Base "A", APO 928, on or about 2 November, 1943, with malice aforethought, wilfully, deliberately, feloniously, unlawfully and with premeditation, stab one Ralph Sheard, Private, Medical Detachment, 96th Engineering (General Service) Regiment, USASOS, APO 928, a human being, with a dangerous weapon, to wit, a knife, thereby inflicting injuries upon the said Ralph Sheard which caused his death on or about 7 November, 1943.

The accused pleaded not guilty to the charge and specification and was found guilty as charged. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement for the term of his natural life. The reviewing authority approved the sentence and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. Hester, the accused, and Sheard, the deceased, on 2 November, 1943, were prisoners in the stockade, Base A, APO 928. About 8:30 that evening deceased and Moses Russell, another prisoner, were playing checkers on deceased's cot in the tent occupied by the latter and several other prisoners. Accused came into the tent and watched the checker game. Russell testified that he [Russell] made a move to get "kangaroo" and

> "* * *Sheard took up my man and we had a misunderstanding and we was trying to get it straight. Hester started to explain what it was and Sheard told him that he wasn't in the game. Hester said 'Your'e not playing for money' and Sheard said he was a god damned liar.
>
> "* * *
>
> "After they began to argue one boy to the other, Hester told Sheard 'Your'e not playing no money, it's no harm', and Hester gets between us and sits on the box that Sheard pulled out. Sheard told Hester to get up off the box and Hester got up like that and stood in the middle of the floor.* **" (R. 20).

Private Tegtmeyer testified that he was in a tent about eight feet away. He heard quarrelling in deceased's tent and "somebody* * *I don't know who" said" I'll kill you* * * Mother fucker, I'm coming* * **" and the "next thing" he knew accused and deceased "fell out of the tent" (R. 35).

Moses Brown, one of the prisoners in the tent, testified that Sheard "got up. He couldn't stand straight up because his legs was straddling the cot,* * * They began wrestling around there.* * * I saw Sheard trying to get up off his cot, then they seemed to reach for each other" (R. 27, 29). Arthur Jones, who was also in the tent, testified that "Sheard got up first and brought his left leg over the cot* * [turning] towards the outside of the tent.* * * That is when Hester sort of plunged at Sheard across the cot* * *. He just looked like a fellow who was making a tackle" (Ex. E). They began wrestling (R. 27) and a kerosene lantern, which was on the cot and by the light of which the checker game was being played, was knocked to the ground (R. 27, 29) breaking the glass (R. 11, 14, 32, Ex. E). "When Hester tackled Sheard, they fell over on the lantern" (Ex. E). During the wrestling accused and deceased fell outside the tent on to the ground, deceased landing on the bottom (R. 8, 27, 29, 39)"on" (R. 36) the lantern and "right near" some broken glass (R. 14, Ex. E). The glass was described by one witness as "about the size of a half dollar" (Ex. E) and by another as "about an inch in diameter", the largest piece being about two and one half inches long (R. 11, 14). They wrestled on the ground for "not over a minute" when deceased called out, as various witnesses testified, "M.P., get this man off of me, I'm stabbed" (R. 35); "I'm stabbed" (R. 31), or "Get this boy off of me. * * *I'm cut" (R. 21). They each got up (R. 9, 28, 35). There was blood on deceased's right side a little above the hip (R. 29, 31, Ex. E). He walked to the stockade gate, told the guard "I've been stabbed" (R. 9, 10), and was taken to the dispensary and from there to the hospital. After accused arose he said "that he didn't have a knife" (R. 35) and walked toward the back of the stockade in the direction of the latrine (R. 12, 16).

Deceased was examined by Captains Dudgeon and Wikoff, both of the Medical Corps, who testified that he had suffered a wound in the right lumbar region about one and one half or two inches in length and one half inch wide, gaping slightly. The wound was of sufficient depth that Captain Dudgeon was able to insert his fingers. There was no perforation of the intestines or internal organs. Captain Dudgeon stated that the wound was clean; that there were no signs that it had been made by a hot instrument as there was no scorching of the flesh; that he supposed it could have been made by a piece of glass but none was found in the wound; and that in his opinion the most likely cause of the wound was a knife (R. 38). Captain Wikoff testified that in his

opinion the wound was occasioned only by a sharp instrument, "in the shape of a knife", and that it was possible, but not very probable, that a piece of glass could have caused it (R. 40). Five days after being admitted to the hospital, deceased died as a result of his wound (R. 41).

Four other prisoners were in the tent during the altercation. They did not hear the threats testified to by the prisoner in the adjoining tent. One witness testified that during the struggle he could see accused's left hand all the time but he could not see his right hand. All witnesses testified that at no time did they see either accused or deceased with a knife or any other weapon (R. 36). Accused, the tent, and the place where they had been wrestling were searched a short time after the incident and no knife was found (R. 11). No blood was discernible either on accused or upon the ground (Ex. E). No witness was asked by either the prosecution, defense, or the court whether blood was seen on the lantern or on the broken glass. The prosecution and the defense stipulated that the

> "Kerosene lantern with broken glass globe is in the Provost Marshal's Office marked Case No. 28, and has been in safe custody of the Provost Marshal since 2 November, 1943" (R. 4).

Neither the lantern nor the pieces of glass seen upon the ground were introduced in evidence.

Accused elected to remain silent. Captain Henry A. Davidson, M.C., a psychiatrist, was the only witness for the defense. He testified that he had examined accused and found him to be of the mental age of eight years and nine months which placed him in the "moron group" (R. 45). He further testified that accused could not have the normal man's appreciation of the harmfulness of the act with which he was charged. On cross-examination the witness stated, however, that accused was able to distinguish between right and wrong and knows that he "will get in trouble" if he does wrong (R. 47).

4. The specification alleges in pertinent part that accused did "with malice aforethought, wilfully, deliberately, feloniously, unlawfully and with premeditation, stab * * * [deceased] with a dangerous weapon * * * thereby inflicting injuries which caused his death * * * ." It is noted that the specification does not directly charge, in the form suggested by the Manual for Courts-Martial, 1928, (No. 86, p. 249) that accused did with the stated intent kill deceased but in substance that he did with such intent commit an assault upon deceased as a result of which death ensued.

A specification in military law need embody only a "statement in simple and concise language of the facts constituting the offense. The facts so stated and those reasonably implied therefrom should include all the elements of the offense sought to be charged" (par. 29a, M.C.M., 1928). Its sufficiency is not measured by the strict rules applicable to indictments (sec. 428(8), Dig. Ops. JAG, 1912-40). Paragraph a of Appendix 4 of the Manual for Courts-Martial, 1928, states that the several forms of specifications [contained therein] are not mandatory and may be added to or deviated from. Article of War 37 provides that the findings or sentence of a court-martial shall not be disapproved for any error in pleading unless after an examination of the entire proceedings it shall appear that the error has injuriously affected the substantial rights of the accused.

Mr. Justice Brown in John Fitzpatrick v. United States (178 U.S. 304; 20 S. Ct. 944), in holding an indictment in comparable words to the specification in the instant case legally sufficient, stated:

> " * * If, as alleged in the indictment, they, [accused] with deliberate and premeditated malice, shot Roberts in the breast with a revolver, and inflicted a mortal wound, of which he instantly died, they would be presumed to contemplate and intend the natural and probable consequences of such act;

and an additional averment that they, with deliberate and premeditated malice, intended to kill him, was quite unnecessary to apprise the common understanding of their purpose. If they purposely inflicted a mortal wound, they must have intended to kill. No person could have a moment's hesitation as to what it was intended to aver, namely, that the defendants had been guilty of a deliberate and premeditated murder; and while a number of cases are cited which lend some support to the argument of the defendant, there was no such statute involved as Sec. 1268 of the Oregon Code [modifying the strict requirements of the common law with reference to pleading]. We have no doubt the indictment furnished the accused with such a description of the charge as would enable him to avail himself of a plea of former jeopardy, and also to inform the court whether the facts were sufficient in law to support a conviction, * * * . While we should hold an indictment to be insufficient that did not charge in definite language all the elements constituting the offense, we have no desire to be hypercritical or to require the pleader to unduly repeat as to every incident of the offense the allegation of deliberateness and premeditation. * * * ."

