OFFICE OF
JUDGE ADVOCATE
GENERAL
OF THE ARMY

BOARD OF REVIEW
AND
JUDICIAL COUNCIL

HOLDINGS
OPINIONS
REVIEWS

VOL. 10

1951

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v. 10

JUDGE ADVOCATE GENERAL'S CORPS

BOARD OF REVIEW
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HOLDINGS, OPINIONS AND REVIEWS

VOLUME 10

Including

CM 344018 - CM 344868

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Judge Advocate General's Corps

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JUDGE ADVOCATE
NAVY DEPARTMENT

OFFICE OF THE JUDGE ADVOCATE GENERAL

Washington, D. C.

1951

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EXPLANATORY NOTES

1. References in the Tables and Index are to the pages of this volume. These page numbers are indicated within parentheses at the upper corner of the page.

2. Tables III and IV cover only the specific references to the Articles of War and Manual for Courts-Martial, respectively.

3. Items relating to the subject of lesser included offenses are covered under the heading LESSER INCLUDED OFFENSES rather than under the headings of the specific offenses involved.

4. Citator notations (Table V) - The letter in ( ) following reference to case in which basic case is cited means the following:

(a) Basic case merely cited as authority, without comment.

(b) Basic case cited and quoted.

(c) Basic case cited and discussed.

(d) Basic case cited and distinguished.

(j) Digest of case in Dig. Op. JAG or Bull. JAG only is cited, not case itself.

(N) Basic case not followed (but no specific statement that it should no longer be followed).

(O) Specific statement that basic case should no longer be followed (in part or in entirety).

5. There is a footnote at the end of the case to indicate the GCMO reference, if any.

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DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGK - CM 344018

22 DEC 1950

UNITED STATES	PUSAN BASE COMMAND
v.	Trial by G.C.M., convened at APO 59, c/o Postmaster, San Francisco, California, 29 and 30 September 1950. Dishonorable discharge, total forfeitures after promulgation, and confinement for life.
Private ERNEST E. KITCHENS (RA 25281747), 511th Quartermaster Service Company, APO 59.	

OPINION of the BOARD OF REVIEW
BARKIN, WOLF and LYNCH
Officers of The Judge Advocate General's Corps

---

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 Judicial Council and The Judge Advocate General.

2. Accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 92nd Article of War.

Specification 1: In that Private Ernest E. Kitchens, 511th Quartermaster Service Company APO 59 did, at Pusan, Korea on or about 21 August 1950, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill Robert C. Noreau, a human being, by shooting him with a carbine.

Specification 2: (Finding of not guilty).

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

Specification: In that Private Ernest E. Kitchens, 511th Quartermaster Service Company APO 59, did at Pusan, Korea on or about 21 August 1950, with intent to commit a felony, viz: murder, commit an assault upon Gai Ho Yun (a Korean National), by feloniously and willfully shooting the said human being with a carbine.

He pleaded not guilty to all charges and specifications. He was found not guilty of Specification 2 of Charge I, but guilty of Specification 1 of Charge I and of Charge I and guilty of Charge II and its specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence

a. For the Prosecution

At or about 4 p.m., 21 August 1950, the accused, Private Ernest E. Kitchens, 511th Quartermaster Service Company, Headquarters Pusan Base Command, accompanied by Private Charles Lambert and Private Robert C. Noreau, the alleged murder victim, went to the Metropolitan Dance Hall in Pusan, Korea (R 11,12,20). At the time of their departure each of them was armed with a carbine. The accused and Lambert had three clips and Noreau had two, which they carried in a pouch on their pistol belts (R 20). At the dance hall they were seated at a booth and were soon joined by three girls, two of whom danced with Noreau and the accused (R 22). The accused remarked that he was jealous because Noreau was dancing with his girl, and "maybe he should take him [Noreau] outside and whip his ass" (R 13,48). The accused "bought himself some sake and there were more drinks bought up included in the price," of admission. A colored soldier approached their table and without being invited to do so drank some of the contents of a bottle belonging to Noreau. Noreau, however, merely said, "That's all right. Just misunderstood" (R 12,23). Private Berry, who had joined the accused's party earlier, testified that Noreau argued with this soldier (R 48, 49). The accused and Noreau had a considerable amount to drink; Noreau, however, drank mostly wine (R 12,22,30). Lambert observed that Noreau started to "get intoxicated" but that accused appeared to be sober. Berry, on the other hand, was of the opinion that both Noreau and accused were drunk (R 22,50).

The dance hall closed at 8 p.m. and the accused, Noreau, and Lambert left together. Upon reaching the street, the accused asked Noreau for his ammunition and upbraided him for dancing with his (accused's) girl, saying, "Noreau, we're friends and all like that, but you go too far sometimes, you breaking up the party." Noreau responded, "We are still friends aren't we?" and gave the accused all of his ammunition which consisted of "two clips." The accused threw his helmet liner on the ground,

handed his rifle to Lambert and grabbed "Noreau by the shirt in a threatening manner" (R 12,14,25,27,38). Noreau, his carbine slung on his shoulder, turned the muzzle down without removing it from his shoulder "as if he was going to hit" the accused (R 27,38). The accused thereupon struck Noreau on the head with the butt of his rifle, causing Noreau to stagger back. As Noreau was wearing a helmet liner he apparently was not hurt badly (R 12,27,38). The accused then told Noreau he was going to fire at him and for Noreau to get some ammunition. Noreau said he did not have any clips and the accused answered that "You'd better get some." Noreau, his rifle still slung on his shoulder, sought refuge behind a telephone pole about twenty-two feet from the accused. Thereupon the accused put a clip in his weapon and commenced firing several rounds at him (R 12,15,28,34,37,48). "After a few shots *** Private Noreau fell," and the accused walked over, kicked Noreau in the left side, and soon thereafter stated to Lambert "he was glad he [accused] did it" (R 12, 13,15,27,31,37,38). The shooting occurred at about 8:15 or 8:30 and it was light enough to see "about 200 yards" (R 16). At the time of the shooting, Gai Ho Yun, a Korean female, who was at a point considerably further from accused than was Noreau was shot in the back (R 69, Pres Ex 9). A bullet which was subsequently removed from her body bore identical markings to a test bullet fired from the accused's weapon (R 74,75, 114; Pros Exs 4, 7). Following the shooting, Lambert and the accused "flagged down" a passing jeep, the accused saying to the occupants that "he just wounded a man and must get back to camp to report the incident because they will think he [accused] committed a murder." Accused also stated, "We'd better get him [Noreau] to the hospital." The accused during this time appeared to be "pretty sober." Noreau, bleeding profusely, was taken to the hospital, and the accused and Lambert returned to camp (R 12,13,39). On the way, the accused removed from his carbine the clips containing two rounds and threw these, as well as a "full clip" into the bay (R 15,29).

Master Sergeant Howard W. James, 511th Quartermaster Service Company, testified that sometime between 8 and 9 o'clock, on the evening of the incident, the accused "came into the orderly room and stated that a man had been shot *** I relieved Private Kitchens of his weapon" and subsequently gave it to a "CID agent" (R 41,44,45,46,87; Pros Ex 4). James identified Prosecution Exhibit 4, a carbine, containing a magazine with one "live round" as the weapon he had taken from accused and it was admitted in evidence without objection (R 43,87). Prior to his giving the carbine to the "CID agent" James took the weapon over to the light, put a piece of paper in the chamber, looked through the barrel and observed that it was dirty. He also smelled the end of the barrel and felt a trace of powder, "as if it had been fired" (R 41, 44-46,89).

At approximately 9 p.m., on 21 August 1950, Noreau was pronounced dead by Lieutenant Colonel George V. Potter, MC. On 22 August 1950,

Captain Arthur F. Lincoln, MC, performed an autopsy on the body of Noreau. He found -

> "*** The bullet entered at 8th interspare posterior lateral left chest, passed through lower lobe of left lung, through the vertrabral body of the 10th vertebrae, through the lower lobe of the right lung. The bullet left the chest at the 7th interspare mid-axillary line right chest and entered the right arm medial surface, middle 1/3 where it was removed lying next to the humerus." (Pros Ex 2)

The bullet which was removed from the body of the deceased and admitted in evidence without objection bore markings identical to the markings on a test bullet fired from Prosecution Exhibit 4, the accused's weapon (R 114,126; Pros Exs 1,2 and 8).

Major Jack B. Richmond, Executive Officer, Criminal Investigation Laboratory, Far East Command, testified that on or about 25 August 1950 he questioned the accused (R 117). At the outset of the interrogation he "warned" him of his rights under Article of War 24 and the accused "signed a statement to the effect that he understood that" (R 118), and made an oral statement to him "that he fired his weapon at Noreau." He (accused) stated he might have hit Noreau with the butt of the weapon "before he fired it," but he "did not intend to kill Noreau, just wound him" (R 122).

b. For the Defense

The rights of the accused as a witness were explained to him and he elected to take the stand and testify under oath (R 152). He testified that he is 19 years of age and unmarried. He completed eight grades of school and has been in the Army approximately twelve months. During his Army service he was a member of five different units. He arrived in Korea "about the 9th of August." The accused stated that he had never been court-martialed and prior to coming in the Army he had never been convicted of any crime. He had known Noreau about one month and Lambert about five months, and got along well with both (R 153,154, 161). On the 21st of August 1950 he, Lambert and Noreau went to the Metropolitan Dance Hall where the three of them drank a considerable amount of sake and the accused also drank some wine. He and Noreau were "pretty drunk" (R 155-158). While there, the accused danced with a girl and Noreau danced with two of them, including the girl who was with the accused (R 161). The accused denied that he argued with Noreau because he danced with his (accused's) girl or that he threatened to "take Noreau out and beat his ass" (R 162,164). Noreau got involved in an argument with a colored soldier and the accused stated, "I tried to get Private Noreau to sit down and keep quiet." After the colored

soldier left, "Private Noreau *** put a clip in his weapon. *** He got up and I told him I would take him back to my company. So I took him outside and started back to the company with him and we got *** approximately a mile from the club up where the accident or incident happened" (R 157,164). He stated that he did not remember taking any ammunition or any clips away from Noreau, nor did he ask for any clips (R 158,165-166).

> "*** I finally got him up the street that goes back to the company and *** he stopped and started arguing with me. He didn't want to go or want me to help him. I reached and grabbed him by the shirt collar ***. I tried to get him to go so he jerks loose and calls me a bad name and when he called me a bad name, I had my rifle off at port arms and tilted the butt and I took a swing at him. I don't know whether I hit him or not" (R 158).

When he struck at Noreau, Noreau did not attempt to strike back at him (R 165). Noreau "jumped back and jerked his weapon off his shoulder at port arms, *** runs back and jumps behind this telephone pole and had his weapon stuck around the pole and I wasn't paying too much attention to whether he had fired or not and I put a clip in my rifle." Noreau had his weapon pointed at the accused and it appeared that he was "going to start firing at" him, whereupon the accused fired his weapon. Noreau had his left side toward accused "with the telephone pole on his left side" (R 159, 166-167). "I couldn't tell I was firing at him or not, just firing in his direction. *** Just firing to wound him and keep him from firing back at me." The accused was "feared" for his life. When Noreau jumped behind the pole, the accused could not see whether there was a clip in Noreau's weapon (R 158,159,167). Noreau did not fire back or say anything (R 167). The accused's "prime thought" had been to get Noreau home so that the military police would not pick him up. After the shots were fired and Noreau fell to the ground, the accused ran over to him. "I seen he had been shot and I turned around and a jeep was coming from the opposite direction. I stopped the jeep and I asked if they would take him to the hospital because he had been shot. They said they would and we got out and put him in the jeep and they took out to the hospital." The accused denied that he kicked Noreau or that he intended to kill him. On the way back to his company the accused threw one magazine away, leaving a total of three magazines in his possession (R 160-161,164). The accused did not remember how many magazines he had at the time he went to the dance hall but he recalled that he had three when he got back to his company (R 161).

4. <u>Discussion</u>

The accused was charged with and found guilty of the premeditated

murder of Robert C. Noreau in violation of Article of War 92 and of assault with intent to commit murder upon Gai Ho Yun in violation of Article of War 93.

The evidence shows that on the evening of 21 August 1950 the accused together with Noreau and another soldier, all armed with carbines, left a dance hall in Pusan, Korea. The accused, apparently irritated because Noreau danced with his girl, rebuked him, and subsequently struck Noreau on the head with a carbine and announced his intention of shooting him. Noreau retreated behind a telephone pole, whereupon the accused, aware of the fact that Noreau had no ammunition, fired a volley at him, as a result of which Noreau was killed and Gai Ho Yun, a Korean female, present in the vicinity, was wounded.

Murder is defined as "*** the unlawful killing of a human being with malice aforethought" (MCM, 1949, par 179a, p 230). Murder is aggravated by the coincidence of premeditation upon the part of the murderer. Premeditated murder is defined as "*** murder committed after the formation of a specific intention to kill someone and consideration of the act intended. Premeditation imports substantial, although brief, deliberation or design" (MCM, 1949, par 179a, p 231).

Malice has been defined as:

> "*** 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 none 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, but rather denotes purpose and design in contradistinction to accident and mischance." (Commonwealth v. Webster, 5 Cush. 296; 52 Am. Dec. 711).

"Malice may be presumed when a homicide is caused by the use of a deadly weapon in a manner likely to result in death." (MCM, 1949, par 125, p 151)

"*** It [malice aforethought] may mean any one *** of the following states of mind preceding or coexisting with the act or omission by which death is caused: *** knowledge that the act which causes death will probably cause the death of, or grievious bodily harm to, any person, whether such person is the person actually killed or not, even though such knowledge be accompanied by indifference whether death or great bodily harm is caused, or by a wish that it may not be caused ***." (MCM, 1949, par 179a, p 231).

"Premeditation and deliberation, as an element of murder, consist in the exercise of the judgment in weighing and considering and forming and determining the intent or design to kill. In this connection the word 'premeditation' means simply entertainment by the mind of an intent or design to kill" (Sec. 420, Wharton's Criminal Law, 12th Ed.).

"It involves a prior intention to do the act in question. It is not necessary, however, that this intention should have been conceived for any particular period of time. It is as much premeditation if it entered into the mind of the guilty agent a moment before the act, as if it entered ten years before" (Sec. 507, Wharton's Criminal Law, supra).

"*** Premeditation imports substantial, although brief, deliberation or design. ***" (MCM, 1949, par 179a, p 231).

The elements of proof of the offense of murder are as follows:

"Proof. - (a) That the accused unlawfully killed a certain person named or described by certain means, as alleged (requiring proof that the alleged victim is dead, that his death resulted from an injury received by him, that such injury resulted from an act of the accused, and that the death occurred within a year and a day of such act); (b) that such killing was with malice aforethought; and if alleged, (c) that the killing was premeditated." (MCM, 1949, par 179a, p 232)

In considering the above precedents and requisites of legal proof, we are particularly impressed by the undisputed evidence in the instant case showing that the accused, using a weapon, designed primarily to kill, fired his carbine at close quarters into the body of Private

Noreau. Clearly there was no legal justification or excuse for the act, and nothing in the record shows provocation in any degree approaching that regarded by the law as adequate to reduce the seriousness of the offense. It is clearly established that the shots were fired intentionally and not accidentally. It is undisputed that immediately preceding the shooting the accused announced he was going to fire at Noreau. Having made good his threat, he further evidenced his specific intent to kill by kicking the prostrate body of his victim.

Although the defense sought to show that the accused was acting in self defense and that therefore the killing was lawful, i.e., with legal excuse, the substantial credible evidence of record shows that the accused was aware that the deceased had no means with which to inflict deadly injury, that he further evidenced no desire to do so, and that in fact he did not do so.

It was suggested by the defense that on the evening of 21 August 1950 the accused was under the influence of intoxicating liquor to such a degree that he could not entertain the specific intent to kill. The question of the degree of the accused's intoxication and the effect of his imbibing on his volition is generally one of fact for the court to determine (CM 294675, Minnick, 26 BR (ETO) 11,21). Where it appears from the evidence, as in the instant case, that the accused was capable of retaining in his memory a recollection of the details surrounding his perpetration of the homicide, that he had the ability to perform acts requiring coordination such as loading and firing a weapon, that he realized the enormity of his offense and the jeopardy in which it placed him as shown by his anxiety to return to his company and report his misdeed, we can but concur in the implied finding of the court that the accused was not so intoxicated as to be unable to harbor a specific intent to kill.

It follows that the evidence unquestionably compels the conclusion of the accused's legal and moral guilt of premeditated homicide perpetrated with malice aforethought (CM 338934, Jones, 6 BR-JC 269,280, and cases therein cited; Bishop v. United States, 107 F. 2d 297, 301; CM 342409, Woodall, 9 Aug 1950).

With reference to the wounding of Gai Ho Yun, incidental to his murder of Noreau, the fact that the accused had no ill will toward her and probably did not know of her presence is immaterial. In assessing the liability of an accused for the unintentional wounding of a person incidental to a murder committed upon another person, the law attaches to the accused in the unintentional wounding the mental state attendant on the murder, and, hence, the unintentional assault, in law, is an assault with intent to murder (CM 248102, Roberts, 31 BR 121,135: Wharton's Criminal Law, supra, Vol 1, p 194).

It is thus obvious that the facts of this case sustain the findings

of guilty of assault with intent to commit murder upon Gai Ho Yun.

5. The Charge Sheet shows that the accused is 19 years of age. He enlisted 7 October 1949 for three years with no prior service. His service prior to the offense has been characterized as poor.

6. The court was legally constituted and had jurisdiction over the accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. 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 and to warrant confirmation of the sentence. A sentence to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for life is authorized upon conviction of a violation of the 92nd Article of War.

Acaron Barkin, J.A.G.C.

Samuel H. Cooper, J.A.G.C.

Glen Lynch, J.A.G.C.

(10)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

CM 344018

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Private Ernest E. Kitchens, RA 25281747, 511th Quartermaster Service Company, APO 59, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution. A United States Penitentiary is designated as the place of confinement.

Robert W. Brown
Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr.
J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

5 January 1951

I concur in the foregoing action.

E. M. BRANNON
Major General, USA
The Judge Advocate General

(GCMO 5, Jan 15, 1951).

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGN-CM 344026

29 NOV 1950

UNITED STATES v. Private CHARLES E. SWINEHART (RA 16311018), Battery A, 83d Field Artillery Battalion.	))))))))	FORT BRAGG Trial by G.C.M., convened at Fort Bragg, North Carolina, 1 November 1950. Dishonorable discharge, total forfeitures after promulgation and confinement for two (2) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
YOUNG, MICKEL and MOBERLEY
Officers of the Judge Advocate General's Corps

1. The Board of Review has examined the record of trial in the case of the soldier named above and submits this, its holding, to The Judge Advocate General under the provisions of Article of War 50e.

2. The accused was tried by general court-martial upon the following Charge and Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that Private Charles E. Swinehart, Battery "A", 83d Field Artillery Battalion, did, at Fort Bragg, North Carolina, on or about 29 September 1950, willfully attempt to damage one tractor, high speed, 18 ton, M-4, issued for use in the military service of the United States, and valued at over fifty dollars ($50.00), by throwing approximately a double handful of sand into the gasoline tank of said tractor.

He pleaded not guilty to and was found guilty of the Charge and Specification and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct for two years. Evidence of two previous convictions was introduced. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, New Cumberland, Pennyslvania, or elsewhere as the Secretary of the Army may direct, but not in a penitentiary, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50e.

3. Inasmuch as the Board holds that error prejudicial to accused's substantial rights occurred at the trial, the evidence will not be summarized in detail.

4. The prosecution established by the testimony of Mr. Joseph J. Buckley, a Special Agent for the CIC, that on 10 October 1950, the accused, after being duly warned of his rights under Article of War 24, had signed and sworn to a typewritten statement which was offered in evidence as Prosecution Exhibit 4. The defense challenged the admissibility of the document (R 17,35), which appears to be a confession to acts constituting the offense charged, and requested that before the court ruled on the admissibility of the document the accused be permitted to take the stand "to testify in regard to this statement only." Thereupon the following colloquy transpired (R 31):

"Law Member: He is limiting his testimony to the voluntary nature--the circumstances under which this statement being offered in evidence was taken?

"Defense: That's correct.

"Law Member: Very well."

The accused then took the stand, having been previously advised by the Law Member substantially in the language set forth in Manual for Courts-Martial, U. S. Army, 1949, Appendix 5, page 342, that he might limit his testimony to the circumstances under which the statement was obtained, and that he could not "be asked on cross-examination whether the confession is true or false" (R 17), and testified as to the circumstances under which the confession was obtained.

On cross-examination the trial judge advocate interrogated accused with respect to matters preliminary to his signing the statement and then questioned him as follows (R 35):

"Q. Were you influenced by anything which made you talk? Did anything influence you to give the statement?
"A. What do you mean by that, sir?

"Q. Or was it just your conscience which dictated to you that you ought to give the statement?
"A. (No reply).

"Q. Was it your conscience that bothered you and made you give the right answer--tell them the truth?
"A. Yes, sir.

"Q. Was that what it was?
"A. (Nodded head in affirmation)."

Prosecution Exhibit 4 was admitted in evidence.

5. The only question to be considered is whether it was prejudicial error for the court to permit the accused to answer questions as to whether in the statement he did "give the right answer [and] tell them the truth."

That the trial judge advocate, by accident or design, in effect asked the accused if the statement was in fact true is the only reasonable interpretation which may be placed on the language employed in the question.

It is the law of this office that such interrogation constitutes a violation of the privilege of an accused against compulsory self-incrimination, and that this privilege is more than a mere rule of evidence or procedure, the violation of which might be subject to the curative provisions of Article of War 37 (CM 333793, Robinson, 1 BR-JC 67, and cases therein cited). Failure to object to such questions does not therefore constitute waiver (CM ETO 3931, Marquez, 11 BR ETO 105).

6. For the foregoing reasons, the Board of Review holds the record of trial legally insufficient to support the findings of guilty and the sentence.

Thos. E. Young, J.A.G.C.

[illegible], J.A.G.C.

Kirk B. Snoverley, J.A.G.C.

JAGN-CM 344026 1st Ind

JAGO, Department of the Army, Washington 25, D. C.
TO: Commanding General, Fort Bragg, North Carolina

1. In the case of Private Charles E. Swinehart (RA 16311018), Battery A, 83d Field Artillery Battalion, I concur in the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence. Under Article of War 50e(3) this holding and my concurrence therein vacate the findings of guilty and the sentence. A rehearing is authorized.

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

(CM 344026).

1 Incl
Record of Trial

E. M. BRANNON
Major General, USA
The Judge Advocate General

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D.C.

JAGH CM 344036

13 December 1950

U N I T E D S T A T E S	)	25TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at APO 25, 30 October 1950. Dishonorable discharge, total forfeitures after promulgation, and confinement for life.
Private First Class GUY E. ARMSTRONG (RA 35442497), Company H, 35th Infantry Regiment, APO 25.	)	

OPINION of the BOARD OF REVIEW
HAUCK, FITZHUGH, and IRELAND
Officers of The Judge Advocate General's Corps

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 Judicial Council and The Judge Advocate General.

2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 86th Article of War.

Specification: In that Private First Class Guy E. Armstrong, Company H, 35th Infantry Regiment, being on guard and posted as a sentinel, near Chirwon, Korea, on or about 8 September 1950, did leave his post before he was regularly relieved.

He pleaded not guilty to, and was found guilty of, the Charge and the Specification. Evidence of one previous conviction by summary court-martial for failure to repair at a fixed time to a properly appointed place was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence.

a. For the prosecution.

On 8 September 1950, Master Sergeant Eddie J. Wagner, Headquarters Company, 35th Infantry Regiment, 25th Infantry Division, was "commander

of the guard" detailed to protect the battalion perimeter. The accused was a member of the guard (R 9) and was present when the guard was instructed as to their duties by Sergeant Wagner (R 11) between 1800 and 1900 hours, 8 September 1950 (R 12). These instructions included orders "to stay on the post until relieved" (R 18). Private First Class Worley and the accused were posted "in a foxhole along the river bed" (R 14). One of them was to be awake at all times. "Usually one would pull 8 hours and then the other would pull 8 hours." When not on duty "the other man could go and clean up * *," or, if "the enemy wasn't around," could "go down to breakfast" (R 12). Except for these temporary absences, both men "were to be on guard at all times" (R 12). The purpose of the guard was "to guard against infiltrating enemy" (R 12).

The accused's organization at that time was located at Chirwon, Korea, and near the larger town of Masan (R 20). On the evening of 8 September 1950 at about 1800 hours, Sergeant Eddie J. Wagner, as commander of the guard, posted the accused (R 10). The accused had "dropped out" when the rest of the guard was being posted so he did not take his position in the foxhole at the same time Private First Class Worley was posted (R 10,15). After Sergeant Wagner had posted the rest of the guard, he found the accused "on my way down" to the CP (R 10). The accused seemed confused "as to where his post was" (R10). Sergeant Wagner pointed out to the accused the location of his post and accused "went on up to the position" (R 10). The accused joined Private First Class Worley at the proper post but only stayed a few minutes when he left "to get a shovel" (R 15,18). The accused never again returned to his post (R 15-18). Sergeant Wagner saw the accused at the CP about one quarter mile from the accused's post (R 10,12). The accused said he was looking for a shovel (R 10). Sergeant Wagner told the accused "Get the shovel and get back to the post" (R 10, 21). At about 0630 hours next morning when Sergeant Wagner went to relieve the guard, the accused was not on his post (R 11). After a search of the CP area, Sergeant Wagner found the accused asleep in his tent. He had not been relieved nor given permission to leave his post during the night. (R 10).

Sergeant First Class Joe R. Downs was on duty in the CP on the night of 8 September 1950 (R 20). He saw the accused in the CP tent after the time he had been posted and when he should have been on his post (R 20). Sergeant Downs testified, "He was told to go back to his post along the dike where he was on guard" (R 20). However, later that night Sergeant Downs saw the accused asleep in his tent (R 20). When Sergeant Downs went to breakfast the next morning, the accused was still in the tent sleeping (R 21).

b. <u>For the defense.</u>

The defense called no witnesses and offered no evidence.

After being warned of his rights as a witness, the accused elected to remain silent (R 22). When the court opened to receive evidence of

previous convictions, the accused was sworn at his own request and testified for purposes of mitigation. He stated that he is 41 years of age, that he has seven years of service, including service in Germany, Austria, and Czechoslovakia, that he is entitled to the Combat Infantry Badge "and all the ribbons that went with it," and that he is the only support of his mother and his father aged 60 and 70, respectively. He said he had several "close calls" in Korea and asked for a transfer "because on account of the treatment of the company commander." He testified two company sergeants told him the commanding officer said, "That Armstrong had better work straight, because if he messes up once I'll have it in for him," and "they said that he had it in for me" (R 25,26).

4. Discussion.

The accused was charged with a violation of Article of War 86 in that

> "* * being on guard and posted as a sentinel, * * [he] did leave his post before he was regularly relieved."

This specification follows exactly the prescribed form given in the Manual for Courts-Martial (Form No. 68, Appendix 4, MCM, 1949, p.320).

In such a case, leaving post before being relieved, there are two essential elements of proof, viz: (a) that the accused was posted or on post as a sentinel, as alleged; and (b) that he left his post without being regularly relieved (MCM, 1949, Par. 174c, p.227).

The evidence is uncontradicted that the accused and Private First Class Worley were posted as part of the outpost guard of Headquarters Company, 35th Infantry Regiment, in the vicinity of Chirwon, Korea, on the night of 8 September 1950. The evidence also conclusively proves that after remaining at his post for approximately ten minutes the accused left his post "to get a shovel" and did not return. It further appears, however, that arrangements as to hours and other details were left to the men themselves. One was to be on watch at all times during which time the other might sleep or leave the post temporarily to "clean up" or for the purpose of eating. The record does not reveal whether the accused or Private First Class Worley was actively on watch at the time the accused left the post. Because of the accused's late arrival and subsequent early departure, it appears that Private First Class Worley and not the accused was actively on watch at the time. Under the circumstances the Board of Review cannot conclude that the accused was posted as a sentinel within the meaning of Article of War 86 (CM 284232, Duncan, 14 BR (ETO) 273,276-277). The situation thus presented is identical with that in the Duncan case wherein the following language is found:

> "It does not follow from the foregoing that accused is guiltless. It was clearly established that 'being on guard' and posted

as a member of an outpost, he did 'leave his post before he was regularly relieved'. Such conduct on his part manifestly constituted a violation of Article of War 96 as a serious military offense - a disorder and neglect to the prejudice of good order and military discipline. The offense committed by accused should have been so charged in the first instance. The inclusion in the Specification of the words 'and posted as a sentinel' was not warranted by the evidence, but the findings of guilty of the Specification were proved as to every other allegation thereof. * * *."

"Had the Specification included the words 'before the enemy' it would have charged a clear violation of Article of War 75, and such charge would have been supported by the evidence. Had the proof shown that accused was actively on watch at the time of his departure, a clear violation of Article of War 86 would have been established. Of the gravity of accused's offense there can be no doubt. The offense of leaving post or outpost by a guard, not posted as a sentinel, before being properly relieved, is not included in the Table of Maximum Punishments set forth in the Manual for Courts-Martial. The most closely related offense included therein is absence without leave from guard, in violation of Article of War 61. * * *."

Limitations upon punishments for absence without leave (from, among other places, guard) in violation of Article of War 61, were suspended by Executive Order of the President dated 8 August 1950, effective in any area commanded or controlled by the Commander in Chief, Far East (E.O. No. 10149, 8 Aug. 50, 15 Fed. Reg. 5149; JAGN-SPCM 2793, Smith, 30 Oct 50). As a result, the only limitation on the maximum permissible punishment is that the death penalty may not be imposed inasmuch as the offense involves a violation of the 96th Article of War (AW 43; CM 260376, Horton, 5 BR (ETO) 395,397; CM 284232, Duncan, supra). The Board of Review, therefore, is of the opinion that the record of trial is legally sufficient to support the sentence.

5. The accused is 41 years of age. He claims his mother and father, 60 and 70 years of age, respectively, are both dependent on him. He states he has three brothers and sisters but none of them help support his parents. He is single. He completed seven years of elementary school and then worked for nine years as a coal miner at an undisclosed wage. He has no known civilian convictions. He enlisted 20 April 1949, at Camp Pickett, Virginia, for three years. The charge sheet shows prior service of six years, two months, nineteen days, but the dates are not given. He joined his present organization 19 July 1949 and his commanding officer rates him "poor" as to character and "unsatisfactory" as to efficiency. He received a summary court-martial 30 November 1949 for failure to repair at a fixed time to an appointed place and was sentenced to be restricted for thirty days, to perform hard labor for thirty days, and to forfeit $20.00 of his pay.

6. The court was legally constituted and had jurisdiction of the person and of the offense. 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 so much of the findings of guilty as involves findings that accused, being on guard at the time and place alleged, did leave his post before he was regularly relieved, in violation of Article of War 96, and legally sufficient to support the sentence, and to warrant confirmation of the sentence. A sentence to confinement at hard labor for life is authorized.

C. J. Hauch, Jr., J.A.G.C.

William C. Fitzhugh, J.A.G.C.

Arthur P. Ireland, J.A.G.C.

(20)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGJ CM 344036

UNITED STATES	)	25TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at APO 25, 30 October 1950.
	)	
Private First Class GUY E. ARMSTRONG, RA 35442497, Company E, 35th Infantry Regiment, APO 25	)	Dishonorable discharge, total forfeitures after promulgation, and confinement for life.

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Opinion of the Judicial Council
Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

- - - - - - - - - - - -

1. Pursuant to Article of War 50d(2) the record of trial and the opinion of the Board of Review in the case of the soldier named above have been submitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon trial by general court-martial the accused pleaded not guilty to and was found guilty of a specification alleging that, being on guard and posted as a sentinel, he did leave his post before he was regularly relieved, near Chirwon, Korea, on or about 8 September 1950, in violation of the 86th Article of War. Evidence of one previous conviction by summary court-martial was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The Board of Review is of the opinion that the record of trial is legally sufficient to support so much of the findings of guilty as involves findings that the accused, being on guard at the place and time alleged, did leave his post before he was regularly relieved, in violation of Article of War 96, and legally sufficient to support the sentence and to warrant confirmation thereof.

3. The evidence is substantially as set forth by the Board of Review in its opinion. We concur with the Board in its conclusion, and the reasons therefor, that the record of trial is legally sufficient to support only so much of the findings of guilty as involves findings that the accused, being on guard at the place and time alleged, did leave his post before he was regularly relieved, and legally sufficient

to support the sentence. The only question is whether the included offense sustained by the record constitutes a violation of Article of War 96, most closely related for the purpose of maximum punishment to the offense of absence without proper leave from guard in violation of Article of War 61, as the Board concludes, or whether the included offense is itself a violation of Article of War 61.

The accused while on guard left his post before being regularly relieved. He therefore necessarily absented himself from his guard without proper leave. This offense is directly denounced in Article of War 61. Accordingly we conclude that the included offense supported by the evidence is a violation of Article of War 61. To the extent that CM 284232, Duncan, 14 BR (ETO) 273, 277 is inconsistent with this conclusion, it should no longer be followed. An analogous situation is that in which absence without leave is held to be an included offense within an alleged violation of Article of War 75 when the specification is so drawn as sufficiently to allege an unauthorized absence (CM 126647, CM 130412 (1919), Dig Op JAG 1912-1940, sec 433(3), p 304; CM 297943, Knorr, 13 BR (ETO) 215, 218).

As indicated by the Board in its holding, the limitations upon punishments, inter alia, for violations of Article of War 61 (see MCM 1949, par 117c, p 134) are not applicable to the instant offense (EO 10149, 8 Aug 1950, 15 Fed Reg 5149). Consequently in this case a sentence to dishonorable discharge, total forfeitures after promulgation and confinement for life is authorized.

4. For the foregoing reasons, the Judicial Council 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 that the accused, being on guard at the place and time alleged, did leave his post before he was regularly relieved, in violation of Article of War 61, and legally sufficient to support the sentence and to warrant confirmation thereof.

Robert W. Brown

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr.

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

(22)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 344036

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Private First Class Guy E. Armstrong, RA 35442497, Company H, 35th Infantry Regiment, APO 25, upon the concurrence of The Judge Advocate General only so much of the findings of guilty as involves findings that the accused, being on guard at the place and time alleged, did leave his post before he was regularly relieved, in violation of Article of War 61 is approved, and the sentence is confirmed and will be carried into execution. The United States Disciplinary Barracks or one of its branches is designated as the place of confinement.

Robert W. Brown
Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr.
J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action. Under the direction of the Secretary of the Army the term of confinement is reduced to twenty years.

E. M. Brannon
E. M. BRANNON
Major General, USA
The Judge Advocate General

10 January 1951

(GCMO 7, Jan 19, 1951).

14009

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D.C.

[illegible] 1950

JAGH CM 344037

UNITED STATES	)	25TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	APO 25, 20 October 1950. Dis-
Private CLARENCE C. CASH (RA	)	honorable discharge, total for-
18298765), Company E, 24th	)	feitures after promulgation,
Infantry Regiment, APO 25.	)	and confinement for life.

OPINION of the BOARD OF REVIEW
HAUCK, FITZHUGH, and IRELAND
Officers of The Judge Advocate General's Corps

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 Judicial Council and The Judge Advocate General.

2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 75th Article of War.

Specification: In that Private Clarence C. Cash, Company E, 24th Infantry Regiment, APO 25, being present with his company while it was engaged with the enemy, did, at or near Haman, Korea, on or about 7 September 1950, shamefully abandon the said company and seek safety in the rear.

He pleaded not guilty to, and was found guilty of, the Charge and the Specification. Evidence of two previous convictions by summary court-martial for violation of a standing order, and for failing to obey the lawful order of a noncommissioned officer was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence.

a. For the prosecution.

The accused, Private Clarence C. Cash, was a member of Company E,

24th Infantry Regiment, and had been a member of that company since 1948 (R 10). He was known personally to Master Sergeant David Robinson, the first sergeant of Company E. Between 31 August 1950 and 7 September 1950, Company E, 24th Infantry, was engaged with the enemy near Haman, Korea (R 10). During this time the accused was absent without leave (R 9) and could not be found although the company area was searched repeatedly (R 9, 10). On 8 September 1950, Warrant Officer Junior Grade Walter M. Bartholow, Company E, 24th Infantry Regiment, saw the accused in the company "rear kitchen area -- the train area" which was located near Masan approximately seventeen miles behind Company E's position on the front. The accused was with "a group of returnees from the front lines and the hospital * *." Most of the group were replacements which had been sent to the area "for transportation back to the line" (R 11). The group was instructed, in accordance with company standing operating procedure, to remain in the area until that afternoon when they would entruck for the front (R 12). When the truck left the accused was not present (R 13).

b. For the defense.

The defense called no witnesses and offered no evidence. The accused after having been warned of his rights as a witness in his own behalf elected to remain silent (R 14).

4. Discussion.

The accused was charged with and found guilty of violation of the 75th Article of War in that he

> "* * being present with his company while it was engaged with the enemy, did, * * shamefully abandon the said company and seek safety in the rear."

The 75th Article of War makes misbehavior before the enemy an offense punishable by death or such other punishment as a court-martial may direct (AW 75, MCM, 1949, p.294). In view of the recent decision of the Judicial Council in the Gilbert case, no question arises as to the applicability of this article to the present situation in Korea (CM 343472, Gilbert, 27 Nov 50).

The Manual for Courts-Martial, 1949, defines misbehavior before the enemy as:

> "* * any conduct by an officer or soldier not conformable to the standard of behavior before the enemy set by the custom of our arms.
>
> * * *
>
> "Under this clause may be charged any act of treason, cowardice, insubordination, or like conduct committed by an officer or soldier in the presence of the enemy" (MCM, 1949, Par. 163(a)).

Winthrop describes misbehavior before the enemy, as, among other things:

> "* * acts by any officer or soldier, as -- * * going to the rear or leaving the command when engaged with the enemy, * * hiding or seeking shelter when properly required to be exposed to fire, * *" (Winthrop's Military Law and Precedents, 2nd Ed., p.623).

The specification in the instant case follows the form given in the Manual for Courts-Martial (MCM, 1949, p.318, Spec. No. 42). This form is more appropriately used in cases of officers chargeable with responsibility for defending a particular post, guard or command. Abandonment by a subordinate ordinarily is charged as misbehavior or running away (MCM 1949, Par. 163(c)). However, it is well established that "The phrase 'shamefully abandon his platoon and seek safety in the rear' is equivalent to the allegation 'did run away from his platoon' (CM ETO 1249, Marchetti; CM ETO 1404, Stack; CM ETO 1408, Saraceno; CM ETO 3722, Skamfer; CM ETO 1663, Ison)" (CM ETO 5475, Wappes, 15 BR (ETO) 109,113). The essential elements of the offense charged in the instant case, therefore, are the same as those of the offense of running away when before the enemy and are: "(a) That the accused was serving in the presence of the enemy; and (b) that he misbehaved himself by running away" (MCM, 1949, Par. 163b).

The uncontradicted evidence establishes that the accused was a member of an organization which was engaged in combat with the enemy in the vicinity of Haman, Korea, from 31 August to 7 September 1950. It also raises a reasonable inference that this situation continued on 8 September 1950, as the record shows the unit to have been in the same position and to have received supplies and replacements on that day. The rear echelon of Company E, 24th Infantry Regiment, the accused's unit, was located in the vicinity of Masan, Korea, some seventeen miles to the rear of the front. As the words "before the enemy" are not words of geographical limitation but are words expressing tactical relationship (MCM, 1949, Par. 163a), it is clear that the rear echelon of Company E, 24th Infantry Regiment, also was before the enemy on 8 September 1950 (CM 257252, Warman, 37 BR 85,90).

The accused had been absent without leave for an indeterminate period but was present at the rear echelon of his unit at Masan on 8 September 1950. He was, therefore, present with his company while it was engaged with the enemy as alleged. The variance of one day between the allegation and proof is immaterial time not being an essential element of his offense (CM ETO 1404, Stack, 4 BR (ETO) 279,280-281).

As one of a group of replacements scheduled to proceed to the front that day, the accused was instructed "to stay in the area until there was transportation to take them back to the company front line;" but when the truck left that afternoon the accused was not present. Exactly when he left the group and where he went is not shown by the record. It is clear,

however, that he did not do his full duty by remaining with his group and returning with it to the front, which proof supports an inference that he ran away (CM 286156, Black, 25 BR (ETO) 71,73; CM 284146, Sumner, 11 BR (ETO) 235,237; CM 298931, Sexton, 15 BR (ETO) 125,127).

5. Consideration has been given to oral representations on behalf of the accused by his counsel, Mr. Frank D. Reeves.

6. The papers accompanying the record of trial show the accused to be 20 years old and to have completed ten years of elementary school. Thereafter, he worked as a truck driver at $30.00 a week until entering the service. He enlisted 27 December 1947 at Dallas, Texas, for three years. He completed basic training at Fort Knox, Kentucky, and joined his present organization 13 January 1949. His commanding officer rates him "poor" as to character and "unsatisfactory" as to efficiency. His AGCT score is 82. He was sentenced by summary court on 25 March 1950 to a forfeiture of $25.00 of his pay for violation of a standing order under Article of War 96 and again by summary court to confinement at hard labor for thirty days and a forfeiture of $50.00 of his pay, for failing to obey the lawful order of a noncommissioned officer in violation of Article of War 96. There is no record of civilian convictions.

7. The court was legally constituted and had jurisdiction of the person and of the offense. 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 of guilty and the sentence, and to warrant confirmation of the sentence. A sentence to confinement at hard labor for life is authorized upon conviction of misbehavior before the enemy in violation of Article of War 75.

C. J. Hauch, Jr., J.A.G.C.

William C. Fitzhugh, J.A.G.C.

Arthur P. Dreland, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

CM 344037

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Private Clarence C. Cash, RA 18298765, Company E, 24th Infantry Regiment, APO 25, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution. The United States Disciplinary Barracks or one of its branches is designated as the place of confinement.

Robert W. Brown
Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr.
J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action. Under the direction of the Secretary of the Army the term of confinement is reduced to twenty years.

E. M. Brannon
E. M. BRANNON
Major General, USA
The Judge Advocate General

January 1951

(GCMO 9, Jan 25, 1951).

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D.C.

1950

JAGH CM 344038

U N I T E D S T A T E S	)	25TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at APO 25, 20 October 1950. Dishonorable discharge, total forfeitures after promulgation, and confinement for life.
Private First Class CLARENCE E. FULSOM (RA 18341742), Company E, 24th Infantry Regiment, APO 25.	)	

OPINION of the BOARD OF REVIEW
HAUCK, FITZHUGH, and IRELAND
Officers of The Judge Advocate General's Corps

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 Judicial Council and The Judge Advocate General.

2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 75th Article of War.

Specification: In that Private First Class Clarence E. Fulsom, Company E, 24th Infantry Regiment, APO 25, did, at or near Masan, Korea, on or about 10 September 1950, misbehave himself before the enemy, by refusing to join his company on line, while his command was engaged with the enemy.

He pleaded not guilty to, and was found guilty of, the Charge and the Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence.

a. For the prosecution.

Master Sergeant David Robinson was first sergeant of the accused's company, Company E, 24th Infantry Regiment, and formerly had been platoon

sergeant of the accused's platoon. He knew the accused intimately (R 10,11). From 29 August to 10 September 1950, Company E, 24th Infantry Regiment, was engaged with the enemy in the vicinity of Haman, Korea (R 9,11). On 3 September 1950, there was a "break through" with resulting confusion. The accused could not be found after the break-through, although Sergeant Robinson made a daily search for him from that date until 10 September 1950 (R 9-11). The accused's status as killed, wounded "or evacuated to the hospital," or AWOL was undetermined during this time (R 11). On 10 September 1950, the accused was found approximately seventeen miles to the rear in the "company rear train area" near Masan, Korea (R 12).

WOJG Walter M. Bartholow was in charge of the Company E rear train area near Masan (R 12). He knew the accused by sight and by name (R 13). On 10 September 1950, he saw the accused in the rear train area and at 10:00 a.m. put the accused on a truck for return to his unit at the front lines (R 12,13). About 1:00 p.m. Warrant Officer Bartholow saw the accused again and asked him "what he was doing back here" (R 13). The accused replied "he didn't want to go up forward because he wanted a transfer to the 77th Engineers and he wanted to see me about it" (R 13). Warrant Officer Bartholow told the accused that he would have to see his company commander if he wanted a transfer and, in any event, he would have to return to the front. Warrant Officer Bartholow then ordered the accused to take the truck leaving at 1:15 p.m. for return to his unit (R 13,14). When the truck left, the accused was not present as ordered (R 13). Warrant Officer Bartholow himself went with the truck and did not see the accused again until the next morning, still in the area, when the mess sergeant brought in the accused at about 11:00 o'clock (R 13). The accused was then placed under arrest and later put in confinement (R 13).

b. For the defense.

The defense called no witnesses and introduced no evidence. After being properly advised of his rights as a witness, the accused elected to remain silent (R 15).

4. Discussion.

The accused was charged with violation of Article of War 75 in that he did:

> "* * misbehave himself before the enemy, by refusing to join his company on line, while his command was engaged with the enemy."

The 75th Article of War makes misbehavior before the enemy an offense punishable by death or such other punishment as a court-martial may direct (AW 75, MCM, 1949, p.294). The Manual for Courts-Martial, 1949, defines misbehavior before the enemy as:

"* * any conduct by an officer or soldier not conformable to the standard of behavior before the enemy set by the custom of our arms.

* * *

"Under this clause may be charged any act of treason, cowardice, insubordination, or like conduct committed by an officer or soldier in the presence of the enemy" (MCM, 1949, Par. 163(a)).

Winthrop describes misbehavior before the enemy, as, among other things:

"* * acts by any officer or soldier, as -- refusing or failing to advance with the command when ordered forward to meet the enemy; * * refusing to do duty or to perform some particular service when before the enemy" (Winthrop's Military Law and Precedents, 2d Ed., p.623).

The words "before the enemy" are not limited by geographical distance but are words expressing tactical relationship (MCM, 1949, Par. 163a). The words "engaged with the enemy" have been held to be synonymous with the words "before the enemy" (CM 257053, Marchetti, 4 BR (ETO) 143,150).

In view of the recent decision of the Judicial Council in the Gilbert case, no question arises as to the applicability of the 75th Article of War to the present situation in Korea (CM 343472, Gilbert, 27 Nov 50).

The specification in the instant case closely follows the form given in the Manual for Courts-Martial (MCM, 1949, p.318), and the Board of Review deems it to be adequate to state an offense in violation of Article of War 75 (CM 289472, Scheck, 14 BR (ETO) 47,49).

The undisputed evidence establishes that the accused was a member of a unit which, at the time and place alleged, was engaged in combat with the enemy. His platoon sergeant, Master Sergeant David Robinson, did not see the accused after 29 August. On becoming first sergeant of the company, 3 September 1950, Sergeant Robinson made a special effort to find the accused, each day checking the three platoons of the company separately and by roll call and roster when combat conditions permitted, but the accused could not be found. On 10 September 1950, the accused was found in the rear train area at a point about seventeen miles to the rear of his unit. Warrant Officer Bartholow put him on a truck and started him back to his organization at about 10:00 o'clock that morning only to find the accused still in the rear train area at 1:00 o'clock that afternoon. Accused offered the excuse that he wanted a transfer and had come back to see about it. Warrant Officer Bartholow told the accused to take up the matter of transfer with his own company commander, warned him that in any event the accused would have to return to his own unit and ordered him to take the 1:15 truck that afternoon. The accused did not report as ordered and the truck left without him.

The facts in this case show beyond question that the accused was "before the enemy" within the meaning of Article of War 75, as defined by the Manual for Courts-Martial (MCM, 1949, Par. 163a). Misbehavior also is fully proved. At 10:00 o'clock in the morning, he was placed on a truck and ordered by a warrant officer to stay on the truck and return to his company. He disobeyed the order by getting off the truck and staying in the rear train area. At 1:00 o'clock that afternoon, he was given a second order, identical to the first, except he was ordered to take the 1:15 o'clock truck. This order he likewise disobeyed. Having been directed to return to his company, his refusal to do so constitutes misbehavior within the meaning of Article of War 75 (CM 282641, Trostle, 24 BR (ETO) 181,183; CM 294796, Transeau, 16 BR (ETO) 153,156). The refusal need not be verbal but may be by conduct in failing to comply with an order (CM 291200, Reed, 17 BR (ETO) 213,216-217).

5. The accused is 20 years of age. He attended elementary school for eleven years and then worked as a porter at $45.00 a week until entering the service. He is single but claims his mother as a dependent. He enlisted on 17 November 1948 at Oklahoma City, Oklahoma, for five years. His commanding officer rates his character as "poor" and his efficiency as "unsatisfactory." He has an AGCT score of 60. There is no evidence of previous convictions, either civil or military.

6. The court was legally constituted and had jurisdiction of the person and of the offense. 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 of guilty and the sentence, and to warrant confirmation of the sentence. A sentence to confinement at hard labor for life is authorized upon conviction of misbehavior before the enemy in violation of Article of War 75.

C. J. Hauch, Jr., J.A.G.C.

William C. Fitzhugh, J.A.G.C.

Arthur P. Ireland, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 344038

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Private First Class Clarence E. Fulsom, RA 18341742, Company E, 24th Infantry Regiment, APO 25, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution. The United States Disciplinary Barracks or one of its branches is designated as the place of confinement.

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action. Under the direction of the Secretary of the Army the term of confinement is reduced to twenty years.

E. M. BRANNON
Major General, USA
The Judge Advocate General

(GCMO 31, March 22, 1951).

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D.C.

2 - 1950

JAGH CM 344039

UNITED STATES	)	25TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at APO 25, 20 October 1950. Dishonorable discharge, total forfeitures after promulgation, and confinement for life.
	)	
Private JAMES F. HUBBARD (RA 14249257), Company E, 24th Infantry Regiment, APO 25.	)	

OPINION of the BOARD OF REVIEW
HAUCK, FITZHUGH, and IRELAND
Officers of The Judge Advocate General's Corps

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 Judicial Council and The Judge Advocate General.

2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 75th Article of War.

Specification: In that Private James F. Hubbard, Company "E", 24th Infantry Regiment, APO 25, did, at or near Haman, Korea, on or about 5 September 1950, run away from his company, which was then engaged with the enemy, and did not return thereto until after the engagement had been concluded.

He pleaded not guilty to, and was found guilty of, the Charge and the Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence.

a. For the prosecution.

On 5 September 1950 the accused, Private James F. Hubbard, Company E, 24th Infantry Regiment, was on duty with his organization near Haman, Korea

(R 9,10). At that time the mission of Company E was to set up road blocks and prevent infiltration of the enemy through its lines to units in the rear. "Of course, we did a lot of fighting also" (R 10). That afternoon his unit received orders to move to a new position (R 9). After the move, Master Sergeant Leroy H. Daniels, the accused's platoon sergeant, had the squad leaders make a search of the platoon for the accused, but he could not be found (R 13,14,19). During the move, Sergeant James O. Cuffie saw the accused get into the back of a "six ply truck" but when the march was completed the accused was missing (R 15). Sergeant Cuffie checked for the accused each evening until the 8th and then, "I quit and reported him as absent" (R 15). Accused was not given permission to leave his unit (R 17,20).

First Lieutenant Charles Ellis was commanding officer of the accused (R 18). Between 1 September and 5 September 1950, Lieutenant Ellis was on a reconnaissance mission behind the enemy lines (R 21,22). He returned on 5 September and reported to Battalion Headquarters where "the colonel" told him to take over his company and move it to a new position (R 19). Preparatory to moving his company, Lieutenant Ellis designated a rendezvous for all elements and ordered the squad leaders to make a check of their men at the rendezvous. The squad leaders' report showed the accused absent (R 19). Lieutenant Ellis did not see the accused on 5 September 1950 although the accused was reported present part of the day and was not officially reported absent until the squad leaders' check (R 19,20). On about 12 September 1950 the accused reported to Lieutenant Ellis at the company command post (R 20). He told Lieutenant Ellis that he got lost from the company on the day of the move, 5 September 1950, and thereafter had tried to get back but could not find his unit (R 20). The accused further stated to Lieutenant Ellis that he had been with the mortar platoon of "M" Company, 27th Infantry Regiment, during his absence (R 20). When asked to point out "M" Company's position, the accused pointed in the opposite direction to that actually held by that organization (R 20). Lieutenant Ellis testified, "Then I knew there was something wrong because the mortar platoon of the 27th was practically right in our area. You could see it from our company CP" (R 20). Lieutenant Ellis did not give the accused any warning of his rights under Article of War 24, because he did not suspect him of wrongdoing until the accused's statement about being with the mortar platoon (R 22,23). After being warned to tell the truth, the accused repeated the same story of being with the mortar platoon, whereupon Lieutenant Ellis placed the accused under arrest (R 21).

b. <u>For the defense</u>.

The defense called no witnesses and offered no evidence.

After being warned of his rights as a witness, the accused elected to remain silent (R 25).

4. Discussion.

The accused is charged with a violation of Article of War 75 in that he did

"* * run away from his company, which was then engaged with the enemy, and did not return thereto until after the engagement had been concluded."

The 75th Article of War makes misbehavior before the enemy an offense punishable by death or such other punishment as a court-martial may direct (AW 75, MCM 1949, p. 294). The Manual for Courts-Martial, 1949, defines misbehavior before the enemy as:

"* * any conduct by an officer or soldier not conformable to the standard of behavior before the enemy set by the custom of our arms.

* * *

"Under this clause may be charged any act of treason, cowardice, insubordination, or like conduct committed by an officer or soldier in the presence of the enemy" (MCM, 1949, Par. 163(a))."

Winthrop describes misbehavior before the enemy, as, among other things:

"* * acts by any officer or soldier, as — * * going to the rear or leaving the command when engaged with the enemy; * *" (Winthrop's Military Law and Precedents, 2d Ed., p. 623).

In view of the recent decision of the Judicial Council in the Gilbert case, no question arises as to the applicability of the 75th Article of War to the present situation in Korea (CM 343472, Gilbert, 27 Nov. 50).

The specification in the instant case follows exactly the form given in the Manual for Courts-Martial (MCM, 1949, p. 318, spec. No. 41).

The uncontradicted evidence establishes beyond question that the accused was a member of Company E, 24th Infantry Regiment, which on or about 5 September 1950, was engaged with the enemy in the vicinity of Haman, Korea. On this date the accused was present with his company and was seen by Sergeant Cuffie at the start of a road march to a new position being made by the company. At the time, the accused was in the act of getting in the back of a "six ply truck." When the company arrived at its new position, the accused was not present and he was not seen again until 12 September 1950. On that date, the accused appeared

at his company command post and reported to Lieutenant Ellis, his commanding officer, that he had been lost and could not find his unit from the time of the move, 5 September 1950. He also said that he had stayed with the mortar platoon, "M" Company, 27th Infantry Regiment. When asked to point out the direction of this unit, he pointed in the opposite direction from that organization's correct position. "M" Company, 27th Infantry Regiment, was, during this time, stationed in an area immediately adjacent to and adjoining the area of the accused's unit and had he been with the mortar platoon as he claimed, he would have been "practically right in" his own company's area. The complete improbability of the accused's story made Lieutenant Ellis suspect it to be untrue and, when the accused repeated the same account after being warned to tell the truth, Lieutenant Ellis placed him under arrest.

These facts establish beyond a reasonable doubt that the accused was guilty of leaving his company while it was engaged with the enemy at the time and place alleged and sustain the court's findings of guilty of a violation of Article of War 75 (CM ETO 1408, Saraceno, 4 BR (ETO) 293,295; CM ETO 1659, Lee, 5 BR (ETO) 173,174; CM 263351, Keyes, 7 BR (ETO) 187, 188; CM 276183, Kuykendoll, 9 BR (ETO) 315,316; CM 298931, Sexton, 15 BR (ETO) 125,127).

5. The accused is 21 years of age. He completed ten years of schooling in 1945 and then worked as a crane operator at $20.00 per week. He is single and claims a sister as a dependent. There is no evidence of a civilian criminal record. Without prior service, he enlisted at Fort Bragg, North Carolina, for three years. He completed basic training at Fort Knox, Kentucky. His commanding officer rated him "poor" as to character and "unsatisfactory" as to efficiency. There is no evidence of previous convictions by courts-martial.

6. The court was legally constituted and had jurisdiction of the person and of the offense. 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 of guilty and the sentence, and to warrant confirmation of the sentence. A sentence to confinement at hard labor for life is authorized upon conviction of misbehavior before the enemy in violation of Article of War 75.

C. F. Hauch, Jr., J.A.G.C.

William C. Fitzhugh, J.A.G.C.

Arthur P. Ireland, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 344039

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Private James F. Hubbard, RA 14249257, Company E, 24th Infantry Regiment, APO 25, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution. The United States Disciplinary Barracks or one of its branches is designated as the place of confinement.

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

8 January 1951

I concur in the foregoing action. Under the direction of the Secretary of the Army the term of confinement is reduced to twenty years.

E. M. BRANNON
Major General, USA
The Judge Advocate General

8 January 1951

(GCMO 4, Jan 15, 1951)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D.C.

JAGH CM 344040 | 2 January 1951

U N I T E D S T A T E S	)	25TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	APO 25, 21 October 1950. Dis-
Private ROBERT L. MILLER (RA	)	honorable discharge, total for-
12308515), Company I, 24th	)	feitures after promulgation, and
Infantry Regiment, APO 25.	)	confinement for life.

OPINION of the BOARD OF REVIEW
HAUCK, FITZHUGH, and IRELAND
Officers of The Judge Advocate General's Corps

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 Judicial Council and The Judge Advocate General.

2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 86th Article of War.

Specification: In that Private First Class Robert L. Miller, Company "I", 24th Infantry Regiment, APO 25, being on guard and posted as a sentinel, at or near Haman, Korea, on or about 11 September 1950, did, leave his post before he was regularly relieved.

He pleaded not guilty to, and was found guilty of, the Charge and the Specification. No evidence of previous convictions by court-martial was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence.

a. For the prosecution.

The accused, Private First Class Robert L. Miller, was a member of Company I, 24th Infantry Regiment (R 17). On 11 September 1950, the

accused's organization was engaged in combat with the enemy in the vicinity of Haman, Korea (R 10,11). The accused was placed in charge of three South Korean policemen by Captain McWee, the adjutant of the 3rd Battalion, 24th Infantry Regiment. Captain McWee also indicated to the accused an area two or three hundred yards in front of the lead tank near the battalion command post which the accused was to guard (R 10). Captain McWee told the accused to select within the indicated area the position he thought best suited; to notify the lead tank of his specific position and promptly return thereto, and to remain there until relieved the next morning (R 10). The accused was posted "about seven or 7:30 p.m." (R 9). On the morning of 12 September 1950 "before six" and "not quite daybreak," the accused was found about 300 yards to the rear of his post (R 10) by Master Sergeant William J. Davidson, Company M, 24th Infantry Regiment (R 14). The accused told Master Sergeant Davidson that he had left his post about daybreak to get a blanket (R 14). Upon being taken to Captain McWee, the accused also told him that "he had returned to get a blanket" (R 11). The accused's detail of three Koreans appears to have been taken into custody during the night by personnel of Company M, 24th Infantry Regiment, on suspicion that they were North Koreans (R 14-15).

b. For the defense.

After being warned of his rights as a witness, the accused elected to take the stand under oath.

He testified that he selected a position and posted the three South Koreans as directed (R 17); that between "two and three o'clock" (R 18) in the morning, he discovered that he had no ammunition (R 17,20) for his Browning Automatic Rifle and he consequently went back to the ammunition jeep to get some. While there firing broke out and he was told to take cover (R 17,19). He "* * kneeled down beside the jeep trailer beside - between the wheel back of the river bed right in between, * *." He could see his position from there. He was then about 150 yards from his post (R 19). He spent approximately five hours at the ammunition jeep and had started back to his post when he met Sergeant Davidson who turned him in to Captain McWee (R 16,18). He did not get a blanket as none were available (R 21).

4. Discussion.

The accused is charged with a violation of the 86th Article of War in that

> "* * being on guard and posted as a sentinel * * [he] did, leave his post before he was regularly relieved."

There are two essential elements of proof of this offense: (a) that the accused was posted or on post as a sentinel, as alleged; and (b) that he left his post without being regularly relieved (MCM, 1949, Par. 174e, p.227).

The accused does not deny that the 3rd Battalion adjutant took him and three South Korean policemen to a point near the "lead tank" where the adjutant pointed out an area for which the accused was responsible. The accused was told to pick a position of his own choice and to post the three Koreans, after which he was to report his position to the lead tank and then resume his position and stay there until he was relieved. The accused admitted that he took his post and placed the Koreans, although he failed to report his position to the lead tank. According to his own testimony, at between two and three o'clock in the morning he discovered the magazine of his Browning Automatic Rifle to be empty so he went back to the ammunition jeep some 150 to 200 yards in the rear to obtain ammunition. He was there pinned down by fire and was unable to leave for five hours. In another version, the accused told Sergeant Davidson and Captain McWee that he went to the rear for a blanket. In any event, whatever the reason, the accused admitted that he left his post and went back some 150 or 200 yards to the rear. At about 6 o'clock in the morning, he was seen by Sergeant Davidson about 300 yards to the rear of his post. It is the opinion of the Board of Review that this evidence is sufficient beyond a reasonable doubt to support the findings of guilty of the Charge and its Specification (CM 263347, Maguire, 6 BR (ETO) 169,171-172; CM 295472, Warren, 20 BR (ETO) 127,128).

5. Consideration has been given to a letter on behalf of the accused from Mrs. Louise Grandberry, 56 Russell Street, White Plains, New York, forwarded through the office of Congressman Gamble of New York.

6. The accused is 19 years of age. He is single and claims his mother as a dependent. He completed one and one-half years of high school. On 18 May 1948, he enlisted at New Rochelle, New York, for three years and completed basic training at Fort Dix, New Jersey. He joined his present organization 10 September 1949. His commanding officer rated him "unsatisfactory" both as to character and efficiency. There is no evidence of previous convictions, either civilian or military.

7. The court was legally constituted and had jurisdiction of the person and of the offense. 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 of guilty and the sentence, and to warrant confirmation of the sentence. A sentence to confinement at hard labor for life is authorized upon conviction of violation of Article of War 86 (Executive Order No. 10149, 8 August 1950, 15 Fed. Reg. 5149).

C. J. Hauch, Jr., J.A.G.C.

William G. Fitzhugh, J.A.G.C.

Arthur C. Ireland, J.A.G.C.

(44)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGU CM 344040

FEB 1951

UNITED STATES v. Private ROBERT L. MILLER, RA 12308515, Company I, 24th Infantry Regiment, APO 25	)	25TH INFANTRY DIVISION Trial by G. C. M., convened at APO 25, 21 October 1950. Dishonorable discharge, total forfeitures after promulgation, and confinement for life.

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Opinion of the Judicial Council
Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

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1. Pursuant to Article of War 50d(2) the record of trial and the opinion of the Board of Review in the case of the soldier named above have been transmitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon trial by general court-martial the accused pleaded not guilty to and was found guilty of a specification alleging that, being on guard and posted as a sentinel, he did leave his post before he was regularly relieved, at or near Haman, Korea, on or about 11 September 1950, in violation of Article of War 86. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. 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 and to warrant confirmation of the sentence.

3. Evidence.

a. For the Prosecution.

Captain Nathaniel L. McWee testified in substance as follows. On or about 11 September 1950 he was adjutant of the 3d Battalion, 24th Infantry Regiment (R 9), which was in contact with the enemy (R 11) in the vicinity of Haman, Korea (R 10). Due to terrain features, the battalion operated both a left and a right command post. On or about 10 or 11 September the battalion was in

contact with the enemy in that particular area (R 11), and Captain McWee, as battalion adjutant, established a battalion guard for the protection of the right command post. Company I, the accused's company, detailed eighteen men at the right command post for this guard duty. Although the accused was not a member of that detail, he was assigned to this guard duty. It was Captain McWee's duty to see that the guard was posted (R 13).

On or about 11 September he "posted the accused as a guard," and explained to him his post and his duties in connection therewith. American soldiers and South Korean policemen were being used together, and the accused was placed in charge of three of the latter (R 9). At about 7:00 or 7:30 p.m. Captain McWee dispatched the accused and his three South Korean policemen to an area between 200 and 300 yards in front of the lead tank (R 9-10, 12). While standing near the Company M command post in the vicinity of the rear tank, which was approximately a hundred yards behind the lead tank, he pointed out to the accused the general defensive positions and told him where he wished him to take his postion (R 13-14). "The exact spot was left to his decision. The general area I pointed out to him" (R 10). The captain could see the area which he pointed out to him (R 12). According to Captain McWee his instructions to the accused were -

> "* * * to go two to three hundred yards in front of that [lead] tank * * * Stay on the right side of this stream, set your position there, notify the leading tank of your exact position, and then return, and under no circumstances are you or any of your policemen to withdraw from that position." (R 14)

The period of the accused's guard duty was from dark until daybreak (R 10, 12). The captain did not give him permission at any time to leave his post for the purpose of getting a blanket or for any other reason, except initially to "notify the leading tank" of his position. Although it was possible for one in charge of a group of three persons to leave his position to obtain needed personal articles (R 11), he could not do so on his own initiative but would have to receive permission, because the accused "had a definite order once he had notified the leading tank of his definite position he was not to leave his post - not to withdraw" (R 12). The only time the accused had authority to leave his post was initially when he was to notify the lead tank of his "exact locality" (R 10). The captain also pointed to a machine gun position at the right front and told the accused the general area of machine gun fire (R 14). He told the accused that neither he nor his men were to withdraw, because the captain

> "could give overhead fire from two tanks also a machine gun that was to his right. Further we had a group of twelve to eighteen men on the ridge overhead to the right of his position." (R 10)

Asked if he understood the instructions, the accused responded in the affirmative. After Captain McWee repeated his instructions, the accused moved his group off toward his position (R 12, 14). Asked whether he knew that the accused ever went to the position, the Captain testified, "I know he left me enroute to his post." He last saw the accused "about twenty-five yards between me and the leading tank" (R 12). Captain McWee testified that he did not know whether or not the accused had ammunition at the time, but that all sentinels stopped at the dump to secure it (R 10).

Before 6:00 a.m., when "it was not quite daybreak," on or about 11 September 1950, Captain McWee saw the accused near a tank about 300 yards "from the general vicinity where his post should have been." The accused was "off the post" (R 9, 10, 11), at the Company M command post, approximately seventy-five yards to the rear of the lead tank, which had been pointed out to him the preceding night. The accused could see his post from the position where the captain saw him inasmuch as there were no terrain features which obstructed the view (R 12). He should not have been less than 200 yards in front of the lead tank (R 14). Captain McWee interviewed the accused in regard to his post. The accused told him "he had returned to get a blanket," but did not say anything about ammunition. Captain McWee asked him if he found a blanket, and he replied in the negative. To the best of Captain McWee's knowledge, the accused was not acting as a noncommissioned officer when in charge of the three Koreans (R 11, 13). There was a noncommissioned officer in charge of the sector who "had four posts of which Miller was one." That noncommissioned officer was to check the accused's position twice before midnight and twice between midnight and daybreak, but the accused could not contact him without leaving his post. There was another officer besides Captain McWee at the command post. Asked whether either he or the other officer checked the accused's position during the night, Captain McWee testified that he did not check it, "but the guard posting during the time - they had two sergeants of the guard and five * * * sergeants of the relief" (R 13).

Master Sergeant William J. Davidson testified that he was a section leader in Company M, 24th Infantry Regiment (R 14) and at about 6:00 a.m. (daybreak) on or about 11 September 1950 he was at his mortar position about thirty-five to fifty yards from the Company M command post (R 14, 15). At that place and time Davidson met the accused between the lead tank and the command post, coming up the river bed toward his gun position and toward the lead tank. Davidson did not have personal knowledge of the location of the accused's post. Three South Korean policemen, previously mistaken for North Koreans, had been picked up and placed in arrest about midnight or 2:00 a.m. The orders were to hold them until morning because "they would probably be killed by somebody" (R 15-16). Davidson stopped and asked the accused "if he was the man that was on guard with the Koreans." The accused said "Yes," and in response to the question where he had been, stated "that he had just left them to go and get a blanket" (R 14, 15). Davidson then informed Captain McWee about the accused (R 16).

b. For the Defense.

After being advised of his rights (R 16), the accused testified to the following effect. At the time in question he was working in the company supply section. Although he was not one of the regular guards, "the sergeant" put him on guard, and they "went up to the post about fifty yards behind 'M' company CP." There Captain McWee pointed out three positions and put each of the three American soldiers in charge of three South Koreans, telling the former where their positions would be and to pick their positions, if they wished (R 17). Captain McWee did not post the accused, but told him the "general vicinity" (R 19).

> "He told me to post the guard, check with the sergeant down in the gun position and ask him just about where he should want me to be. I checked with the sergeant and he told me to get right on the ridge just a little bit above his gun position in the rice paddy" (R 17),

so that they could cover the tanks in case they sent up a flare. The sergeant showed the accused the general direction of his position (R 20), telling him to use his judgment as to where it should be (R 19). The accused "posted the position to the left of the gun position" (R 17), and placed the South Koreans where he thought they could best be used, as instructed (R 18, 19). He did not talk to the personnel of either tank because he was not close enough to do so. "They knew Capt McWee told them just about what vicinity we were in. They told us they could fire over our heads." He told the sergeant at the gun position about where he had his men posted (R 19).

The post selected by the accused was located in the rice paddies to the left of the river bed (R 20), and was between two tanks. The lead tank was "way up front in the river bed" to his right forward, and the rear tank was near a gun position. His post was in front of the rear tank and closer to it than to the lead tank. He was so far behind the lead tank that he was unable to see it from the post (R 19). His post was about two hundred to three hundred yards from the battalion command post (R 18).

When the accused had been on the line previously he had been armed with a rifle (M-1) and not with a Browning Automatic Rifle (R 21). When he went to his post at the time in question he took with him a BAR (R 17, 20), which he had obtained from the supply section (R 21). At about 1:30 or 2 a.m. he checked his weapon, pulled out the magazine and discovered that he was without ammunition (R 18). Asked whether he had an opportunity to get the ammunition before he was sent to his post, he testified that he did not know where he was going. The sergeant "just told me to come with him" (R 20).

He tried to convey to his South Koreans the information that he had no ammunition and would go down to the supply jeep, get some, and return immediately (R 17). He thereupon left his position about 2:00 or 2:30 a.m. on 11 September and proceeded to the supply jeep, which was in the river bed about one hundred fifty yards from the battalion command post and also about one hundred fifty yards from the accused's post and the general area which included it. The supply jeep was about seventy-five yards behind the rear tank (R 18, 19, 20). He did not see the three South Korean policemen any more during the night (R 20). After he obtained ammunition, firing broke out around the ridge, but he started back toward his position. Someone in the dugout warned him to get down and take cover, lest he get shot out in the open. The accused accordingly "kneeled down beside the jeep trailer * * * between the wheel back of the river bed right in between" (R 17, 19). The accused was instructed that if anything should happen (R 17) and anyone should come down through the area, they would send up a flare to warn of the enemy's approach. After the signal was given, they were to open fire (R 18). He remained in position beside the jeep (R 17), from which point he could see his post, for approximately five hours until just before daylight. There was firing all night long from machine guns, automatic rifles "and so forth," which could have come from the company's position on the ridge (R 19, 20). The accused waited until the firing was over and then walked toward his post. The sergeant in charge of the guard stopped him and asked if he was in charge of the South Koreans, to which he replied in the affirmative (R 17). He first told the sergeant that he went back to get some ammunition and also a blanket. He did not get a blanket because there was none (R 21). The sergeant asked him where he had been. When the accused explained to him, the sergeant took him to Captain McWee, who placed him in arrest (R 18).

4. Discussion.

The accused is charged with leaving his post before he was regularly relieved, while on guard and posted as a sentinel, in violation of Article of War 86. The undisputed evidence shows clearly that the accused was on guard duty throughout the night in question and that the area in which he was to select his post was designated for him by superior authority. The prosecution's evidence is to the effect that Captain McWee, the battalion adjutant, pointed out to the accused the general area in which the accused was to select a post, and directed him to post himself and the three South Korean policemen of whom he was in charge, to notify the lead tank of the location of his post, to return thereto, and not to withdraw under any circumstances. The prosecution's evidence places the general area which was to include the accused's post, between two hundred and three hundred yards forward of the lead tank. The accused admitted establishing a post with his three South Koreans but his testimony with respect to his post is at variance with that of the prosecution in two major respects. First, the accused places the general area which

was to include his post, between the lead tank and the rear tank. Second, the accused testified that Captain McWee instructed him to ask the sergeant in the gun position where he should establish his post within that area, and that pursuant to the sergeant's instructions to use his own judgment, he established his post between the tanks, just forward of the rear tank and at a considerable distance to the rear of the lead tank, and notified the sergeant of his position.

The accused admitted that after establishing the post with his three South Koreans, he left that position, as he claimed, to obtain a blanket and ammunition. According to the accused, this ammunition was in a jeep about 150 yards from the general area in which he had established his post. It is clear from the prosecution's evidence that at about 6:00 a.m. on or about 11 September 1950 the accused was seen approaching the Company M command post and the lead tank. He admitted that he had been in that area for about five hours because of firing.

The first element of proof of the offense here alleged is that the accused was posted or on a post as a sentinel (MCM 1949, par 174c, p 227). It is well established that the fact that a sentinel has not been posted in the regular way is not a defense and it is sufficient if he has taken his post in accordance with proper instructions, whether or not formally given (Ibid, par 174a, p 226; see CM 258069, Waters, 4 BR (ETO) 37, 49; CM 263347, Maguire, 6 BR (ETO) 169, 171; CM 277930, Dick, 12 BR (ETO) 349, 351). It is also clear that the fact that an accused was posted as a sentinel may be inferred from circumstantial evidence, which may shift the burden of explanation to the accused (CM 263347, Maguire, supra, p 172).

We will now consider the evidence in this case. Because of the very definite variance between the testimony of the accused and that of Captain McWee as to the latter's instructions regarding the location of the accused's post, we are not convinced that the accused fully understood where he was to locate his post. Also, because of the absence of any evidence from the prosecution showing that the accused reached even the general area in which he was directed to establish his post, we cannot overlook the uncontradicted testimony of the accused to the effect that he established his post considerably in rear of the general area indicated by Captain McWee, not pursuant to his directions, but in accordance with the instruction of an unknown sergeant at a gun position. Under these circumstances, we are impelled to conclude that there is substantial doubt that the accused ever established his post anywhere near the general area indicated by Captain McWee. Accordingly, we are of the opinion that the evidence fails to establish beyond a reasonable doubt that the accused was posted or was on post as a sentinel within the purview of Article of War 86 and the Manual for Courts-Martial, 1949.

On the other hand, it is clearly established by the prosecution's evidence and not disputed by the accused, that on the night in question the accused was on guard and in charge of three South Korean policemen as helpers. Moreover, the instructions to the accused required his continuing presence with the South Koreans and precluded his delegating his duties to them or leaving them to their own devices. It cannot be seriously contended that the accused thought otherwise. It is also undisputed that the accused was found in the vicinity of the M Company command post at about 6:00 a.m. (daybreak) on the morning following his assignment to the guard and before he had been relieved therefrom. According to Captain McWee, this point was approximately 300 yards from where the accused's post was supposed to have been located. According to the accused, he was at a point less than 150 yards from the place where he had left the three South Koreans and he was then returning to them after an absence of approximately five hours.

The accused testified at the trial that, while at the position where he had placed the three South Koreans, he discovered he did not have any ammunition and that at about 2:00 or 2:30 a.m. he left that position to obtain ammunition from the supply jeep located about 75 yards to the rear of M Company command post. The accused further testified to the effect that he was pinned down near the supply jeep for approximately five hours because of firing. This latter contention is uncorroborated. It is true that prior to dispatching the accused to his post, Captain McWee had warned him of possible friendly overhead firing from the tanks, from a machine gun position and from a group of soldiers on a ridge. However, the machine gun position and the group of soldiers were located to the right of the place where Captain McWee had directed the accused to establish his post, and any fire from these positions could not have pinned down the accused unless it was in the direction of M Company command post and the rear tank, a most improbable situation.