While accused introduced only one witness in his defense, the examination of that and other witnesses shows conclusively that accused was fully aware that he was charged with the crime of murder. In the opinion of the Board of Review the specification sufficiently avers the crime of murder (Ball v. United States, 163 U.S. 662; 16 S. Ct. 1192) and sufficiently apprises the accused of the crime with which he is charged.

5. The evidence establishes that accused and deceased were quarrelling about a checker game. Although the voice was not identified, a witness who was in a tent eight feet away testified that he heard the words "I'll kill you * * * Mother fucker, I'm coming * * * " coming from the tent where the quarrel was taking place. Inasmuch as the only men engaged in a quarrel in the tent in question were accused and deceased, and, as it was established that accused was the physical aggressor, the court could infer that the threatening words were spoken by accused.

Accordingly, the court had before it evidence that accused and deceased quarrelled; that accused threatened deceased and sprang on him with such force that they both fell out of the tent on to the ground. Approximately one minute later deceased suffered a mortal wound which could have been occasioned only by a sharp instrument in the shape of a knife. No person other than the accused was engaged in the fight or close enough to deceased to have stabbed him. After deceased said that he was stabbed, accused made no effort to aid him but walked in an opposite direction. Although no witness testified that a knife was seen in accused's possession, he had sufficient opportunity to dispose of one had he so wished.

In addition to such facts there was some testimony that when accused and deceased fell upon the ground deceased landed on a kerosene lantern, the globe of which had been broken, and near to some glass.

Inasmuch as the proof of accused's guilt in the instant case rests largely upon circumstantial evidence, it must, in order to be sufficient to support conviction, be of such nature as to not only prove all the elements of the offense but must at the same time exclude every reasonable hypothesis except guilt (II. Bull. JAG, p. 238; id., p. 311). A mere suspicion or probability of the innocence of accused, however, is not sufficient to preclude conviction (sec. 922, Wharton, Criminal Evidence). From the circumstances it might be contended that the wound which deceased suffered was not caused by a knife but by the broken glass or by the lantern. The medical officers who examined

deceased testified that the wound was clean; that no broken glass or any "fine" substance was found within it, and there was no scorching of the flesh. One of the medical officers "supposed" that the wound could have been made by a piece of glass but in his opinion the most likely cause was a knife. The other medical officer testified that it was possible "but not very probable" that a piece of glass could have caused it. No blood was seen on the ground near where the accused and deceased were tusseling and no evidence was introduced that there was any blood on the lantern or on the broken glass.

From the evidence presented by the record, the Board of Review is of the opinion that a conclusion that deceased's wound was caused by the lantern or by a piece of glass is a mere suspicion or probability and is not a reasonable hypothesis. The record contains sufficient evidence upon which the court could legally predicate its finding that deceased met his death by reason of a knife wound inflicted by accused and that accused was guilty of the crime charged (par. 148a, M.C.M., 1928).

6. For the reasons above stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of the court and the sentence.

_____, Judge Advocate.
Colonel, J.A.G.D.

_____, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

_____, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review
CM A-1095

28 April, 1944.

UNITED STATES v. Corporal CHARLES MOORE (32083141), Headquarters and Headquarters Company, First Battalion, 24th Infantry.	)	Trial by G.C.M., convened at Headquarters, V Island Command, A.P.O. 709, 25 January, 1944. Dishonorable discharge, total forfeitures, confinement for ten years. The Federal Correctional Institution, Englewood, Colorado.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Corporal Charles Moore, Head quarters and Headquarters Company, First Battalion, 24th Infantry, did, at APO 709, on or about January 6, 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Theodore Brevard, Company A, 24th Infantry, a human being, by shooting him with a rifle.

Accused pleaded not guilty to the charge and specification and was found guilty as charged. He was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence. The confirming authority approved only so much of the findings of guilty of the specification and charge as involves a finding of guilty of voluntary manslaughter in violation of Article of War 93, and modified the sentence to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years. The Federal Correctional Institution, Englewood, Colorado, was designated as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence shows that accused was a member of Headquarters Company, 1st Battalion, 24th Infantry, stationed at A.P.O. 709 (R. 7). About 6:15

o'clock on the evening of 5 January, 1944, he, together with several soldiers, began drinking "raisin jack" (R. 6-8). He continued drinking until 9:30 o'clock at which time accused was "pretty drunk" and Private Grier, with whom he had been drinking, took him to his (accused's) tent.

Some time between 10:00 and 11:00 o'clock accused went to the "gambling tent", where he engaged in a dice game (R. 10, 15). This tent was located ninety feet from the tent occupied by accused and about one hundred feet in the opposite direction from a ration shed (Ex. A; R. 10, 15). Accused, who was "* * * acting like he was drunk. Kinda noisy like", got into an argument with Private King. As a result of the argument the game was stopped (R. 10, 16). King and accused left, continuing the argument in the front of the tent. Private Culpepper approached accused and said, "Cpl. Moore, why don't you and Pvt. King cut out this argument. * * *Why don't you go on home before you get in trouble." Accused then hit Culpepper, who in turn hit accused on the jaw, knocking him to the ground where he lay unconscious for four or five minutes (R. 10, 16). Accused regained consciousness and went back into the gambling tent. Private Culpepper testified -

> "He [accused] says, 'Who hit me?' I looked up and he said, 'I know who hit me -- Culpepper.' He said, 'Come here; I want to talk with you.' I said, 'Go home. I don't want to talk with you tonight.'
>
> * * *
>
> He said, 'I want to see you now. If I see you tomorrow and come up to talk with you, and you resist in any kind of way, I'll blow your damn brains out.' I tells him, 'You go on home and wait until tomorrow, and then you can tell me what you want to tell me.'" (R. 16).

Culpepper then left, going to the latrine (R. 16). About this time accused was heard to say "* * * if he [accused] would see him [Culpepper] next he was liable to have a pistol" (R. 11). King then assisted accused towards his tent (R. 11).

Shortly thereafter, accused again returned to the gambling tent. Accused was "noisy" and Private Horton told him to be quiet. A fight then ensued between Horton and accused (R. 11). Culpepper, who was returning from the latrine, saw accused and Horton "ahold of each other" and pulled them apart. Accused then told Horton "I am going to blow your damn brains out" (R. 17). Culpepper left, going to his tent. Accused also left and went in the direction of his tent (R. 11, 17).

Thereafter accused was seen moving towards the gambling tent in a "kinda sneaky position". Someone then yelled, "Watch out! Here comes the boy with the rifle!" (R. 12). About this time, Technician Fifth Grade Vernest R. Johnson, who occupied the tent adjoining the gambling tent was awakened. He turned over in his bed and saw accused coming towards his tent. Accused assumed a kneeling position at the corner of the tent and aimed his rifle across Johnson's chest towards the gambling tent. Accused then entered Johnson's tent and aimed his rifle again in the same direction (R. 27). At that time the men had run from the gambling tent (R. 27). Privates Dickson and Brevard, the latter carrying a lighted flashlight, ran toward the ration shed (R. 21). Accused, without firing the gun, walked to the door of Johnson's tent, placed his rifle against the face of the door, and aimed it in the direction of the ration shed. He pulled the trigger but the rifle misfired. He then worked the bolt and fired the gun (R. 25, 27). Accused then ran out of the tent. After the shot was fired, Dickson told Brevard to put the flashlight out but Brevard only grunted (R. 21). Brevard was found lying against a box in the ration shed with a bullet wound in his neck (R. 22, 24). Shortly thereafter, Major Albert S. Witherington, M.C., examined Brevard and found him dead (R. 31). An autopsy revealed that the bullet wound caused his death (Ex. 3; R. 31).