There are also substantial reasons for doubting the truth of the accused's claim that his reason for leaving the locality where he had placed the South Koreans was to obtain ammunition. Captain McWee testified that all sentinels were given an opportunity to obtain ammunition before assuming their posts. Both Captain McWee and Sergeant Davidson testified that when they saw the accused on the following morning he said that he had left his position with the three South Koreans to get a blanket. Captain McWee testified specifically that the accused did not mention ammunition. The duration of the accused's absence - five hours - also militates against the truth of his claim.

After careful consideration of the record of trial, we are of the opinion that the evidence is legally insufficient to establish that the accused was posted or on post as a sentinel, but that it does establish beyond a reasonable doubt that he was on guard and absented himself from his guard without authority in violation of Article of War 61.

The question arises whether the offense of absence without proper leave from guard is included within the offense of leaving post while on guard as a sentinel before being regularly relieved. In CM 236351, Ambutavicz, 22 BR 385, it was charged that the accused, being on guard and posted as a sentinel, was found drunk on post, in violation of Article of War 86. The evidence showed that the accused was found drunk during his tour of duty at a distance of at least 300 yards from his post. The reviewing authority approved only so much of the findings of guilty as involved findings of guilty of the lesser included offense of being found drunk while on guard as a sentinel, in violation of Article of War 96. The Board of Review stated:

> "The finding, as modified by the reviewing authority, constitutes a lesser included offense, for the only element missing is that of being on his post. In essence, the finding as approved is that the accused was found drunk on duty, the duty consisting of his being on guard as a sentinel. This violated Article of War 85, for the members of the guard are considered on duty during their entire tour within the meaning of that Article (M.C.M., 1928, par. 145, p. 160)."

(See also CM 282161, Kay, 16 BR (ETO) 15, 18).

In CM 344036, Armstrong, BR-JC, Jan 1951 the Judicial Council held that the offense of absenting oneself without proper leave from guard, specifically denounced in Article of War 61, is included within the offense of leaving post while on guard as a sentinel before being regularly relieved.

Following the reasoning of the foregoing authorities, we are of the opinion that the accused's offense of absenting himself without proper leave from guard in violation of Article of War 61 is included within the offense charged. The limitations upon punishments, inter alia, for violations of Article of War 61 are not applicable to the instant offense (EO 10149, 8 Aug 1950, 15 Fed Reg 5149). Consequently in this case a sentence which includes confinement at hard labor for life is authorized (CM 344036, Armstrong, supra).

5. For the foregoing reasons, the Judicial Council 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 that the accused, being on guard, did absent himself without proper leave from his guard at the place and time alleged, in violation of Article of War 61, and legally sufficient to support the sentence. However,

considering all the circumstances of this case, including the accused's age of nineteen and his probable lack of experience in guard duty, it is recommended that the sentence to confinement be reduced to five years.

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

DEPARMENT OF THE ARMY
Office of The Judge Advocate General

CM 344040

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Private Robert L. Miller, RA 12308515, Company I, 24th Infantry Regiment, APO 25, upon the concurrence of The Judge Advocate General only so much of the findings of guilty is approved as involve findings that the accused, being on guard, did absent himself without proper leave from his guard at the place and time alleged in violation of Article of War 61, and the sentence is confirmed and will be carried into execution. The United States Disciplinary Barracks or one of its branches is designated as the place of confinement.

Robert W. Brown
Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr.
J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

FEB 9 1951

I concur in the foregoing action. Under the direction of the Secretary of the Army and upon the recommendation of the Judicial Council the term of confinement is reduced to five years.

E. M. Brannon
E. M. BRANNON
Major General, USA
The Judge Advocate General

12 February 1951

(GCMO 19, Feb 15, 1951).

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DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D.C.

JAGH CM 344043

28 December 1950

U N I T E D S T A T E S	)	25TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	APO 25, 20,23 and 28 October
Private J. P. MORGAN (RA	)	1950. Dishonorable discharge,
36553000), Company B, 24th	)	total forfeitures after promulga-
Infantry Regiment, APO 25.	)	tion, and confinement for life.

OPINION of the BOARD OF REVIEW
HAUCK, FITZHUGH, and IRELAND
Officers of The Judge Advocate General's Corps

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 Judicial Council and The Judge Advocate General.

2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 75th Article of War.

Specification: In that Private J. P. Morgan, Company B, 24th Infantry Regiment, APO 25, being present with his company while it was engaged with the enemy, did, at or near Haman, Korea, on or about 11 August 1950, shamefully abandon the said company and seek safety in the rear, and did fail to rejoin it until returned to his company by the Company Commander.

He pleaded not guilty to, and was found guilty of, the Charge and the Specification. Evidence of one previous conviction by summary court-martial for using threatening and insulting language toward a noncommissioned officer, and of one previous conviction by special court-martial for temporarily depriving the owner of a 1/4-ton truck, of failure to obey a lawful order of a noncommissioned officer, and for leaving Camp Fuji without proper authority was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence.

a. For the prosecution.

The accused, Private J. P. Morgan, was a member of Company B, 24th Infantry Regiment (R 9). On 11 August 1950, the accused's organization was engaged with the enemy and was attacking North Korean forces near Haman, Korea (R 9,14). The accused was present with his unit at the beginning of an attack on a ridge but was missing when the company reached the top of the ridge (R 9,10,12,14,15-16,17). He was not seen again until 19 August 1950 when his company commander saw him at the Battalion rear command post (R 11,12). The accused was not given permission to leave his company "on the 11th or before the 11th" (R 13,15,17). A "check with the medics" revealed that "they had no records of him for being sent back for medical treatment of any kind" on 11 August (R 11).

b. For the defense.

Captain Paul A. Carlson, Battalion Surgeon, saw the accused for treatment sometime prior to 10 August 1950, at which time the accused "was just sort of upset and rather tense, tired state." The accused had "no apparent physical disabilities" and Captain Carlson sent him back to duty (R 21). Captain Carlson left the battalion aid station on 10 August and went to the Regimental Collecting Station.

Sergeant Walter Joseph, Company B, 24th Infantry Regiment, remembered seeing the accused "tagged" for medical evacuation sometime in August or September (R 22-24). They were on the "Su Bok Range Mountains" at the time and were in combat with the enemy. The accused told Sergeant Joseph that "he was going to the medics." Joseph saw the medical tag on him (R 22). Later that day the accused "did come up the hill right to the CP" and reported to the company commander (R 23).

Master Sergeant Melvin Williams testified that after the accused returned to his company, until he was confined 13 September 1950, he performed his military duties efficiently (R 18).

The accused, after being warned of his rights as a witness, elected to take the stand and testify under oath (R 25). He testified that on 11 August 1950, he made the climb up the hill called "Bloody Peak" although he was extremely sick with diarrhea (R 26). He informed Sergeant Williams of this fact and was given permission to go to the medical aid station at the top of the hill where he was found to have a high temperature (R 26). He was tagged with the usual medical tag and evacuated to the battalion aid station at the bottom of the hill (R 26). He stayed at the battalion aid station where he received treatment of "pills" and "shots" for about seven days (R 27). On 19 August 1950, the unit administrative officer, "Mr. Lewis" took him and three other men from the aid station back to the company (R 27). From then until he was confined 13 September 1950, he went on patrols and engaged in combat (R 27).

c. For the court.

Corporal James T. Edwards kept the medical log and was "the official custodian" of the medical log of the 1st Battalion aid station, 24th Infantry Regiment (R 32). Two extracts from the medical log book pertaining to the accused were introduced in evidence by the prosecution without objection (R 34; Pros Exs 1a and 1b). The first entry showed that the accused was treated 7 August 1950 for "anxiety state" and was returned to duty (Pros Ex 1a). The other entry showed that the accused was treated on 9 August 1950 for "pain in leg" and was evacuated to the collecting station (Pros Ex 1b). The medical log book contained no other entries concerning the accused for the period 14 July to 19 August 1950 (R 35). Corporal Edwards testified that the longest a person could stay at the aid station was overnight and it would be impossible for the accused to have stayed there as long as seven days (R 35).

4. Discussion.

The accused was charged with and found guilty of violation of Article of War 75 in that

> "* * being present with his company while it was engaged with the enemy [he], did, * * shamefully abandon the said company and seek safety in the rear, and did fail to rejoin it until returned to his company by the Company Commander."

The 75th Article of War makes misbehavior before the enemy an offense punishable by death or such other punishment as a court-martial may direct (AW 75, MCM 1949, p.294). The Manual for Courts-Martial, 1949, defines misbehavior before the enemy as:

> "* * any conduct by an officer or soldier not conformable to the standard of behavior before the enemy set by the custom of our arms.
>
> * * *
>
> "Under this clause may be charged any act of treason, cowardice, insubordination, or like conduct committed by an officer or soldier in the presence of the enemy" (MCM, 1949, Par. 163a).

Winthrop describes misbehavior before the enemy, as, among other things:

> "* * acts by any officer or soldier, as -- * * going to the rear or leaving the command when engaged with the enemy; * *" (Winthrop's Military Law and Precedents, 2d Ed., p.623).

The words "before the enemy" are not limited by geographical distance but are words expressing tactical relationship (MCM, 1949, Par. 163a). The words "engaged with the enemy" have been held to be synonymous with the words "before the enemy" (CM 257053, Marchetti, 4 BR (ETO) 143,150).

In view of the recent decision of the Judicial Council in the Gilbert case, no question arises as to the applicability of the 75th Article of War to the present situation in Korea (CM 343472, Gilbert, 27 Nov 50).

The evidence adduced by the prosecution in support of the charge and specification and the admissions of the accused proved conclusively that the accused was present with his unit which was engaged in combat with the enemy at the time and place alleged. The accused also admitted that he left his unit. The only issue in the case, therefore, is the controverted issue of fact whether the accused's act of leaving his unit was for the legitimate purpose of securing medical treatment, as he testified, or to avoid the hazards of combat. The determination of this issue, in the first instance, was the duty of the trial court (CM 325457, McKinster, 74 BR 233, 241). Its findings necessarily indicate that it resolved this question against the accused and these findings are entitled to considerable weight (CM 323161, Lacewell, et al, 72 BR 105,109). There is substantial evidence in the record of trial which supports the court's determination of this issue. The lack of any record of the treatment of the accused at the battalion aid station on 11 August 1950, and the testimony of Corporal Edwards that the accused could not have remained there for seven days as he testified indicate the accused's testimony to be unworthy of belief. The Board of Review concurs with the court that the evidence is sufficient to prove that the accused left his company without permission (CM 307385, Wood, 61 BR 103,107-108). The factual situation presented is substantially the same as that existing in the case of CM 298931, Sexton, 15 BR (ETO) 125, in which case the following language is found at page 127:

> "The prosecution showed, through the testimony of Lieutenant Schwarzkopf, that on 8 October and on 4 November, 1944, accused's company was either actively attacking the enemy or was in reserve positions subject to call and within the range of enemy artillery fire. It thus appears that, on those dates, the company was 'before the enemy' within the meaning of that phrase as used in Article of War 75 (CM ETO 1404, Stack; Winthrop's Military Laws and Precedents, Reprint, 1920, pp.623,624; Dig. Opns, JAG, 1912-40, sec. 433(2), p.303). It was further shown through the introduction of an extract copy of the company morning reports, that accused absented himself without leave from his company on the dates alleged. The evidence thus supports the inference that accused was before the enemy on the dates alleged and shows that he absented himself from his company without permission on those dates. This conduct constitutes misbehavior before the enemy in violation of Article of War 75 (CM ETO 1663, Ison; CM ETO 1659, Lee; CM ETO 2582, Keyes; CM ETO 3828, Carpenter). * *."

The Sexton case differs from the instant case in that in the Sexton case the accused was charged with and found guilty of running away from his company in violation of Article of War 75, while in the instant case the

specification alleges that the accused did "shamefully abandon" and "seek safety in the rear." This difference does not help the accused as the gravamen of the offense alleged in either manner is the abandonment of his company by the accused (CM 297170, Woods, 13 BR (ETO) 37,42), with the result that a specification alleging that the accused did "shamefully abandon" his company while it was before the enemy "and seek safety in the rear" is equivalent to an allegation that he did "run away from his company" (CM 257053, Marchetti, supra; CM 277044, Puleio, 9 BR (ETO) 37,39), and may be supported by the same proof (CM 277044, Puleio, supra, and cases there cited).

The Board of Review is of the opinion that the record of trial is legally sufficient to sustain the findings and sentence (CM ETO 1408, Saraceno, 4 BR (ETO) 293,295; CM ETO 1659, Lee, 5 BR (ETO) 173,174; CM 263351, Keyes, 7 BR (ETO) 187,188; CM 276183, Kuykendoll, 9 BR (ETO) 315, 316; CM 289896, O'Berry, 11 BR (ETO) 203,204-205; CM 298931, Sexton, supra).

5. The accused is 30 years of age. He is single and claims a dependent mother. He completed 11 years of elementary school in 1940 and, after that, worked as a truck driver at $50.00 a week. He enlisted 2 April 1948 for five years with prior service from 18 December 1942 to 27 November 1945. He joined his present unit 16 March 1950 and is rated by his commanding officer as "inferior" in character and "unsatisfactory" as to efficiency. He has no known civilian convictions but has two military convictions within the year preceding this offense. One is a summary court-martial for using threatening and insulting language toward a noncommissioned officer and the other is a special court-martial for absence without leave from camp, failure to obey a lawful order of a noncommissioned officer, and unauthorized use of a government truck. In both cases he received approximately the maximum authorized punishment.

6. The court was legally constituted and had jurisdiction of the person and of the offense. 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 of guilty and the sentence, and to warrant confirmation of the sentence. A sentence to confinement at hard labor for life is authorized upon conviction of misbehavior before the enemy in violation of Article of War 75.

C. J. Hauch, Jr., J.A.G.C.

William C. Tighe, J.A.G.C.

Arthur P. Ireland, J.A.G.C.

JAGU CM 344043

MEMORANDUM FOR THE JUDGE ADVOCATE GENERAL

SUBJECT: CM 344043, Private J. P. Morgan

This soldier was convicted of shamefully abandoning his company while it was engaged with the enemy, seeking safety in the rear, and failing to rejoin his company until returned thereto by the Company Commander. He was sentenced to dishonorable discharge, total forfeitures after promulgation and confinement for life. This sentence was approved by the reviewing authority.

The prosecution evidence showed that on 11 August 1950 the accused left his unit without authority during the course of an attack on a ridge, and was not seen again until 19 August. Defense evidence showed that sometime in August or September the accused was tagged for medical evacuation and that prior to 10 August he was tired, upset and tense. Both prosecution and defense evidence showed that during the period of twenty-five days after 19 August, when the accused was returned to his unit on the front line, and before 13 September, when he was confined pending trial, he performed efficient combat service with his company.

In our opinion, the evidence of the accused's condition prior to his offense and of his combat service thereafter, although not a defense to the charge, warrants substantial clemency. Accordingly, we recommend that the period of confinement be reduced to five years, and that the entire sentence be suspended.

Robert W. Brown

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr.

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

CM 344043

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Private J. P. Morgan, RA 36553000, Company B, 24th Infantry Regiment, APO 25, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution. The United States Disciplinary Barracks or one of its branches is designated as the place of confinement.

Robert W. Brown, Brig Gen, JAGC C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action. Under the direction of the Secretary of the Army and upon the recommendation of the Judicial Council, the term of confinement is reduced to five years and the entire sentence is suspended.

E. M. BRANNON
Major General, USA
The Judge Advocate General

23 January 1951

(GCMO 12, Jan 29, 1951).

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D.C.

DEC 15 1950

JAGH CM 344072

UNITED STATES	)	7TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Zama, Honshu, Japan, 4 September 1950. Dismissal and total forfeitures after promulgation.
First Lieutenant RICHARD LEE FALLON (0-1798725), 7th Military Police Company, APO 7).	)	

OPINION of the BOARD OF REVIEW
HAUCK, FITZHUGH, and IRELAND
Officers of The Judge Advocate General's Corps

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 and the Judicial Council.

2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that 1st Lt Richard L. Fallon, 7th Military Police Company, did, without proper leave, while enroute from Camp Sendai, Honshu, Japan, to Camp Fuji, Honshu, Japan, absent himself from his organization at Camp Fuji, Honshu, Japan, from about 10 August 1950 to about 29 August 1950.

He pleaded not guilty to, and was found guilty of, the Charge and the Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct for two years. The reviewing authority approved the sentence, remitted the period of confinement, and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence.

a. For the prosecution.

The accused was a member of the 7th Military Police Company (R 38) and was in charge of the military police remaining at Camp Sendai, Honshu,

Japan, after the 7th Infantry Division had moved from there to Gotemba, Honshu, Japan (R 11). At about 1300 hours, 6 August 1950, the accused was directed to proceed immediately from Camp Sendai to join the 7th Infantry Division at Gotemba by Captain Edward J. Beck, the 7th Division Assistant Provost Marshal (R 11,12). The accused requested and was granted permission to remain one more day in order to close out his property accounts by Captain Nielson, the Division G-4 representative who was charged with closing out the Rear Echelon of the Division (R 12,13,17).

On 7 August 1950, the accused was given an official order (Pros Ex No. 1, Letter Orders No. 8-33) to proceed to Gotemba, Honshu, Japan, to rejoin his parent organization which had made a permanent change of station (R 17-18). On the same date he was issued a transportation order (Pros Ex 2) authorizing the rail transportation officer to furnish "Richard L. Fallon, 1st Lt., 7th MP Co" a one-way ticket with berth from Sendai to Yokohama (R 18-19). Sergeant Albert E. Jaketic, the noncommissioned officer in charge of the Sendai Rail Transportation Office (R 24) testified that the Office Diagram (Pros Ex 3) revealed that ticket No. 209764 for Train Number 1202, South Bound Yankee Limited, departing at 2145 hours for Yokohama, had been issued to Lieutenant Fallon, the accused, upon presentation of the Transportation Order (Pros Ex 2), reserving for him Berth F in Car 7 of said train (R 25-26). Pertaining to the ticket so issued there were also identified and received in evidence the ticket agent's stub (Pros Ex 5), detached and retained by the issuing RTO (R 28), and the conductor's ticket stub (Pros Ex 4), detached by the conductor when the passenger boarded the train and turned into Headquarters 8010 3rd TMRS, Yokohama, Japan (R 28). Sergeant Jaketic further testified that ticket No. 209764 had been used on the night of 7 August 1950 (R 31). Mr. Aubrea P. Irwin, Superintendent of the Laundry at Camp Schimmelpfennig, Honshu, Japan, on 7 August 1950 at about 2100 hours drove the accused to the Sendai RTO and saw him board the train about twenty minutes before departure (R 32-33). The accused has not been seen at Camp Sendai since that date (R 13,19,33).

Captain Alvin R. McIver saw the accused at the Yuroka Hotel in Tokyo, Honshu, Japan, on 20 August and again on 26-27 August 1950 (R 34-35). On the latter date the accused was to accompany witness to Camp Fuji but failed to catch the train which was moving out when they arrived at the track although witness caught the train and returned to camp with accused's bag (R 35-36). On 29 August 1950 at about 0020 hours accused was apprehended in the Yuroka Hotel by an agent of the CID (R 37-38) and at about 1500 hours was turned over to his commanding officer, Captain Warren M. Hess, at the Eighth Army Provost Marshal Stockade, Tokyo, Honshu, Japan (R 40).

A morning report signed by Captain Hess, accused's commanding officer, on 16 August 1950 containing the entry that accused was from temporary

duty with Headquarters Camp Sendai, APO 547, to absent without leave as of 0001 hours, 10 August 1950 (Pros Ex 6) was admitted in evidence (R 46) after Captain Hess testified that he, upon receiving a copy of accused's orders (Pros Ex 1) had made inquiry concerning accused's whereabouts and had learned that accused had left Camp Sendai some time prior (R 41-45). From his personal knowledge of the time it takes to come from Camp Sendai to Camp Fuji, Captain Hess selected 10 August 1950 as the day accused should have been present for duty (R 48). A second morning report dated 29 August 1950 signed by the unit personnel officer, reflecting that the accused went from absent without leave to confinement in the Eighth Army Stockade, APO 403 (Pros Ex 7) was received in evidence (R 50).

b. For the defense.

The defense called no witnesses and offered no evidence. After having been duly advised of his rights as a witness, the accused elected to remain silent (R 51). When the court was opened to receive evidence of previous convictions, the defense offered in evidence five letters of commendation to be considered in mitigation which were received and admitted as Defense Exhibit A (R 55).

4. Discussion.

The accused was charged with and found guilty of going absent without proper leave from his organization at Camp Fuji, Honshu, Japan, from 10 August to 29 August 1950 while enroute from Camp Sendai to Camp Fuji.

Absence without leave is a military offense in violation of Article of War 61 (AW 61, MCM, 1949, p.292). To establish the offense it was necessary for the prosecution to prove that the accused absented himself from his organization as alleged and that such absence was without authority (MCM, 1949, Par. 149). Both of these facts are usually proved, prima facie, by entries on the morning report (MCM, 1949, Par. 146a, p.199).

The evidence in the instant case established that, on 6 August 1950, the accused, while on duty at Camp Sendai, Honshu, Japan, was verbally directed to proceed immediately to rejoin the 7th Military Police Company, a unit of the 7th Infantry Division, which had made a permanent change of station to Gotemba, Honshu, Japan. After an authorized delay of one day in which he was to close out his property accounts, the accused was furnished letter orders and a transportation order which he used to secure a railroad ticket between Camp Sendai and Yokohama for travel enroute to Gotemba in compliance with said orders. He was seen by a witness to depart Camp Sendai by train on the evening of 7 August 1950 and was not seen in the vicinity of Camp Sendai thereafter. Accused did not proceed to his organization, the 7th Military Police Company, and remained absent therefrom until 29 August 1950 when he was apprehended at the Yuroka Hotel

in Tokyo, Honshu, Japan, by an agent of the CID and returned to military control. There was no legal justification for his failure to report. Such testimony by the witnesses clearly established both elements of the offense.

The evidence of absence without authority was further corroborated by the admission in evidence of morning report entries pertaining to the accused. Since it was shown that these entries were made by a person who had the duty to record the fact and to know, or to ascertain through customary and trustworthy channels of information, the truth of the matters recorded, they were properly admitted (MCM, 1949, Par. 130b, p.166; CM 320957, Boone, 70 BR 223,225). It was not necessary that the recording of the events in the morning report be made contemporaneously with the happening of the events recorded (CM 320957, Boone, supra). Based upon the morning report entries (Pros Exs 6 and 7) and the testimony of Captain Hess, the court was justified in finding as a matter of fact that the accused's absence without leave began 10 August 1950, the date he should have been present for duty with the 7th Military Police Company, taking into consideration the usual travel time from Camp Sendai, and was terminated by apprehension 29 August 1950.

5. The accused was born 25 December 1916 at Waltham, Massachusetts. He is single and his mother and father are still living. He has one brother and two sisters. Accused was graduated from high school in Melrose, Massachusetts, in 1934 and subsequently completed a one-year course in Malden Business College, Malden, Massachusetts in 1937. He was employed from 1937 to 1941 by the Metropolitan Life Insurance Company and from 1941 to 1942 by the General Electric Corporation. Accused was a member of the National Guard from 20 January 1935 until he was inducted 16 September 1940 into the Federal service with Battery A, 211th Coast Artillery (AA). As an enlisted man, he attained the grade of first sergeant. On 19 November 1943, he was commissioned a second lieutenant after completing the Provost Marshal General's School at Fort Custer, Michigan. During World War II he served overseas in the Asiatic-Pacific Theater for sixteen months. Accused attained the rank of first lieutenant and was relieved from active duty 14 March 1946. He was recalled 7 May 1947 and has served on active duty until the present date. The accused's efficiency reports are not available to the Board of Review at this time.

6. The court was legally constituted and had jurisdiction of the person and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. 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, as modified by the reviewing authority, and to warrant confirmation of the sentence. A

sentence to dismissal and total forfeitures after promulgation is authorized upon conviction of an officer of violation of Article of War 61.

C. J. Hauch, Jr., J.A.G.C.

William C. Fitzhugh, J.A.G.C.

Arthur P. Ireland, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 344072

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of First Lieutenant Richard Lee Fallon, 0-1798725, 7th Military Police Company, APO 7, upon the concurrence of The Judge Advocate General the sentence as modified by the reviewing authority is confirmed and will be carried into execution.

Robert W. Brown
Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait
C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr.
J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action.

E. M. Brannon
E. M. BRANNON
Major General, USA
The Judge Advocate General

2 January 1951

(GCMO 3, Jan 10, 1951).

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D.C.

[illegible] 1950

JAGH CM 344116

UNITED STATES v. Private HARRY B. DRUMMOND (RA 33800486), Company G, 24th Infantry Regiment, APO 25.	)))))))	25TH INFANTRY DIVISION Trial by G.C.M., convened at APO 25, 26 October 1950. Dishonorable discharge, total forfeitures after promulgation, and confinement for fifty (50) years. Disciplinary Barracks.

REVIEW by the BOARD OF REVIEW
HAUCK, FITZHUGH, and IRELAND
Officers of The Judge Advocate General's Corps

1. The Board of Review has examined the record of trial in the case of the soldier named above.

2. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 75th Article of War.

Specification 1: In that Private Harry B. Drummond, Company G, 24th Infantry Regiment, APO 25, did, at or near Haman, Korea, on or about 23 August 1950, run away from his platoon, which was then engaged with the enemy, and did not return thereto until after the engagement had been concluded.

Specification 2: (Finding of not guilty).

The accused pleaded not guilty to the Charge and its Specifications. He was found guilty of Specification 1 and of the Charge, and not guilty of Specification 2. Evidence of two previous convictions by summary court-martial for violating standing orders and being in an off limits area was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor, at such place as proper authority may direct for fifty years. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, Camp Cooke, California, or elsewhere as the Secretary of the Army may direct, but not in a penitentiary, as the place of confinement, and pursuant to Article of War 50(e), withheld the order directing execution of the sentence.

3. Evidence.

a. For the prosecution.

The evidence pertinent to the finding of guilty of Specification 1 and the Charge may be summarized as follows:

The accused was a member of Company G, 24th Infantry Regiment (R 9), which from 23 to 26 August 1950, was engaged with the enemy in the vicinity of Haman, Korea (R 10). The accused was present with his platoon "before dark" on 23 August (R 12). The platoon was "on a mission going up to aid Easy Company * *" (R 15), and was about a mile and a half from the rest of Company G (R 12). The accused was given "his position for that night" by Sergeant First Class Harvey C. Boone, his assistant platoon sergeant (R 15). This position was in a foxhole with Private First Class Thomas Reed (R 16-17). Between "nine and ten o'clock" that night (R 18) the platoon engaged in a fire fight with the enemy (R 9,12,16). Private First Class Reed testified:

> "* * we got to firing and Drummond takes off. He jumps out of the foxhole - I don't - don't say he went off the hill, but he left out of the foxhole, and went to the right" (R 18).

Private First Class Reed did not see the accused again that night (R 18). The following morning the accused could not be found in the platoon area although a search was made of the entire area (R 9,15). Further searches of the area were made "that afternoon and again the next day" but the accused could not be found (R 9). The accused did not have permission to be absent (R 11,16). The accused's platoon rejoined Company G, in the latter's area, on 25 August 1950 (R 9,12) at which time the engagement with the enemy had been concluded (R 18) although the company was still "in defense" (R 9).

Second Lieutenant (then First Sergeant) Louis Thomas Bowling had seen the accused on the morning of 23 August. At that time the accused stated that he was on his way to "sick call." Bowling gave the accused a note authorizing him to visit the aid station and indicating the time the accused left the company. Lieutenant Bowling did not again see the accused "until about the 26th" (R 19).

b. For the defense.

After explanation of his rights as a witness, the accused elected to be sworn and to testify in his own behalf (R 21,22).

He admitted that he was present with his platoon on 23 August 1950 (R 22) and that he was assigned a combat position in a foxhole with Reed

"on this hill they call 'Bloody Peak'." At the time he was ill. He "had a headache" and his chest "was ailing." He told "the colonel" that he "was feeling bad," but the colonel "still said, 'Go ahead up on the hill - get up on the hill'." Other troops passing his position dislodged a box of ammunition which "rolled down the hill and bounced off from a little cliff * * and landed on the foxhole and hit /his/ left ankle." "Reed said, 'Did the ammunition fall on your ankle'?" To which he replied, "Yeah." He later asked Reed, "Where is the medics?" Reed answered, "I don't know where the medics be, but probably on the hill." After dark he decided he had "better find the aid and see if /he/ could get something for /his/ head and chest and about /his/ ankle because it began to swell, * *." As he left the foxhole he said: "Well, Reed * *I am going to find an aid." It was possible that Reed did not hear him as there was firing going on at the time. Upon leaving his foxhole he found Corporal Jackson, who he thought was a squad leader, and told him he "wanted to go to the aid station." Jackson told him to "See the lieutenant in CP." He proceeded to "the CP" but no officer was there. After waiting about ten minutes he told Corporal Berry, the radio operator, that he was going to the aid station and left. He subsequently made his way either to the first battalion or the third battalion aid station where he was given "some pills" and his ankle and hand were bandaged. As it was dark and he did not know the way to the company command post, he remained at the aid station overnight. The next morning he proceeded to the G Company area where he reported to First Sergeant Bowling and to the company commander. Master Sergeant McCrea, who was present at the time gave him a task filling up holes in the CP area. The next day, 25 August, "Sgt. Bowling said, 'Okay, go up'. He said Sergeant McCrea told him to tell me to go join the platoon, and I said, 'What did he say? Go join the platoon?' And I - he said, 'That is what he said.' That is what Sergeant Bowling said, and I joined the platoon" (R 23-24). The accused denied that he had seen Bowling before going to the aid station or that Bowling had given him "a slip" authorizing him to go (R 24,27).

c. Rebuttal by the prosecution.

Second Lieutenant Bowling was recalled by the prosecution as a rebuttal witness. He repeated his former testimony to the effect that he had authorized the accused to go to the aid station on the morning of 23 August and that he had not seen him on the twenty-fourth. He did not remember the accused ever showing him a bandaged ankle or hand. The accused was given the task of filling up the holes at the command post "around the 28th or 30th" after he returned to his unit on 26 August (R 31).

Private First Class Thomas Reed was recalled as a witness for the court. He did not remember a box of ammunition falling into the foxhole

he shared with the accused on 23 August nor anything happening to the accused that evening. He denied that the accused told him where he was going when he left the foxhole or that the accused mentioned being sick. When he again saw the accused he asked him "* why did he run off and leave me in the foxhole." The accused replied to the effect that "he didn't leave the hill" (R 34).

4. Discussion.

The accused was charged with and found guilty of violation of the 75th Article of War in that he

> "* * did, at or near Haman, Korea, on or about 23 August 1950, run away from his platoon, which was then engaged with the enemy, and did not return thereto until after the engagement had been concluded."

The 75th Article of War makes misbehavior before the enemy an offense punishable by death or such other punishment as a court-martial may direct (AW 75, MCM, 1949, p.294). The Manual for Courts-Martial, 1949, defines misbehavior before the enemy as:

> "* * any conduct by an officer or soldier not conformable to the standard of behavior before the enemy set by the custom of our arms. Running away is but a particular form of misbehavior specifically made punishable by this article" (MCM, 1949, Par. 163a).

Winthrop describes misbehavior before the enemy, as, among other things:

> "Such acts by any officer or soldier, as -- * * going to the rear or leaving the command when engaged with the enemy: * *." (Winthrop's Military Law and Precedents, 2d Ed., p.623).

The words "before the enemy" are not limited by geographical distance but are words expressing tactical relationship (MCM, 1949, Par. 163a). The words "engaged with the enemy" have been held to be synonymous with the words "before the enemy" (CM 257053, Marchetti, 4 BR (ETO) 143,150).

In view of the recent decision of the Judicial Council in the Gilbert case no question arises as to the applicability of the 75th Article of War to the present situation in Korea (CM 343472, Gilbert, 27 Nov. 50).

The evidence proves conclusively and the accused admits that he was a member of Company G, 24th Infantry Regiment, and that he was present with his platoon which was engaged with the enemy in the vicinity of Haman, Korea, on 23 August 1950. The accused also admitted that he left his

platoon without authority. The only issue which requires determination, therefore, is whether the accused's act in leaving his platoon and his subsequent conduct amounted to running away within the meaning of Article of War 75. A conflict of evidence exists with respect to this point. The determination of this issue, in the first instance, was the duty of the trial court (CM 325457, McKinster, 74 BR 233,241). As indicated by its findings, it resolved this issue against the accused.

If the accused is to be believed, he was ill at the time he assumed his assigned combat position on 23 August 1950, and shortly thereafter was injured by a box of ammunition which fell on his ankle. He then sought medical assistance and on the following morning reported for duty to his first sergeant and company commander at the company command post. The testimony of the other witnesses indicates this story to be untrue. The accused said nothing to his companion, Private Reed, about being ill. Reed knew nothing of an ammunition box falling into the foxhole. Reed did not hear the accused say where he was going when he left the foxhole. Second Lieutenant Bowling was certain it was the morning of 23 August, not 24 August, that he authorized the accused to go to the aid station. He was equally certain that the accused did not report to him or to the company commander on 24 August, and that he did not see the accused after 23 August until the engagement was concluded on 26 August. Such being the state of the evidence, the Board of Review finds no basis for disturbing the findings of the trial court on this issue, and is of the opinion that the record of trial is legally sufficient to sustain the findings and sentence (CM 343978, Lewis and Martin, 7 Dec 50 and cases cited therein).

5. Consideration has been given to oral representations on behalf of the accused by his counsel, Mr. Frank D. Reeves.

6. The papers accompanying the record of trial indicate the accused to be 25 years of age. He is single and has no dependents. Accused had prior military service from December 1943 to March 1946, and currently enlisted on 26 October 1948 for three years. He was convicted by a summary court-martial on 24 January 1950 for violating standing orders and being in an off-limits area. He was sentenced to be reduced to recruit and to forfeit $60.00 of his pay for one month. He was convicted by summary court-martial on 21 March 1950 for being in an off-limits area and was sentenced to forfeit $50.00 of his pay for one month.

7. The court was legally constituted and had jurisdiction of the person and the offense. 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 of guilty and the sentence. A sentence to confinement at hard labor for fifty years is authorized upon conviction of misbehavior before the enemy in violation of Article of War 75.

C. J. Hauch, Jr., J.A.G.C.

William C. Tufteugh, J.A.G.C.

Arthur P. Ireland, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

DEC 28 1950

Board of Review

CM 344116

UNITED STATES v. Private HARRY B. DRUMMOND (RA 33800486), Company G, 24th Infantry Regiment, APO 25.	25TH INFANTRY DIVISION Trial by GCM, convened at APO 25, 26 October 1950. Dishonorable discharge, total forfeitures after promulgation, and confinement for fifty (50) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
HAUCK, FITZHUGH, and IRELAND
Officers of the Judge Advocate General's Corps

The record of trial in the case of the soldier named above has been examined and is held by the Board of Review to be legally sufficient to support the findings of guilty and the sentence.

C. J. Hauck, Jr., J.A.G.C.
William C. Fitzhugh, J.A.G.C.
Arthur D. Ireland, J.A.G.C.

1st Indorsement

JAN 8 1951

Dept. of Army, J.A.G.O. To the Commanding General, 25th Infantry Division, APO 25, c/o Postmaster, San Francisco, California

1. In the case of Private Harry B. Drummond (RA 33800486), Company G, 24th Infantry Regiment, APO 25,

attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence. Confirming action is not by The Judge Advocate General or the Board of Review deemed necessary.

2. Pursuant to the provisions of Article of War 51(a), and under the direction of the Secretary of the Army, so much of the sentence as exceeds dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for 20 years is remitted. Under the provisions of Article of War 50 you now have authority to order the execution of the sentence as modified.

3. A radiogram is being sent advising you of the foregoing holding and action. It is recommended that the attached draft of that portion of the general court-martial order pertaining to the action herein, be included in the published order. 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 344116).

E. M. Brannon

E. M. BRANNON
Major General, USA
The Judge Advocate General

1 Incl
Draft of part
GCMO

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D.C.

JAGH CM 344118

UNITED STATES	)	25TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	APO 25, 30 October 1950. Dis-
Private CHARLES C. McAFEE (RA	)	honorable discharge, total for-
11175082), Service Company, 35th	)	feitures after promulgation, and
Infantry Regiment, APO 25.	)	confinement for fifty (50) years.
	)	Disciplinary Barracks.

REVIEW by the BOARD OF REVIEW
HAUCK, FITZHUGH, and IRELAND
Officers of The Judge Advocate General's Corps

1. The Board of Review has examined the record of trial in the case of the soldier named above.

2. The accused was tried upon the following Charges and Specifications:

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

Specification: In that Private Charles C. McAfee, Service Company, 35th Infantry, did, without proper leave, absent himself from his assigned organization at Chung-Ni, Korea, from about 16 August 1950, to about 21 September 1950.

CHARGE II: Violation of the 84th Article of War.

Specification: In that Private Charles C. McAfee, Service Company, 35th Infantry, did, near Masan, Korea, on or about 16 August 1950, through neglect lose eight drums of (eighty octane) gasoline, of the value of $55.04, one drum of motor oil (OE 30), of the value of $7.98, of a total value of $63.02, issued for use in the Military Service of the United States.

The accused pleaded not guilty to all Charges and Specifications. He was found guilty of the Specification of Charge I except the words and figures "16 August 1950," substituting therefor the words and figures "24 August 1950," of the excepted words, not guilty, of the substituted words, guilty; and guilty of Charge I. He also was found guilty of the Specification of Charge II except the words and figures "of the value of $55.04," "of the value of $7.98," and "$63.02," substituting therefor the words and figures

"some value of more than $20.00 but less than $50.00," of the excepted words not guilty, of the substituted words, guilty; and guilty of Charge II. Evidence of two previous convictions by Summary Courts-Martial for AWOL and breach of restriction, and of one previous conviction by Special Court-Martial for wrongful taking of a blanket and AWOL was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor, at such place as proper authority may direct for fifty years. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, Camp Cooke, California, as the place of confinement, and pursuant to Article of War 50(e), withheld the order directing execution of the sentence.

3. Evidence.

a. For the prosecution.

The accused, Private Charles C. McAfee, was a member of Service Company, 35th Infantry. On 16 August 1950, he was present "at the bivouac area boardering the CP" near the town of Masan, Korea. He was directed by Sergeant First Class Sherman M. Horn, the company truckmaster, to report to Private First Class George W. Mitchell "to haul gas" (R 10). The accused reported to Private First Class Mitchell with a two and one-half ton truck (R 11) and, pursuant to Mitchell's instructions, went with him to "the Division POL." Seventeen barrels of 80 octane gasoline and one barrel of OE 30 oil were loaded on the accused's truck at the POL dump. Private First Class Mitchell "signed for the gas and oil" and "pulled out in front of McAfee's truck and talked with him and told him to follow me - to follow me to the area - to Service Company area." Mitchell then "left with the other truck to go back to the organization" (R 12). Because of a curve in the road at the entrance to the POL dump, Mitchell was unable to see whether the accused was following him or not but after proceeding three or four miles he noticed that the accused's truck was not within sight (R 13). Mitchell next saw the truck about seven hours later when it was driven into the Service Company area by Corporal McClaren. At that time the entire load on the truck consisted of "9 drums of 80 octane gas" (R 14-15).

Private Frank James Lawson, Service Company, 35th Infantry Regiment, accompanied the accused to the division POL dump on 16 August 1950. The accused drove his truck to the dump, the gasoline was loaded and the accused "started to drive back" (R 17). Lawson heard Mitchell say "You men come on - follow me back." Lawson and the accused left the dump a few minutes after Mitchell and "went on the same road but * * couldn't see him down the road" (R 18). None of the gasoline or oil on the truck was unloaded prior to leaving the dump. About "half-way" from the POL dump Lawson left the truck and was "picked up" by the military police (R 19).

Later that afternoon Corporal Billy W. McClaren, who had been sent to look for the missing truck, saw it pass the military police operations office in Masan. He pursued the truck and, with the assistance of the military police overtook it on the Pusan road (R 21-22,23). When McClaren first saw the truck it was being driven by "a colored fellow" and the accused was sitting beside him (R 24). When McClaren caught up with the truck it already had been stopped by the military police. The "colored fellow" "was sitting at the wheel" and the accused "was out of the truck standing by the truck" (R 22). Private First Class Gross drove the truck back to the service company area followed by McClaren. On reaching the area Gross and McClaren checked the load on the accused's truck and found only nine barrels of gasoline (R 22-23). The accused refused to accompany McClaren back to the company and walked off disappearing around a corner (R 22). The accused was not seen again until 21 September 1950 (R 27) and was carried as absent without leave on the service company morning report during this time (Pros Exs 1 and 2). He did not have authority to be absent (R 27,30).

It was stipulated that the accused was admitted to the 25th Infantry Division Hospital at Masan on 16 August 1950, and was discharged from the hospital on 24 August 1950, at which time "he was marked duty and instructed to return to his unit" (R 8). It also was stipulated that the gasoline and oil referred to in the specification of Charge II was of a total value of more than twenty dollars ($20) and less than fifty dollars ($50) (R 8-9).

b. For the defense.

The defense called no witnesses and offered no evidence. Upon being advised of his rights as a witness in his own behalf, the accused elected to remain silent (R 32).

4. Discussion.

The accused stands convicted of absence without leave from his organization at Chung-Ni, Korea, from about 24 August 1950, to about 21 September 1950, in violation of Article of War 61, and with losing through neglect eight drums of gasoline and one drum of engine oil of a total value of more than twenty dollars and less than fifty dollars issued for use in the military service of the United States, in violation of Article of War 84.

The offense of absence without leave may be proven prima facie by proof "(a) That the accused absented himself from his command, * * *, as alleged; and (b) that such absence was without authority from anyone competent to give him leave" (MCM, 1949, Par. 149). These facts may both be proved prima facie by entries on the unit morning report (MCM, 1949, Par. 146a).

The uncontradicted evidence in the instant case establishes that on 16 August 1950, the accused was present for duty with his unit, Service Company, 35th Infantry Regiment; and that at sometime shortly before 1730 hours that day he was seen in Masan, Korea. Thereafter he was not again present with his unit until 21 September 1950. No one competent to grant him leave had given him permission to be absent. These facts were proven by appropriate extract copies of the morning report of Service Company, 35th Infantry Regiment, and by the testimony of the company commander and first sergeant. As it was stipulated that the accused was hospitalized from 16 August 1950, to 24 August 1950, the court excepted this period from its findings of guilty of absence without leave.

Loss of military property through neglect is a violation of the 84th Article of War (AW 84, MCM, 1949, p.296). "A loss or injury is occasioned through neglect when it is the result of a want of such attention to the nature or probable consequences of an act or omission as was appropriate under the circumstances" (MCM, 1949, Par. 172b).

"Neglect" may be defined as follows:

> "To omit, as to neglect business, or payment, or duty, or work. It does not generally imply carelessness or imprudence, but simply an omission to do or perform some work, duty or act." (Bouvier's Law Dictionary, Unabridged, Rawles Third Revision, Vol. 2, p.2312).

The foregoing definition has been quoted with approval and held to be the correct definition of the word "neglect" as used in Article of War 83 (CM 330698, Bryan, 79 BR 137,143; CM ETO 393, Caton, 1 BR (ETO) 325,335). The Board of Review knows of nothing to indicate that any other meaning was intended in the use of the same word in Article of War 84.

In the instant case, the accused as the assigned driver of a two and one-half ton truck was given the mission of hauling gasoline and oil from the division POL dump to his company area. He drove his truck to the dump where seventeen barrels of gasoline and one barrel of oil were loaded. It clearly appears that this gasoline and oil were property of the United States and were issued for use in the military service. It was stipulated that the value of eight barrels of gasoline and one barrel of oil was of a value in excess of twenty dollars and less than fifty dollars. The accused was then directed to follow Private First Class Mitchell back to the Service Company area. He failed to do so and some six or seven hours later was stopped by military police on the Pusan road. Inspection of the load revealed eight barrels of gasoline and the barrel of oil to be missing. The missing gasoline and oil do not appear to have been found (cf. CM 217868, Schiedinger, 11 BR 329,336). The record of trial does not indicate where or how the gasoline and oil disappeared from the accused's truck. It manifestly appears, however, that this property was placed in the accused's custody and that he was given the specific duty of transporting

it to the Service Company area. He did not perform this duty. In the opinion of the Board of Review these facts are sufficient to prove that the loss of the property occurred through the neglect of the accused (CM 330698, Bryan, supra; CM ETO 393, Caton, supra). This conclusion is strengthened by the fact that when stopped by the military police the accused did not return to his company but absented himself without leave for a period of approximately a month.

5. The papers accompanying the record of trial show the accused to be 21 years old and unmarried. Prior to entry into the military service, he completed ten years of school and thereafter worked as a "drier" at $32.00 per week. He enlisted 29 August 1947 for three years. He had no prior service. There is no evidence of any civilian criminal convictions. His company commander rated him unsatisfactory as to character and efficiency.

6. The court was legally constituted and had jurisdiction of the person and the offenses. 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 of guilty and the sentence. A sentence to confinement at hard labor for fifty years is authorized upon conviction of absence without leave in violation of Article of War 61 (Executive Order No. 10149, 15 Fed. Reg. 5149, 8 Aug. 1950).

C. J. Hauch, Jr., J.A.G.C.

William C. Pittsinger, J.A.G.C.

Arthur P. Iverland, J.A.G.C.

(82)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

Board of Review

DEC 28 1950

CM 344118

UNITED STATES v. Private CHARLES C. McAFEE (RA 11175082), Service Company, 35th Infantry Regiment, APO 25.	25TH INFANTRY DIVISION Trial by GCM, convened at APO 25, 30 October 1950. Dishonorable discharge, total forfeitures after promulgation, and confinement for fifty (50) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
HAUCK, FITZHUGH, and IRELAND
Officers of the Judge Advocate General's Corps

The record of trial in the case of the soldier named above has been examined and is held by the Board of Review to be legally sufficient to support the findings of guilty and the sentence.

C. J. Hauck, Jr., J.A.G.C.
William C. Fitzhugh, J.A.G.C.
Arthur P. Ireland, J.A.G.C.

1st Indorsement

JAN 6 1951

Dept. of Army, J.A.G.O. To the Commanding General, 25th Infantry Division, APO 25, c/o Postmaster, San Francisco, California

1. In the case of Private Charles C. McAfee (RA 11175082), Service Company, 35th Infantry Regiment, APO 25,

attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence. Confirming action is not by The Judge Advocate General or the Board of Review deemed necessary.

2. Pursuant to the provisions of Article of War 51(a), and under the direction of the Secretary of the Army, so much of the sentence as exceeds dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for 20 years is remitted. Under the provisions of Article of War 50 you now have authority to order the execution of the sentence as modified.

3. A radiogram is being sent advising you of the foregoing holding and action. It is recommended that the attached draft of that portion of the general court-martial order pertaining to the action herein, be included in the published order. 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 344118).

E. M. Brannon

E. M. BRANNON
Major General, USA
The Judge Advocate General

1 Incl
Draft of
part GCMO

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGK - CM 344192

JAN 2 3 1951

UNITED STATES	1ST CAVALRY DIVISION
v.	Trial by G.C.M., convened at Headquarters 1st Cavalry Division (Saber Rear), Taegu, Korea, 1, 2 and 23 September 1950. Dismissal, total forfeitures after promulgation, and confinement for three (3) years.
First Lieutenant GEORGE T. SORANAKA (O-1342401), Company A, 5th Cavalry Regiment.	

OPINION of the BOARD OF REVIEW
BARKIN, WOLF and LYNCH
Officers of The Judge Advocate General's Corps

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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 Judicial Council and The Judge Advocate General.

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

CHARGE: Violation of the 75th Article of War.

Specification 1: (Finding of not guilty).

Specification 2: In that 1st Lieutenant George T. Soranaka, Company "A", 5th Cavalry Regiment (Infantry), did, at or near Waegwan, Korea, on or about 9 August 1950, while before the enemy, shamefully have destroyed and abandoned certain arms and equipment, to wit, one .50 caliber machine gun and one recoilless rifle.

Specification 3: (Finding of not guilty).

He pleaded not guilty to the charge and specifications. He was found not guilty of Specifications 1 and 3, but guilty of Specification 2 of the charge and of the charge. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor, at such place as proper authority may direct, for three (3) years. The reviewing

authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence

a. For the Prosecution

From 1 to 9 August 1950, the 1st and 2d Battalions of the 5th Cavalry Regiment, 1st Cavalry Division, occupied a defensive position along the east bank of the Naktong River near the town of Waegwan, Korea, the 1st Battalion on the south and the 2d Battalion on the north. The North Korean forces, hereinafter called the enemy, were on the opposite shore (R 9). The north extremity of the 1st Battalion was about a mile south of Waegwan and extended southwardly along the river front for about two or three miles. The 2nd Platoon, A Company, 1st Battalion, occupied the most northern position of the 1st Battalion, and was just south of the position occupied by the 2d Battalion (R 38,106).

Upon assuming command of the 5th Cavalry Regiment, on 4 August 1950, Colonel Marcel S. Crombez ordered his battalion commanders to hold their positions on the east bank of the river at all costs, and stated that those units deployed on the river bank would engage any of the enemy attempting to cross the river, but would not engage any elements which might infiltrate through the line, as the latter would be engaged by certain reserve units in the rear. Lieutenant Colonel Morgan B. Heasley, Commanding Officer of the 1st Battalion, transmitted this order to all his subordinate commanders, including the accused, platoon leader of the 2nd Platoon, A Company, of his battalion. Colonel Heasley stated that "the river positions would be held at all costs," that "it was our duty to stay there and stay put and we would not move out," and that the troops were to remain in position and "shoot it out." First Lieutenant Martin J. Rezac, Commanding Officer of A Company, and accused's immediate superior, reiterated these orders to accused and stated that there was to be no withdrawal. Accused then transmitted the orders to his squad leaders. Accused's platoon was composed of two squads totaling 18 men and a gun crew of about seven men. The latter group manned a .75 recoilless rifle and a .50 caliber machine gun (R 9,16,23,38,40-41,68,89,157).

At about 0400 hours, 9 August 1950, Private First Class Harold S. Smith, squad sergeant of the 1st Squad, 2nd Platoon, observed a group of the enemy crossing the river and infiltrating through the platoon's left flank. He dispatched Private First Class Alexander T. Sykes to accused to report the matter (R 89,113). Sykes delivered this information to accused, who attempted unsuccessfully to contact A Company Command Post by telephone (R 114). Accused thereupon dispatched Sykes to the 2d Battalion Command Post to report the situation

and return with instructions (R 114,152). After about 45 minutes, Sykes not having returned, accused decided to go there with Sergeant Doyle N. Sadler, his platoon sergeant, as he had been told that the area between his sector and that of the 2d Battalion was mined (R 152,163-164). They arrived at E Company, 2d Battalion Command Post safely and accused tried unsuccessfully to contact the 1st Battalion. Accused and Sadler then returned to their sector and saw that friendly artillery and mortar shells were falling around the area (R 69, 97,153). Although the enemy had at no time attacked them, accused, at about 0700 hours, ordered his platoon and gun crew less the 1st Squad to move from their assigned area into the 2d Battalion area. At the same time he ordered his gun crew to destroy the .75 recoilless rifle and a .50 caliber machine gun (R 52, 70, 98-99,153-155,157). Sergeant Glen R. Anderson, in charge of the gun crew, to whom the order was relayed, destroyed the two weapons (R 67, 155). Accused and his platoon less the 1st Squad crossed over into the 2d Battalion area and proceeded beyond that point for a distance variously estimated from 200 to 500 yards (R 54,68,78). At about 0730 hours, Lieutenant Rezac, observing that the 2nd Platoon was not in its assigned position, proceeded to the 2d Battalion area and found accused and his platoon there (R 42). Accused informed Lieutenant Rezac that he had moved his platoon and ordered the destruction of the .75 recoilless rifle and .50 caliber machine gun because heavy fire was falling in his area. He stated that his communications were not operating, that he thought the enemy were to his rear, and that the two weapons were destroyed because they were too heavy to carry (R 43). Lieutenant Rezac replied that he could see accused's "point more or less but he /accused/ was supposed to hold on the river at all costs and to move back there immediately, which he did." Accused's action had resulted in his assigned position being unoccupied for about one to one and a half hours (R 42-46,70,77-78,101,130,157-158).

Second Lieutenant Robert L. Rundle, platoon leader of the 1st Platoon, Company A, 1st Battalion, testified that on a previous occasion, after being surrounded on three sides, their communications having failed, he and accused withdrew their troops safely despite orders to hold the line at all costs. On this occasion, accused was personally responsible for saving 40 men of the company. Lieutenant Colonel Glenn R. Rogers, Executive Officer, 5th Cavalry Regiment, stated that the order on the previous occasion was to hold a certain position until the 8th Army had cleared a given point and then withdraw (R 62,64,110).

First Lieutenant William F. Turner, 441st CIC, 1st Cavalry Division, stated that on or about 12 August 1950 he and Major Trevathan spoke to accused at the Eighth Army Stockade, Taegu, Korea, concerning the alleged offense in issue. Prior to discussing the matter, they advised

accused of his rights under Article of War 24, and informed him that he did not have to make a statement but that if he did it could be used against him in a trial by court-martial. No threats or promises of clemency or immunity were made, and accused was not mistreated or were any privileges withheld. Accused thereafter made two statements, one in question and answer form and the other in narrative form, which were admitted in evidence without objection as Prosecution Exhibits 3 and 4 (R 145-149). In these two statements, accused stated that, on or about 7 August 1950, he was platoon leader of the Second Platoon, A Company, 1st Battalion, 5th Cavalry Regiment, which was ordered to occupy a specified defensive position about 1,000 yards along the east bank of the Naktong River, which position they occupied. On 8 August, Lieutenant Rezac, commander of A Company, ordered accused to hold his sector of the line "at all costs." At 0330 hours, 9 August, enemy mortar fire was received on his position and accused requested artillery fire to combat it. At 0410 hours, Private Sykes informed accused that approximately 200 North Koreans "had broken through left of his position." Accused could not report this to A Company Command Post because "the lines were out." He dispatched Private Sykes to the 2d Battalion to report "this," because he was "cut off from the rest of 1st Battalion." Shortly thereafter, he saw about 20 men on a hill behind his position. At 0530 hours, having received no word from Private Sykes, accused, upon being informed by Sergeant Sadler that the area was mined, decided to go to the 2nd Battalion with Sergeant Sadler. At 0545 hours, they proceeded north and observed "American artillery and mortar fire" falling on his position. He thereafter arrived at E Company, 2d Battalion Command Post, where he tried to contact 1st Battalion Headquarters. Apparently unsuccessful, he and Sergeant Sadler "rushed" back to his position "through United States artillery and mortar fire and enemy small arms fire." During a lull in the firing, at about 0700 hours, he moved the 2nd Platoon into the 2nd Battalion area about 200 to 400 yards from their assigned position because he did not "believe in sacrificing U. S. lives unnecessarily." He then returned to E Company, 2nd Battalion Command Post, with one of his men who had been wounded and arranged to have "60 mm" mortar support for a counterattack on the enemy who were on the hill behind his assigned position. Shortly thereafter he met Lieutenant Rezac, to whom he explained the situation, and "I believe that he thought that was the right thing to do at that time." He then stated, "We /2nd Platoon/ moved right back into position." Asked whether he held his line as ordered, he said:

> "In a way I did and in a way I did not, because when the enemy came I held my position and after we were cut off and American artillery and mortar fire started droppint into my position I shifted my platoon across a little stream and

set a defensive along that stream to prevent the sacrifice of American lives unnecessarily."

Relative to the destruction of weapons, the following colloquy is extracted from Prosecution Exhibit 3:

"Q Did you at any time order the destruction of any of your weapons?
"A I did at the time of deployment. A 75 MM recoilless rifle and a 50 caliber machine gun.

"Q Why did you order this equipment destroyed?
"A It was too heavy for the men to move.

"Q What method did you direct your men to use in destroying these weapons?
"A White phosphorous hand grenades.

"Q Do you recall the exact words you used in directing the destruction of the 75 MM recoilless rifle and 50 caliber machine gun?
"A No sir, I don't.

"Q Were these weapons at any time subject to being captured by the enemy?
"A At that time no.

"Q Then why did you order these weapons to be destroyed?
"A Actually with the mortars and artillery shells coming in, the men expose themselves unnecessarily. My opinion at the time was to get the men out because the weapons could be replaced but the men couldn't. That is the reason we destroyed a few weapons in Yong Dong also.

"Q Again I ask you, were these weapons in danger of being captured by the enemy at any time prior to or after your deployment?
"A No, prior to reployment. After, I don't know."

b. For the Defense

Warrant Officer Junior Grade James C. Elliott, Assistant S-3, 61st Field Artillery Battalion, 1st Cavalry Division, testified that about 0630 hours, 9 August 1950, his unit, located to the rear of the 2nd Platoon, A Company, received orders to fire on a hill to the north of the 1st Battalion area. Pursuant to this order his unit at 0645 hours fired "450 rounds of shells HE, and 61 rounds of FWP" as an "observed mission" (R 167-172).

Sergeant Sadler, recalled as a defense witness, stated that on a previous occasion, when his position was overrun by the enemy, requiring a forced withdrawal, he had received instructions to destroy such equipment that was too heavy to carry. However, "if [he] weren't being overrun by the enemy" he would carry out all equipment (R 177-178).

Accused, having been advised of his rights as a witness, elected to be sworn and testify (R 181-182). He testified that he was commissioned a second lieutenant after completing Officers Candidate School at the Fort Benning Airborne School in November 1947. On 10 July 1948 he went overseas and became platoon leader of the 81st Mortar Platoon, D Company, 11th Airborne Division. After a month he was assigned to Military Government duty for 14 months, and as Post Exchange Officer thereafter, until five days before he left for Korea when he became executive officer of A Company, 5th Cavalry Regiment (R 193-194).

From 25 July to 10 August 1950, he was in command of the 2nd Platoon, A Company, 1st Battalion, 5th Cavalry Regiment (R 182). On 2 August, his company commander designated the area of his platoon along the Naktong River and ordered him to hold this position at all costs (R 183,195).

From 2 to 9 August, accused had his platoon in their assigned position. His 1st Squad was to the left, his 2nd Squad was to the right, and his gun crew was slightly to the rear of the 2nd Squad. To the left of the 2nd Platoon was the 3rd Platoon, to the rear of which were A Company and 1st Battalion Command Posts. Immediately to the right of the 2nd Platoon was the 2nd Battalion area, the dividing line of which was a dry stream bed. On 9 August, the strength of the 2nd Platoon was approximately 25 men, of which about six were members of the gun crew (R 183-134).

At about 0100 hours, 9 August, accused received an intelligence report that the enemy were directly across the river from his position and that B Company, 1st Battalion, had moved closer to his rear. At 0355 hours, accused observed enemy mortars firing from across the river into the 1st and 3rd Platoon areas. He reported the incident to A Company Command Post by telephone and requested counter artillery fire, but observed none (R 184-185).

At 0430 hours, Sykes reported to accused that 200 North Koreans had "broken through" about 100 yards to the left of the 2nd Platoon. Accused tried to contact A Company Command Post by telephone but was unsuccessful. He proceeded to the point where Sykes stated he saw the enemy but could see nothing. He thought that at most the action was an infiltration and not an attack and accordingly directed his right flank machine gun to cover the road to the rear leading north

to Waegwan. He then dispatched Sykes to Company E, 2nd Battalion Command Post, across the dry stream bed to determine the identity of certain persons observed on a hill behind his platoon area. When Sykes had not returned an hour later, accused decided to go himself. As he was advised that the dry stream bed was mined, he left Sergeant Sargant in charge of the platoon, and took Sergeant Sadler, his platoon sergeant, with him so that "one of us would get through." Arriving at the Company E, 2nd Battalion Command Post, accused tried to contact the 1st Battalion and Company A Command Post by telephone to no avail. He then returned to his own area, arriving there at about 0630 or 0700. At that time artillery fire was bursting around the right side of the 2nd Platoon area. He thereupon decided to withdraw his men toward the right "as /he/ didn't see any sense in staying there and be killed unnecessarily -- my men there -- they were scared, they were tired, worn out ***." He stated that he intended to return as soon as the "artillery lifted." He was not particularly concerned about the enemy at any time. There was no enemy action and the only danger was from friendly artillery. He stated that had he commenced firing it would have attracted the attention of others who would have investigated his situation. During a lull in the firing, he ordered the platoon less the 1st Squad to leave. The 1st Squad was left behind because the artillery was not falling on their position. He admitted on cross-examination, however, that he did not notify the 1st Squad because "we didn't have time to get them out." Shortly thereafter he met Lieutenant Rezac and reported what he had done and Lieutenant Rezac "thought /accused/ did right at that time." Accused and his men then returned to their original position. Upon arrival accused observed that the 1st Squad was not there (R 184-192, 197-198,200-201,203, 207).

Concerning the order he had received to remain in his position at all costs, he said that on two previous occasions when similar orders had been issued, and the alternative was to "stay or be wiped out," the company commander had ordered a withdrawal. His interpretation of the order was to hold the position against the enemy at all costs. As the position was being shelled by friendly fire, he did not think the order was applicable (R 192).

Relative to his orders to destroy the .75 recoilless rifle and .50 caliber machine gun in issue, accused testified as follows:

> "Q Now, there has been some testimony before this court that you ordered at that time a certain weapon to be destroyed; can you explain to the court the reason why you gave that order?
>
> "A Yes, sir. The 75mm recoilless, it takes about at

least 4 men to carry that and the .50 caliber machine gun, that takes two men to carry out and with the possibility of artillery landing close by, that party carrying it out would be exposing themselves to more danger than was required, I thought. Because that equipment could be replaced -- the men couldn't.

"Q Now, on previous operations had you observed other units destroying their weapons due to the fact that they couldn't carry them out?

"A I have seen mortars destroyed, I have seen artillery destroyed -- 105 and 155, I have seen machine guns destroyed -- that is light machine guns, I have even saw carbines and M-1s destroyed and I have seen a lot left behind which were used against us afterwards.

"Q Now, where did these incidents occur, in what general area of Korea?

"A At Yongdong, sir." (R 191)

He further stated that on two previous occasions "where we were surrounded and we had to be wiped out" or withdraw, the unit had withdrawn (R 192). He admitted however that on the occasion in issue, from the time he received Sykes' information relative to possible enemy infiltration until he ordered his platoon to withdraw from its assigned area, he was not "particularly concerned about the enemy" (R 192). On this point, he further testified:

"Q Now, Lieutenant Soranaka, at the time you ordered the destruction of these automatic weapons, was your position being overrun by North Koreans?

"A No, sir, I wasn't worried about North Koreans.

"Q You weren't in the danger of being overrun at any time; is that correct?

"A No, sir" (R 204).

* * *

"Q Now, Lieutenant Soranaka, if you were not worried about the enemy crossing the river or being behind you, why did you destroy or cause to be destroyed the .50 caliber and the 75 recoilless gun?

"A Well, sir, that has been SOP, if you are going to leave a weapon behind to destroy it.

"Q Why did you feel it was necessary to leave it behind? Was the artillery fire that thick?

"A Well, sir, it was during the lull that we moved but by carrying that heavy equipment out -- you see it takes 6 men to get this 75 recoilless out by -- beg your pardon, I mean 4 men and at least 2 for the .50 caliber." (R 206)

First Lieutenant Marvin J. Rezac, Second Lieutenant Robert L. Runkle, Master Sergeant Freddie Evanson, Sergeant Doyle N. Sadler, Corporal Charles T. Spires and Private First Class Alexander T. Sykes testified to accused's excellent leadership ability from 25 July to 9 August 1950 (R 55-56, 63, 140-141,142,143,174).

4. Discussion

Accused has been charged with and found guilty of a violation of the 75th Article of War in that he did, at the time and place alleged, "while before the enemy, shamefully have destroyed and abandoned certain arms and equipment, to wit, one .50 caliber machine gun and one recoilless rifle."

Article of War 75 states in pertinent part:

"Misbehavior Before the Enemy. - Any officer *** who, before the enemy, misbehaves himself, ***, or casts away his arms or ammunition, *** shall suffer death or such other punishment as a court-martial may direct."

The proof required is:

"(a) That the accused was serving in the presence of an enemy; and (b) acts or omissions constituting misbehavior of the accused as alleged." (MCM 1949, par 163a)

Misbehavior before the enemy as contemplated by Article of War 75 is not confined to acts of cowardice but is a general term which "renders culpable *** any conduct of an officer or soldier not conformable to the standard of behavior before the enemy set by the custom of our arms."

"'The enemy' includes not merely the organized forces of the enemy in time of war, but also imports any hostile body that our forces may be opposing, such as a rebellious mob or a band of renegades. Whether a person is 'before the enemy' is not a question of definite distance, but is one of tactical relation.

* * *

"Under this clause may be charged any act of treason, cowardice, insubordination, or like conduct committed by an officer *** in the presence of the enemy." (MCM 1949, par 163a)

It is a matter of common knowledge that on 9 August 1950, the date the offense is alleged to have been committed, North Korean forces were, and had been since 25 June 1950, engaged in an all-out offensive against the Republic of Korea. Pursuant to action recommended by the United Nations Security Council on 27 June 1950, certain United States forces as part of the United Nations forces were committed to repel the attack. It is a matter of history that on or about 9 August United Nations forces, of which the 1st Cavalry Division of the United States Army was a part, were on the east bank of the Naktong River which formed part of the defense perimeter of the Pusan bridgehead. It has been held that the North Korean forces in the present military operation in Korea are "the enemy" within the meaning of Article of War 75 (CM 343472, Gilbert, 1950).

Accused's act of ordering the destruction and abandonment of one .50 caliber machine and one recoilless rifle was consummated when accused and his platoon, though not actively fighting, were in a defensive position within range of enemy artillery and small arms fire. The tactical situation as well as the proximity of the enemy clearly established the fact that the alleged offense was committed before the enemy (CM 295694, Rodriguez, 19 BR (ETO) 233, 235).

The uncontradicted evidence, admitted by accused, is that at the time and place alleged, while before the enemy, accused was personally responsible for having destroyed and abandoned one .50 caliber machine gun and one recoilless rifle. The question is whether such conduct was "shameful" in violation of Article of War 75 as alleged. The conduct thus denounced contemplates the shameful abandonment or casting away of arms and ammunition and may take the form of gross negligence or inefficiency, or consist of a culpable failure by the officer to do his whole duty while before the enemy (CM 277345, Stohlmann, 9 BR (ETO) 177,187). Accused and his platoon had been in a defensive position for about a week. The sector had been quiet during that period. When accused was informed of an infiltration by a small group of the enemy and was unable to contact A Company Command Post by telephone, he apparently became panicky. Instead of dispatching a messenger to A Company Command Post, accused sent him in the opposite direction to another Battalion, because the way to A Company Command Post crossed the area where the infiltrating enemy had probably traversed. Not hearing from the messenger within an hour thereafter, accused took his platoon sergeant with him to the 2nd Battalion Area, leaving the platoon without adequate leadership. Later, being unable to contact

his company headquarters, accused returned to his platoon and observed artillery and mortar fire falling in his area. Evidence of his state of mind was further exemplified by his action in ordering a part of his platoon holding the north end of the platoon line to evacuate their assigned position and not informing the 1st Squad holding the south sector of the line of the situation. Under the circumstances, it was not surprising that the 1st Squad had left their positions when he returned. Accused apparently based his defense for leaving his assigned position and abandoning and destroying the weapons alleged upon the facts that he interpreted the order to hold his position at all costs to mean that he was to hold at all costs against the enemy and not against friendly artillery fire, and also upon his solicitude for the safety of his men. The accused thus advances the novel and untenable proposition that friendly supporting fire coincident to the presence of the enemy excuses the abandonment of his assigned position and the destruction of his arms before the enemy. We are unable to discern the distinction whereby accused's conduct is excused by friendly action whereas it would not be excused by enemy action. Accused knew that his platoon was in no immediate danger from the enemy, and was well protected from artillery fire dropping in his area as indicated by the fact that no one was hurt thereby. In addition, he knew or should have known that leaving the 1st Squad without instructions would probably result in serious consequences. It is our opinion that accused's act in taking that portion of his platoon whom he could conveniently notify and leaving the remainder to their own resources in complete ignorance of the situation was an act inconsistent with his assertion that his only interest was to save lives. It is our further opinion that there was no justification or excuse in fact or law for accused's order to destroy and abandon the weapons alleged. Such action on the part of accused was shameful, unjustified, and a wanton renunciation of his military duty in violation of Article of War 75 (CM 290632, Skovan, 13 BR (ETO) 321, 323-325).

The Board is therefore of the opinion that the evidence is legally sufficient to support the findings of guilty as alleged.

5. Attached to the record of trial is a Petition for Clemency signed by all members of the court and prosecution in this case, which states in pertinent part as follows:

> "It is the belief of the required majority of the court present throughout the trial that the imposition of the above sentence was commensurate with the offense of which accused was found guilty. However, in view of the nature of this officer's assignments immediately preceding combat duty, his soldierly manner, demeanor and appearance during trial, together with his apparent, sincere desire to return to

combat duty as an infantry platoon leader, it is recommended that such clemency be given accused as is within the discretion of the reviewing authority."

6. Records of the Department of the Army show that the accused is 22 years of age and unmarried. He attended but did not complete high school at Iolani Honolulu High School, Honolulu, Hawaii. He had enlisted service in the United States Army from 9 May 1946 to 1 November 1947, when he was commissioned a second lieutenant and was subsequently promoted to first lieutenant. His overall efficiency ratings are 059 for the period 8 September 1948 to 31 January 1949; 071 for the period 7 May 1949 to 31 August 1949; 062 for the period 1 September 1949 to 29 November 1949; 066 for the period 8 February 1950 to 9 July 1950.

7. The court was legally constituted and had jurisdiction over the accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. 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 and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 75.

_____, J.A.G.C.

_____, J.A.G.C.

_____, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGU CM 344192

UNITED STATES v. First Lieutenant GEORGE T. SORANAKA, O-1342401, Company A, 5th Cavalry Regiment	1ST CAVALRY DIVISION Trial by G.C.M., convened at Headquarters 5th Cavalry (Infantry) (Saber Rear), Taegu, Korea, 1, 2, and 23 September 1950. Dismissal, total forfeitures after promulgation, and confinement for three years.

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Opinion of the Judicial Council
Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

- - - - - - - - - -

1. Pursuant to Article of War 50d(2) the record of trial and the opinion of the Board of Review in the case of the officer named above have been transmitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon trial by general court-martial the accused pleaded not guilty to and was found guilty of a specification alleging that he did, at or near Waegwan, Korea, on or about 9 August 1950, while before the enemy, shamefully have destroyed and abandoned certain arms and equipment: One .50 caliber machine gun and one recoilless rifle, in violation of Article of War 75. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for three years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. 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 and to warrant confirmation of the sentence.

3. One preliminary matter requires consideration. The assistant staff judge advocate in the review of the record of trial, dated 18 November 1950, concluded that "unskillfulness or an error of judgment, particularly when occasioned by an immoderate zeal in protecting one's men from the inaccuracy of friendly artillery fire," was not "criminal

misconduct toward one's flag and country" and that the Government failed to prove any misconduct by the accused. He expressed the opinion that

> "The competent evidence fails to establish beyond a reasonable doubt the legality of the conviction of the accused * * *. The record of trial is legally insufficient to support the findings and sentence." (p 10)

He recommended

> "* * * that the findings of guilty and the sentence be disapproved and that the accused be restored to all rights, property and privileges of which he may have been deprived by reason of his illegal conviction. A form of action designed to accomplish the foregoing is submitted herewith." (p 11)

The staff judge advocate concurred in the opinion and recommendation of his assistant, but the reviewing authority signed an action, dated 23 November 1950, approving the sentence and forwarding the record of trial for action under Article of War 48. The staff judge advocate in a supplemental statement at the end of the review pointed out that the reviewing authority's action was not in accordance with the staff judge advocate's opinion and recommendation. It does not appear that, prior to taking his action thereon, the reviewing authority transmitted the record of trial to The Judge Advocate General.

Article of War 47c provides in pertinent part:

> "Action on record of trial. - Before acting upon a record of trial by general court-martial * * *, the reviewing authority will refer it to his staff judge advocate or The Judge Advocate General for review and advice; and no sentence shall be approved unless upon conviction established beyond reasonable doubt of an offense made punishable by these articles, and unless the record of trial has been found legally sufficient to support it." (Underscoring supplied)

The prohibition contained in the latter portion of the foregoing provision is reiterated in substance in the Manual for Courts-Martial, 1949 (par 87b, p 93), which further provides:

> "When a reviewing authority is in disagreement with his staff judge advocate as to whether a conviction of an

offense is established beyond reasonable doubt, the reviewing authority should transmit the record of trial, with an expression of his own views and the opinion of the staff judge advocate, to The Judge Advocate General for advice." (Ibid) (Underscoring supplied)

The question arises whether the reviewing authority had the legal power to approve the findings of guilty and the sentence in this case, contrary to the opinion and recommendation of his staff judge advocate, without having transmitted the record of trial to The Judge Advocate General for advice.

The last clause of Article of War 47c does not expressly provide who shall determine whether a conviction is established beyond a reasonable doubt and the legal sufficiency of the record to support the sentence. Recourse to the Articles of War, Manual for Courts-Martial, 1949, and holdings by the Board of Review, however, sheds light on this matter.

Reference to the provisions of Article of War 37 and paragraph 87 of the Manual shows that the reviewing authority's action is required to be the result of the exercise of his own judgment and discretion, not of the judgment and discretion of his staff judge advocate or of The Judge Advocate General or of any other person. Article of War 37 prohibits holding the proceedings of a court-martial invalid or disapproving the findings or sentence in any case for any error relating to pleading, procedure or admission or rejection of evidence, unless in the reviewing authority's opinion, after an examination of the entire proceedings, it shall appear that the error has injuriously affected the accused's substantial rights. The Manual provides specifically that this Article vests a sound legal discretion in the reviewing authority, who should weigh the effect of an error within its purview in the light of the facts as shown by the record (par 87b, p 91). Advisory instructions contained in paragraph 87b (p 94) of the Manual provide inter alia that in the course of taking action upon a record of trial a reviewing authority is empowered to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact. Paragraph 87a (p 91) expressly forbids the reviewing authority to "delegate his functions as such to anyone," and paragraph 87b (p 97) requires him to sign the action "in his own hand."

The function of the staff judge advocate or of The Judge Advocate General with respect to a record of trial, prior to the reviewing authority's action thereon, on the other hand, is limited to review of the record and advice to the reviewing authority thereon (see AW 47c; MCM 1949, par 87b, p 93). It does not include the making of a binding determination of the legal sufficiency or insufficiency of the record. As indicated, the determination of this matter is the nondelegable function of the reviewing authority himself.

The quoted provision of the Manual that when the reviewing authority is in disagreement with his staff judge advocate, the former should transmit the record of trial to The Judge Advocate General for advice (par 87b, p 93), is in terms clearly directory, not mandatory.

In CM 229477, Floyd, 17 BR 149, 153, et seq., it appeared that there was no compliance with the requirements of former Article of War 70 for a pretrial investigation or reference of the charges by the appointing authority to his staff judge advocate for consideration and advice prior to reference for trial. It further appeared that there was no compliance with the requirement of former Article of War 46 that the reviewing authority, before acting upon the record of trial, refer the same to his staff judge advocate or to The Judge Advocate General. The Board of Review pointed out that the requirement for reference of records of trial to staff judge advocates had theretofore been held to be directory only and to have no effect upon the legality of the proceedings. The Board also adverted to the rule that although the language of a statute is mandatory, it may be regarded as directory if the legislative purpose can best be carried out by such construction. It was concluded that the proceedings were not invalidated by any of the mentioned irregularities and that the record of trial was legally sufficient to support the findings of guilty in part and the sentence in part. The Floyd case was followed in CM 229479, Lax, 17 BR 159, 161, and CM 229480, Mayo, 17 BR 163, 165. Its soundness has not been questioned by appellate agencies in the Office of The Judge Advocate General, and the case has been cited with approval by the Supreme Court on the point that a pretrial investigation is not a mandatory or jurisdictional requirement (see Humphrey, Warden, v. Smith, 336 U.S. 695, 697-700 (1949)).

We therefore conclude that the reviewing authority has the legal power to disagree with his staff judge advocate and to act upon records of trial by general court-martial according to his own experience, discretion and conscience, without obtaining advice from The Judge Advocate General. Such action includes the power to determine whether the conviction is established beyond a reasonable doubt and whether the record of trial is legally sufficient to support the sentence. Of course, the reviewing authority should give careful consideration to the opinions, advice and recommendations of his staff judge advocate. He should follow the provisions of Article of War 47c and paragraph 87b of the Manual and recognize the special qualifications of his staff judge advocate and The Judge Advocate General respecting military justice matters.