Some time later that night Staff Sergeant Lucius T. Gilbert took a rifle from accused which, upon examination, was found to have been fired (R. 28, 30). Records revealed that the rifle had been issued to accused (R. 30).

On behalf of the defense Staff Sergeant Taylor testified that he saw the fight between Horton and accused at which time Horton kicked accused on the hip while accused lay on the ground. Thereafter accused "seemed to be angry. * * * He wasn't normal" (R. 33, 34).

Accused took the stand in his own behalf and testified substantially the same as did other witnesses as to the drinking of "raisin jack" up to the time he and Grier were together. As to events thereafter accused testified:

> "* * * I don't know if we drank all that we had or whether we got some more. I don't remember when I left the area, or what time it was, or how I left. I don't know if I went directly to this gambling tent or stopped at my tent. But I do remember being at the gambling tent. I remember that. I don't know whether I was in a gambling game or not, but I remember having an argument with Pvt. Culpepper. What this argument was about, I don't know. But I remember it turned into a fight and I was on the ground and someone was kicking me. I don't remember what followed after the kicking, but I can remember Captain Walker and Lt. Hill and Sgt. Gilbert. The next day I found that I was in a small cage up at the stockade. * * * I asked the MP what I was being held for, and for the first time I learned that a man had been killed was when the MP answered that I was being held for murder. * * *" (R. 39).

Accused remembered that he had helped drink five quarts of liquor that evening. While he recalled the fight with Culpepper, who he thought had kicked him, he did not remember any other fight, nor did he remember that he had procured his rifle or fired it (R. 39, 40).

Captain James H. Walker, accused's company commander, testified that when he saw accused in the early morning of January 6, 1944, accused was in a very drunken and excited state (R. 37). On the following afternoon Major Weldon W. Cox noticed that accused's left jaw was swollen and he had a "knot-like" swelling on his rib (R. 35).

Major Haviland A. Connolly as S-3 had observed accused "almost daily" for eleven months during which time accused was in the Operations Section of the 1st Battalion. In his opinion accused was well-behaved and of a friendly, docile nature. Both Captain Walker and Major Connolly rated accused as an excellent soldier.

4. The evidence reveals that accused shot Brevard causing his death.

It was a question of fact for the court to determine, whether, at the time of the shooting, accused, because of drunkenness, had the mental capacity to intend the natural consequences of his act. It is the province of the court to weigh evidence and judge the credibility of witnesses (sec. 395 (56), Dig. Ops., JAG, 1912-40). From all the facts and circumstances surrounding the case, the court could properly find that accused had the mental capacity to intend, and in fact did intend, death or grievous bodily harm by the unlawful shooting.

The court found accused guilty as charged and the reviewing authority approved the sentence. The confirming authority confirmed only so much of the findings of guilty as involved the lesser included offense of voluntary manslaughter in violation of Article of War 93. (The evidence reveals no provocation on the part of deceased but provocation by Privates Culpepper and Horton.) Accused could have been found guilty of voluntary manslaughter had either Culpepper or Horton been struck by the bullet and died as the result thereof. Although by chance deceased was the victim of a bullet that might have been intended for Culpepper or Horton, the homicide was an offense of the same magnitude (sec. 35, 26 Am. Jur., p. 179; U.S. v. Hart, 162 F. 192, cf. sec. 452, Title 18, U.S.C.A., p. 327). The record contains evidence from which the confirming authority could determine that accused was guilty of such lesser included offense.

5. For the reasons stated above the Board of Review holds that the record of trial is legally sufficient to support the findings and the sentence as modified by the confirming authority.

, Judge Advocate.
Colonel, J.A.G.D.

, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General, A.P.O. 924, 30 April, 1944. To: Commanding General, U.S.A.F.I.S.P.A., A.P.O. 502.

1. In the case of Corporal Charles Moore (32083141), Headquarters and Headquarters Company, First Battalion, 24th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM A-1095).

ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

(Sentence as modified ordered executed. GCMO 6, USAFISPA, 4 May 1944)

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review
CM A-1120

26 April, 1944.

UNITED STATES v. Private GEORGE T. McGREW (37328924), Headquarters Company Shore Battalion, 532nd Engineer Boat and Shore Regiment.	Trial by G.C.M., convened at APO 322, 5 April, 1944. Dishonorable discharge, total forfeitures, confinement for five years. The Stockade, Base D, USASOS, APO 929.

REVIEW by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the soldier named above, having been examined in the Branch Office of The Judge Advocate General and there found legally insufficient to support the findings in part, has been examined by the Board of Review, and the Board submits this, its review, to the Assistant Judge Advocate General, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

2. The accused was tried upon the following charges and specifications:

CHARGE I. Violation of the 63rd Article of War.

Specification: (Finding of not guilty).

CHARGE II: Violation of the 64th Article of War.

Specification 1: In that Private George T. McGrew, Headquarters Company Shore Battalion, 532d Engineer Boat and Shore Regiment, having received a lawful command from Lieutenant Colonel George H. Barrows, C.M.P., his superior officer, to go to work, did at APO 322, on or about 25 February 1944, willfully disobey the same.

Specification 2: In that Private George T. McGrew, Headquarters Company Shore Battalion, 532d Engineer Boat and Shore Regiment, having received a lawful command from First Lieutenant Paul F. Frye, his superior officer, to get out of bed and repair to the properly appointed place for reveille, did at APO 322, on or about 0645, 21 February 1944, willfully disobey the same.

Accused pleaded not guilty to all charges and specifications and was found not guilty of Charge I and its specification and guilty of Charge II and its specifications. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined

at hard labor for five years. The reviewing authority approved the sentence, suspended the execution of that portion thereof adjudging dishonorable discharge, and designated the Stockade, Base D, USASOS, APO 929, as the place of confinement. The result of the trial was published in General Court-Martial Orders Number 8, Headquarters, Sixth Army, APO 442, 12 April, 1944.

3. The evidence reveals that on the morning of 21 February, 1944, at APO 322, accused was not present at reveille. First Lieutenant Paul F. Frye, his company commander, sent two sergeants to have accused report and was advised by them of accused's refusal. He then went to accused's tent, "picked up the cot" upon which accused was lying, and "dumped him on the floor". The officer ordered accused to get up and report to his place in the formation. Accused said that he did not have to stand reveille formation and crawled back into bed (R. 13, 14). Lieutenant Frye told accused that such action would subject him to court-martial. The accused stated "that was what he wanted" and did not obey the order (R. 15).

The evidence further reveals that Lieutenant Colonel George H. Barrows, CMP, having been informed that accused, then in confinement, had refused to eat and to work, caused the accused to be brought to his office at about 7:30 or 8:00 o'clock in the evening of 23 or 25 February, 1944, where he had a "man to man" talk with him in an endeavor to find out what was the matter. Accused contended that he, as a prisoner awaiting trial, was not required to work with convicted prisoners. The Colonel explained to accused that pursuant to army regulations he could be employed in the same manner as any other prisoner while in custody. The Colonel testified:

"* * *

Q. At the time you are speaking of did you again order him to go to work?
A. I had just previously ordered him to go to work. He refused and I confirmed the order and asked him if it was true he would not obey. He said he wouldn't do it. I then gave him a direct order to move a chair. He refused then and I told the boys to take him back and keep him on bread and water." (R. 8).

* * *

"A. * * * A great number of men in the Army do not know the reasons for discipline. It is our policy to get a man back to normal again. That was all explained to the accused. After that had been done, the direct order was given and the accused refused to obey it.

Q. What was the order?
A. To move a chair and I made it plain it was a direct order." (R. 9).

* * *

"Accused: You stated in your testimony that the accused was given a direct order to go to work?
A. Yes.

Q. He was given a direct order to move a chair?
A. Yes.

Q. Was that order given by you?
A. It was given by me to the accused.

Q. At what time.
A. I don't remember the exact time but it was at night.

Q. Even though it was night, your ordered the accused to go to work?
A. Yes, to do his work with a detail.

Q. That was not a direct order?
A. That is just the point and that is why I gave the order to move the chair." (R. 10).

* * *

"Q. Were there any work details then? [at the time accused was ordered to go to work]
A. A man is always subject to duties to be performed. The command to move the chair was given to further establish the fact of refusal.