The failure of the reviewing authority herein, being in disagreement with his staff judge advocate as to whether the conviction was established beyond reasonable doubt, to seek the advice of The Judge Advocate General as contemplated by paragraph 87b of the Manual, was an error of procedure which did not injuriously affect any of the accused's substantial rights within the purview of Article of War 37 (CM 229477, Floyd, supra).

B

JUDGE ADVOCATE GENERAL'S DEPARTMENT

Apparently the Board of Review is of the same opinion. If the action of the reviewing authority in approving the sentence was incorrect in substance, it is apparent that the appellate review prescribed in the Articles of War is a means for correcting the error. In our opinion, the procedural irregularity in the reviewing authority's action was harmless and does not require disapproval of the findings of guilty and the sentence. In arriving at this conclusion we have not overlooked the holding by the Board of Review of the Department of the Air Force, in which The Judge Advocate General, United States Air Force, concurred, in the case of AFCJA-18 ACM 2813, Norris, August 1950, wherein a contrary conclusion was reached.

4. The evidence is substantially as stated by the Board of Review in its opinion. The Judicial Council concurs with the Board in its conclusion that the record of trial is legally sufficient to support the findings of guilty and the sentence. The undisputed evidence, including the accused's own testimony at the trial, establishes that he did, at the place and time alleged, while before the enemy in the sense of Article of War 75, have destroyed and abandoned a .50 caliber machine gun and a .75 caliber recoilless rifle. The only question is whether such action on the accused's part was shameful as alleged. The word "shameful" is defined as "bringing shame or disgrace" or "disgraceful." (Webster's New Int'l Dict. 2d Ed, Unabridged, 1949, p 2301). In the sense of Article of War 75, the word may connote conduct which is ill-advised, characterized by extremely bad judgment, unwise, or illogical (CM 295441, Wallace, 22 BR (ETO) 25, 31-32). In the Wallace case the Board of Review stated:

> "The evidence clearly showed that accused was 'before the enemy' and had a duty to defend the road block which he established as ordered. The only question that remains is whether under the circumstances his departure from the road block with his platoon to get further orders constituted a shameful abandonment of his post within the meaning of Article of War 75. Considering the evidence in the light most favorable to accused, his conduct was not governed by cowardice or timidity, but by his intention to prevent his men from being taken prisoners and their valuable equipment captured, which the rapid advance of the enemy, as reported to him, was likely to bring about. He had been surrounded and cut off by the enemy before. Later developments made it clear that his withdrawal from the road block was ill-advised and showed extremely bad judgment on his part,

resulting fortunately in no advantage to the enemy. He started back with his platoon to the road block about 15 minutes after reporting to Colonel Fuller (R 19), The position was left undefended, however, for about three hours.

* * *

"In its determination of whether or not accused did shamefully abandon his post the court could properly consider the entire tactical situation as disclosed by the evidence, including the reason for the road block in question. The purpose of the road block which he was ordered to establish 'as quickly as he could' (R 6) was to 'to prevent the enemy from infiltrating any patrols or tank destroyers through that area' (R 6). When he left the road block with his platoon about four hours after it was in position he left it undefended at the time when the event it was intended to prevent showed signs of being about to take place. In the opinion of the Board of Review this conduct unwisely and illogically taken by accused constituted a shameful abandonment of his post which it was his duty to defend within the meaning of Article of War 75 and the court's findings of guilty are fully supported by the evidence (Cf: CM ETO 6694, Warnock)."

Here, giving the accused the full benefit of any doubt and conceding arguendo that he was motivated by solicitude for the safety of his men in directing that the weapons be destroyed and abandoned, we still are of the opinion that his actions, under all the circumstances of the case as indicated in the Board's opinion, were so unjustifiable and unwarranted as to be shameful and a violation of Article of War 75.

Our opinion is not altered by the fact that the court acquitted the accused of the charges (1) of shamefully withdrawing his command and abandoning a position which it was his duty to defend, and (2) of neglecting to take aggressive action to repulse the enemy and to inform his higher command of the approaching enemy, thereby endangering the safety of the command and the lives of its men, both in violation of Article of War 75. It is well established that actual or seeming inconsistencies between findings of guilty under particular counts of an indictment or under particular specifications of charges in trials by court-martial, and findings of not guilty on closely related counts or specifications in the same proceedings, do not require reversal of a judgment of conviction or disapproval of findings of guilty (CM 335123, Green, 2 BR-JC 53, 58, 63, and authorities therein cited).

5. For the foregoing reasons, the Judicial Council is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. In view of all the circumstances of the case,

however, including the indications that the accused's misbehavior was motivated by solicitude for the safety of his men, and in view of the petitions for clemency signed by all the members of the court and prosecution, we recommend that the sentence to confinement and forfeitures of pay be remitted and that the execution of the dismissal be suspended.

(Dissent)
Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

DISSENTING OPINION
by
BROWN
Member of the Judicial Council

I am unable to concur in the opinion of the majority of the Judicial Council that the record of trial is legally sufficient to support the findings of guilty and the sentence. I concur in their opinion that the mere fact that the reviewing authority in his action departed from the advice and recommendation of his staff judge advocate without having sought the advice of The Judge Advocate General does not in itself require disapproval of the conviction and sentence. I agree that the error, if any, was merely procedural and did not in itself injuriously affect the substantial rights of the accused. Since, however, I concur with the staff judge advocate in his opinion that the record is legally insufficient, I necessarily conclude that the reviewing authority committed an error of substance in approving the sentence in this particular case. Approval of the instant sentence would have been equally erroneous, in my view, even had the staff judge advocate himself recommended such action.

Careful consideration of the record leads me to conclude that, under all the circumstances, the action of the accused in ordering the weapons in question destroyed was neither shameful, in violation of Article of War 75, nor otherwise culpable. It would seem that the accused's decision which is here in question can be justly evaluated only by considering the situation as it appeared to him then and there and under all the circumstances. He was young and relatively inexperienced in combat. The normal confusion of combat was aggravated by the fact that the events preceding the decision occurred before daybreak, and by the receipt of friendly artillery and mortar fire in and around the accused's position. The circumstances, including his unsuccessful attempt to communicate with supporting units, justified his inference that he was cut off from them. His claim that his decisions to withdraw and destroy the weapons were motivated by a laudable desire to avoid needless sacrifice of his men's lives is not directly refuted. That the court believed the claim so far as it related to the withdrawal is evidenced by the fact that it acquitted the accused of the charge of shamefully withdrawing his command and abandoning a position which it was his duty to defend. In my opinion, this action by the court was fully justified. It seems clear to me, under the circumstances, that the destruction of the weapons was a normal and logical incident of a justifiable withdrawal. I feel that the accused's decision was arrived at honestly and as a result of conscientious evaluation of the confused situation as he saw it at the time. I am apprehensive that the court members unconsciously fell into the error of evaluating the decision with too much objectivity, in the light of their own superior rank and experienco and their own knowledge of subsequent events, and failed to accord due weight to the accused's subjective appraisal of the situation. The totality of the evidence fails to convince me beyond a reasonable doubt that either the withdrawal or the order of destruction of the weapons was so unjustifiable

or unwarranted as to be shameful or otherwise culpable in the sense of the Articles of War. I therefore am of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence and that the same should be disapproved.

Robert W. Brown

Robert W. Brown, Brig Gen, JAGC

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 344192

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of First Lieutenant George T. Soranska, O-1342401, Company A, 5th Cavalry Regiment, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution. The United States Disciplinary Barracks or one of its branches is designated as the place of confinement.

(Dissent)
Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action.

E. M. BRANNON
Major General, USA
The Judge Advocate General

13 March 1951

(GCMO 29, March 21, 1951).

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D.C.

JAGH CM 344194

2 January 1951

UNITED STATES v. First Lieutenant PAUL WOODMAN McALISTER, JR. (01312188), Headquarters Company, 6th Infantry Division, Fort Ord, California.	FORT ORD Trial by G.C.M., convened at Fort Ord, California, 22 November 1950. Dismissal.

OPINION of the BOARD OF REVIEW
HAUCK, FITZHUGH, and IRELAND
Officers of The Judge Advocate General's Corps

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 and the Judicial Council.

2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 95th Article of War.

Specification: In that First Lieutenant Paul W. McAlister, Jr., Headquarters Company, 6th Infantry Division, Fort Ord, California, then a member of Headquarters Company, 4th Infantry Division, Fort Ord, California, did at Fort Ord, California, from on or about 14 January 1949 to on or about 14 April 1950, the said First Lieutenant Paul W. McAlister, Jr. being a commissioned officer of the Army at all times between the dates aforesaid, wrongfully and dishonorably fail and neglect to terminate, discontinue or cancel a family allowance in favor of his wife, Mary I. McAlister, thereby causing to be issued and disbursed to the said Mary I. McAlister, United States Treasury checks of a total value of $1,920.00, the said First Lieutenant Paul W. McAlister, Jr. then well knowing on and between the dates aforesaid that Mary I. McAlister was not entitled to receive said checks or the proceeds thereof as a family allowance.

He pleaded not guilty to, and was found guilty of, the Charge and the Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence.

a. For the prosecution.

The accused was identified as First Lieutenant Paul W. McAlister, Jr., a member of Headquarters Company, 6th Infantry Division (R 9).

On 18 July 1947, while serving as a staff sergeant at Williams Field, Arizona, the accused executed WD AGO Form 625, Application for Dependency Benefits (Pros Ex 2; R 16). He was subsequently ordered to extended active duty as a first lieutenant effective 6 October 1948, pursuant to Special Orders No. 191, Headquarters, Sixth Army, Presidio of San Francisco, California, dated 20 September 1948, and assigned to the 4th Infantry Division, Fort Ord, California (Pros Ex 3, R 17). Throughout the period from January 1949, through April 1950, the accused was a member of Headquarters Company, 4th Infantry Division (R 10), which unit was later redesignated Headquarters Company, 6th Infantry Division, effective 4 October 1950, pursuant to General Orders No. 11, Headquarters, Fort Ord, California, dated 3 October 1950 (R 9,25).

From January 1949, through April 1950, inclusive, sixteen family allowance checks for $120.00 each were mailed to Mary I. McAlister, 1020 North Patricio Street, Phoenix, Arizona, the payee named in the Application for Dependency Benefits (Pros Exs 2,4; R 21). All checks except those for the months of April and December 1949, and January and February 1950, bore the accused's indorsement (Pros Ex 4, R 20-22). The accused had received these checks through the mail and had made admissions to the unit mail clerk that the ones so received were family allowance checks (R 26-28).

Prosecution Exhibit No. 1, received in evidence without objection (R 13), contained thirty-eight known specimens of accused's signature, which had been written in the presence and at the request of Agent Elmer C. Day, 60th MP Criminal Investigation Detachment, Fort Ord, California, on 29 August 1950 (R 12-13). A duly qualified expert in the field of handwriting analysis (R 14-15) compared the known specimens of accused's signature (Pros Ex 1) with the signature appearing upon the application for Dependency Benefits (Pros Ex 2) and the purported indorsements of the accused appearing on the twelve family allowance checks indicated above (Pros Ex 4). He was of the opinion that the signatures appearing on all of the exhibits mentioned were written by one and the same person (R 15-16, 18-19,20,22).

On 29 August 1950 the accused voluntarily made a statement to Agents Todd and Day at which time he also executed the signatures appearing in Prosecution Exhibit No. 1 (R 31). Subsequently on 1 September 1950 the accused again appeared voluntarily at the office of the Criminal Investigation Detachment and made a second statement to Agent Day (R 32) which was identified by the witness and received in evidence without objection as Prosecution Exhibit No. 5 (R 34). In this statement the accused admitted that all the signatures appearing on the photostatic copies of the checks were either his or his wife's; that he became aware of the fact that his wife was receiving these checks on the date /January 1949/ his signature first appeared on the allotment check; and that he made no official report concerning the checks. The accused also stated that he had talked to Major Johnston, Finance Officer, Fort Ord, California, at the Officers' Club one evening about the matter and that Major Johnston informed him that he (accused) would get a notice from "St Louis" at which time deductions would be made from his pay. Accused added that in May 1950 Major Johnston advised him that he was indebted to the Finance Office, St. Louis, in the amount of $2040.00; that he subsequently executed a military-pay order in the amount of $175.00 per month; and that as of 31 August 1950 he had reimbursed the government in the amount of $700.00. He concluded with the statement that he did not, at any time, have the thought in mind of defrauding the Government of the monies they had paid him in allotment checks. Agent Day further testified that the checks referred to in accused's statement were the checks contained in Prosecution Exhibit No. 4 (R 35).

It was stipulated orally (R 22-23) that if he were present in court, Major Roy C. Johnston, Finance Officer, Headquarters 6003 Area Service Unit, would testify in effect that accused talked to witness unofficially one evening in the Officers' Club in February or March 1950 regarding overpayment of a family allowance; that he advised accused to write the Military Pay Division and notify them to stop the allotment or to have his wife return it; that accused could not have interpreted his statement as meaning it was not necessary to make any effort on his part to return the overpayment; and that the first official action in the case was on or about 25 April 1950 when witness wrote to The Adjutant General through the Chief of Finance advising that corrective action had been taken to collect the overpayment.

The court took judicial notice of pertinent provisions of Army Regulation 35-5540, 10 June 1947 (R 29), and the court's attention was directed particularly to the following portion thereof (R 30):

> "Par 15b. Changes in the status of an enlisted man which will terminate entitlement to a monthly family allowance include ... (3) appointment as flight officer, warrant officer or commissioned officer."

b. For the defense.

On 29 August 1950 the accused made a statement to Agent Grover C. Todd, 60th Military Police Criminal Investigation Detachment (Def Ex A for identification purposes only; R 38). The pertinent parts thereof which were read to the court may be summarized as follows (R 39):

> That he was charged with the check for November 1948; that it bears his indorsement; that he was discharged on 5 October and came back to active duty on 6 October; that he was entitled to the November check which he received in Phoenix, Arizona; and that he put in a cancellation for the allotment after the November check was paid.

The amount of the accused's original "indebtedness" to the Government was $2,040.00 but the balance remaining due and unpaid as of the date of trial was $990.00 (R 41). The first notice of indebtedness was received by the Finance Office at Fort Ord, California, between the 1st and 3rd of May 1950 and payments at the rate of $175.00 per month have been made since that date (R 41).

After he was advised of his rights as a witness, the accused stated that he desired to remain silent (R 42).

4. Discussion.

The accused was charged with and found guilty of a violation of the 95th Article of War in that he did from on or about 14 January 1950 to on or about 14 April 1950, being a commissioned officer of the Army at all times between the dates aforesaid, wrongfully and dishonorably fail and neglect to terminate, discontinue or cancel a family allowance in favor of his wife, Mary I. McAlister, thereby causing to be issued and disbursed to the said Mary I. McAlister, United States Treasury checks of a total value of $1,920.00, he, the accused, then well knowing on and between the dates aforesaid that Mary I. McAlister was not entitled to receive said checks or the proceeds thereof as a family allowance.

> "Conduct violative of /the 95th Article of War/ is action or behavior in an official capacity which, in dishonoring or disgracing the individual as an officer, seriously compromises his character and his standing as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally, seriously compromises his position as an officer and exhibits him as morally unworthy to remain an officer of the honorable profession of arms." (MCM, 1949, Par. 182)

The evidence is undisputed that the accused, while serving as an enlisted man, initiated a family allowance in the amount of $120 per month

payable to his wife, Mary I. McAlister; that accused was subsequently ordered to active duty as an officer (First Lieutenant) in October, 1948; that said family allowance continued in effect for seventeen months after his wife's entitlement thereto had ceased; that the accused knew said allowance was being received at least during the months from January 1949 to April 1950, inclusive; and that accused took no affirmative action to terminate, discontinue or cancel the allowance.

The only questions requiring comment or discussion by the Board of Review are (1) whether the specification states a military offense and (2) whether the offense, if one is alleged, constitutes a violation of the 95th Article of War.

It is clear that the entitlement to a family allowance ceased at the time the accused was ordered to extended active duty in a commissioned status (Par. 15b(3), AR 35-5540, 10 June 1947). Army Regulations are public military regulations and all military personnel are presumed to have knowledge thereof (CM 267639, Tressler, 44 BR 27,32; CM 322052, Shamel, 71 BR 19,26; CM 328133, Konno, 76 BR 313,328). The receipt of the family allowance after termination of entitlement thereto by the accused or his wife with his knowledge was wrongful and, as such, constituted a military offense.

To determine whether the offense so committed was not only wrongful but also dishonorable within the contemplation of the 95th Article of War, the accused's course of conduct throughout the period alleged must be considered. For seventeen months accused's wife received allotment checks to which she was not entitled, and, by his own admission, the accused knew for at least sixteen months that this allotment was being received monthly. He further admitted that he had at no time initiated action to terminate the allowance. It is true that Mary I. McAlister, accused's wife, was the payee named on the checks, but the accused's indorsement appears on twelve of them beginning with January 1949 and ending with April 1950. It is immaterial whether the accused actually received the proceeds of said checks because it is obvious that he indirectly, if not directly, benefited thereby to the extent of $120 per month for sixteen months or $1,920.00. Consequently, for the period alleged, the accused received from the Government not only his full pay and allowances as an officer but also a family allowance of $120 per month to which neither he nor his family was entitled. The action of the accused in accepting funds to which he was not entitled was inherently dishonest and deceitful. Continuing as it did over a prolonged period of time, his conduct showed such a lack of honesty as to dishonor and disgrace the accused's character and standing as an officer and a gentleman. It violates the provisions of the 95th Article of War (CM 281486, Lally, 54 BR 151,157).

The fact that the accused was in the process at the time of the trial of making restitution of the money obtained in this dishonest manner is no defense to the charge (CM 281486, Lally, supra).

5. The accused was born 18 April 1918 at San Diego, California. At a pretrial neuropsychiatric examination it was revealed that the accused had an unfortunate childhood. His parents were divorced when he was quite young and his father was killed shortly thereafter in an accident. Accused disclosed that he "was raised on the streets of Los Angeles," learned all the "tricks of the gangs," and eventually was arrested by the juvenile court authorities. He was sent to a ranch where he lived with foster parents for several years. He completed three and one-half years of high school in 1933 at Lancaster, California. In civilian life he worked as an employment interviewer and a sign painter. He is married and has three children under six years of age.

The accused was inducted into the Army 6 January 1941 and attained the grade of Staff Sergeant before attending The Infantry Officer Candidate School at Fort Benning, Georgia. He was commissioned a Second Lieutenant 24 February 1943 and was promoted to First Lieutenant 1 June 1945. He served in the European Theater of Operations from 6 April 1944 to 6 August 1945. His principal duties were as traffic control officer and supply officer. He was relieved from active duty 7 November 1945. His efficiency ratings up to that date were uniformly excellent. On 7 July 1947 the accused enlisted in the Air Force as a Staff Sergeant and on 6 October 1948 he was recalled to extended active duty as a First Lieutenant. Since his recall to active duty, he has served as Supply Officer of Headquarters Company, 6th (formerly 4th) Infantry Division, at Fort Ord, California, with efficiency ratings of 060, 065, 058, and 069.

6. The court was legally constituted and had jurisdiction of the person and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. 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 and to warrant confirmation of the sentence. A sentence to dismissal is mandatory upon conviction of a violation of Article of War 95.

C. J. Hauch Jr., J.A.G.C.

William C. Tifterugh, J.A.G.C.

Arthur P. Ireland, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

CM 344,194

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of First Lieutenant Paul Woodman McAlister, Jr. 01312188, Headquarters Company, 6th Infantry Division, Fort Ord, California, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution.

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action.

E. M. BRANNON
Major General, USA
The Judge Advocate General

18 January 1951

(GCMO 8, Jan 25, 1950).

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

Board of Review

CM 344224

UNITED STATES v. Corporal VERLON S. WHITE (RA 13 294 765), Private WILLIE MARTIN, JUNIOR (RA 15 265 791), Private HARDY E. SANDERS (RA 18 260 249), and Private BERNELL GORDON (RA 18 210 433), all of Company "M", 24th Infantry Regiment, APO 25.	25TH INFANTRY DIVISION Trial by GCM, convened at Taejon, Korea, APO 25, 26 October 1950. As to accused WHITE, MARTIN, SANDERS, and GORDON: Dishonorable discharge, total forfeitures after promulgation, and confinement for ten (10) years. Branch United States Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
JOSEPH, HYNES and TAYLOR
Officers of the Judge Advocate General's Corps

The record of trial in the case of the soldiers named above has been examined and is held by the Board of Review to be legally sufficient to support the findings of guilty and the sentences.

R. V. Joseph, J.A.G.C.
John J. Hynes, J.A.G.C.
John F. Taylor, J.A.G.C.

JAGE CM 344224 1st Indorsement

JAGO, SS USA, Washington 25, D. C. 3 January 1951

TO: Chairman, the Judicial Council, Office of The Judge Advocate General, Dept of the Army, Washington 25, D. C.

In the cases of Corporal Verlon S. White (RA 13 294 765), Private Willie Martin, Junior (RA 15 265 791), Private Hardy E. Sanders (RA 18 260 249) and Private Bernell Gordon (RA 18 210 433), all of Company M, 24th Infantry Regiment, APO 25, pursuant to Article of War 50e(2) the record of trial and

JAGE CM 344224

the foregoing holding by the Board of Review are transmitted to the Judicial Council for appropriate action. Participation by The Judge Advocate General in the confirming action is required.

FOR THE JUDGE ADVOCATE GENERAL:

1 Incl
Record of trial

FRANKLIN P. SHAW
Major General, USA
The Assistant Judge Advocate General

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGU CM 344224

UNITED STATES v. Corporal VERLON S. WHITE, RA 13294765, Private WILLIE MARTIN, JUNIOR, RA 15265791, Private HARDY E. SANDERS, RA 18260249, and Private BERNELL GORDON, RA 18210433, all of Company M, 24th Infantry Regiment, APO 25	25TH INFANTRY DIVISION Trial by G.C.M., convened at Taejon, Korea, APO 25, 26 October 1950. EACH: Dishonorable discharge, total forfeitures after promulgation, and confinement for ten years. Disciplinary Barracks.

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Opinion of the Judicial Council
Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

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1. Pursuant to Article of War 50e(2) the record of trial and the holding by the Board of Review in the case of the soldiers named above have been submitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon common trial by general court-martial each accused pleaded not guilty to and was found guilty of running away from his company, which was then engaged with the enemy, and not returning thereto until apprehended by military authorities in Pusan, Korea, in violation of Article of War 75. The offense as to each accused was alleged to have occurred at or near Masan, Korea, on or about 16 August 1950. No evidence of previous convictions was introduced as to any of the accused. Each was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for ten years. The reviewing authority, as to each accused, approved the sentence, designated the Branch United States Disciplinary Barracks, Camp Cooke, California, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50e. The Board of Review as to each accused has held the record of trial legally sufficient to support the findings of guilty and the sentence.

3. Evidence

a. For the Prosecution.

On 16 August 1950 the accused Martin and Sanders were drivers of a one-quarter ton truck in Company M, 24th Infantry Regiment (R 11, 13). The company was in contact with the enemy on that date

(R 12, 15). These two accused's normal place of duty was in the vicinity of the front line, "where they could get to the platoon with the vehicles in case they had to move out" (R 13). On the mentioned date Sergeant Orsbin Winstead, motor sergeant of Company M, brought Martin and Sanders from the front line area to the bivouac area, thirty-five miles to the rear and about two miles out of Masan, Korea, "to get some work repaired on their vehicle" (R 10, 11, 12). Martin and Sanders were to do only first echelon work on the vehicle. The remainder of the work was to be done by Winstead and his two mechanics (R 13). Winstead's only instructions to Martin and Sanders related to the place where they were to park their vehicle and sleep for the night. They were free to move about, but not with their "vehicles" (R 11). Winstead did not tell them how long they would be in the Masan area (R 12).

On the same day, 16 August 1950, the accused White and Gordon, also members of Company M, were working as cooks under the company mess sergeant, Sergeant First Class Albert Moore (R 14). The kitchen where they worked was in the river bed near Masan (R 15). Under the system then in operation the cooks, including White and Gordon, cooked and carried chow up to the front line on alternate days (R 14-15). Moore testified:

> "* * * we were feeding the heavy mortar, a part of 3d Headquarters and M Company. We were putting it on the line and * * * going back to the mortar position feeding them where they were firing to the enemy. * * * They were back in the rear supporting the troops. * * * where the infantry men were on the front, we would feed them and they would be relieved and come down and get the chow." (R 16)

On 16 August, White and Gordon performed their regular duty cooking chow (R 16), after which they were free to take a bath or attend to other personal matters of that nature (R 17). The "next shift came on the next day" (R 16), when these two accused were on detail to carry chow to the front line (R 15).

On the morning of 17 August the one-quarter ton truck used for carrying chow to the front lines, which had been parked at the mess hall, was missing from the area. All four of the accused were also missing from the area (R 11, 12, 15). After Winstead searched the area and was unable to find Martin and Sanders, he reported their absence to the first sergeant (R 12). Likewise Moore, after unsuccessfully searching the area for White and Gordon, reported their absence to the first sergeant (R 15). Moore gave them no permission to be absent from the area on 17 August (R 16). Because of the absence of White and Gordon, who were supposed to carry chow to the front line that day, Moore was obliged to and did deliver chow to the front line "three times a day" in their stead (R 15). When Moore had obtained the vehicle from the motor pool he had informed the cooks that it would be used only for hauling chow (R 16).

The next time Winstead saw Martin and Sanders was on 18 August, when they came through the motor pool (R 12, 14). When he asked them where they had been, they replied either "I have been to Pusan" or "I started to Pusan" and "the MPs had my vehicle" (R 12). Moore next saw White and Gordon about 10:00 a.m. on 17 August (R 15, 17).

Without objection by the defense, the prosecution introduced into evidence an extract copy of a Military Police Desk Blotter of Headquarters Base Provost Marshal of Pusan (Provisional) for 17 August 1950, containing an entry as of 0610 to the effect that the four accused "were picked up (earlier-blotter reference)" as stragglers. The notation concerning the accused Martin also states "violation curfew" (R 17; Pros Ex 1).

b. For the Defense.

After being warned as to their rights in the premises (R 17-18), each of the accused elected to testify under oath.

White testified in substance as follows. On 16 August he and Gordon were on duty and volunteered to carry chow up to the front line. White completed "that duty" (R 18). He volunteered to go to the front line because "the other cooks had put up the next mornings meal." On some mornings White would go up to the front line and on others he would not. Normally the sergeant would not tell him the night before but would awaken the cooks whom he wished to go up to the front line. There was no set policy in this regard (R 20). White had gone up there possibly twenty times (R 21).

On the evening of 16 August, after White returned from the front line to the kitchen area in the rear, Gordon agreed to accompany him to the bath house in Masan, about two miles away. When White was unable to find "the jeep driver" he had Martin drive them to the bath house (R 19, 20, 21). Previously, if it was not too dark, White was accustomed to go to the river bed for his bath. However, if it was late, as was the case on the evening of 16 August, he would go to the shower, because a soldier had been shot at the river bed (R 21). The last time he had gone to the shower was about 14 August (R 22).

Upon their return from the bath house between 8:00 and 9:00 p.m., after dark, the gate guard stationed at the entrance to the mess area told them he had received orders from Warrant Officer Cotton not to permit any vehicle to move around in the mess area, which was blacked out at nightfall, and told them "to follow the road around" (R 19, 21, 22). Asked how long these orders had been in effect, White testified that there were two warrant officers, each of whom "would privately give their own orders" (R 22). The accused followed the road as directed and crossed a bridge which entered into Pusan, about thirty or forty miles from Masan (R 19, 21, 22). The trip to Pusan took them about forty-five minutes (R 20). It was dark and White had never been over the back road to the kitchen area (R 22). He did not ask permission to be relieved from his duties on the morning of 17 August. Asked whether he inquired along the road how to get back, White testified they saw Koreans but saw no vehicles coming up (R 20).

As soon as they arrived in Pusan, about 9:15 or 9:30 p.m., a military police "after curfew" patrol picked them up (R 19, 20, 21). They told him they were out of the 24th Infantry Regiment and were looking for the mess hall in the rear, in an attempt to get back. He thereupon directed them to 25th Division Headquarters. En route there they were picked up by another military police patrol, to whom they told the same thing. This man required them to follow him to "Operations," where the desk sergeant asked them what happened. When they told him, he held them until the arrival of the Officer of the Day. After they told that officer their story, he locked them up and kept them overnight until the morning of 17 August. At that time the day sergeant, after expressing surprise that the accused had been picked up, transferred them from "Operations" to "8059," from which they were transferred up to the 25th Division. En route back to their company, to which they were then transferred, the company commander asked them where they had been (R 19, 20). When they explained to him that they "had got orders to follow the road and we wind up in Pusan," he said, "For punishment I am going to send you men up to the front line" (R 19).

On 19 August they proceeded to the front line, where they stayed for twenty-one days, after which they were confined. On the front line White was assigned to a machine gun section and was on patrol duty. They (apparently White and Gordon) were then transferred to a fighting position, where White was on outpost duty. They came into contact with the enemy, "but neither one of us left * * * the hill." On 25 August Martin and Sanders were transferred to Company L. While "we" were up there, the company commander inquired how they were doing and they replied they were "getting along fine." They were issued the Combat Infantryman's Badge. After about a week the company commander was shot, and the first sergeant "called us down and pinned court-martials against us." They were locked up at 25th Division Headquarters pending charges under the 58th Article of War. They saw the investigating officer and told him that Lieutenant Pico (apparently the company commander) said he was not going to court-martial them but was going to transfer them to the front line, as he did. The investigating officer said he did not see how they could be court-martialed under the 58th Article of War and that he would check on it. Thereafter he told them they were charged with misbehavior before the enemy under the 75th Article of War. They remained there until the trial (R 19).

Gordon testified substantially as follows. They were in the kitchen area for about a month. The cooks were on guard for two-hour periods, during which they would patrol all over the area. They were required to carry a weapon at all times, except around 16 August, when they were not so required (R 26).

Gordon testified on direct examination that he had nothing to add to what White stated about their trip (R 25), but without objection

by the defense, he testified on cross-examination substantially as follows. His purpose in accompanying White on the trip was to go to the bath house, as they did (R 26). They left the kitchen area to go to the showers about 8:00 or 8:30, when it was dark. Martin was actually driving the vehicle (R 28), but Gordon asked White where he was going, and White replied he was lost (R 26). Gordon also offered suggestions when it appeared that White was not going to find the place. They travelled about an hour while searching for the area. When they arrived in Pusan, Gordon did not know where they were. They were picked up there between 9:00 and 9:30, and stayed in Pusan about two or three days. They were taken to the desk sergeant about 9:45. Thereafter they were confined, stayed overnight and were transferred to the replacement center (R 27).

Gordon further testified in substance as follows: When he was returned to the 24th Infantry Regiment, he was transferred to the mortar section. During approximately twenty-one days while he was up there, he was engaged with the enemy every night. He did not run away from the enemy (R 25).

Martin testified thus in substance. He went with White to the bath house on the night of 16 August 1950. After Martin's return to his unit, Company M, he was assigned to the mortar platoon for about a week, after which he was transferred to Company L, where he was assigned as assistant squad leader in the 1st platoon. They stayed on the hill until he was called down to the rear on 9 September. There were always a few snipers around, and they made one or two attacks. He was in contact with the enemy "just about every night" during that period. They never ran away (R 23).

Sanders testified substantially as follows. When he returned to the 24th Infantry Regiment he became a member of a machine gun platoon. They went on patrols for about five days, after which he and Martin were transferred to Company L. They stayed on a little hill for about four days, during which period there was no fighting. Then they moved to another hill which it took them about eight hours to ascend. They stayed at the top of this hill for about eleven days, during which snipers attacked "off and on," and every night (R 24). Sanders was in contact with the enemy "just about every night." He never ran away. Snipers, whose position they did not know, threw hand grenades, so they "just had to lay low and tried not to be one of the unlucky ones to be hit" (R 25). About three men were shot, but they could not take them down until about 5:00 p.m. because of the snipers. After eleven days, Sanders was ordered to the Company M Command Post, where they were informed that they were going to be court-martialed (R 24).

4. Discussion.

Each accused has been convicted of running away from his company, which was engaged with the enemy, and not returning thereto until apprehended, in violation of Article of War 75. The evidence establishes that the accused's company was engaged with the enemy on the date in question. It also establishes, in our opinion, that all four of the accused were before the enemy in the sense of Article of War 75, even though they were in a rear area. The accused Martin and Sanders were drivers of a vehicle, normally used to aid the front line troops in withdrawing, but which they had accompanied to the bivouac area near Masan, Korea, about thirty-five miles behind the front line, for the purpose of repair. Their duties were thus directly in support of combat operations. The evidence also shows that the accused White and Gordon were cooks working under the company mess sergeant in the kitchen in the rear near Masan. Their duties required them to cook one day and to carry chow up to the front line for the troops the next, using a one-quarter ton truck. Their duties also were thus directly in support of combat operations. It is clearly established that all four accused absented themselves without authority from their company's rear area on the day in question and, also without authority, drove the chow truck from Masan to Pusan, a distance of at least thirty miles, where they were apprehended and held overnight. After they were returned to their organization, all four accused were ordered to the front line, where they served continuously in combat for about three weeks, after which they were ordered back for trial upon the instant charges.

The only question presented by the evidence is whether the four accused or any of them "ran away" in the sense of Article of War 75. It is apparent to us that the expression "run away" as used in Article of War 75 imports not only absenting oneself from his unit without authority, but also an accompanying intent to avoid either combat service or duty so directly related thereto as to involve physical danger to the individual concerned. Such is the implication of the provision in the Manual for Courts-Martial, 1949, that "Misbehavior is not confined to acts of cowardice. * * * Running away is but a particular form of misbehavior specifically made punishable by this article" (par 163a, p 216). Running away, according to Winthrop,

> "* * * is merely a form of misbehaviour before the enemy, * * *. Barker, an old writer cited by Samuel, says of this offence: - 'But here it is to be noticed that of fleeing there be two sorts; the one proceeding of a sudden and unlooked for terror, which is least blameable; the other is voluntary, and, as it were, a determinate intention to give place unto the enemie - a fault exceeding foule and not excusable'" (Winthrop's Military Law and Precedents, 2d Ed, 1920 Reprint, p 624)

An examination of the numerous cases involving the charge of running away in violation of Article of War 75 confirms this view (see, for example,

CM ETO 1404 Stack, 4 BR (ETO) 279, 281; CM ETO 1659, Lee, 5 BR (ETO) 173, 174; CM 285209, Ison, 5 BR (ETO) 185, 188; CM 290632, Skovan, 13 BR (ETO) 321, 325). Considering the evidence as a whole, with particular reference to the unrebutted testimony by all four accused as to their three weeks' combat service following the alleged commission of the offenses, we are not convinced beyond a reasonable doubt that they, or any of them, intended to avoid hazardous duty or were motivated by cowardice when they absented themselves without leave from their organization. Only by disbelieving the testimony of the four accused which is not rebutted by any affirmative evidence or shaken on cross examination is it possible to attach grave culpability to their several offenses of absence without leave. On the contrary if their testimony be true, a comparatively minor dereliction of duty in connection with a desire for personal sanitation at a time when their services seemed unnecessary in connection with the tactical operations was magnified by intervening causes out of all proportion to the minor dereliction which marked the inception of the offense. We are therefore of the opinion that the record of trial does not establish beyond a reasonable doubt that they "ran away" from their company, as alleged, but merely that they absented themselves without leave in violation of Article of War 61. Absence without leave is an included offense within that here alleged (CM 126647 (1919), CM 130412 (1919), Dig Op JAG 1912-1940, sec 433(3), p 304; CM 297943, Knorr, 13 BR (ETO) 215, 218 and cases therein cited; see CM 344036, Armstrong, BR-JC, Jan 1950). The limitations upon punishments, inter alia, for violations of Article of War 61 are not applicable to the instant case (EO 10149, 8 Aug 1950, 15 Fed Reg 5149; CM 344036, Armstrong, supra). Consequently in this case a sentence to dishonorable discharge, total forfeitures after promulgation and confinement for ten years is authorized.

5. For the foregoing reasons, the Judicial Council 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 that each of the accused at the time and place alleged absented himself without leave from his company, which was then engaged with the enemy, and did not return thereto until apprehended by military authorities at the place alleged, in violation of Article of War 61, and legally sufficient to support the sentence. In view of all the circumstances of the case, however, including particularly the accused's prolonged combat service following the commission of their offenses, we are of the opinion that, as to each accused, the sentence to confinement should be reduced to a period of one year and the entire sentence suspended.

Robert W. Brown

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr.

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

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DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Corporal Verlon S. White, RA 13294765, Private Willie Martin, Junior, RA 15265791, Private Hardy E. Sanders, RA 18260249, and Private Bernell Gordon, RA 18210433, all of Company M, 24th Infantry Regiment, APO 25, upon the concurrence of The Judge Advocate General, as to each accused, only so much of the findings of guilty is approved as involves findings that each accused at the place and time alleged absented himself without proper leave from his company which was then engaged with the enemy and did not return thereto until apprehended by military authorities at the place alleged, in violation of Article of War 61. Upon the concurrence of The Judge Advocate General, as to each accused, the sentence is confirmed, but the term of confinement is reduced to one year. The United States Disciplinary Barracks or one of its branches is designated as the place of confinement of each accused.

Robert W. Brown
Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr.
J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action. Under the direction of the Secretary of the Army and upon the recommendation of the Judicial Council the execution of the entire sentence as to each accused is suspended.

Franklin P. Shaw
FRANKLIN P. SHAW
Major General, USA
Acting The Judge Advocate General

7 February, 1951

14009

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGN-CM 344253

9 DEC 1950

UNITED STATES v. Private ROBERT D. MURPHY (RA 14217882), Headquarters Company, 3d Battalion, 511th Airborne Infantry Regiment, 11th Airborne Division, Fort Campbell, Kentucky.	FORT CAMPBELL Trial by G.C.M., convened at Fort Campbell, Kentucky, 10 November 1950. Dishonorable discharge, total forfeitures after promulgation and confinement for two and one-half (2½) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
YOUNG, MICKEL and MOBERLEY
Officers of the Judge Advocate General's Corps

1. The Board of Review has examined the record of trial in the case of the soldier named above and submits this, its holding, to The Judge Advocate General under the provisions of Article of War 50e.