Q. Did you issue the command for him to go to work at that time?
A. Yes, and afterwards to move a chair." (R. 19).

In his argument to the court the Trial Judge Advocate stated in part:

"* * * On the second Charge, the 64th Article of War, specification 1, the prosecution asks that the court amend this specification. The prosecution asks that the words 'to go to work' be deleted and the words 'to move that chair' be substituted. (Prosecution then read that part of Par. 78c, MCM, as pertains to exceptions and substitutions)

The testimony given by Colonel Barrows and Sgt. Shankweiler has established that both orders were given, yet it seems that the order to 'move that chair' should be the order that was deliberately disobeyed.* * * " (R. 21).

4. There is no evidence in the record that the order to go to work (specification 1, Charge II) had reference to any work then in progress. On the contrary, it would appear that it was no more than a direction to accused to perform, in futuro, such duty as might be required of him as a member of a prison detail. Apparently Colonel Barrows himself realized that the order was of such nature that a violation of Article of War 64 could not be predicated thereon, for, in answer to the question "That [order to go to work] was not a direct order?", he testified, "That is just the point and that is why I gave the order to move the chair" (R. 10). The latter order required immediate performance and was not associated with any military activity then pending and itself was illegal (sec. 422 (6), p. 18, Bull. I, JAG). It was only after accused refused to obey the second order that the Colonel ordered him to be held in close confinement.

The Trial Judge Advocate also recognized that the evidence as to the first order was not sufficient to support a finding of guilty. In his closing argument he stated, "It seems that the order to move the chair should be the order that was deliberately disobeyed" and asked that the specification be amended accordingly.

The "command" contemplated by Article of War 64 is "an express and personal one, that is to say an order of a specific character, * * *, in contradistinction to one of a general scope, as one issued to the command of which the accused is a member and applying to him no more than the rest" (p. 573, Winthrop, Mil. Law & Prec.). Likewise, where "the order to a person is to be executed in the future, a statement by him to the effect that he intends to disobey it is not an offense under A.W. 64 * * *" (par. 134b, M.C.M., 1928).

It is the opinion of the Board of Review that the order which was made the basis of specification 1 of Charge II was not proven to be an order of a specific character requiring immediate execution. Accordingly, no violation of Article of War 64 was established.

The evidence is clear that accused willfully disobeyed the order of First Lieutenant Frye to get out of bed and repair to the properly appointed place for reveille (specification 2, Charge II). The improper action of the Lieutenant in physically dumping accused out of bed bears no relation to the validity of the order given the accused. There is a complete absence of proof that he was physically injured thereby or otherwise was relieved from the duty imposed upon him and the penalties arising from his willful disobedience. Dishonorable discharge, total forfeitures, and confinement at hard labor for five years, the approved sentence, is within the limits of punishment authorized for this offense.

5. Two contentions of accused, both in the nature of special pleas, although untenable, should be commented upon.

a. Before arraignment, upon being asked whom he desired as counsel, accused stated that he had previously requested as counsel W. M. McGrew of Denver, Colorado, and that "no other counsel was acceptable." Accused then said, and contended in his argument to the court at the conclusion of the trial, that to cause him to be tried without such counsel violated his constitutional rights and denied to him "due process of law". The court announced that accused had been informed that it was not possible to accede to his request and further informed him that his defense would be conducted by the regularly appointed defense counsel. It appears from the record that such counsel were present throughout the proceedings but that accused refused their services and examined the witnesses and presented closing argument to the court himself.

The right of an accused in a trial by court-martial to be represented by civil counsel, provided by him, was first recognized by statute by the act of August 29, 1916 (39 Stat. 619), and is now embodied in Article of War 17. It is a privilege afforded accused within the fabric of the system of military justice and may not be used as an instrument to defeat its ends. It is obvious that a trial by court-martial need not be continued until civil counsel, residing in the United States, designated by accused, is able to reach one of the many theaters of war wherein the trial may be pending. See also Romero v. Squier, 133 Fed. 528 (p.133, Bull. II, JAG). The refusal to continue the trial in the absence of the civil counsel of accused's choice was not an abuse of discretion and his substantial rights were not prejudiced thereby.

b. Accused, in his closing argument, contended in effect that as there was no investigation of the offenses, the court was without jurisdiction. Accused presented no evidence in proof of such contention and an examination of the papers accompanying the record of trial reveals that investigation sufficient to satisfy the requirements of Article of War 70 was had before reference of the cause to trial by court-martial.

6. Captain Charles Bohnengal, a psychiatrist, a witness for the prosecution, testified that in his opinion accused was sane. On cross-examination witness was asked "What constitutes insanity?" (R.20). The court sustained objection to that question. Such action was error. The sanity of accused is a question of fact for the court to resolve. As there was no evidence before the court that accused was not sane either at the time of the commission of the alleged offenses or at the time of trial, or that he could not intelligently conduct his defense, the error is considered harmless. No errors with respect to the introduction of evidence prejudicial to the substantial rights of accused appear in the record.

7. For the reasons stated above the Board of Review is of the opinion that the record of trial is not legally sufficient to support the findings of guilty of specification 1 of Charge II but is legally sufficient to support the findings of guilty of specification 2 of Charge II and of Charge II and the sentence.

, Judge Advocate.
Colonel, J.A.G.D.

, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

WAR DEPARTMENT
Services of Supply
Branch Office of The Judge Advocate General
Melbourne, Victoria

A.P.O. 924,
30 April, 1944.

SUBJECT: Record of trial in the case of now General Prisoner George T. McGrew.

TO: Commanding General, Sixth Army, Army, A.P.O. 442.

1. The record of trial in the above described case has been examined by the Board of Review in this office and in the inclosed copy of its written review the opinion is expressed, for the reasons set forth, that the record of trail is legally insufficient to support the finding of guilty of the first specification of Charge II. I am in agreement with the Board's opinion, and bring the matter to your attention with the view that while the sentence still remains a legal one for the remaining offense of which the accused was properly found guilty, under the circumstances you may desire to initiate action designed to remit a portion of the term of confinement ordered executed.

2. Assuming that McGrew is in confinement at Base D, USASOS, APO 929, in a facility under the jurisdiction of the Commanding General, USASOS, it necessarily follows that under this circumstance that authority is the one to promulgate a general court-martial order modifying the sentence, if such action is determined upon.

ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

Inclosure:
Copy of review

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review
CM A-1127

14 May, 1944.

UNITED STATES v. Private Francis E. KJELLGREN (20116032), Company A, 114th Engineer Battalion.	Trial by G.C.M. convened at A.P.O. 32, 16 April, 1944. Dishonorable discharge, total forfeitures (all but $40.00 per month for 6 months suspended), hard labor for six months.

REVIEW by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the soldier named above having been examined in the Branch Office of The Judge Advocate General and there found legally sufficient to support the findings of guilty and the sentence of the court, but the sentence as approved and ordered executed, illegal in part, has been examined by the Board of Review and the Board submits this, its review, to the Assistant Judge Advocate General.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 64th Article of War.

Specification: In that Private Francis E. Kjellgren, Company "A", One Hundred Fourteenth Engineer Battalion, having received a lawful command from Lieutenant Edwin G. Moran, his superior officer to drive a truck, did, at Yamai Point New Guinea, on or about the 25th day of March 1944, willfully disobey the same.

The accused pleaded guilty to the charge and specification and was found guilty thereof. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for three years. The reviewing authority approved and ordered executed only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and the performance of hard labor for six months, but suspended the execution of those portions thereof involving dishonorable discharge and forfeiture of pay and allowances in excess of $40.00 per month for six months. The findings and sentence were promulgated in General Court-Martial Orders No. 11, Headquarters 32nd Infantry Division, 19 April, 1944.