2. The accused was tried by general court-martial upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that, Private Robert D. Murphy, Headquarters Company, Third Battalion, 511th Airborne Infantry Regiment, did, at Fort Campbell, Kentucky, on or about 13 August 1950, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: overseas service with the 187th Airborne Infantry Regiment, and did remain absent in desertion until he was apprehended at Dallas, Texas, on or about 7 September 1950.

He pleaded not guilty to, and was found guilty of, the Charge and Specification and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor, at such place as proper authority may direct, for a period of two and one-half (2½) years. Evidence of one previous conviction was considered

by the court in adjudging the sentence. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, or elsewhere as the Secretary of the Army may direct, but not in a penitentiary, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50e.

3. Evidence.

a. For the Prosecution.

Accused was a member of Headquarters Company, Third Battalion, 511th Airborne Infantry Regiment (R 9). First Lieutenant Joe R. Tramell, the Commanding Officer of accused's company, testified that on 8 August 1950 accused was being "returned to duty;" that the accused reported to the Lieutenant in the unit orderly room, and that Lieutenant Tramell interviewed accused (R 9, 10, 11). At that time all personnel of the company except a cadre had been transferred to the 187th Regimental Combat Team (R 11), inasmuch as the company commander previously had been directed to reduce his company to cadre strength (R 15). In the conversation of 8 August 1950 Lieutenant Tramell informed accused that he would be treated the same as any other soldier and that as soon as orders could be "run off" he would be transferred to the 187th Regimental Combat Team (R 12, 15). Lieutenant Tramell knew that the 187th Regimental Combat Team was "going to be shipped overseas" (R 16). However, the only statement touching this matter made by the Lieutenant to the accused was that the 187th was "hot for combat" (R 12, 16).

On 11 August 1950 the First Sergeant of Headquarters Company, Third Battalion, 511th Airborne Infantry Regiment, had received word from Division Headquarters that accused was to be transferred to the 187th Regimental Combat Team (R 21), and accordingly the Sergeant told accused of the impending transfer, which was to be effective on 15 August 1950 (R 23). The Sergeant informed accused that he would have to clear the company between 11 and 15 August 1950 (R 22) and directed accused to "contact" the supply sergeant for the purpose of checking clothing and turning in all property which belonged to the organization (R 17).

Special orders of the 11th Airborne Division dated 9 August 1950, purporting to transfer accused to the 187th Airborne Infantry Regiment, specifying the effective date of change of the morning report to be 15 August 1950, were received in Headquarters Company, Third Battalion, 511th Airborne Infantry Regiment, on 12 August 1950, but accused was not shown a copy thereof (R 15, 19, 22). The orders pertinently read, "Fol EM 511th Abn Inf Regt are trf in gr to 187 Abn Inf Regt. EDCMR: 15 August 1950" (Pros Ex 3). Said special orders of 9 August 1950 pertaining to accused were revoked on 15 August 1950 (R 29, Pros Ex 4).

Accused was absent without leave from his company at Fort Campbell, Kentucky, on Sunday, 13 August 1950 (R 14, 18, 23, Pros Ex 1). He was apprehended by civilian police officers at Dallas, Texas, on 7 September 1950 and was returned to military control on that date (R 23, Pros Exs 1 and 2).

In early August 1950 the 187th Airborne Infantry Regiment, which then was at Fort Campbell, Kentucky, had received from the 11th Airborne Division instructions to form a Regimental Combat Team, and also had received a training directive preparatory to overseas movement (R 24, 27, 29).

At about this time the Regiment was undergoing special training in firing, and troops had run an infiltration course in which live ammunition was used (R 31, 32). One enlisted man, a member of the Regiment, testified that because of the training they "knew [they] were going to do something, * * * but didn't know where, when, or how * * *" (R 33). In August he and other members of the Regiment were told they had been chosen to go with the combat team, and at about the same time Article of War 28 was read to them (R 32). On about 24 or 25 August fragmentary movement orders were issued to the 187th Regimental Combat Team, and on 1 September 1950 the final movement order was issued, but the destination of the organization was not disclosed (R 26). The Regiment left Fort Campbell, Kentucky, on 1 September 1950, went to California, and thence to Japan, from where it was flown to Kimpo Airfield in Korea. On 21 October 1950 it was situated in a combat zone 18 miles north of the North Korean Capital, Pyongyang (R 30).

b. <u>For the Defense</u>.

There was testimony for the Defense that the mentioned Special Orders dated 9 August 1950 transferring accused to the 187th Airborne Infantry Regiment were received at Headquarters 511th Airborne Infantry Regiment, of which accused's company was a part, at 1122 hours and were dispatched to "'L' Company" (sic) at 1145 hours on 12 August 1950 (R 39).

The accused elected to remain silent (R 41).

4. The charge of desertion is here predicated upon the alleged specific intent to avoid hazardous duty, particularized as overseas service with the 187th Airborne Infantry Regiment. Therefore, proof of that intent is an essential element in the case. The rule is well established and has been repeatedly stated to be that:

> "Where, as here, such proof must be by inference from the fact of absence under the circumstances, the evidence must establish that accused knew, or had reason to know

and accordingly expected, that his embarkation for such foreign service was imminent and that his absence would avoid it. (Citing cases)" (CM 268622, Sfer, 44 BR 317.) (See, e.g., CM 272610, Armas, 46 BR 319; CM 265447, Hodge, 43 BR 41. See CM 270352, Uyechi, 45 BR 233.)

There is no such evidence here. The record of trial shows that his company commander and first sergeant informed accused that he was to be transferred to an organization described by the company commander as being "hot for combat." The fact of accused's impending transfer to another unit alone is of no significance. The description of that unit as being "hot for combat" was ambiguous, enigmatic and so vague a characterization as to be practically meaningless. It cannot be said that this phrase would effectively convey to accused the idea that his immediate destiny was overseas service or imply that his absence would result in the avoidance of such service. It would not so charge accused with notice of imminent embarkation as to render unreasonable any hypothesis explaining his absence except that of an intention to avoid overseas service (CM 268622, Sfer, supra).

Neither the directives and instructions emanating from the headquarters of the 11th Airborne Division, nor the special training received by personnel of the 187th Regimental Combat Team, nor the expectations of some members thereof that they were going somewhere would be binding upon accused since at no time was he a member of the latter organization and no showing is had that accused was aware of any of these circumstances (E.g., M 230826, McGrath, 18 BR 53; M 231163, Sinclair, 18 BR 153). Furthermore, it has been held that knowledge that members of an organization were restricted to short term passes and that vague rumors concerning troop movements were current did not put an accused on notice that the organization was facing immediate departure for duty beyond the continental limits of the United States (CM 222861, Fragassi, 13 BR 329, 1 Bull. JAG 103).

The evidence presented in the instant case clearly sustains only a conviction of the lesser included offense of absence without leave (SpCM 427, Kallenberger, 4 BR-JC 441).

It is not necessary to consider the possibility that the court may have disregarded the allegation of the specific intent to avoid hazardous duty and rested its finding of guilty on the tenuous assumption that an unexplained absence of 26 days was sufficient to show an intent to desert. Where a specific intent is alleged, the court cannot find the accused guilty of the general intent to remain absent permanently (See SpCM 427, Kallenberger, supra).

5. For the foregoing reasons the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of the Charge and its Specification as involves a finding that accused did, at the time and place alleged, absent himself without proper leave from his organization and did remain absent without proper leave until he was apprehended at the place and time alleged, in violation of Article of War 61, and legally sufficient to support only so much of the sentence as provides for confinement at hard labor for two months and 15 days and forfeiture of $58.33 per month for a like period.

, J.A.G.C.

, J.A.G.C.

, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGU CM 344253

UNITED STATES	)	FORT CAMPBELL
v.	)	Trial by G.C.M., convened at Fort Campbell, Kentucky, 10 November 1950. Dishonorable discharge, total forfeitures after promulgation and confinement for two and one-half years. Disciplinary Barracks.
Private ROBERT D. MURPHY, RA 14217882, Headquarters Company, 3d Battalion, 511th Airborne Infantry Regiment, 11th Airborne Division, Fort Campbell, Kentucky	)	

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Opinion of the Judicial Council
Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

- - - - - - - - - - -

1. Pursuant to Article of War 50e(4) the record of trial and the holding by the Board of Review in the case of the soldier named above have been submitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon trial by general court-martial the accused pleaded not guilty to and was found guilty of desertion at Fort Campbell, Kentucky, on or about 13 August 1950 by absenting himself without proper leave from his organization with intent to avoid hazardous duty, overseas service with the 187th Airborne Infantry Regiment, and remaining absent in desertion until he was apprehended at Dallas, Texas, on or about 7 September 1950. Evidence of one previous conviction by special court-martial was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence and to be confined at hard labor for two and one-half years. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, as the place of confinement and withheld the order directing execution of the sentence pursuant to Article of War 50e.

The Board of Review has held the record of trial legally sufficient to support only so much of the findings of guilty as involves findings that the accused did at the place and time alleged absent himself without proper leave from his organization and did remain so absent until he was apprehended at the place and time alleged, in violation of Article of War 61, and legally sufficient to support only so much of the sentence

as provides for confinement at hard labor for two months and fifteen days and forfeiture of $58.33 per month for a like period. The Judge Advocate General has not concurred in the Board's holding.

3. The evidence, which is substantially as stated in the Board's holding, establishes beyond question that the accused absented himself without leave from his organization at Fort Campbell, Kentucky, on 13 August 1950 and remained so absent until his apprehension in Dallas, Texas, on 7 September 1950. We do not concur in the Board's conclusion that the evidence is legally insufficient to establish the accused's intent, at the time he so absented himself, to avoid the hazardous duty of overseas service with the 187th Airborne Infantry Regiment.

One form of desertion is absence without leave accompanied by the intent to avoid hazardous duty (AW 28; MCM 1949, par 146a, p 198). The hazardous duty may include duty in a combat or other dangerous area (Ibid). As stated in CM ETO 1921, King, 6 BR ETO 1, 4, the elements of proof of the offense are, in addition to unauthorized absence: (1) that the organization in question was under orders or anticipated orders involving hazardous duty, (2) that the accused was notified, or informed, or had reason to believe, that the organization was about to engage in hazardous duty, and (3) that his absence was with the intent to avoid such duty. The intent should be proved by evidence of facts raising a reasonable inference that the accused knew with reasonable certainty that he would be required for the hazardous duty alleged (MCM 1949, par 146a, p 200). For example, it might be shown that he was personally warned of the imminence of the hazardous duty or that the period of his absence was of such duration and under such circumstances that he must have had reasonable cause to know that he would miss the duty (Ibid).

In the instant case the accused's company commander on 8 August 1950 informed him that he was to be transferred to the 187th Regimental Combat Team and cautioned him against any absence without leave. He also told the accused that the 187th Regimental Combat Team was "hot for combat" (R 11-12, 16). As a result of official information received by telephone, the accused's first sergeant informed him on 11 August that the accused was to be transferred to the 187th Airborne Infantry Regiment and that the transfer would be effective on 15 August (R 17-19). Orders, dated 9 August 1950, so transferring the accused were received by the first sergeant on 12 August (R 19-20, 28; Pros Ex 3). On 13 August, as indicated, the accused absented himself without leave at Fort Campbell, Kentucky, and remained so absent until his apprehension at Dallas, Texas, on 7 September (R 13-14, 18, 23; Pros Ex 1, 2). Meanwhile movement orders were issued to the 187th Regimental Combat Team on about 24 or 25 August and 1 September 1950 (R 26), on which date the regiment departed Fort Campbell. By 21 October it was in a combat zone in Korea (R 30).

We do not concur in the conclusion of the Board that the commanding officer's characterization of the 187th Regimental Combat Team as "hot for combat" was ambiguous, enigmatic or so vague as to be practically meaningless. In common parlance it could only mean that the organization was about to be transferred to the only United States combat area in the world at the time, August 1950, which was in Korea. The record shows that at the time in question the accused was twenty-one years of age and had served over four years (R 43). Thus we may assume that he understood the personal and official warning of the imminence of the hazardous duty. His unauthorized absence, which commenced two days after thewarning and continued until his apprehension six days after the unit's departure for Korea, under all the circumstances, clearly indicates that the accused must have had reasonable cause to know that by absenting himself he would miss the hazardous duty of combat in Korea as a member of the 187th Regimental Combat Team. The evidence, in our opinion, establishes beyond a reasonable doubt the accused's guilt as alleged (See authorities collected in CM 265447, Hodge, 43 BR 41, 45-46). We find nothing in the cases cited by the Board of Review, including the Hodge case, which militates against the conclusion reached herein.

4. For the foregoing reasons, the Judicial Council is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence to dishonorable discharge, total forfeitures after promulgation and confinement for two and one-half years is authorized upon conviction of this violation of Article of War 58 (MCM 1949, par 117c, p 134).

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 344253

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Private Robert D. Murphy, RA 14217882, Headquarters Company, 3d Battalion, 511th Airborne Infantry Regiment, 11th Airborne Division, Fort Campbell, Kentucky, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution. The United States Disciplinary Barracks or one of its branches is designated as the place of confinement.

Robert W. Brown
Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr.
J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action.

E. M. Brannon
E. M. BRANNON
Major General, USA
The Judge Advocate General

15 January 1951

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

Board of Review

CM 344313

UNITED STATES v. Private JOHNNY B. LEATHERS, JR (RA 17233279), and Corporal FRANK L. HENDERSON (RA 16261530), both of Battery A, 159th Field Artillery Battalion, APO 25.	25TH INFANTRY DIVISION Trial by GCM, convened at APO 25, 3 November 1950. Leathers: Dishonorable discharge, total forfeitures after promulgation and confinement for five (5) years. Disciplinary Barracks. Henderson: acquitted.

HOLDING by the BOARD OF REVIEW
LUDINGTON, LENEY and BYRNE
Officers of the Judge Advocate General's Corps

The record of trial in the case of the soldiers named above has been examined and is held by the Board of Review to be legally sufficient to support the findings of guilty and the sentence, as to Leathers.

_____, J.A.G.C.
Herbert H. Leney, J.A.G.C.
(ABSENT), J.A.G.C.

JAGE CM 344313 1st Indorsement

JAGO, SS USA, Washington 25, D. C. 4 January 1951

TO: Chairman, the Judicial Council, Office of The Judge Advocate General, Dept of the Army, Washington 25, D. C.

In the case of Private Johnny B. Leathers, Jr. (RA 17233279), Battery A, 159th Field Artillery Battalion, APO 25, pursuant to Article of War 50e(2) the record of trial and the foregoing holding by the Board

JAGE CM 344313

of Review are transmitted to the Judicial Council for appropriate action. Participation by The Judge Advocate General in the confirming action is required.

FOR THE JUDGE ADVOCATE GENERAL:

1 Incl
Record of trial

FRANKLIN P. SHAW
Major General, USA
The Assistant Judge Advocate General

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGU CM 344313

25th INFANTRY DIVISION

UNITED STATES v. Private JOHNNY B. LEATHERS, JR, RA 17233279, Battery A, 159th Field Artillery Battalion, APO 25	Trial by G.C.M., convened at APO 25, 3 November 1950. Dishonorable discharge, total forfeitures after promulgation and confinement for five years. Disciplinary Barracks.

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Opinion of the Judicial Council
Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

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1. Pursuant to Article of War 50e(2) the record of trial and the holding by the Board of Review in the case of the soldier named above have been transmitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon trial by general court-martial in common with Corporal Frank L. Henderson, of the accused's organization, the accused pleaded not guilty to and was found guilty of a specification alleging that, being present with his unit while it was engaged with the enemy, he did, near Masan, Korea, on or about 14 September 1950, shamefully abandon the said unit and seek safety in the rear, and did fail to rejoin it until he was apprehended at Masan, Korea, on or about 16 September 1950, in violation of the 75th Article of War. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for five years. The reviewing authority approved the sentence, designated the Branch United States Disciplinary Barracks, Camp Cooke, California, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50e.

The Board of Review has held the record of trial legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence.

3. The evidence for the prosecution in brief was as follows:

On 14 September 1950 each accused was a member of Battery A, 159th Field Artillery Battalion, which was then engaged with the enemy "outside" Haman. There was evidence that both were notified on 14 September

that they were to be on guard that night but neither reported for duty and they had to be replaced. However, the witness who was supposed to have notified them was not positive as to the date. A search of the area failed to reveal their whereabouts. Both accused were apprehended on 16 September 1950 on the Masan-Haman road, about seven miles from the battery's position.

The evidence for the defense in brief was as follows:

On 14 September 1950 each accused reported for duty and served as a guard. On 15 September, Henderson acting under instructions of a mess sergeant, his "chief of section," went in search of some truck bows and Leathers went with him. They proceeded to Headquarters Battery, approximately seven miles to the rear of Battery A, as a possible source of the bows. Upon being advised at Headquarters Battery that they had no bows, and because no one was permitted to leave the area after 1600 hours, they remained for the night. They were apprehended the next morning while returning to their battery. Leathers testified that he had accompanied Henderson on his search at the latter's request.

On the basis of this evidence, some of which was vague, contradictory and inconsistent, Henderson was found not guilty and Leathers was found guilty of shamefully abandoning his company, which was engaged with the enemy, seeking safety in the rear, and failing to rejoin it until he was apprehended at Masan, Korea.

The evidence as to the notification and failure of each accused to report for guard on 14 September 1950 was identical. The only variance in the testimony respecting the two accused concerned their permission to leave on 15 September. Henderson testified that he was given permission by his mess sergeant to leave the area to obtain some truck bows. Leathers, a private, testified he was requested by Henderson, a corporal, to go with him to obtain the bows. Since this was the only variance in the testimony, we conclude that it was the basis of the difference in the court's findings as to the two accused. We find no valid reason in the record to warrant the different results reached by the court. It is true that the explanation offered by Henderson was weak and that offered by Leathers still weaker, but in our opinion, the difference should not have led to diverse findings. Each of the accused's explanations indicated some color of authority to leave the area on 15 September. If it be assumed that the order given Henderson to obtain truck bows carried with it implied authority to leave the area to obtain them, it is not unreasonable to imply authority on the part of Leathers to leave the area with him when so requested by Henderson. The record is vague as to the number and size of the trucks involved and the number of bows to be obtained, but we may take judicial notice of the fact that if a substantial number of bows were needed, their size, shape and weight would easily require the services of two men to transport them. Under the circumstances presented in this case, particularly the acquittal of Henderson and the implied authority

of Leathers to accompany him, it would be contrary to the interests of justice to permit the conviction of Leathers to stand. We therefore conclude that the ends of justice will be better served by disapproving the findings of guilty and the sentence as to Leathers.

4. For the foregoing reasons, the Judicial Council is of the opinion that the record of trial is insufficient to support the findings of guilty and the sentence.

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

(140)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 344313

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Private Johnny B. Leathers, Jr., RA 17233279, Battery A, 159th Field Artillery Battalion, APO 25, upon the concurrence of The Judge Advocate General, the findings of guilty and the sentence are disapproved.

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action.

FRANKLIN P. SHAW
Major General, USA
Acting The Judge Advocate General

26 January, 1951

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D.C.

JAN 29 1951

JAGH CM 344318

UNITED STATES v. Private First Class ANTHONY P. FORTES (RA 11178456), Company B, 24th Infantry Regiment, APO 25.	)	25TH INFANTRY DIVISION Trial by G.C.M., convened at APO 25, 21 October 1950. Dishonorable discharge, total forfeitures after promulgation, and confinement for life.

OPINION of the BOARD OF REVIEW
MILLER, FITZHUGH and IRELAND
Officers of The Judge Advocate General's Corps

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 Judicial Council and The Judge Advocate General.

2. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 75th Article of War.

Specification 1: In that Private First Class Anthony P. Fortes, Company B, 24th Infantry, APO 25, did, at or near Haman, Korea, on or about 22 August 1950, run away from his company, which was then engaged with the enemy, and did not return thereto until after the engagement had been concluded.

Specification 2: In that Private First Class Anthony P. Fortes, Company B, 24th Infantry, APO 25, did, at or near Haman, Korea, on or about 4 September 1950, misbehave himself before the enemy by failing to return to his company when ordered to by Sergeant First Class Walter T. Jones, while his command was engaged with the enemy.

He pleaded not guilty to, and was found guilty of, the Charge and its Specifications. Evidence of one previous conviction by summary court-martial for being drunk and disorderly in camp was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. Evidence.

a. For the prosecution.

The accused, Private First Class Anthony P. Fortes, was a member of Company B, 24th Infantry Regiment (R 9-11). On 22 August 1950, the organization of the accused was engaged with the enemy near Haman, Korea, and was in readiness to attack an enemy-held hill position (R 9,10). The attack was delayed and the company was halted on the hill just below Company K. Master Sergeant Levy Carter, the accused's first sergeant, gave him an order "to go below the hill and to report to Lt Gooch, a new member of the company, and then report back to the company or stay there over night and report back the next morning" (R 9,11). Sergeant Carter checked the company next morning for the accused but he was not present (R 9,11). Sergeant Carter made daily checks of the company in the morning and evening but the accused was not present with the company after 22 August 1950 until approximately 11 September 1950 when the accused was brought back to the company (R 9-11). On 11 September 1950, the accused was found in the rear area near Masan about twelve miles behind B Company's front lines (R 13-15).

Master Sergeant Walter T. Jones, Company B, 24th Infantry Regiment, on 22 August 1950, saw the accused at the 1st Battalion CP, at a point some six miles to the rear of the company's defensive position. The accused "was just loafing around the CP area" (R 12). The sergeant did not speak to the accused on this occasion but simply observed him (R 13).

Jones again saw the accused "on the 4th of September" at Haman in the B Company mess hall (R 13). The witness subsequently corrected "Haman" to "Masan" (R 14,15), and further testified that he told the accused "to report back to the organization with several more men that were returning and that I would get transportation from the Sv Co by truck" (R 13). When asked concerning the exact words he used, the witness replied, "* * I told him that I was sending some more men back to the company and wanted him to go back also. That he could get transportation by going to the Sv Co. That they would furnish the transportation for the men to go back to the company. At the same time, I think I had four more men going back from the hospital. I told him to join them and go back to the company; the company proper" (R 13). Sergeant Jones assumed that the accused had obeyed and reported back to the company but stated, "* * I didn't see him leave and I had no report of him getting there" (R 13,14).

On 11 September 1950, Sergeant Jones again saw the accused in the same area near Masan (R 13). Masan was approximately twelve miles to the rear of the company's front line position (R 15). The accused was in a two-man pup tent and his tent mate reported him to Sergeant Jones (R 13).

b. For the defense.

After being warned of his rights as a witness, the accused elected to remain silent (R 16).

4. Discussion.

The accused was charged with and found guilty of two violations of Article of War 75.

Specification 1 alleged that the accused did

"* * run away from his company, which was then engaged with the enemy, and did not return thereto until after the engagement had been concluded."

This follows exactly the form prescribed by the Manual for Courts-Martial (MCM, 1949, Appendix 4, Form No. 41, p.318).

Specification 2 alleged that the accused did

"* * misbehave himself before the enemy by failing to return to his company when ordered to by Sergeant First Class Walter T. Jones, while his command was engaged with the enemy."

This form also follows substantially that given in the Manual for Courts-Martial (MCM, 1949, Appendix 4, Form No. 40, p.318).

The 75th Article of War makes misbehavior before the enemy an offense punishable by death or such other punishment as a court-martial may direct (AW 75, MCM 1949, p.294). The Manual for Courts-Martial, 1949, defines misbehavior before the enemy as:

"* * any conduct by an officer or soldier not conformable to the standard of behavior before the enemy set by the custom of our arms.

* * *

"Under this clause may be charged any act of treason, cowardice, insubordination, or like conduct committed by an officer or soldier in the presence of the enemy" (MCM, 1949, Par. 163(a)).

Winthrop describes misbehavior before the enemy, as, among other things:

"* * * acts by any officer or soldier, as -- * * going to the rear or leaving the command when engaged with the enemy; * *" (Winthrop's Military Law and Precedents, 2d Ed., p.623).

The words "before the enemy" are not limited by geographical distance but are words expressing tactical relationship (MCM, 1949, Par. 163a). The words "engaged with the enemy" have been held to be synonymous with the words "before the enemy" (CM 257053, Marchetti, 4 BR (ETO) 143,150). The fact that the accused was found some twelve miles to the rear of his company's front line position does not prevent him being held "before the enemy" in the sense of Article of War 75 (CM 343775, Williams, BR-JC, Jan. 1951; CM 343949, Bryant, BR-JC, Jan. 1951).

In view of the recent decision of the Judicial Council in the Gilbert case, no question arises as to the applicability of the 75th Article of War to the present situation in Korea (CM 343472, Gilbert, 27 Nov. 50).

The uncontradicted evidence shows that the accused was present with his unit which was engaged in combat with the enemy at the time and place alleged. He was ordered by his first sergeant to report "below the hill" to perform duty with Lieutenant Gooch but he was directed to return to the company by the next morning at the latest. He not only failed to report as directed but the evidence indicates that he went to the rear area some twelve miles back of his company's front lines, his assigned place of duty, and remained there until about 11 September 1950. The Board of Review is of the opinion the evidence is legally sufficient to sustain the finding of the court as to Specification 1 (CM ETO 1408, Saraceno, 4 BR (ETO) 293,295; CM ETO 1659, Lee, 5 BR (ETO) 173,174; CM 263351, Keyes, 7 BR (ETO) 187,188; CM 276183, Kuykendoll, 9 BR (ETO) 315,316; CM 289896, O'Berry, 11 BR (ETO) 203,204-205; CM 298931, Sexton, 15 BR (ETO) 125,127).

The evidence is equally certain that on 4 September 1950 he was ordered by Master Sergeant Walter T. Jones to report back to his company which order he disregarded and failed to obey. This constituted misbehavior before the enemy and the Board of Review is of the opinion that the evidence is sufficient to sustain the court's finding as to Specification 2 (CM ETO 6177, Transeau, 16 BR (ETO) 153,156; CM ETO 11503, Trostle, 24 BR (ETO) 181,183; CM ETO 11790, Andes, 24 BR (ETO) 307,310).

5. The accused is 19 years of age. He completed nine years of elementary school in 1946 and is single with no dependents. He had no civilian occupation. There is no evidence of civilian criminal offenses. Without prior service, the accused enlisted on 25 February 1948 for three years. He joined his present organization 16 November 1949. His commanding officer rates him "inferior" as to character and "unsatisfactory" as to efficiency and recommends he be eliminated from the service. The accused has an AGC test score of 112. On 24 February 1950, he was sentenced by summary court-martial to forfeit $60.00 of his pay for one month for being drunk and disorderly in camp.

6. The court was legally constituted and had jurisdiction of the person and of the offenses. 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 of guilty and the sentence, and to warrant confirmation of the sentence. A sentence to confinement at hard labor for life is authorized upon convictions of misbehavior before the enemy in violation of Article of War 75.

Reginald C. Miller, J.A.G.C.

William C. Fitzhugh, J.A.G.C.

Arthur C. Ireland, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 344318

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Private First Class Anthony P. Fortes, RA 11178456, Company B, 24th Infantry Regiment, APO 25, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution. The United States Disciplinary Barracks or one of its branches is designated as the place of confinement.

Robert W. Brown
Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait
C. B. Mickelwait, Brig Gen, JAGC

1951

J. L. Harbaugh, Jr.
J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action. Under the direction of the Secretary of the Army the term of confinement is reduced to twenty years.

E. M. Brannon
E. M. BRANNON
Major General, USA
The Judge Advocate General

(GCMO 27, 20 March 1951)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D.C.

JAN 30 1951

JAGH CM 344372

UNITED STATES v. Private JIMMIE L. DAVIS (RA 19245224), Headquarters Special Troops, Yokohama Command, APO 503.	))))))))	YOKOHAMA COMMAND Trial by G.C.M., convened at Yokohama, Honshu, Japan, 1,2 November 1950. Death.

OPINION of the BOARD OF REVIEW
MILLER, FITZHUGH, and IRELAND
Officers of The Judge Advocate General's Corps

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 Judge Advocate General and the Judicial Council.

2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Jimmie L. Davis, Headquarters, Special Troops, Yokohama Command, APO 503, then Headquarters and Headquarters Company, 17th Regimental Combat Team, 7th Infantry Division, APO 7, did, at Gotemba, Honshu, Japan, on or about 4 September 1950, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill Private Winston A. Hamilton, a human being, by stabbing him with a bayonet.

He pleaded not guilty to, and was found guilty of, the Charge and the Specification. Evidence of two previous convictions by summary court-martial for wrongfully absenting himself from company bed check, and for breach of restriction by going absent without leave was introduced. He was sentenced to be put to death in such manner as proper authority may direct, all members of the court present at the time the vote was taken concurring in the sentence. The reviewing authority approved the sentence, but in view of the accused's youth and the circumstances of the case, recommended that the sentence be commuted to dishonorable discharge,

forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for the term of the accused's natural life, and forwarded the record of trial for action under Article of War 48.

3. Evidence.

a. For the prosecution.

The autopsy report of Major Walter G. Olin, Jr., MC, Pathology Department, 406th Medical General Laboratory, APO 500, U. S. Army, pertaining to Private Winston A. Hamilton, Company A, 17th Regimental Combat Team, who died 4 September 1950, at Gotemba, Yamanashi Prefecture, Japan, was received in evidence as Prosecution Exhibit 1 (R 14). The autopsy disclosed five puncture wounds in the chest, one puncture wound on the left flank, and four shallow puncture wounds on the face. Death was caused by laceration of the pulmonary vein due to a stab wound in the left chest inflicted 4 September 1950 by a carbine bayonet (Pros Ex 1).

A diagrammatic representation of the "tea house" in Gotemba, Japan, was received in evidence without objection as Prosecution Exhibit 2 (R 17). Places and positions were identified throughout the trial by witnesses marking thereon in colored pencil. For purposes of clarity and convenience, reference herein will be made to such markings when appropriate.

On 3 September 1950 the accused, Corporal Frederick B. Stanley, Private Winston A. Hamilton (the victim) and a Sergeant Kipes were at the "tea house" (Pros Ex 2) in Gotemba, Honshu, Japan (R 23,68). During the evening Hamilton choked and threatened one of the Japanese girls with a knife (R 26,68,73). When a man, referred to as "Papa-san," ran out to call the military police, Hamilton ran after him, forced him back into the house and threatened him with the knife (R 27,74). Later that evening Hamilton went into the room where the accused was and threatened him with the knife (R 69,75). Hamilton was intoxicated at the time (R 75).

At about noon of the following day, 4 September 1950, the accused, together with Corporal Stanley and Private First Class Stephen F. Kuldanek, left the camp area to go to the mentioned tea house (R 16,45). The accused was unarmed but Stanley had a carbine bayonet in a sheath attached to his belt and Kuldanek carried an M-1 rifle and carbine bayonet (R 19, 25,53,55). Since the unit was alerted for shipment to Korea and bayonets were disappearing, a large percentage of the boys carried their bayonets with them (R 19,25). When they arrived at the tea house in Gotemba, they met Hamilton sitting in the entrance drinking beer and whiskey (R 16,18, 46). They were surprised to see him (R 25,28,56), but there was no argument or words between Hamilton and the accused at that time (R 18,47). The accused and Stanley entered the house, undressed and donned kimonos,

leaving their clothes in room marked No. 3 (Pros Ex 2), at which time Stanley's bayonet was still attached to the belt of his pants (R 19). Shortly thereafter, Hamilton and Kuldanek left the tea house together (R 16,47) and went to a hotel about five or six blocks away where they drank for four or five hours with a friend of Hamilton, Corporal Moore (R 47,56). At the hotel Kuldanek overheard Hamilton tell his friend, "Boy, I sure had Davis scared shitless last night when I pulled that knife on him" and some words to the effect that he got the knife from somebody's boot (R 57). In the meantime the accused and Stanley remained at the tea house and drank some beer; Stanley later went into room marked No. 1 (Pros Ex 2) with his girl (R 16-17).

Early in the evening, about 4:00 or 5:00 p.m., Hamilton and Kuldanek returned to the tea house (R 18,48,63) to get Kuldanek's rifle which he had left there (R 57). Both of them were drunk (R 28,29,42,48). The two entered room No. 3 (Pros Ex 2). Kuldanek thought that the accused was in the room at that time. They proceeded to room No. 1 (Pros Ex 2), awakened Stanley and invited him to have a drink (R 48-49,18). Returning to room No. 3, they ordered beer. The accused was not then in the room, but came in later (R 49,58). When Stanley entered room No. 3, Hamilton and Kuldanek were seated near a table talking together, and the accused, dressed in kimono, was standing to one side (R 19,32-34,49-50). Hamilton said to Kuldanek, "If Davis fucks around tonight this is going to be it" (R 49,58,59). Kuldanek remarked, "By God, if there's going to be any trouble, you are going to whip my ass, too" or words to that effect (R 19,33,58). The accused said "What's up? What's the scoop?" or words to that effect (R 19,59). Hamilton started to get up and the accused swung at him with a beer bottle, hitting a chair (R 19-20,34). Hamilton did not make a motion to reach for anything (R 34). In the next instant the accused had a bayonet in his hand and lunged at Hamilton (R 20-21, 50) who received a cut over the left eye (R 51). Hamilton, chased by the accused, ran around the table and stopped behind Stanley. When he tried to intervene between the two, Stanley was stabbed by the accused and received a cut in the left arm (R 21,38,42a,51). At that moment Kuldanek became scared and "took off." Hamilton then dashed out the entrance marked No. 4 (Pros Ex 2) followed closely by the accused. Stanley tried to hold the accused by the back of his kimono but he pulled away (R 21). Kieko Hirayama, a Japanese girl who lived in the tea house (R 61-62), was eating in room marked L-1 (Pros Ex 2) and heard the sliding door marked L-3 pushed down. She saw Hamilton run out of the house, pursued by the accused with a knife in his hand (R 63-64). She ran after them down the alley, following the accused by about two meters. When Hamilton tripped and fell over a wooden tub in the alley marked L-6 (Pros Ex 2), the accused jumped on top of him. They turned over once or twice with the accused finally remaining on top. The witness saw the accused stab Hamilton three times in the chest (R 65-66).

About five minutes after he had chased Hamilton out of the house, the accused returned to room No. 3 (R 42,43). At that time Stanley noticed that his bayonet was missing from its scabbard. The accused said to him, "I am sorry I cut you. I need some money to get out of here." and "I got him" (R 22,40). At that time the accused had the bayonet in his hand (R 23,41). Kuldanek then returned to the house and the accused gave him a dog chain and collar to take back to camp. Kuldanek went into the alley and found Hamilton lying there, bleeding profusely. He remained with the victim until the arrival of the military police; shortly thereafter Hamilton died (R 52).

At no time during the altercation was Hamilton seen to have a weapon (R 21,37,38,51,54,64) or to threaten the accused (R 35,38). Hamilton was bigger and huskier than the accused (R 35).

About midnight, 4 September 1950, Sergeant Floyd L. Trantham, a squad leader in the 7th Military Police Company, picked up the accused in a Japanese house approximately one-half block from the scene of the stabbing. As a result of information given him by the accused, the sergeant found the bayonet in a basket in the same house where accused was hiding. He turned the accused and the bayonet over to the Criminal Investigation Detachment. The bayonet was properly identified and received in evidence as Prosecution Exhibit 4 (R 76-78).

On 6 September 1950, the accused, after being informed of his rights under Article of War 24, gave a written statement to an agent of the 44th Criminal Investigation Detachment (R 80). The defense conceded that it was a "voluntary statement freely given by the accused" (R 81). In this statement, which was received in evidence as Prosecution Exhibit 5 (R 83), the accused admitted substantially the facts as already set forth in the testimony of the prosecution's witnesses, except for the actual stabbing of Hamilton, stating "I do not remember anything during the time I was after Hamilton, I must have just gone crazy." He stated that he was not drunk. He also stated that he thought Hamilton was armed, that he secured Stanley's bayonet and that he drew the bayonet from the sash of his kimono and started stabbing at Hamilton when he thought the latter was reaching for a knife. He further stated, "I do remember that I was after him with the bayonet. Hamilton ran out of the house and I after him." He further stated that he offered to help Hamilton when the latter told him in the alley that he was "hurt bad," but that he, the accused, ran away when someone said the military police were coming. He admitted washing blood from the bayonet and hiding it in a closet in another house. He also admitted that he intended to do bodily harm to Hamilton if he bothered him in any way because Hamilton had threatened him the night before (Pros Ex 5).

b. <u>For the defense.</u>

The accused, having been advised of his rights as a witness, elected to take the stand and testify under oath (R 87). He stated that he is

twenty years old and has only a makeshift family consisting of a stepfather, stepmother, half brother and sister. He never knew his father and does not know where his mother is. He enlisted in the Army when he was fifteen years old but was given a minority discharge two and one-half months later. After his discharge, he returned to his stepparents' home in Arizona, but they had moved and he could not locate them. He went to California where he was picked up as a vagrant because he had no money or permanent address in the State. He was sentenced to the reformatory until such time as he could be transported to Arizona, and, after serving fourteen months therein, he was sent back to Arizona. A few months later on 2 August 1948 he reenlisted in the Army (R 87-90). He explained that the two summary courts-martial mentioned in his statement to the CID (Pros Ex 5) were for one absence without leave of three hours and another for two days. He was punished by a fine on both occasions (R 90).

The accused stated that he had known Hamilton since May 1949 and had never had any trouble with him until the evening of 3 September 1950 in his girl's house (Pros Ex 2) in Gotemba (R 90,110). Upon that occasion while the accused was in room No. 1 (Pros Ex 2), Hamilton, who was "pretty drunk," came into the room, pulled out a carbine bayonet, grabbed the accused by the shoulder and said, "Now, Davis, you son-of-a-bitch, I have got you. I am going to cut your throat" (R 91,108). The accused asked what it was all about and Hamilton said, "You know what it is all about." Accused replied, "You haven't got anything against me. We have been friends all along." Accused suggested they have a beer and talked him out of it. Hamilton put his bayonet away and they shook hands. The accused was afraid of Hamilton who was drunk. Accused weighs 132 pounds and Hamilton was taller and huskier (R 91-92).