3. The evidence is legally sufficient to support the findings of the court and its sentence.

4. The only remaining questions requiring the specific consideration of the Board of Review pertain to the legal effect of the action of the reviewing authority.

a. The reviewing authority approved -

> " * * * only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and the performance of hard labor for six months * * * ".

It is observed that a form of action approving " * * * only so much of the findings [sentence] as provides for * * * " is properly taken by a reviewing authority only when a portion of the findings or sentence of the court is illegal. Mitigation of a legal sentence is properly accomplished by remission.

The action in the instant case operated as a disapproval of so much of the sentence of the court as imposed confinement (sec. 404 (2), Dig. Ops., JAG, 1912-40). In consequence, if the resulting sentence had been immediately executed and the accused dishonorably discharged he would have been freed from military control. There is no provision of military law authorizing the imposition of hard labor without confinement as a part of his punishment on a person dishonorably discharged the service. It would not be possible, therefore, to execute that portion of the action attempting to require the performance of hard labor. A sentence, or any part thereof, not capable of execution is without legal effect and void. Accordingly, so much of the action of the reviewing authority as attempts to add hard labor to the sentence is ineffective and void and the legal effect of the action was to approve a sentence of dishonorable discharge and total forfeitures only. The quantity or quality of a sentence may not be changed by its suspension in whole or in part. Therefore, the suspension of the execution of the dishonorable discharge did not enable the reviewing authority to add to the sentence performance of hard labor.

b. The reviewing authority ordered that -

> "[the sentence as approved] will be duly executed, but the execution of those portions thereof adjudging dishonorable discharge and forfeiture of pay and allowances in excess of $40.00 per month for six months are suspended."

Article of War 52 provides that the reviewing authority may -

> " * * * suspend the execution, in whole or in part, of any * * * sentence as does not extend to death, and may restore the person under sentence to duty during such suspension; * * * . A sentence, or any part thereof, which has been so suspended may be remitted, in whole or in part, * * * and, * * * the same authority may vacate the order of suspension at any time and order the execution of the sentence or the suspended part thereof in so far as the same shall not have been previously remitted, * * *."

Pursuant to this article of war, if the execution of a sentence is suspended in part, the accused is credited in satisfaction of his sentence with that portion which he has served and, in the event the suspension is vacated, he is obliged to serve, together with any other portion of the sentence remaining unexecuted, the portion previously suspended. If a sentence is of such nature that it is not thus divisible, suspension in part can not be effectuated.

In the instant case, the action of the reviewing authority placed accused in a duty status for six months and attempted to subject him to a forfeiture of $40.00 per month for such period, the execution of the dishonorable discharge, however, remaining suspended. The reviewing authority may vacate the suspension of the execution of the dishonorable discharge at any time during the soldier's service (sec. 410 (4), Dig. Ops., JAG, 1912-40). In the instant case, if the action of the reviewing authority were put into

effect, in the event the suspension were subsequently vacated, it would not be possible to credit in satisfaction of the sentence then to be executed an amount equal to the forfeiture previously imposed upon accused. On the contrary, he would suffer in addition to the approved sentence the added punishment of loss of pay forfeited during the period he was in a pay status under suspended sentence. To thus increase a sentence of a court-martial is illegal (par. 87b, p. 73, M.C.M., 1928).

It must be concluded, therefore, that a reviewing authority may not legally suspend the execution of a sentence of dishonorable discharge and total forfeitures (and confinement at hard labor) and order the execution of partial forfeitures during the period of such suspension. If it is desired to retain the prisoner in a pay status with a partial forfeiture of his pay, it is necessary that the sentence be mitigated by the remission of the dishonorable discharge (par. 87b, p.77, M.C.M., 1928).

6. For the reasons above stated, the Board of Review is of the opinion that the record is legally sufficient to sustain the findings and sentence of the court but that so much of the action of the reviewing authority as attempts to provide for the performance of hard labor without confinement for six months and attempts to order the forfeiture of $40.00 of accused's pay per month for six months is illegal.

_____, Judge Advocate.
Colonel, J.A.G.D.

_____, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

_____, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

WAR DEPARTMENT
Army Service Forces
Branch Office of The Judge Advocate General

A.P.O. 924,
16 May, 1944.

SUBJECT: Record of trial of Private Francis E. Kjellgren (20116032), Company A, 114th Engineer Battalion.

TO: Commanding General, 32nd Infantry Division, A.P.O. 32.

1. The above described record of trial has been determined legally sufficient to support the findings and sentence of the court. As revealed by the accompanying review by the Board of Review the sentence as modified and ordered executed is in part illegal.

2. It is suggested that a general court-martial order be promulgated vacating so much of the action on the sentence as provides for other than approval of the dishonorable discharge and the forfeiture of all pay and allowances due or to become due and the suspension of the execution thereof.

3. When the original copy of the inclosed review has served its purpose the return thereof is requested together with eight copies of the general court-martial orders referred to in paragraph 2, above.

ERNEST H. BURT,
Brigadier General, U. S. Army,
Assistant Judge Advocate General.

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review
CM A-1130

30 April, 1944.

UNITED STATES v. Private GEORGE W. PLEMMONS (7083778), Company B, 35th Infantry.	Trial by G.C.M., convened at Auckland, New Zealand, 19 February, 1944. Dishonorable discharge, total forfeitures, confinement for ten and one-half years. The United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. The accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 93rd Article of War.

Specification 1: In that Private George W. Plemmons, Company B, 35th Infantry, did, at or near the Prince Arthur Hotel, in a city at or near A.P.O. # 25, on or about 13 January 1944, with intent to do him bodily harm, commit an assault upon Private Joseph Gonock by cutting him on the face with a dangerous thing, to wit, a broken glass.

Specification 2: In that Private George W. Plemmons, Company B, 35th Infantry, did, at or near A.P.O. # 25, on or about 31 January 1944, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of A. R. Ninkie, five pounds, eight shillings, New Zealand currency of a value of about seventeen dollars and fifty cents ($17.50), one tobacco pouch wallet of a value of about fifty cents ($.50), and one 1939 Chevrolet automobile of a value of over fifty dollars ($50.00), all the property of said A. R. Ninkie.

CHARGE II: Violation of the 96th Article of War.

Specification: In that Private George W. Plemmons, Company B, 35th Infantry, did, in a city at or near A.P.O. # 25, on or about 2 February 1944, commit an assault upon one Toko Kahui, by wrongfully pointing a dangerous weapon, to wit a .45 caliber pistol, at said Toko Kahui.

Accused pleaded not guilty to all specifications and charges and was found guilty as charged. He was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for fifteen years. The reviewing authority approved the sentence but remitted four and one-half years of the confinement, and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence shows that on January 13, 1944, Private Joseph Gonock, a member of the 25th Division Military Police Platoon, was in the saloon of the Prince Arthur Hotel, Auckland, New Zealand, drinking beer with two civilians. Private Gonock was not on duty at this time. The three were seated at a table (R. 8), "doing coin tricks" when accused approached and "wanted to do something else with the coins" (R. 13). Private Gonock told accused to "get out of the way" (R. 8). Accused then called him a "son-of-a-bitch". Accused went to the bar, secured a twenty-ounce beer glass, returned, called Private Gonock a "MP bastard" and struck him over the left eye with the beer glass. The testimony is conflicting as to whether the beer glass was broken before or after the blow was struck (R. 8, 14, 17). Gonock was taken to the 39th General Hospital where a piece of glass was removed from his eye. He exhibited a scar which resulted from the wound. Private Gonock thought accused was intoxicated but several other witnesses thought him to be sober (R. 11, 13, 18).