Later that same evening Hamilton choked a girl and pointed a bayonet at her throat because "she wouldn't go down on him" (R 92,109). When the "papa-san" went out to get the military police, Hamilton went after him, ripped off his tee-shirt, dragged him back into the house, kicked him, threw him down by the table and then told him "that he had better stay there or he was going to get the shit kicked out of him" (R 92). The accused was not involved in this incident and did not see Hamilton again until the next day (R 92-93,97).

On 4 September 1950, the accused, with Stanley and Kuldanek, went to the tea house. They did not expect to see Hamilton there, but when they arrived at approximately 1:30 or 2:00 p.m., they found Hamilton sitting in the foyer drinking beer and whiskey. Hamilton was drunk. The accused went into room No. 3 (Pros Ex 2), ordered two beers, changed into a kimono and played his guitar. Kuldanek departed with Hamilton, but left his rifle, saying he would be back later to get it. Stanley remained with the accused for awhile, then went into another room with his girl. Around 5:30 or 6:00 p.m., Hamilton and Kuldanek returned and

entered room No. 3 at which time nothing was said. When they left the room, accused went to the toilet and, upon his return, found Hamilton, Kuldanek and Stanley all in the room. The accused overheard Hamilton tell Kuldanek, "If that bastard Davis starts anything this is it." The accused asked what was the scoop? What did he mean? Kuldanek said, "If you kick anybody's ass you are going to kick mine, too." Hamilton then started to get out of his chair. He raised his arm, and accused, thinking Hamilton was going to pull a knife, swung at his arm with the beer bottle. Accused then pulled the bayonet and chased Hamilton out of the house down an alley. Hamilton turned around and grabbed the accused who did not remember the ensuing fight. Accused remembered standing above Hamilton who said, "Davis, I am hurt bad." Accused said, "Let me help you into the house and we will get you fixed up." Then somebody said, "The MP's are coming," and accused ran back, got into his clothes and went to the next house. At no time did accused intend to kill Hamilton (R 93-95).

Upon cross-examination, the accused admitted that when he first arrived at the tea house on 4 September 1950, Hamilton did not speak to him or threaten him and that accused was not then afraid of him (R 98). When Hamilton and Kuldanek returned and went in to awaken Stanley, accused armed himself with the knife. Hamilton was drunk and the accused was not "taking any chances. He threatened me the night before" (R 99). The accused further admitted that although he thought that he was in danger of great bodily harm when Hamilton started to get out of his chair, he could have left the room, but that he had no intention of leaving that place if any trouble started. He was going to stay there and fight, if necessary (R 101,102). When the accused started stabbing at Hamilton, the latter turned around and ran, chased by the accused with the bayonet in his hand. The accused did not know if Hamilton had a knife, but he was scared. He did not remember the stabbing but recalled standing over Hamilton in the alley with a bloody bayonet in his hand, which he later washed off in the house (R 103-105).

The accused stated that "in a certain way" he was afraid of drunken men, because "his step-mother used to bring drunk men home to go to bed with her and I used to fight them all over the place, and I used to get my ass kicked all over the place. I know that a drunk person is a lot stronger and meaner than a sober person" (R 107).

4. Discussion.

The accused was charged with and found guilty of the premeditated murder of Winston A. Hamilton in violation of Article of War 92. The specification in the instant case follows exactly the form given in the Manual for Courts-Martial (MCM, 1949, p.322, spec. No. 81).

"Murder is the unlawful killing of a human being with malice aforethought" (MCM, 1949, par. 179a, p.230).

"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 the life of anyone. 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.

"Malice aforethought * * 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 * *." (MCM, 1949, par. 179a, p.231; and see Commonwealth v. Webster, 5 Cush. 295, 52 Am. Dec. 711).

"Malice may be presumed whenever a homicide is caused by the use of a deadly weapon in a manner likely to result in death" (MCM, 1949, par. 125a, p.151).

A deadly weapon is anything with which death may be easily and readily produced (Acers v. United States, 164 U.S. 388,391 (1896)).

"Murder does not require premeditation, but if premeditated it is a more serious offense and may be punished by death. A murder is not premeditated unless the thought of taking life was consciously conceived and the act or omission by which it was taken was intended. Premeditated murder is murder committed after the formation of a specific intention to kill someone and consideration of the act intended. Premeditation imports substantial, although brief, deliberation or design" (MCM, 1949, par. 179a, p.231).

"Strictly speaking, 'deliberately' does not mean brooded over, considered, reflected upon a week, a day, or even an hour; but means an intent to kill, simply, executed in furtherance of a formed design to gratify a feeling for revenge, or for the accomplishment of some unlawful act." (Wharton, Criminal Law, 12th Ed., 1932, sec. 420, p.631).

"Premeditation and deliberation, as an element of murder, consist in the exercise of the judgment in weighing and considering and forming and determining the intent or design to kill. In this connection the word 'premeditation' means simply entertainment by the mind of an intent or design to kill." (Wharton, Criminal Law, supra, p.634).

"* * /Premeditation/ involves a prior intention to do the act in question. It is not necessary, however, that this intention should have been conceived for any particular period of time. It is as much premeditation if it entered into the mind of the guilty agent a moment before the act, as if it entered ten years." (Wharton, Criminal Law, supra, sec. 507, p. 737; and see Bostic v. United States, 94 F2d 636,638 (CA DC 1937), and cases cited).

The elements of proof of the offense of premeditated murder are as follows:

"Proof. -- (a) That the accused unlawfully killed a certain person named or described by certain means, as alleged (requiring proof that the alleged victim is dead, that his death resulted from an injury received by him, that such injury resulted from an act of the accused, and that the death occurred within a year and a day of such act); (b) that such killing was with malice aforethought; and if alleged, (c) that the killing was premeditated." (MCM, 1949, par. 179a, p.232).

The evidence, both of the prosecution and the defense, clearly establishes that on 4 September 1950 in Gotemba, Japan, the accused stabbed Winston A. Hamilton with a bayonet and that, as a result of such stabbing, Hamilton died a few minutes thereafter. The only questions requiring discussion or comment by the Board of Review are (1) the sufficiency of the evidence to establish the elements of malice aforethought and premeditation and (2) the contention of the accused that the killing was done in self-defense.

There is no doubt in the minds of the Board that the evidence of the circumstances preceding the killing and the judicial admissions of the accused establish both premeditation and malice aforethought. The accused armed himself with a bayonet prior to any alleged provoking incident with the deceased on 4 September 1950, and in his sworn statement to the CID agents 6 September 1950, which was received in evidence and conceded by the defense to be a "voluntary statement freely given by the accused," he admitted that he told Kuldanek "* * if Hamilton had a knife and started any trouble that we would both get cut up, as I had a knife also" and that shortly thereafter "Hamilton asked me what I had told Kuldanek and I told him he knew what I had said." No reference was made in accused's testimony during the trial to these admissions, and we think this omission is illuminating and bears upon the question of accused's intent and design. The deceased was unarmed. The accused does not claim otherwise, although he testified that he did not know whether deceased had a knife. The evidence is uncontradicted that accused initiated the assault by striking at deceased with a beer bottle as the latter started

to arise from his chair; that accused immediately pulled the bayonet from his kimono and started stabbing at deceased; that deceased at this time sustained a cut over his left eye; that deceased immediately turned and ran; that accused was undeterred in his pursuit even by the intervention of Stanley who received a cut in his left elbow as a result thereof; and that accused pursued the deceased to the final fatal encounter. Shortly after the stabbing, the accused spontaneously declared, "I got him." The autopsy performed upon the deceased revealed the cause of death to be a laceration of the pulmonary vein due to a stab wound, left chest; it also revealed four other puncture wounds of the chest, a puncture wound of the left arm and compound fracture of the left humerus, a puncture wound in the left flank, a puncture wound above the left eye with a chip fracture of the supra-orbital ridge, and several other shallow puncture wounds about the face.

From such evidence the conclusion is irresistible that the accused, resentful of his experience of the preceding evening, formed an intent to kill the deceased. There was sufficient time, in the opinion of the Board, for the accused to deliberate upon the intended act (Cf. Bostic v. United States, supra, at p.639). Accused's initial attack, aggressive pursuit and vicious final attack upon the deceased, culminating in his death, manifest the successful accomplishment of accused's design. His spontaneous declaration, "I got him," made shortly thereafter, serves only to establish more strongly the existence of accused's consciously conceived intent to kill.

The accused's assertions that his "mind went blank" and that he did not remember stabbing the deceased can be afforded little credence in view of his statements to Stanley, "I am sorry I cut you. I need some money to get out of here" and "I got him," together with his precipitous flight into hiding prior to the arrival of the military police.

Furthermore, there is nothing in the record to show provocation in any degree approaching that regarded by the law as adequate to reduce the seriousness of the crime from murder to voluntary manslaughter.

> "Voluntary manslaughter is homicide caused by an act likely to result in death, intentionally committed in the heat of sudden passion brought about by provocation. The law recognizes the fact that a man may be provoked to such an extent that in the heat of sudden passion, caused by provocation, and not by malice, he may strike a fatal blow before he has had time to control himself, and therefore does not in such case punish him as severely as if the killing was done with malice aforethought. The provocation must be such as the law deems adequate to excite uncontrollable passion in the mind of a reasonable man, and the act of killing must be committed under and because of the passion. The provocation must not be sought or induced as an excuse for

> killing or doing harm. If sufficient cooling time elapses between the provocation and the blow, the killing is murder, even if the passion persists." (MCM, 1949, par. 180a, p.233).

Certainly, whatever provocation may have existed occurred approximately twenty-four hours prior to the stabbing and the killing can not now be said to have been committed in the heat of sudden passion (Cf. Andersen v. United States, 170 U.S. 481,511 (1898)).

Finally, the posture of the defense was that the killing was excusable on the ground that it was done in self-defense. It was contended by the defense that the accused chased the deceased from the house as a matter of necessity; that if the accused saw the deceased leaving, "that wasn't sufficient;" that accused "had to make sure that Hamilton left the immediate vicinity, otherwise he was in danger."

> "To excuse a killing on the ground of self-defense upon a sudden affray, the killing must have been believed on reasonable grounds to be necessary to save his life * * or to prevent great bodily harm to himself * *. The danger must be believed on reasonable grounds to be imminent, and no necessity will exist until the person, if not in his own house, has retreated as far as he safely can. To avail himself of the right of self-defense, the person doing the killing must not have been the aggressor * *." (MCM, 1949, par. 179a, p.230).

Mr. Chief Justice Fuller, speaking for a unanimous court, in Andersen v. United States, supra, at page 508, said:

> "It is true that a homicide committed in actual defense of life or limb is excusable if it appear that the slayer was acting under a reasonable belief that he was in imminent danger of death or great bodily harm from the deceased, and that his act in causing death was necessary in order to avoid the death or great bodily harm which was apparently imminent. But where there is manifestly no adequate or reasonable ground for such belief, or the slayer brings on the difficulty for the purpose of killing the deceased, or violation of law on his part is the reason of his expectation of an attack, the plea of self-defense cannot avail. Wallace v. United States, 162 U.S. 466; Allen v. United States, 164 U.S. 492; Addington v. United States, 165 U.S. 184." (Underscoring supplied; see also Josey v. United States, 135 F2d 809,810 (CA DC, 1943)).

In the instant case the accused's testimony demonstrates that he cannot avail himself of the doctrine of self-defense. As the accused told his story he was not repelling violence. Neither the alleged provocation of the preceding evening (Cf. Andersen v. United States, supra, at

p. 511), nor the alleged utterance by the deceased when accused returned to the room constitutes legal justification for his act in initiating the fatal assault upon the deceased. On the contrary, accused's account of his previous difficulty with the deceased, even when considered in the light most favorable to the accused, only serves to belie his statement that he did not at any time intend to kill the deceased. He was not threatened with an uplifted weapon (Memphis Street Railway Company et al. v. Townes, 281 F. 127 (CCA 6, 1922)) or otherwise the subject of an assault. If he was in fear of great bodily harm, it was his duty to retreat as far as he safely could (MCM, 1949, par. 179a, supra; CM 314876, Rollinson, 64 BR 233,240; CM 322487, Dinkins, 71 BR 185,193; CM 329922, Brown, 78 BR 201,204; CM 339357, Wright, 5 BR-JC 49,68). While failure to retreat is not a categorical proof of guilt (Brown v. United States, 256 U.S. 335,343 (1921); Josey v. United States, supra, at p.810), accused's aggressive pursuit of the deceased negatives any contention that the killing was done in self-defense (Cf Fook v. United States, 164 F2d 716,717 (CA DC 1947), cert. den., 333 U.S. 838). Accused admitted that he could have turned and walked out of the room at the time of the deceased's alleged provoking statement. It was also admitted that, as accused pursued the deceased, he was not in mental fear of his life or afraid that he was going to suffer great bodily harm -- he claimed that he "was just scared." A bare fear of possible fatal injury or other bodily harm, unaccompanied with any overt act indicative of an intention to inflict such injury, does not warrant one in killing another by way of prevention; there must be an actual danger at the time (Beard v. United States, 158 U.S. 550,562 (1895), quoting with approval East's Pleas of the Crown, p.271). How much more unreasonable and unjustified was accused's conduct in pursuing his alleged provocator who was fleeing from the scene of battle. We conclude that the accused was, from the beginning, the aggressor. The evidence establishes that the accused had no reasonable ground to believe that danger was imminent or that the killing was necessary to save his life or to prevent great bodily harm to himself. Clearly, there was no legal justification or excuse for the act and the evidence unquestionably compels the conclusion of the accused's legal and moral guilt of premeditated murder perpetrated with malice aforethought (CM 336706, Pomada, 3 BR-JC 209,215; CM 339357, Wright, 5 BR-JC 49,68; CM 342409, Woodall, 13 Sep 1950; CM 344018, Kitchens, 8 Jan 1951).

5. Consideration has been given to the brief of Mr. Thomas D. Aitken, as attorney for the accused, which was forwarded with the record of trial, and to a copy of a letter from Mr. J. L. Davis, the accused's stepfather, addressed to Senator Carl Hayden of Arizona.

6. The accused is 20 years of age and is single. He has an unfortunate background. It appears that while his mother was married, he was fathered by another man whom he has never known. The mother left

him when he was very young. He spent some time in an orphanage and thereafter was brought up by his mother's husband, to whom he refers as his stepfather, and a series of stepmothers. He has an antipathy to drunks and a feeling of danger when in their company because of beatings he had received in his youth from drunken men who associated with his stepmother in his stepfather's absence. Due to the various migrations of the family, he was unable to remain in school any length of time and has not gone beyond the sixth grade. However, he appears to be a well-spoken, alert, intelligent individual with an aptitude for languages. He enlisted in the Army in March 1945 when he was fifteen years old, but after two months and two days he was given a minority discharge although he liked the Army and was sorry to leave it. After his discharge, he made an unsuccessful attempt to locate his family in Arizona. He then hitchhiked to California where he was picked up as a vagrant and held for deportation to Arizona. He spent fourteen months in the Preston Reformatory in California where he was badly treated after which time he was "deported" to Arizona. After working several months as a "cow puncher" in Arizona, he reenlisted in the Army 2 August 1948 for three years. He claims that, upon the advice of the recruiting sergeant, he did not mention his confinement in the reformatory. He has been convicted twice by summary courts-martial for absence from bed check and breach of restriction. In each case he was sentenced to a forfeiture. His character and efficiency ratings in the Army prior to the commission of the present offense are "excellent."

A Board of Medical Officers, convened 1 December 1950 subsequent to the trial of the accused, determined that the accused was mentally responsible at the time of the offense and was mentally capable at the time of the trial.

In view of the accused's youth and background and all the circumstances of the case, the reviewing authority has recommended that the sentence be commuted to dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for the term of the accused's natural life.

7. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. 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 and to warrant confirmation thereof. A sentence to death or imprisonment for life is mandatory upon conviction of premeditated murder in violation of Article of War 92.

Reginald C. Miller, J.A.G.C.

William C. Fitzhugh, J.A.G.C.

Arthur C. Ireland, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGU CM 344372

UNITED STATES	)	YOKOHAMA COMMAND
	)	
v.	)	Trial by G.C.M., convened
	)	at Yokohama, Honshu, Japan,
Private JIMMIE L. DAVIS, RA	)	1, 2 November 1950. Death.
19245224, Headquarters Special	)	
Troops, Yokohama Command, APO	)	
503	)	

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Opinion of the Judicial Council
Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

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1. Pursuant to Article of War 50d(1) the record of trial and the opinion of the Board of Review in the case of the soldier named above have been submitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon trial by general court-martial the accused pleaded not guilty to and was found guilty of the premeditated murder of Private Winston A. Hamilton by stabbing him with a bayonet, at Gotemba, Honshu, Japan, on or about 4 September 1950, in violation of Article of War 92. Evidence of two previous convictions by summary court-martial was introduced. He was sentenced to be put to death in such manner as proper authority may direct, all members of the court present at the time the vote was taken concurring. The reviewing authority approved the sentence, but in view of the accused's youth and the circumstances of the case, recommended that the sentence be commuted to dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for life, and forwarded the record of trial for action under Article of War 48.

3. Evidence

The evidence, which is reviewed at length by the Board of Review in its opinion, is substantially as follows.

a. For the prosecution.

On 3 September 1950 the accused, Corporal Frederick B. Stanley, Private Winston A. Hamilton (the deceased) and others were at a "tea house" in Gotemba, Honshu, Japan. During the evening Hamilton choked and threatened one of the Japanese girls with a knife. When the "Papa-san" ran out to call the military police, Hamilton ran after him, forced him back into the house

and threatened him with the knife. Later that evening, Hamilton, who was larger and huskier than the accused and who was intoxicated at the time, threatened the accused with the knife.

Around nnon on 4 September the accused, together with Corporal Stanley and Private First Class Stephen F. Kuldanek, proceeded from the camp area to the "tea house." The accused was unarmed, Stanley had a carbine bayonet attached to his belt, and Kuldanek carried an M-1 rifle and carbine bayonet. Hamilton was sitting in the entrance of the "tea house" drinking whiskey and beer when they arrived. They were surprised to see him but no argument ensued between Hamilton and the accused at that time. The accused and Stanley entered the house, undressed and donned kimonos, leaving their clothes in what for convenience will be called the living room. Stanley's bayonet was still attached to his belt. Shortly thereafter, Hamilton and Kuldanek proceeded from the house to a hotel, where they drank for four or five hours. The accused and Stanley remained at the "tea house" drinking beer, Stanley later retiring to a bedroom with a girl.

At about 4:00 or 5:00 p.m. Hamilton and Kuldanek, both drunk, returned to the house to get Kuldanek's rifle. They proceeded to one of the bedrooms, where they awakened Stanley and invited him to have a drink. They then ordered beer in the living room, to which the accused later came. When Stanley entered the living room, Hamilton and Kuldanek were seated near a table talking, and the accused, dressed in a kimono, was standing to one side. Hamilton said to Kuldanek, "If Davis [the accused] fucks around tonight this is going to be it." Kuldanek remarked, "By God, if there's going to be any trouble, you are going to whip my ass too" or words to that effect. The accused asked, "What's up? What's the scoop?" or similar words. When Hamilton started to arise, the accused swung at him with a beer bottle, striking a chair. Hamilton made no motion to reach for anything. The accused, who had a bayonet in his hand, lunged at Hamilton, cutting him over the left eye. The accused chased Hamilton around the table and the latter stopped behind Stanley, who was stabbed in the arm by the accused when he tried to intervene. Hamilton then ran out of the house into an alley, pursued closely by the accused, who had a "knife" in his hand. Stanley tried to hold the accused back but he pulled away. The accused and Hamilton ran down the alley and when Hamilton tripped and fell over a wooden tub, the accused jumped on top of him and during the melee that followed the accused stabbed Hamilton three times in the chest. At no time during the altercation did Kuldanek or Stanley see Hamilton with a weapon. The testimony of the witness Kieko Hirayama was vague and contradictory on this point. At one place in her testimony she stated that she did not know whether or not Hamilton had anything in his hand. On another occasion, referring to the struggle in the alley, she testified "the soldier underneath had one, and then [accused] had one." Upon further interrogation she stated that when Hamilton was being pursued up the alley she observed only one knife and that was in the hands of accused.

About five minutes later the accused, with a bayonet in his hand, returned to the living room, where he told Stanley, "I am sorry I cut you. I need some money to get out of here" and "I got him." Kuldanek, who had fled when the trouble started in the "tea house," returned and found

Hamilton lying in the alley, bleeding profusely. Shortly after the prompt arrival of the military police Hamilton died.

The accused was arrested about midnight, 4 September 1950, in a Japanese house approximately one-half block from the scene of the stabbing. As a result of information given by him the bayonet was found in a basket in the house where he was hiding.

The accused, in a voluntary written statement to a Criminal Investigation Detachment Agent, admitted substantially the facts as set forth above, except for the actual stabbing of Hamilton, stating "I do not remember anything during the time I was after Hamilton, I must have just gone crazy." However, he stated he was not drunk and recalled that "I was after him with the bayonet. Hamilton ran out of the house and I after him." He stated that he thought Hamilton was armed and he started stabbing at Hamilton with the bayonet when he thought the latter was reaching for a knife. He admitted washing blood from the bayonet and secreting it in another house. He also admitted that he intended to do bodily harm to Hamilton if he bothered him in any way because Hamilton had threatened him the night before.

The autopsy performed upon the deceased Hamilton on 6 September 1950 revealed the cause of death to be a laceration of the pulmonary vein due to a stab wound in the left chest. It also revealed four other puncture wounds in the chest, a compound fracture of the left humerus, puncture wounds in the left arm, in the left flank and above the left eye, with a chip fracture of the supra-orbital ridge, and several other shallow puncture wounds about the face.

b. For the defense.

The accused, upon being advised of his rights, elected to testify under oath. After testifying to the details of an unfortunate background he stated that he had known Hamilton since May 1949 and had never had any trouble with him until the evening of 3 September 1950 in the "tea house" in Gotemba. On that occasion Hamilton, who was "pretty drunk," pulled out a carbine bayonet, grabbed the accused by the shoulder and said, "Now, Davis, you son-of-a-bitch, I have got you. I am going to cut your throat." When the accused asked what it was all about, Hamilton replied, "You know what it is all about." The accused said, "You haven't got anything against me. We have been friends all along." The accused suggested that they have a beer and "talked him out of it." Hamilton put his bayonet away and they shook hands. The accused was afraid of Hamilton, who was drunk. On the same evening Hamilton choked a girl and pointed a bayonet at her throat because "she wouldn't go down on him." He also threatened and assaulted the "papa-san" who went out to get the military police. The accused was not involved in either of these incidents.

At about 1:30 or 2:00 p.m. on 4 September 1950 the accused, Stanley and Kuldanek went to the "tea house." Hamilton was sitting in the foyer drinking whiskey and beer and was drunk. Hamilton did not speak to the accused or threaten him and the accused was not then afraid of him. The accused entered the house, ordered two beers, changed into a kimono, and began playing his guitar. Hamilton and Kuldanek left the house but returned and entered the living room at about 5:30 or 6:00 p.m. When Hamilton and Kuldanek went in to awaken Stanley, the accused armed himself with a "knife." Hamilton was drunk and the accused was not "taking any chances. He threatened me the night before." The accused went to the toilet and upon his return found Hamilton, Kuldanek and Stanley all in the room. The accused overheard Hamilton tell Kuldanek, "If that bastard Davis starts anything this is it." The accused asked "what was the scoop?" What did he mean? Kuldanek said, "If you kick anybody's ass you are going to kick mine, too." When Hamilton started to get out of his chair he raised his arm, and the accused, thinking Hamilton was going to pull a knife and believing himself in danger of great bodily harm, swung at his arm with the beer bottle. The accused then pulled the bayonet and chased Hamilton out of the house "to make sure he did leave."

When they reached a narrow place in the alley, Hamilton turned around and grabbed the accused and they "went down." The accused did not remember the ensuing fight. However, he remembered standing over Hamilton, who stated to him he was "bad hurt." The accused said, "Let me help you into the house and we will get you fixed up." Then somebody said, "The MP's are coming," and the accused ran back, got into his clothes and went to the next house. At no time did he intend to kill Hamilton or even to see him. The accused admitted that he could have left the room when the trouble started, but he had no intention of leaving the place if any trouble started. He was going to stay there and fight if necessary. He did not know whether Hamilton had a knife, but he was scared. He knew "that a drunk person is a lot stronger and meaner than a sober person."

4. Discussion.

The accused was charged with and found guilty of premeditated murder in violation of Article of War 92.

Murder is the unlawful killing of a human being with malice aforethought (MCM 1949, par 179a, p 230). Malice may consist of an intention to cause death or grievous bodily harm (Ibid, par 179a, p 231), and may be presumed when a homicide is caused by the use of a deadly weapon in a manner likely to result in death (Ibid, par 125a, p 151). A deadly weapon is anything with which death may be easily and readily produced (Acers v. United States (1896), 164 U.S. 388, 391).

The evidence establishes that on 4 September 1950 the accused, having previously armed himself with a bayonet, attacked Private Winston A. Hamilton with the bayonet in a Japanese "tea house" in Gotemba, Japan. Hamilton was unarmed and attempted to elude the accused by flight. The accused, however, pursued Hamilton out of the house and down an alley, where the latter tripped, or turned around and grabbed at the accused, and fell. In the ensuing struggle the accused inflicted numerous stab wounds on the body of Hamilton. As a result of one of the wounds, in the left chest, Hamilton died a short time thereafter. In our opinion, the accused's savage and repeated use of the bayonet clearly shows malice.

Murder is premeditated when the thought of taking life was consciously conceived, a specific intention to kill someone formed and the intended act considered for a substantial period, however brief (MCM 1949, par 179a, p 231; CM 337089, Aikins and Seevers, 5 BR-JC 331, 375, 390, and authorities therein cited; CM 339254, Barnes et al, BR-JC, July 1950).

The evidence shows that the accused, apparently angered at Hamilton's threat of the preceding evening but without further provocation, armed himself with a bayonet on 4 September 1950. He initiated the attack on Hamilton and pursued him out of the house into an alley, although Stanley sought to restrain him. When Hamilton fell, the accused jumped upon him and remained upon him after a scuffle. He then stabbed Hamilton about nine times with the bayonet. Shortly thereafter he returned to the house, where he spontaneously declared, "I got him." There is no reasonable doubt from this evidence that the murder was the successful accomplishment of a deliberate and preconceived design to kill. We concur with the Board of Review in its conclusion that the murder was premeditated.

We also concur with the Board of Review that the record is devoid of any evidence indicating provocation adequate to reduce the crime from murder to manslaughter. The only provocation shown by the evidence occurred approximately twenty-four hours prior to the homicide, which thus can not be said to have been committed in the heat of sudden passion (Cf Andersen v. United States (1898), 170 U.S. 481, 511).

With respect to the issue of self defense, the evidence, including the accused's own testimony, establishes that he had no reasonable ground to believe that the killing was necessary to save his life or to prevent great bodily harm to himself or that the claimed danger was imminent. He admitted that he could have turned and walked out of the room when the claimed danger threatened, adding that he had no intention of leaving if any trouble started, since he was going to stay there and fight if necessary. We concur with the Board of Review in its conclusion that the record clearly fails to show that the homicide was excusable on the ground of self defense (MCM 1949, par 179a, p 230; cf Andersen v. United States, supra).

We conclude that the accused was fully and convincingly proven guilty of the premeditated murder of Private Winston A. Hamilton (CM 336706, Pomada, 3 BR-JC 209, 215; CM 339357, Wright, 5 BR-JC 49, 68).

5. Careful consideration has been given to the brief submitted on behalf of the accused by his attorney, Mr. Thomas D. Aitken, and forwarded with the record of trial.

6. The accused is 20 years of age and is single. He enlisted in the Army in March 1945 at the age of 15 years, but after two months and two days received a minority discharge. He reenlisted on 2 August 1948 at Flagstaff, Arizona, for three years.

7. The court was legally constituted and had jurisdiction of the accused and the offense alleged. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Judicial Council is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. In view of the accused's youth and the circumstances of the case, the reviewing authority has recommended that the sentence be commuted to dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for the term of the accused's natural life. We concur in this recommendation particularly in view of the deceased's unwarranted and unprovoked assault on accused on 3 September 1950 and his veiled threat directed towards the accused on 4 September just prior to the initial attack by accused. While this provocation and the resultant state of mind are wholly insufficient to warrant a reduction of the crime from murder to a lesser offense these matters do merit consideration in connection with the sentence. A sentence to death or imprisonment for life is mandatory upon conviction of premeditated murder in violation of Article of War 92.

Robert W. Brown
Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr.
J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

JAGU CM 344372 1st Ind.

JAGO, Department of the Army, Washington 25, D. C. MAR 26 1951

TO: The Secretary of the Army

1. Herewith transmitted for the action of the President are the record of trial, the opinion of the Board of Review and the opinion of the Judicial Council in the case of Private Jimmie L. Davis, RA 19245224, Headquarters Special Troops, Yokohama Command, APO 503.

2. Upon trial by general court-martial this soldier was found guilty of the premeditated murder of Private Winston A. Hamilton at Gotemba, Honshu, Japan, on or about 4 September 1950, in violation of Article of War 92. He was sentenced to be put to death in such manner as proper authority may direct, all members of the court present at the time the vote was taken concurring in the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48, with the recommendation that, in view of the accused's youth and the circumstances of the case, the sentence be commuted to dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for the term of the accused's natural life.

3. I concur in the opinion of the Board of Review and the Judicial Council that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. The Judicial Council and I recommend that the sentence be confirmed, but in view of all the circumstances in the case, including the deceased's unprovoked assault upon the accused on the preceding day, the Judicial Council and I further recommend that the sentence be commuted to dishonorable discharge, forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence, and confinement at hard labor for the term of the accused's natural life, and that the sentence as thus commuted be carried into execution. I also recommend that an appropriate United States penitentiary be designated as the place of confinement.

4. Consideration has been given to letters from Mr. J. L. Davis, the accused's stepfather, addressed to the President and Senator Carl Hayden and to a brief submitted on behalf of the accused by his attorney, Mr. Thomas D. Aitken.

5. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action

designed to carry into effect the recommendations hereinabove made, should such recommendations meet with your approval.

E. M. Brannon

E. M. BRANNON
Major General, USA
The Judge Advocate General

5 Incls
1 Record of trial
2 Opinion B/R
3 Opinion Judicial Council
4 Draft ltr to Pres sig S/A
5 Form of Action

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D.C.

FEB 14 1951

JAGH CM 344374

UNITED STATES	)	EUROPEAN COMMAND
v.	)	Trial by G.C.M., convened at Heidelberg, Germany, 30-31 October 1950. Dismissal, total forfeitures after promulgation, and confinement for one and one-half (1½) years.
Lieutenant Colonel JOHN H. HANSEN (0353737), Headquarters 7806 Station Complement Unit.	)	

OPINION of the BOARD OF REVIEW
MILLER, FITZHUGH, and IRELAND
Officers of The Judge Advocate General's Corps

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 and the Judicial Council.

2. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Lieutenant Colonel John H. Hansen, Headquarters, 7806 Station Complement Unit, did, at Wurzburg, Germany, on or about 12 August 1950, with intent to deceive Corporal Loy C. Duncan and Private Lloyd G. Eidsor, military policemen in the execution of their military duties, officially state to the said Corporal Duncan and Private Eidsor that "I'm Lt. Colonel Hansen and it is all right, boys, as I just came up to have Mrs. Wooten take something down right away", or words to that effect, which statement was known by the said Lieutenant Colonel Hansen to be untrue in that he did not then and there intend to employ the secretarial services of the said Mrs. Wooten.

Specification 2: In that Lieutenant Colonel John H. Hansen, Headquarters, 7806 Station Complement Unit, was, at Wurzburg, Germany, on or about 12 August 1950, drunk in uniform in a public place, to wit: Carnegie Hall, Wurzburg Military Post, Non-Commissioned Officers' Club.

Specification 3: In that Lieutenant Colonel John H. Hansen, Headquarters, 7806 Station Complement Unit, did, at Wurzburg, Germany, on or about 12 August 1950, wrongfully and indecently commit an assault upon Elsie Wooten, wife of Sergeant Arthur W. Wooten, by threatening her by saying to her, "that is the last time you will ever scream", or words to that effect; by threatening her with the loss of her job and transfer of her husband to the Infantry if she would not give in to him; by forcing her down on a couch and on a kitchen table in her home; by attempting to pull her clothing off; by chasing her through her home; by exposing his penis to her view, and by other lascivious acts, with intent to gratify his lust.

Specification 4: In that Lieutenant Colonel John H. Hansen, Headquarters, 7806 Station Complement Unit, did, at Wurzburg, Germany, on or about 12 August 1950, wrongfully and indecently commit an assault upon Hella Goepfert by embracing and fondling her person; by placing his hand upon her breast and belly; and by threatening her by saying to her, "If you are not at my will, I shall do so", or words to that effect, thereupon showing her his crossed hands, with intent to gratify his lust.

Specification 5: In that Lieutenant Colonel John H. Hansen, Headquarters, 7806 Station Complement Unit, did, at Wurzburg, Germany, on or about 12 August 1950, wrongfully and unlawfully by trick and deceit enter the dwelling house of Sergeant Wooten.

He pleaded not guilty to the Charge and its Specifications. He was found guilty of Specifications 1, 2, 3 and 5, guilty of Specification 4 except the words "and by threatening her by saying to her, 'If you are not at my will, I shall do so', or words to that effect, thereupon showing her his crossed hands"; of the excepted words, Not Guilty, and guilty of the Charge. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct for one and one-half years. The reviewing authority approved only so much of the findings of guilty of Specification 3 of the Charge as involves findings that the accused did at the place and time alleged wrongfully and indecently commit an assault upon Elsie Wooten by threatening her by saying to her, "that is the last time you will ever scream," or words to that effect; by threatening her with the loss of her job and transfer of her husband to the Infantry if she would not give in to him; by forcing her down on a couch and on a kitchen table in her home; by

chasing her through her home; by exposing his penis to her view, and by other lascivious acts, with intent to gratify his lust in violation of Article of War 96. The reviewing authority also approved only so much of the findings of guilty of Specification 4 of the Charge as involves findings that the accused did at the place and time alleged wrongfully and indecently commit an assault upon Hella Goepfert by embracing and fondling her person; by placing his hand upon her breast with intent to gratify his lust in violation of Article of War 96, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. Evidence.

a. For the prosecution.

The accused, Lieutenant Colonel John H. Hansen, was a member of 7806 Station Complement Unit, Wurzburg, Germany. From January 1950 to near the end of July 1950 he was Post Adjutant and after that he was the Post Executive Officer (R 155).

On 12 August 1950 at about 0130 hours, the accused appeared at "Carnegie Hall," the noncommissioned officers' club at Wurzburg Military Post (R 12). The club was officially closed at 0100, a part of the lights had been turned off, and the front door had been locked (R 12,14, 17). The accused entered by a side door off a "rear porch" and "adjacent to the bar" (R 16). He found Sergeant Robert M. O'Malley, 14th Military Police, CID, and Sergeant and Mrs. Robert Crawshaw at a table playing cards (R 12). The accused approached the three at the table and asked what they were doing there (R 12). Sergeant O'Malley told the accused they were "finishing a little card game prior to going home" (R 12). The accused then checked on the automobiles parked in front of the club (R 12,13). The accused wanted to know if therewas any "shacking up" going on downstairs and on being told there was none, said, "Well, Sergeant, I know there have been people shacking up down there and they will have to stop it" (R 13). The accused went on to say the commanding officer did not like the late hours being kept by officersand enlisted men and that "a new regime was coming into the post" (R 13). The accused told the enlisted men to be seated and continue their game and then for a few minutes he talked about enlisted men and his own previous service as such (R 13,15). He then asked Mrs. Crawshaw to show him the way out, which she did, letting him out through the front door (R 13,17). Sergeant O'Malley testified that in his opinion the accused was drunk, but not enough to need assistance (R 14,15). O'Malley thought the accused "made incoherent remarks in regard to his previous military service as an enlisted man" (R 15). The accused's speech was "slurred slightly" (R 15). The uniform of the accused "appeared to be in excellent order other than his hat which was tilted on the back of his head" (R 13).

Mrs. Elsie Wooten, was employed as a civilian secretary to the accused at Wurzburg Military Post (R 32,33). Her husband, Sergeant Arthur

Wooten, was at the time of this incident on reenlistment leave in the United States and Mrs. Wooten was living alone with her three-year old daughter in the family apartment (R 33,34). On the night of 11 August 1950, Mrs. Wooten retired about 10 o'clock and slept until she was awakened by the doorbell ringing (R 35). The bell rang for some ten minutes, but instead of answering the door, she called the military police and asked them to investigate (R 35). The military police desk sergeant said he would send someone and in a few minutes he called back and asked if the doorbell was still ringing (R 35). Mrs. Wooten stated, "I told him no, that I had heard someone go down the stairs at that time, and * * he says, 'Continue to talk to me on the telephone until the M.P.'s arrive', and I did this." (R 35). She saw a motor vehicle drive up and when the doorbell rang again shortly after, she went to the door thinking it was the military police (R 35,36). When she opened the door she found the accused, standing at the door and the military police just coming up the stairway (R 36). The accused told the military police, "I am Colonel Hansen. I have something very important for Mrs. Wooten to take down and it can't wait until morning" (R 36). He also said "Everything is all right, You may go" (R 36). One of the military policemen asked Mrs. Wooten, "Is everything all right?", to which she replied, "Yes," whereupon the military policemen left the house (R 36).

Corporal Loy G. Duncan, one of the military policemen, was of the opinion the accused was drunk because he was "unsteady on his feet" and "over-emphatic" in his speech (R 20). The other military policeman, Private Lloyd G. Eidsor, "K" Company, 18th Infantry Regiment, thought the accused was perhaps not drunk but "under the influence of liquor" and he characterized the speech of the accused as "slow and slurred" (R 28,31). The accused leaned against the wall for support, and "couldn't stand up" (R 28,31). Private Eidsor quoted the accused as saying, "Boys, I am Lt. Colonel Hansen, and I just came up here to have Mrs. Wooten take something down for me right away" and "It is all right" (R 27).

Mrs. Wooten was asked to tell the court "whether or not, had it not been for his [the accused's] information that he wanted some work done, * * you would have let him in your home at that hour" (R 39). Her answer was, "No, I would not have let him in" (R 39).