On the evening (R. 23) of January 31, 1944, accused and Private Long, both members of Company "B", 35th Infantry, stationed at Auckland, New Zealand, engaged a taxi driver, Mr. Athel Ray Ninkie, to take them to a place near Camp Mangere (R. 20; Pros. Ex. "A"). Prior to reaching the camp, accused, who was sitting by the driver, directed him to turn in "Buckland Road". They travelled about 300 yards down this road when the driver was instructed to stop. Private Long pointed a service revolver at the driver who was ordered to get in the back of the taxi, where his hands were tied behind him, and then ordered to "stay down while going through the city" (R. 21). Accused got in the front seat to drive, after first inquiring as to the conditions of the lights and tires and the amount of gas. Accused asked Long, who still had the driver covered with the pistol, to make sure Mr. Ninkie's hands were tied and then drove the taxi several miles, stopping on the Puhinui Road, where the driver was taken from the car into the bush and ordered to lie down. His feet were tied together and accused then robbed him of a tobacco pouch containing about five pounds and eight shillings, and a wallet (R. 22). (By stipulation it was agreed that the rate of exchange of New Zealand currency was $3.2442 per pound (R. 19)). Accused and Private Long then left the taxi driver and drove the car to "Green Lane" where it was abandoned. They then took a tram into Auckland (Pros. Ex. "A").

On the evening of February 2, 1944, about 11:30 P.M., accused and Private Long went to the home of Mr. Toko Kahui, 41 Anglesea Street, Auckland, New Zealand. Two American sergeants and some girls were also there. Accused sat at a table for about ten minutes and then asked one of the girls to go outside and speak with him. The girl refused and accused then "got a bit rough. He tried to pull the girl off the little bed, so I [Mr. Kahui] threw him out - threw him away from the bed". Accused then left the room. Shortly thereafter Mr. Kahui went to a room where "my wife was and there was Plemmons with a pistol" (R. 25). Mr. Kahui then returned to the room where the two sergeants and the girls were, followed by accused who "had a gun on him". Accused then "told us to stand still and he threatened every one in the room" (R. 30). Accused was "threatening the girls, trying to get them to go out with him but the girls wouldn't go. He had the pistol in his hand all the time. I [Mr. Kahui] told

Plemmons to put the pistol away but he just told me to shut up and not to make any moves" (R. 26). Staff Sergeant Jesse R. Harris testified that accused held up the group at the point of a gun for approximately half an hour. Mr. Kahui testified that accused continued this conduct for about an hour when Kahui walked up to him, whereupon accused put the pistol against Mr. Kahui's stomach. Mr. Kahui then hit accused in the right eye, knocking him out. The pistol fell to the floor and was picked up by one of the sergeants. Subsequent examination showed it to have been loaded at the time of the incident (R. 27, 31). At the time in question accused "was quite sober" (R. 28).

The prosecution introduced in evidence a statement given Major Donald A. Small by accused wherein he denied hitting Private Joseph Gonock with anything other than his fists (spec. 1, Charge I). He admitted that he and Long had agreed to hold up the taxi driver and to take his car and cash but claimed the amount in cash to be only two pounds and a check for thirty pounds (spec, 2, Charge I). As to the incident at the home of Mr. Kahui, he admitted having gone there with Private Long, and drinking two or three quarts of wine but claimed that he became very drunk and did not remember what happened (spec., Charge II) (Pros. Ex. "A").

The accused elected to remain silent and called no witnesses.

4. The evidence clearly establishes the offenses of which accused was charged. A beer glass weighing twenty ounces if unbroken, wielded in the manner disclosed by the evidence, is a dangerous weapon. If broken and shoved into the face of Private Gonock it is equally dangerous, and in either event was calculated to do bodily harm. The court was fully warranted in finding accused guilty of the offense alleged in specification 1, Charge I.

The uncontradicted evidence and accused's confession clearly establish all of the essential elements of robbery, as alleged in specification 2, Charge I.

There was no contradiction of the alleged assault on Mr. Kahui. Accused admitted being at the place and having a pistol with him at that time. The evidence fully supports the court's findings of guilty of Charge II and its specification.

5. For the reasons stated above the Board of Review holds the record legally sufficient to support the findings of guilty and the sentence.

[signature], Judge Advocate.
Colonel, J.A.G.D.

[signature], Judge Advocate.
Lieutenant Colonel, J.A.G.D.

[signature], Judge Advocate.
Lieutenant Colonel, J.A.G.D.

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review
CM A-1138

5 June, 1944.

UNITED STATES v. Private LEONARD HATCHETT (33626593), Company "M", 25th Infantry.	Trial by G.C.M., convened at APO 709, 3 April, 1944. Dishonorable discharge, total forfeitures, confinement for life. The United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 92 Article of War.

Specification: In that Private Leonard (NMI) Hatchett, Company M, 25th Infantry, did at APO 709, on or about 1 March 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one, Private Richard C. Pulliam, a human being, by shooting him with a Caliber .45 pistol.

The accused pleaded "Not Guilty generally; Not Guilty by reason of temporary insanity" to, and was found guilty of, the charge and its specification. He was sentenced to dishonorable discharge, total forfeitures, and confinement for life. The reviewing authority approved the sentence and has designated The United States Penitentiary, McNeil Island, Washington, as the place of confinement. Pursuant to Article of War 50½, the record of trial was forwarded to the Board of Review, Branch Office of The Judge Advocate General, Melbourne, Victoria, Australia.

3. The evidence for the prosecution shows that on March 1, 1944, at APO 709, Guadalcanal, Solomon Islands, at about 11:30 A.M., deceased and several

other soldiers were engaged in a card game in the recreation tent. Accused went into the tent and asked deceased for a match. Deceased replied that there was one on the table and told accused to take it. Accused took the match and left the tent. Finishing the card game, deceased looked for a dime belonging to him, found it gone, and made the statement that he thought accused had taken it (R.8). After the noonday meal deceased was near the mess hall. He was approached by accused and asked by him if he thought that he [accused] had his dime. Deceased replied in the affirmative. Deceased then turned and went to a lister bag and got a drink of water. Returning, he was again asked by accused, "Do you still think I have your dime?". Deceased again replied in the affirmative. Accused, who was standing about four yards from deceased, pulled a .45 caliber pistol from his right hand pocket in his fatigue clothes and shot deceased, the bullet going through the left elbow and entering the body in the region of the left flank, traversing the body in a slightly downward direction and emerging on the opposite side about one inch lower, causing his death (R.6). Prior to the shooting neither accused nor deceased appeared to have been angry (R.10). Neither had used any threatening language nor did deceased have any weapon in his hand. Accused left the scene and went toward the orderly room where he was met by Lieutenant Lemuel A. Penn, who took his pistol from him and put him under arrest. He asked accused why he shot deceased and accused related to him the incident of getting a match from deceased, deceased asking him if he had his dime, his reply in the negative, and then said "I will stop these people from messing with me" (R.27). Accused at this time was performing no duty requiring him to be armed with a pistol but had a right to have it in his possession (R.7). Lieutenant Penn testified that a standing order prohibited men in the company from having ammunition in their possession and that accused had been notified of such order. An inspection of the pistol by Lieutenant Penn showed it to have recently been fired and to have one round in the chamber (R.25).

Captain George W. W. Little, M.C., was called as a witness for the defense and it was agreed that he was a medical expert. On March 17, 1944, witness examined accused as to his sanity. As a result of such examination he concluded that accused "is sane now and was apparently sane at the time of the commission of the crime" (R.41). He further testified "In my opinion I do not think that the man acted as one temporarily insane after the incident" (R.40).

Accused elected to be sworn and testify.

He testified, in substance, as did other witnesses, as to the events up to the time of the actual shooting. When he approached the mess hall deceased called him and said: "I want to ask you something about that dime". Accused stated "That was the time I stopped, and told him I didn't get his dime. Then he said 'You got it'". Deceased went to the lister bag, then returned to a box on which he had been sitting and stated "You've got my dime" and made a "motion toward the axe". "Then I shot. I pulled the pistol out and shot". Private Charlie E. Ellis testified that at this time deceased would have had to

take "about three steps to get to the axe * * * He [accused] was between the axe and Pulliam" (R.23, 24). Accused remembered nothing after the shot was fired. He did not remember saying anything to deceased while the latter was going to the lister bag. He admitted being very angry at this time, stating, "I don't know how mad I was", and claimed that he did not know what he was doing and did not feel that he was doing wrong (R. 37). The next thing he remembered was being approached by Lieutenant Penn and a military police sergeant and giving Lieutenant Penn his pistol (R.33). He accounted for having the ammunition in his possession, stating that he had found it near the unloading docks (R.34). He admitted having loaded his pistol upon returning to his tent after having asked deceased for a match in the recreation tent.

Lieutenant William D. Spencer, 25th Infantry, testified that he saw accused just after the killing: "He seemed to be excited. He said something to the effect; I'm tired of people fooling with me. I would rather die and go to hell than be accused of stealing a dime " (R.38). At this time accused was "trembling" and "sweating". "He was shouting" (R.39)

4. The accused is charged with murder. The specification alleges that accused did " * * * with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill * * * [the deceased], by shooting him with a .45 Caliber pistol." In order to determine the legal sufficiency of the evidence to support the finding of guilty under this specification, it is necessary that the evidence support the conclusion that the accused unlawfully killed the deceased with malice aforethought.

> " * * Murder is defined as ' * * * the unlawful killing of a human being with malice aforethought.' The word 'unlawful' as used in this definition means ' * * without legal justification or excuse.' A justifiable homicide is 'A homicide done in the proper performance of a legal duty * * *.' Furthermore, an excusable homicide is one ' * * which is the result of an accident or misadventure in doing a lawful act in a lawful manner, or which is done in self-defense on a sudden affray, * * * '.
>
> '* * * Malice, in this definition, is used in a technical sense, including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done malo animo, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief. And therefore malice is implied from any deliberate or cruel act against another, however sudden.

* * * *

> It is not the less malice aforethought, within the meaning of the law, because the act is done suddenly after the intention to commit the homicide is formed; it is sufficient that the malicious intention precedes and accompanies the act of homicide. It is manifest, therefore, that the words 'malice aforethought' in the description of murder, do not imply deliberation, or the lapse of considerable time between the malicious intent to take life and the actual execution of that intent to take life and the actual execution of that intent, but rather denote purpose and design in the contradistinction to accident and mischance (Commonwealth v. Webster, 5 Ouch. 296; 52 Am. Dec. 711)'." (CM 222148, Griggs).

Similarly the Manual for Courts-Martial defines malice aforethought as follows:

> "Malice aforethought. - Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. (Clark.)
>
> Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; intent to commit any felony. * * * " (M.C.M., 1928, par. 148a).

The competent evidence for the prosecution shows, and the accused admits, that he shot deceased at the time and place alleged. He pleaded "Not Guilty generally; Not Guilty by reason of temporary insanity", to the charge and specification. The plea was properly considered by the court as a plea of not guilty. The record contains no substantial evidence that accused was insane at the time of the alleged crime. Quite the contrary is proven by the

only witness called by the accused:

> "Where there was no substantial evidence of insanity, the presumption of sanity contemplated in paragraph 63 and 112, M.C.M., was operative, and it was not necessary to introduce in evidence the finding of a medical board appointed on request of defense counsel in order to enable the court to dispose of the question of the mental condition of the accused. The court is empowered to constitute itself the judge of the extent to which the burden of inquiring into mental condition is imposed upon it. C.M. 193543 (1930)." (Dig. Ops., JAG, 1912-40, sec. 395 (36)).

Accused attempted to excuse the killing by testifying that immediately before he fired the fatal shot deceased was reaching for an axe. One witness testified that accused was standing between the axe and deceased when accused shot him. All witnesses testified that deceased was unarmed; that he did not make any threatening movements toward accused and did not appear to be angry. Only the statement of accused as to deceased reaching for the axe supports any excuse for the homicide. However, accused did not give this as his excuse immediately after he had shot deceased but stated that he had rather be dead and in hell than accused of stealing a dime. Accused quarrelled with deceased, went to his tent, armed himself with a loaded pistol, in direct violation of standing orders of which he had been appraised, approached deceased, again quarrelled with him and shot him. Accused admits he was angry with deceased. He stated: "I didn't know how mad I was".

> "To avail oneself of a plea of self-defense the facts must be such as to induce the reasonable belief or fear of the immediate existence of peril of death or great bodily harm (Allison v. United States, 160 U.S., 203-217). Whether such circumstances existed to establish self-defense is for the court to decide as a question of fact." (CM A-1178, Clark).

There is sufficient evidence in the record to support the court's findings that accused, did, at the time and place, kill deceased as alleged.

5. In the instant case the major portion of the trial was conducted at the scene of the crime. The testimony of the witnesses referred to places and distances which may have been apparent to the court but were vague and indefinite in the record. Fortunately, the legal sufficiency of the record could be determined without the consideration of such testimony. A record of trial by general court-martial should "set forth a complete history of the proceedings had in open court" (par. 85b, M.C.M., 1928), so that the reviewing authority and others required to review the record may have before them all of the evidence considered by the court in reaching its conclusion. Places, distances, or directions referred to by witnesses should be described by apt

words or by reference to exhibits introduced in evidence and attached to the record.

6. For the reasons stated above, the Board of Review holds the record legally sufficient to support the findings and sentence.

_____, Judge Advocate.
Colonel, J.A.G.D.

_____, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

_____, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

ARMY SERVICE FORCES
In the Branch Office of The Judge Advocate General
Melbourne, Victoria,
Australia.

Board of Review
CM A-1142

4 June, 1944

UNITED STATES v. Private CHARLES M. EVERS (17014855), Medical Detachment, 63rd Infantry.	Trial by G.C.M., convened at APO 6, 22 April, 1944. Dishonorable discharge, total forfeitures, confinement for twenty years. The Stockade, Base "D", USASOS, APO 929.

OPINION by the BOARD OF REVIEW
STAGG, ROBERTS, and MURPHY,
Judge Advocates.

1. The record of trial in the case of the soldier named above having been examined in the Branch Office of The Judge Advocate General and there found legally insufficient to support the findings, has been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General.

2. The accused was tried upon the following charge and specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Charles M. Evers did at APO 6, on or about 5 February 1944 desert the service of the United States by absenting himself without proper leave from his organization with intent to shirk important service, to wit: serve as aid man in a rifle company in a theatre of operations.

The accused pleaded not guilty to, and was found guilty of, the charge and specification. He was sentenced to dishonorable discharge, total forfeitures, and confinement for twenty years. The reviewing authority approved the sentence, but suspended, until the soldier's release from confinement, the execution of that portion adjudging dishonorable discharge, and designated the Stockade, Base "D", USASOS, APO 929, as the place of confinement. The findings and sentence were promulgated in General Court-Martial Orders No. 3, Headquarters

6th Infantry Division, 26 April, 1944.

3. The evidence reveals that accused, a member of the Medical Detachment of the 63rd Infantry, 6th Division, arrived in New Guinea from Hawaii on the S.S. Monterey (R.10) on 2 February, 1944. Accused knew one of the members of the transport's crew, having previously served with him in the Merchant Marine. That crewman went to accused's quarters aboard the S.S. Monterey and, in the presence of at least three other soldiers, said, according to one of those soldiers, that "if anyone wanted to go back to the States he could fix it up; * * * he would, if possible, help any soldier or sailor or any member of the Armed Forces to get back to the States as a stowaway. He would do everything possible to help them. * * * he would try and get any stowaway on the boat back to the States safely" (R. 14, 15, 16). Three or four times (R.12) during the voyage accused asked Private William Eppich, with whom he was quartered, if Eppich "wanted to go back to the states with him and he thought it would be pretty easy to arrange" (R. 8, 11). Accused had also told another soldier "that he had his own reasons" for having in his possession a pair of blue coveralls not of army issue (R. 15, 18).

Accused was last seen in the detachment on 4 February and, on the morning report for the following day, was shown as absent without leave (Pros. Exh. A).

Accused admitted, when testifying as a witness in his own behalf, that he had left his organization without leave on the evening of 4 February, and stowed away on the S.S. Monterey. He was discovered about eight days later and placed in confinement (R.41). Upon arrival in San Francisco, he was turned over to the military authorities at Fort McDowell and subsequently returned to his organization in New Guinea (Pros. Exh. B).

Accused endeavored to explain his actions by testifying that his parents had been killed in an accident when he was a child and that his wife was the only person whom he had "in this world". On 27 December he had received a letter from her stating, in effect, that she had been informed by a doctor that she could not have a child without first undergoing a spinal operation which she might not be able to survive, and asking that accused "grant her a divorce" (R.38). He wrote her three letters but received no answer. He therefore attempted to return to his home because "I wanted to get things straightened out with my wife, one way or another" (R.39). He testified that he did not "intend to leave the Army or go away from it entirely"; nor did he "intend to avoid * * * duty as an Aid Man" or "going anyplace where duty might require * * * in the face of the enemy or otherwise" (R.38). After seeing his wife he "was going to come back to the Army" but he knew that he could not return to his organization in New Guinea as he had no way of returning (R.43).

Both Major Joseph J. Grandone, the officer commanding the medical detachment, and Captain Richard E. Hiatt, accused's company commander, testified that accused had always performed his duties in a satisfactory manner (R.23, 33). Private Vincent T. Hynes testified that he was a friend of accused; that accused was a good soldier and that accused had been worried about not having heard

from his [accused's] wife.

4. In order to sustain the findings of guilty, it is necessary that the evidence support the conclusion that accused absented himself from his organization with the intent to shirk the important service alleged (par. 130a, p. 142, M.C.M., 1928). The court-martial had before it evidence that accused, while en route from Hawaii to New Guinea with his organization, conceived a plan for his return to the United States as a stowaway. Two days after disembarking in New Guinea, accused left his organization without leave and stowed away on the transport. He was apprehended eight days later on the high seas.

Although accused's organization was in a theater of operations when he absented himself, there is no evidence that it was in proximity to the enemy nor had it been alerted for movement to a forward area. There is no evidence of the nature of the duties accused was then performing. Apparently, such duties were only the routine duties of an aid man in a medical detachment. There is no evidence in the record that accused quit his organization with intent to shirk the service alleged, nor are there any circumstances in evidence from which such an inference may be drawn.

The mere absence of a soldier from his organization, even though it is then within a theater of operations in a foreign country, does not, without other proof, establish prima facie that he intended to shirk important service. To hold otherwise would be to militate against the clear intent of Article of War 28 and would lead to the conclusion that, almost without exception, every soldier absent without leave for any period of time while on foreign duty may be properly found guilty of desertion. As the Board of Review stated in CM 224805 (I Bull. JAG 269, Oct. 1942) -

> "All military service in time of war is more important, in a general sense, than similar service in time of peace. The importance of such service is increased by its urgency and necessity. The importance of war service and the greater relative seriousness of avoidance of such service are fully recognized in the statutory authorizations for punishments for such avoidance through desertion. Under Article of War 58 the authorized penalty for desertion is greater than for the same offense in time of peace. But if the intention of Congress in defining the special type of desertion embraced in Article of War 28 had been to include in the term 'important service' all service in time of war it could simply have so stated and it would have been quite unnecessary to make the differentiation, as the Congress did, between important and other service. The context of Article of War 28 plainly uses the word 'important' as a relative term to be applied comparatively in time of war as well as in time of peace. * * * * "

The record contains ample evidence upon which a finding that accused intended to remain absent permanently could be predicated, had accused been so charged. Such evidence, however, does not supply proof of the intent alleged. Controlling is the recent holding of the Board of Review in CM 224765, (cited with approval and followed in CM 231163 (II Bull. JAG 140, Apr. 1943)), in pertinent part as follows:

> "The offense of desertion is defined as '* * * * * * absence without leave accompanied by the intention not to return, or to avoid hazardous duty, or to shirk important service' (M.C.M., 1928, par. 130). Thus it is apparent that desertion is an offense requiring a specific intent of mind. It is equally clear that the word 'desert' is a broad, inclusive term and when used in a specification is susceptible of attributing to the accused any one of the three intents of mind described above. When, therefore, the word 'desert' in a specification is modified, as in the present case, by the phrase ' * * * in order to avoid hazardous duty * * * ', its meaning is narrowed and the justiciable issues of the Specification are accordingly restricted. Furthermore, when a Specification alleges desertion with an intent to avoid hazardous duty, the proof must show such an intent. If the proof shows no such intent, but rather an intent not to return to the service, there is a fatal variance between the allegata and the probata and a finding of guilty of desertion based on such proof cannot be approved." (I Bull. JAG 323, Nov. 1942).

It must be concluded, therefore, that the record of trial is legally sufficient to support only so much of the findings as involves the lesser included offense of absence without leave in violation of Article of War 61. It is noted that the date of the termination of such absence is not alleged in the specification as contemplated by the Manual for Courts-Martial (cf. forms 14, 21, pgs. 240, 241). However, despite this omission, the offense of absence without leave is included within the specification. Normally such an allegation is necessary since the extent of the period of unauthorized absence is essential to fix the maximum allowable punishment. Now, however, as a temporary change due to the existence of war, the limitations upon such punishment have been removed by Executive Order and for the time being, although desirable, it is unnecessary to allege and prove the duration of such a period, as distinct from alleging and proving the date of the inception of the offense.

5. Accused was sentenced to dishonorable discharge, total forfeitures, and confinement for twenty years. The reviewing authority suspended the execution of the dishonorable discharge until the soldier's release from confinement. The sentence is permissible for the offense

of which the accused is legally guilty. If the findings of guilty under Article of War 58 be not vacated, however, upon execution of the dishonorable discharge, accused will suffer the additional punishment of loss of his nationality (Nationality Act of 1940 (54 Stat. 1169) as amended by the act approved January 20, 1944 (Pub. Law 221, 78th Cong.)). Such additional punishment may not legally be imposed for a violation of Article of War 61.

6. For the foregoing reasons the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty as involves findings of guilty of absence without leave in violation of the 61st Article of War, and legally sufficient to support the sentence.

, Judge Advocate.
Colonel, J.A.G.D.

, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General, APO 924, 8 June, 1944. To: Commander-in-Chief, Southwest Pacific Area, APO 500.

1. The record of trial and accompanying papers in the case of Private Charles M. Evers (17014855), Medical Detachment, 63rd Infantry, together with the holding thereon of the Board of Review, are transmitted herewith pursuant to Article of War 50½, as amended, for your action.

2. The Board of Review holds that the record of trial is legally sufficient to support only so much of the findings of guilty as involves findings of guilty of the lesser included offense of absence without leave, in violation of Article of War 61, and legally sufficient to support the sentence. I concur in this holding and therefore recommend that so much of the findings of guilty of the charge and its specification as involve the findings of guilty of an offense by the accused other than absence without leave in violation of Article of War 61, be vacated.

3. The offense of absence without leave in this instance properly may be considered aggravated and deserving of a sentence appropriate to desertion. It may be noted from the inclosed statistical data that the most severe sentence for desertion thus far ordered executed in either the South or Southwest Pacific Areas, included 15 years confinement at hard labor. The average sentence of confinement is 5 and 3/4 years. It is suggested that a 10 year term of confinement is adequate and appropriate in this case and the recommendation is made, therefore, that the court-martial's sentence of confinement at hard labor for 20 years be mitigated by the remission of 10 years.

4. A form of action embracing the two recommendations made above is inclosed herewith should your decisions be in accord with these recommendations.

ERNEST H. BURT,
Brigadier General, U.S. Army,
Assistant Judge Advocate General.

2 Inclosures:
Incl. 1 -Form of action.
Incl. 2 -Statistical data.

(Findings vacated in part in accordance with recommendation of Assistant Judge Advocate General. Ten years of confinement remitted. GCMO 6, USAFFE, 13 Jun 1944)