The accused entered the apartment and when Mrs. Wooten went to get her notebook, and pencil, he told her "Oh, you won't need that" (R 28,36). Mrs. Wooten asked "Why?" and the accused, who was standing very close behind her, put his arms around her and said "I want you" and proceeded to kiss her (R 36). Mrs. Wooten pulled away and said to the accused, "Oh, you are drunk. Go home" (R 36). The accused replied, "I am not drunk. I know what I am doing" (R 36).

Mrs. Wooten testified further as follows:

"* * I asked him why he came up there anyway and he said because he wanted to, so I went over and sat down on the couch and he sat

on the other end of the couch. I started to get up and he said 'That's all right. I am not going to bother you. I just want to stay a little while. I will go home after a little while', and then he said 'You had a very low efficiency report'. He said 'I can do a lot for you if you will do what I want'. He said that if I didn't do what he wanted, he said 'I will send your husband to the Infantry and break him down to Recruit, and separate you for good'. I asked him what he thought my husband would think when I told him he had been there and he said 'Oh, you won't tell your husband'. I said 'What will your wife think of your being down here?' He said 'She doesn't care. She goes where she wants to and I go where I want to'.

"Q. Did anything else happen while you were on the couch?
A. Then I asked him how he would feel if any man went into his home if he wasn't there. He said 'If that's what my wife wants, she can have all she wants. It doesn't matter with me', and then very suddenly he reached out and grabbed me and pushed me down on the couch and began trying to get into my clothes.

Q. What did he do exactly, Mrs. Wooten, when he was trying to get into your clothes?
A. He was pushing them back at the neck.

Q. And --
A. And I fought him off there and then he tried to pull me close up and he got his hands on my breast and then he put his hands over my private parts through my gown.

Q. Did you make any outcry there?
A. And I screamed and he told me to shut up and then when I screamed the next time he said 'If you scream again it will be the last time you ever scream', so I got away from him and I wanted to slip off of the couch on to the floor and get away from him, and I ran into the dining room around the table and he chased me around the table several times.

Q. Did he ever catch you?
A. No, and he went back in the living room and sat down and I sat in the chair across the room and he then repeated that, he says, 'I can do a lot for you in the office' if I would go out with him every five or six months, and that if I did not do what he wanted that I would lose my job and that he would break my husband down to a Recruit and send him to the Infantry. And I told him, I said, 'You are drunk. You don't know what you are doing.' He said

'I am not that drunk.' He said 'Give me some whiskey', and I told him that I did not have any whiskey, and he said 'Well, I want a drink'. I said 'I don't have anything to drink'. I said 'I will make you some coffee. Maybe you will come to your senses and know what you are doing and go home.' He said 'I don't want to go home and I know what I am doing'. I told him to stay there then and I would make him some coffee anyway. He said 'Don't you have anything else to drink?' I said 'No'. I said 'Do you want some coffee?' He said 'Yes', so I went to the kitchen and proceeded to make some coffee. I almost had it on the stove when I heard him laughing behind me and I said 'What is so funny?'. He said 'You are having such a hard time getting the top on the coffee pot', and then he grabbed me again and pushed me back over the kitchen table, and I began crying and he started rubbing my neck and I pulled away from him and ran into the dining room. He said 'I won't hurt you. I just want to rub your neck', and he followed me into the dining room and around the table several times and I ran out down the hall and he grabbed at my robe and fell in the hall. I went back to the living room and by this time the coffee had perked and I told him to go sit down that I would give him some coffee and I did that, and he drank a cup of coffee and I drank several cups. I was trying to pass away some time to figure out what I could do or how I could get out of the house and he had repeatedly warned me to keep quiet and after I drank the coffee I started out of the kitchen and tried to get to the door and he stopped me. Then I went back into the living room and he again repeated what he would do to my husband, that I wouldn't have a job, and that if I needed a job and wanted a job that I should do what he wanted, and about this time I heard my little girl cry out. I said 'I will have to see about my little girl'. He said 'All right. Go see about her but then come back' and I stayed in the bedroom thinking perhaps he would get tired and go home.

DC: Object to the thinking, for the reason --

Q. How long did you stay in the bedroom, Mrs. Wooten?
A. I would say ten or fifteen minutes, when I heard him come down the hall toward the bedroom. He said 'Where are you?', so I came out of the bedroom and --

Q. And how did you come back out of the bedroom when he called you?
A. The bedroom is very small and only had one door.

Q. And when you came out —
A. I went out of the bedroom and I again attempted to get out the door and he put his foot against the door and closed it and told me if anybody should come to the door I should tell them that everything is all right and for me to keep quiet. And he had me in the corner by the window and he held my hands and forced them down to touch his penis.

Q. Did he have his penis exposed?
A. Yes.

Q. And his clothing open or closed?
A. Open. I pulled away from him and ran into the dining room and I told him to go home. He said he wasn't ready to go home, that he wouldn't go until -- he said 'I won't go home until I get what I want'. After several minutes I looked out into the hall again, and he was standing at the end of the hall laughing, with his penis still exposed. I stepped back into the dining room and he said 'If you will kiss me good-night I will go home'. I told him no, that I would not and after several minutes I again looked out to see where he was and he was standing just outside the door, and when I looked out he grabbed me and locked his legs around mine and held my hands behind my back and forced my face up to his and kissed me and left a mark on my neck, and then he released me and he told me that he would get what he wanted eventually, that he wouldn't give up, that he always got what he wanted. Then he asked for a mirror.

COURT MEMBER: May I hear that again?
Thereupon the reporter read back as follows:

'Then he asked for a mirror'.

A. And I showed him the room where the mirror was and he said 'I think I got all mussed up'. He went in and straightened his clothes and his tie and brushed his hand over his hair, and he came back out and said that 'I won't give up. I will get what I want eventually. I always get what I want'.

Q. And did he leave then, Mrs. Wooten?
A. Yes.

Q. What time was that about when he left?
A. Approximately six o'clock.

Q. Had he been there all the time from about two o'clock until six o'clock?
A. Yes." (R 36,37,38,39)

She also stated that the accused said while he was holding her in the dining room doorway "'Did you ever notice how I watched you in the office?' I said 'No." He said 'Every time you come near my desk I want to reach out and grab you'." (R 48). He also told her, "You don't know what it is all about. I want to teach you. * * I can wind you up like a little rubber ball so that you bounce all the way across the room" (R 49). During the time the accused was in Mrs. Wooten's apartment, he did not drink any liquor, but only coffee (R 37,46,50). Mrs. Wooten thought he was completely sober when he left (R 192,193).

After the accused left Mrs. Wooten's apartment, she telephoned to the people next door and when Sergeant First Class Donald J. Spaeth answered the telephone, she told him to have his wife come over "right away" (R 39,52). The time was approximately 0600 (R 52). Mrs. Spaeth went to the Wooten apartment and found Mrs. Wooten crying, "all mussed up," and "in a terrible hysterical condition" (R 53). Sergeant Spaeth arrived about ten minutes after his wife and advised Mrs. Wooten to call the Post Provost Marshal, Major Gibson (R 54,55). He soon, thereafter, called Major Gibson and when the Provost Marshal arrived, took in shorthand, and later transcribed, Mrs. Wooten's statement of the occurrence (R 55).

After leaving Mrs. Wooten's apartment, the accused went back to the Wurzburg Military Post and appeared at the General Staff Building about 0600 hours (R 63). He encountered Frau Hella Goepfert, a charwoman, reporting for her first day of employment (R 64). The accused accosted her and when she told him she was employed, he said, "No, you have been sleeping here in this building" (R 64). She showed the accused her employee's pass after which he got out of his car and told her "to come along" (R 64). She said "I thought it was the right building and I went inside the building with Colonel Hansen" (R 64). The accused then "wanted to get me downstairs into the basement" (R 65). She said, "He pulled me towards him and kept me tight" (R 65) and "he touched me all over my body" (R 65). Asked specifically if the accused felt of her breasts, she said "Yes I assumed this was included, because he touched me all over my body" (R 65). She indicated by moving her hands from her shoulders down to her waistline (R 66). Asked if he touched her with his hands on her belly, she said "Well, not directly on my belly. He touched me all over my body" (R 65,66). He held her "maybe five to ten minutes. Five minutes" (R 66). She finally "clipped his chin" and she stated "at that time Colonel Hansen let go of me a little and I got away" (R 66). She said she told the accused she was married and had six children and that he too was apparently married but that "he told me to come along" (R 66).

b. <u>For the defense.</u>

A written stipulation of the testimony of the accused's wife was received in evidence as Defense Exhibit B (R 80), in which she stated that on 11 August 1950 accused had drunk a "double-double" martini at

their home shortly after 1730 hours; that from 1945 hours until about 2400 hours at the home of Major Eben Jones accused had drunk "whiskey-water high balls" in large quantities, "pouring them down with both hands as fast as he got them;" that at 0130 hours 12 August 1950 she accompanied accused to the Carnegie Hall Noncommissioned Officers' Club, remaining in the car while he was inside; that he left her at their quarters about 0145 hours; and that she did not see the accused again until about 0730 hours when she found him in their automobile in front of their quarters. "She aroused him from a drunken - stupor," assisted him into the house where he fell asleep until 1200 hours, at which time she admonished him that he "had better stop drinking." Mrs. Hansen also related three specific instances and mentioned "other minor instances" of "black-out" caused by excessive use of alcohol during which periods accused did things which he later could not remember (Def Ex B).

The defense presented the testimony of twelve officers who rated the accused as superior or excellent in the performance of his military duties. Seven of these officers described his drinking habits as "excessive" and "beyond moderation" (R 83,87,90,94,102,108,115). Five officers and one civilian told of instances where the drinking of the accused had resulted in his loss of memory of events which had occurred (R 83,88,98, 108; Def Exs C and D).

Major Eben R. Jones, at whose house accused was a guest on the evening of 11 August 1950, testified that accused "had a drink in his hand and he was drinking until the approximate time he left my quarters" (R 103). The accused was definitely drinking "to excess" (R 104). He was one of the last to leave and in the opinion of the witness he was drunk (R 105,106).

Captain Richard Flaherty, 57th Field Hospital, was Medical Officer of the Day, 12 August 1950, when Colonel Hansen was brought into the hospital (R 118). He diagnosed the accused as suffering from "acute anxiety reaction" (R 118). Captain Flaherty thought the accused had a genuine loss of memory of the events of the night before (R 119). But he also thought the accused knew what he was doing at the time the incidents occurred (R 120).

The accused, having been advised of his rights as a witness, elected to testify under oath (R 152). He testified that on the evening of 11 August 1950, he went home and found a "family disturbance" in which his eldest daughter, aged 14, and the maid had become involved (R 155,156). After settling this matter he went downstairs and poured himself a drink (R 156). He mixed a "double-double martini * * At least that" (R 156). At 1930 hours, he went to the quarters of Major Eben R. Jones (R 102,156). He recalled several highballs (R 157). He did not recall leaving the Jones' quarters at all but the next thing he remembered was being awakened

about 0730 hours Saturday, 12 August 1950, in his automobile in front of his quarters (R 157). Mrs. Hansen was shaking him and telling him to wake up (R 157, Def Ex B). Later in the day he was restricted to quarters and relieved of duty (R 157). He related four instances when he had a loss of memory due to excessive use of alcohol (R 153,154,161,155).

Captain Robert G. Houlihan, Ward Officer on the Psychiatric Service, 98th General Hospital, Munich, Germany, was called as a defense witness (R 123). The accused was his patient from 14 to 21 August 1950 and he was a member of the Board of Medical Officers, all psychiatrists, appointed to evaluate the mental condition of the accused (R 124,125). Captain Houlihan considered the accused to be sane, but in writing up the case characterized him as "rigid and repressed"; and explained, "By that I mean that, a person's character is of a strength and inflexibility that does not allow him to recognize and be well acquainted with many of the subconscious strivings or wishes or instincts that are operating" (R 124). He further testified that it is possible for a person not to remember all he did following excessive use of alcohol, but a person who is "rigid and repressed" is not unduly susceptible to such a result (R 124). On cross-examination, the order appointing the Board and the Report of the Board Proceedings were introduced without objection as Prosecution Exhibits 2 and 3 (R 125). The findings of the Board were that the accused knew right from wrong and could adhere to the right both now and at the time of the alleged offense and that he presently has sufficient mentality to understand the proceedings and to conduct and cooperate in his own defense (Pros Ex 3).

c. Rebuttal for the prosecution.

Lieutenant Colonel Hans Lowenbach, 98th General Hospital, was neuropsychiatric consultant for the European Command and Acting Chief of the Neuropsychiatric Service of 98th General Hospital (R 172). He examined the accused and was a member of the Board appointed to inquire into the accused's mental condition (R 178). He briefly stated the basis for his conclusion that the accused was "entirely sane" on the night 11-12 August 1950 (R 178,179). Asked several hypothetical questions based on facts in evidence concerning the accused, Colonel Lowenbach stated such a person knew right from wrong at the time and had the mentality to adhere to the right (R 179,180). A person may suffer "retro-grade amnesia" or loss of memory from excessive use of alcohol (R 179,181). But such loss of memory does not mean the person is not conscious of what he is doing and does know right from wrong at the time a given event is occurring (R 181,182).

4. Discussion.

Mental Responsibility.

The accused, upon arraignment, stated, "the accused pleads temporary insanity induced by excessive use of alcohol resulting in amnesia or

blackout at the time of the offenses; to all specifications and to the charge, not guilty" (R 10). The law member then stated that the plea would be regarded as a plea of not guilty as to all specifications and the charge (R 10). The ruling of the law member was correct. The plea of "temporary insanity" is not recognized in military law, is equivalent to a plea of not guilty, and does not raise any separate issue as to mental responsibility (CM 262735, Kaslow, 41 BR 113,124). The trial in the instant case proceeded along the same lines as the cited case; that is, evidence bearing on the accused's mental capacity was presented as a part of the trial on the merits and not as a separate issue (See also CM 205621, Curtis, 8 BR 207,221; CM 252628, Earle, 34 BR 111,117; CM 320478, Vance, 71 BR 415,426-427).

The testimony of two members of the medical board, Captain Robert G. Houlihan, a witness called by the defense, and Lieutenant Colonel Hans Lowenbach, a prosecution witness, agree as to the accused's sanity, and his mental responsibility was therefore affirmatively proved. This testimony was confirmed by the introduction, without objection by the defense, of the findings of the board of Medical Officers concerning accused's sanity. The third member of the board, Colonel Daniel J. Berry, Medical Corps, was not called as a witness and there is no indication in the record of trial that the prosecution, defense, or the court desired to examine him in connection with the findings of the board (See MCM, 1949, par. 112c). A court is not required to initiate an inquiry into the mental capacity of the accused in the absence of some evidence which indicates that the accused might be mentally irresponsible (CM 327221, McGuire, 76 BR 59,64). It is manifest that no issue as to sanity exists, and no duty devolves upon the court to make additional inquiry, when the expert testimony introduced by the accused shows that he is sane (CM 231963, Hatteberg, 18 BR 349,364; CM 275648, Creighton, 48 BR 117,127-128). We have given careful consideration to the expert and other testimony concerning accused's mental capacity and find no reasonable basis for disturbing the court's findings in regard to accused's mental responsibility implicit in its general findings of guilty.

Specification 1.

The accused was charged with and found guilty of a violation of Article of War 96 for having made a false official statement.

The elements of the offense of making a false official statement are: (1) that the accused made the alleged report, (2) that it was official, (3) that it was false, (4) that he knew it to be false, and (5) that the report was made with intent to deceive the person to whom it was made (CM 339494, Clifford, 5 BR-JC 131,138; CM 343385, Allen, BR-JC, 12 Dec 1950).

The facts bearing on this specification are undisputed. About 0130 hours, 12 August 1950, the accused was at the door of Mrs. Elsie Wooten's

apartment when two members of the Military Police arrived. Mrs. Wooten had previously called the military police desk sergeant and complained that someone was persistently ringing her doorbell. The military policemen were dispatched in response to her call. On seeing the police, the accused said, according to Mrs. Wooten: "I am Colonel Hansen. I have something very important for Mrs. Wooten to take down and it can't wait until morning. * * Everything is all right. You may go;" or "I just came up here to have Mrs. Wooten take something down for me right away * * It is all right," as quoted by the military policemen. Mrs. Wooten was asked by one of the military policemen if everything was all right and when she said "yes," the police left. Mrs. Wooten stated that she believed the accused wanted her to do some emergency work as his secretary and that, had she not so believed, she would not have admitted him to her apartment. As soon as the accused came into the apartment, he disclosed he had misrepresented his purpose in pretending that he had any official business to transact. The Board of Review agrees with the opinion of the Staff Judge Advocate, "The accused's declaration to Mrs. Wooten, when they were alone in her apartment, that she would not require her pencil and notebook together with the persistency of his advances established conclusively that the services he intended to employ were not secretarial."

The defense counsel contended that the words used by the accused were cryptic and, at most, too uncertain and vague to justify a reasonable conclusion by the military policemen that accused was representing himself as intending to employ Mrs. Wooten for "secretarial services." We cannot agree. The common intendment of the words was that there was no disturbance requiring the intervention of the military policemen and that Mrs. Wooten's services were required in connection with some official matter (See CM 280010, Bair, 52 BR 383,387). Furthermore, the accused, in disclosing his name and official position as Post Executive Officer, together with his representations and virtual order for the military policemen to leave, made it appear that he was acting in an official capacity.

Even if it were contended that accused's statement may be interpreted in one sense as true, it is immaterial so long as it was used to produce a false inference. In the Bair case, supra, the accused was asked if "he had been to town Saturday morning and Saturday night," to which he replied that he had "been to town Saturday morning and Monday morning." This statement was true, but left the inference that he was not in town Saturday night, the time relevant to the official inquiry. Such statement was held to be a false statement.

There is no question that the accused made the statement as alleged and that the statement was official. This much was tacitly admitted by the defense counsel in his argument for a finding of not guilty (R 78).

The military policemen, in appearing at Mrs. Wooten's apartment as directed by the desk sergeant, were performing their assigned official duties. When the accused was discovered by the military policemen to be at Mrs. Wooten's door, it was undoubtedly obvious to him that some satisfactory explanation was required before they would depart. As heretofore noted, accused sought to assure them that there was no disturbance, that he was acting in an official capacity and that Mrs. Wooten's services were required in connection with some official matter. The fact that accused volunteered this information does not, under these circumstances, detract from the official character of the statement. And, as stated by the Board of Review in CM 280335, Alexander, 53 BR 177, at page 180:

> "The fact that the statement was made by an officer to an enlisted man [a military policeman] is immaterial. The gravamen of the offense is the making of a false official statement. (CM 248919, 31 B.R. 377, CM 122249, Dig. Op. JAG 1912-40, par. 454(49), MCM 1928, par. 151.)."

Following the departure of the military policemen, accused entered Mrs. Wooten's apartment. Mrs. Wooten went to a desk, commenting "I will get my notebook and pencil." In response to this accused said "Oh, you won't need that," "I want you," and proceeded to kiss her suddenly and against her will. These words and accused's subsequent conduct demonstrate, we think, the falsity of the statement made by him to the military policemen and his knowledge that the statement was false.

From the known falsity of the statement may be inferred the intent to deceive (CM 337961, Sykora, 4 BR-JC 187,190; CM 339004, Shea, 5 BR-JC 1,17; CM 343385, Allen, BR-JC, supra). In the instant case, accused's design is clear. He said enough to produce the desired result of causing the military policemen to leave by assuring them that he was at Mrs. Wooten's apartment for a proper purpose and on official business. By his words and conduct, he also induced Mrs. Wooten to believe the same thing and to release the protectors who might otherwise have saved her from the predicament which immediately thereafter developed. The conclusion is inescapable that the accused made the statement to the military policemen with the intent to deceive them.

All elements of the offense are therefore proved. It is the opinion of the Board of Review that the evidence is sufficient beyond a reasonable doubt to sustain the court's finding of guilty as to Specification 1.

Specification 2.

The court found the accused guilty of being drunk in uniform in a public place.

Drunkenness is defined as "* * any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties * *" (MCM, 1949, par. 173, p.226; CM 197398, Mini, 3 BR 99,105; CM 200472, Hoebeke, 4 BR 333,337).

The undisputed evidence leaves no doubt that the accused was drunk in uniform at the time and place alleged. The accused stated he started drinking about 6 o'clock in the evening by mixing himself a "double-double" martini. He admitted having two more martinis at the Officers' Club before he left with Mrs. Hansen to go to the quarters of Major Eben R. Jones at about 7:30 o'clock the same evening; and he recalled having consumed three drinks of whiskey and water at Major Jones' quarters. According to Major Jones the accused was drinking constantly and to excess during the evening until he left at about 1:30 o'clock the following morning. It was Major Jones' opinion that the accused was drunk when he left. Sergeant O'Malley saw the accused in uniform a few minutes later at the Noncommissioned Officers' Club. Although the accused was not otherwise disorderly, his speech was "slurred slightly" and he talked incoherently. It was Sergeant O'Malley's opinion that the accused was drunk, although not enough to need assistance. Shortly after the accused left the Noncommissioned Officers' Club he was observed by two military policemen and Mrs. Wooten at her apartment. All three knew he had been drinking and two persons thought he was drunk. The military policemen observed him leaning against the wall. The accused testified that he "blacked out" and that he suffered a complete loss of memory. These facts are sufficient to prove beyond a reasonable doubt that the accused was drunk during the time he appeared in uniform at the Noncommissioned Officers' Club.

There is a remaining question: was the accused "in a public place" as alleged? The defense counsel contended that the "NCO club is a public place only so long as it is being operated and open * *."

The accused arrived at the Noncommissioned Officers' Club at approximately one-half hour after the club was supposed to be closed. The front door was closed and locked and the accused entered by a side door which was still open. He found three people still in the club, Sergeant O'Malley and Sergeant and Mrs. Crawshaw, who were "finishing up a card game." It has been held repeatedly that an officers' club is a public place (CM 207887, Lowry, 8 BR 377,387; CM 302853, Peterson, 59 BR 95,97; CM 323254, Guilfoyle, 72 BR 191,194); and, that a bar under the management of Japanese civilians but "open only to U. S. Army enlisted personnel" is a public place (CM 302885, Payne, 59 BR 133,137). On the authority of the latter case, as well as by analogy to the cases involving officers' clubs, we conclude that the Noncommissioned Officers' Club was a public place. Furthermore, the club was not "closed" so long as the side door was open to anyone who chose to use it for ingress or egress. The fact the accused was able to enter indicates that the public was not in fact excluded, even

though the main door was locked and it was supposed to be "after hours." As long as accused was within the sight and hearing of other military personnel and a civilian, it does not matter that only a few persons were present in the club after normal closing hours (See CM 226357, Betette, 15 BR 89,90-92).

The Board of Review, therefore, concludes that the evidence is sufficient beyond a reasonable doubt to sustain the court's finding of guilty of Specification 2.

Specification 3.

Under this specification, the accused was found guilty of an indecent assault upon Mrs. Elsie Wooten, the wife of an enlisted man. The action of the reviewing authority excepted the words "by pulling her clothing off" from the findings and approved the remaining portion. The Manual for Courts-Martial defines the offense as follows:

> "An indecent assault is the taking by a man of indecent, lewd, or lascivious liberties with the person of a female, without her consent and against her will with intent to gratify his lust or sexual desires" (MCM, 1949, par. 183c, p.258);

and the elements of proof are stated to be:

> "(a) That the accused assaulted a certain female by taking indecent liberties with her person; (b) facts and circumstances indicating that the acts were done with intent to gratify the lust or sexual desires of the accused" (MCM, 1949, par. 183c, p.258).

The Manual for Courts-Martial, 1949 and 1928, both state:

> "It is a battery for a man to fondle against her will a woman not his wife" (MCM, 1949, par. 180k, p.245; MCM, 1928, par. 149l, p.178),

and in CM 237229, Baldwin, 23 BR 333,337; CM 292529, Valby, 57 BR 221,227; and CM 318670, Bradford, 67 BR 379,383,384, the quoted provision was applied and the offense was treated as an assault and battery. The aggravated offense of indecent assault, therefore, differs from the offense of assault and battery by virtue of the additional element that the act was done with "intent to gratify the lust or sexual desires of the accused" (See CM 218643, Bright, 12 BR 103,116-117).

The uncontroverted testimony of Mrs. Wooten establishes beyond doubt the relevant facts. The accused appeared at her apartment at about 1:30

o'clock in the morning and was admitted only after he had induced Mrs. Wooten to believe that he was there officially and for the purpose of giving her some emergency dictation. No sooner had the door closed, however, than the accused announced she would not need her pencil and notebook and indicated his real intentions by putting his arms around her and kissing her. There followed a persistent series of acts which plainly show he intended to make her "do what he wanted." The accused reminded her that as his secretary, she "had a very low efficiency report" and told her, "I can do a lot for you if you do what I want." He threatened her repeatedly with loss of her job, with sending her husband "to the Infantry," and with breaking her husband "down to Recruit." Mrs. Wooten testified at one point, "very suddenly he reached out and grabbed me and pushed me down on the couch and began trying to get into my clothes * * he got his hands on my breast and then he put his hands over my private parts through my gown." A repetition of this same conduct in attempting to pull her clothing off and in fondling her person, occurred when he forced her down on the kitchen table and also when he caught her at the bedroom "in the corner by the window" and again at the dining room door. On these last two occasions, the accused exposed his private parts and Mrs. Wooten stated that one time "he held my hands and forced them down to touch his penis." Without going into further detail, the evidence shows conclusively that the accused engaged in "chasing her through her home," as alleged, during a period of approximately four hours. Sergeant First Class and Mrs. Spaeth saw Mrs. Wooten soon after the accused left and testified to her disheveled, worn-out appearance and her hysterical condition. The evidence thus shows that at the time and place alleged accused took indecent and lascivious liberties with the person of Mrs. Wooten. His language and conduct confirm the conclusion that Mrs. Wooten did not give her consent to his acts and that the fondling and touching of her person was entirely against her will.

The Board of Review has carefully studied the facts and circumstances to determine what effect the drunkenness of the accused may have had on the element of intent. If the accused was so intoxicated as to be unable to form an intent to gratify his lust or sexual desires, the aggravated offense of indecent assault cannot be sustained, although assault and battery would remain as a lesser included offense.

> "It is a general rule of law that voluntary drunkenness * * * is not an excuse for crime committed while in that condition * *" (MCM, 1949, par. 140a, p.188).

While the accused undoubtedly was drunk at the time he arrived at Mrs. Wooten's apartment, he does not seem to have reached such gross drunkenness as would render him incapable of forming a lustful intent. He was apparently able to drive his automobile to the correct address

and again to drive it away when he left. He was able to recognize the military policemen when they arrived at the apartment and agile enough in his thinking to convince them they should leave. He was able to conduct himself so as to conceal his intoxication from Mrs. Wooten long enough to induce her to admit him to her apartment in the belief that he was there on legitimate official business. When she discovered he had been drinking and accused him of being drunk, he replied: "I am not drunk. I know what I am doing. * * I want you." All of his subsequent conduct was consistent with and calculated to achieve one purpose - her submission to him for satisfaction of his sexual desires. He reminded her that she was an employee under his supervision, that he made out her efficiency reports and implied he could either promote or dismiss her from her job. He threatened demotion for her husband, an enlisted man, and transfer and separation of the husband from her and the children. When he could not talk her into complying with his demands, he tried to force her into submission by intermittent physical violence over a four-hour period of time. While the accused presumably was overcoming the effects of his drinking all of this time, his most reprehensible conduct occurred just before he left at about six o'clock. Mrs. Wooten testified that the accused was "completely sober" at that time.

The aforementioned conduct of the accused clearly indicates that even if his mental powers were somewhat impaired and diminished by his voluntary intoxication, nevertheless, he was, in general, oriented, coordinated, and rational enough to possess the mental capacity required in forming the intent alleged.

Lieutenant Colonel Hans Lowenbach, senior psychiatrist of the Board of Medical Officers which examined the accused, testified that it is possible for a person to suffer a retrograde amnesia or loss of memory and still to have known exactly what he was doing at the time each incident occurred. He was examined and cross-examined at length and his answers seem exceptionally illuminating and accurate (TM 8-240, Psychiatry In Military Law (Sept. 1950), subpars 10d, 12e). He concluded that the accused knew right from wrong and was able to adhere to the right at all times on the night of 11-12 August 1950. It follows that the accused had the mental capacity to be criminally responsible for his acts. Accused's demeanor, including the conversation accompanying it, leave no doubt that he was motivated by an intent to gratify his lust.

The Board of Review is of the opinion the evidence is sufficient beyond a reasonable doubt to sustain the court's finding of guilty, as approved by the reviewing authority, under Specification 3.

Specification 4.

The accused was found guilty under this specification of an indecent assault upon Frau Hella Goepfert, a German national. The action of the reviewing authority excepted the words "and belly" from the court's findings.

The principles of law and the legal authorities applicable to this specification are the same as those above cited in the discussion of Specification 3 and need not be here repeated.

The facts are undisputed. After the accused left the apartment of Mrs. Elsie Wooten, he drove to the General Staff Building of the Wurzburg Military Post at about 0600 hours. Frau Hella Goepfert was a German woman who was reporting that morning for her first day of employment as a charwoman at the General Staff Building. The accused stopped her and asked what she "was doing there." She replied that she was an employee but the accused refused to believe her and said, "No, you have been sleeping here in this building." She then showed her employee's pass, whereupon the accused got out of his car and told her "to come along." She followed him into the building. The accused checked a couple of doors and on finding them locked, he "pulled" her toward the basement. She said he "Wanted to get me downstairs into the basement." When she would not go, she said "He pulled me towards him and kept me tight." Asked specifically if he touched her breasts, she answered "Yes I assumed this was included, because he touched me all over my body" and she indicated by her hands from the shoulders to the waistline. She was asked if the accused touched her on her belly to which she replied, "Well, not directly on my belly" but she added again, "He touched me all over my body."

The Board of Review is of the opinion that the evidence is sufficient beyond a reasonable doubt to prove the accused took indecent liberties with the person of the female alleged, without her consent and against her will, and with intent to gratify his lust and sexual desires, and that the court's finding of guilty, as approved by the reviewing authority, is sustained.

Specification 5.

In this specification the accused was charged and found guilty of unlawful entry in violation of Article of War 96 in that he did

> "wrongfully and unlawfully by trick and deceit enter the dwelling house of Sergeant Wooten."

The form of this specification substantially follows the prescribed form in the Manual for Courts-Martial (MCM, 1949, Appendix 4, Form No. 181, p. 332).

The elements of proof necessary to sustain a conviction are: (a) that there was an entry into the house alleged and (b) that such entry was unauthorized or prohibited by official orders or regulations (CM 322500, Barnes, 71 BR 223,233; CM 322931, Wolsey, 71 BR 339,341).

In the discussion of the crime of burglary, the Manual for Courts-Martial states:

"There is a constructive breaking when the entry is gained by a trick, such as concealing oneself in a box; or under false pretense, such as impersonating a gas or telephone inspector * *." (MCM, 1949, par. 180d, p.237).

It follows that in the lesser included offense of unlawful entry, if the entry is gained by stratagem, trick, or false pretense, the entry is unlawful and hence unauthorized (CM 307029, Duitz, 60 BR 65,76).

The facts are uncontroverted. The accused appeared at the apartment of Mrs. Elsie Wooten and created the impression he was there on official business to give her some urgent dictation. She was the wife of an enlisted man and the accused's secretary at the Wurzburg Military Post. She could have been, and doubtless was, awed by his rank and the fact he controlled her duties as an employee in his office.

The accused told the military policemen "everything is all right" and Mrs. Wooten, believing the accused was there for a legitimate purpose, joined in assuring the military policemen the same, whereupon they left. The conduct of the accused immediately after entering the apartment and continuing thereafter, abundantly shows that his representations made outside were untrue and made with obvious intent to deceive.

Mrs. Wooten testified she would not have let the accused in had it not been that she believed "that he wanted some work done." That she wanted no night visitor is apparent from her previous refusal to answer her doorbell and by her calling the military police. That she did not want the accused in her home after discovery of his deception is shown by her prompt request for him to go home and her subsequent resistance to his advances. The conclusion seems inescapable that the accused intended from the start to enter the house of Sergeant Wooten for the purpose of satisfying his sexual desires toward Mrs. Wooten, including the committing of assault and battery, if necessary; that he tricked and deceived Mrs. Wooten into admitting him by false statements; and that consequently his entry was obtained by false pretense.

The Board of Review is of the opinion the evidence is sufficient beyond a reasonable doubt to sustain the court's finding of guilty of Specification 5.

5. Consideration has been given to oral representations on behalf of the accused, by his counsel, Colonel Frederick Bernays Wiener and Mr. Thomas H. King. Consideration has also been given to a letter of clemency in which five members of the court, joined by the defense counsel and assistant defense counsel, recommend some form of clemency which will allow the accused to reenlist in the Regular Army as a Master Sergeant. Two other members of the court and the Trial Judge Advocate recommend vacating that portion of the sentence pertaining to confinement.

6. The accused is 38 years of age having been born 31 July 1912, at Cropesville, New York. His mother died during his childhood and his father, a carpenter, reared him. He completed twelve years of schooling and after that worked as a stenographer at $25.00 a week. He is married and has four children. There is no evidence of civilian conviction.

The accused enlisted 16 February 1931 for assignment to the Hawaiian Department Headquarters. By early 1935, he became a sergeant and was assigned as secretary for the Commanding General, General Drum. When General Drum left, the accused, then a staff sergeant, became secretary for the Chief of Staff, General Ulio. He was promoted to technical sergeant in 1938 and to master sergeant in 1940. In April 1941, he was ordered to active duty as a First Lieutenant, Organized Reserve Corps. He was promoted to Captain, 1 February 1942, to Major 30 October 1942, and to Lieutenant Colonel 29 May 1943. He served in the European Theater from 7 April 1944 to 9 July 1945 as Division Adjutant General, 79th Division. He had a short tour of duty at Rheims, France, and returned in October 1945 to the United States. He next was assigned as Director of Personnel at Camp Beale, California. While there he was recommended for promotion to Colonel and was promoted to Colonel in the reserve. He was assigned to Headquarters, Sixth Army about 1 July 1947 and served as Executive Officer, Officer-in-Charge of G-3, ORC Division, of Sixth Army. He returned to the European Theater in January 1950 and served first as adjutant then briefly as executive officer of 7806 Station Complement Unit at Wurzburg, Germany, until the date of these offenses. He is authorized to wear the EAME Medal with five battle stars, the Bronze Star, the Army Commendation Ribbon with Oak Leaf Cluster, and the American Defense Medal. He has had no previous military conviction. He has a commendable record of performance of duty. His efficiency reports as a commissioned officer prior to 1 July 1947 are all excellent or superior, most of them superior. His most recent over-all numerical efficiency ratings, for the period 1 July 1947 to 31 May 1950, are in order 102, 104, 099, 083, 091, 110 and 126.

7. The court was legally constituted and had jurisdiction of the person and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty, as approved by the reviewing authority, and the sentence, and to warrant confirmation of the sentence. A sentence to dismissal, total forfeitures after promulgation, and confinement at hard labor for one and one-half years is authorized upon conviction of an officer of violations of Article of War 96.

_____, J.A.G.C.

William C. Fitzhugh, J.A.G.C.

Arthur P. Ireland, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 344374

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Lieutenant Colonel John H. Hansen, 0353737, Headquarters 7806 Station Complement Unit, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution. The United States Disciplinary Barracks or one of its branches is designated as the place of confinement.

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action.

E. M. BRANNON
Major General, USA
The Judge Advocate General

22 March 1951

(GCMO 36, 28 March 1951).

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGK - CM 344452

JAN 2 5 1951

UNITED STATES v. Major JOHN FRANKLIN DUNLOP (0-351087), 3431 Area Service Unit.	FORT JACKSON, SOUTH CAROLINA Trial by G.C.M., convened at Fort Jackson, South Carolina, 1 and 2 December 1950. Dismissal and total forfeitures after promulgation.

OPINION of the BOARD OF REVIEW
BARKIN, WOLF and LYNCH
Officers of The Judge Advocate General's Corps

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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 Judicial Council and The Judge Advocate General.

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

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

Specification: In that Major John F. Dunlop, 3431 Area Service Unit, then a member of National Guard Instructor Group, South Carolina Military District, did, at Rock Hill, South Carolina, from about 27 May 1950 to about 26 August 1950, while lawfully married to Stella Mary Dunlop wrongfully, unlawfully, openly and dishonorably live and cohabit with Jean Rosson, a woman not his wife.

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

Specification 1: In that Major John F. Dunlop, ***, did, at Rock Hill, South Carolina, from about 27 May 1950 to about 26 August 1950, while lawfully married to Stella Mary Dunlop wrongfully, unlawfully and openly live and cohabit with Jean Rosson, a woman not his wife.

Specification 2: (Finding of not guilty).

He pleaded not guilty to all charges and specifications. He was found guilty

of the Specification of Charge I and of Charge I and not guilty of Specification 2 of Charge II and guilty of Specification 1 of Charge II and of Charge II. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence

a. For the Prosecution

The evidence for the prosecution shows that the accused was married on 25 July 1943 at Windsor, Ontario, Canada, to Stella Woloch, and that there were two children born of this union. The marriage was still in effect at the time of the alleged offenses (R 9, Pros Exs 1,2,7).

By deposition dated 26 September 1950, Stella Dunlop testified that -

> "When my husband returned from overseas in October, 1949, he told me that he didn't love me, that he loved a woman he had met over in England and had had a child by her and that he wanted a divorce so he could marry her. ***" (Pros Ex 7).

He refused to take her to his place of duty in South Carolina. The accused subsequently instituted action for divorce which she contested. She did not join him overseas on the first occasion he had sent for her because their younger child was ill. On the second occasion that the accused made arrangements for her to make the trip she declined because "I had been receiving letters from him telling me about the girl he had met there in England and was in love with and that he had a baby by her" (R 11, Pros Ex 7).

It was stipulated that if Joseph Savoretti, District Director, Immigration and Naturalization Service, United States Department of Justice, Miami, Florida, were present in court and sworn as a witness he would testify: That the records of his office show that Jean Margaret Rosson is of the English race and a British national. She obtained an immigration visa at London, England, and was admitted to this country for permanent residence. "It is shown that she was at the time destined to Rock Hill, South Carolina. It is further shown that her passage was paid by her fiance John F. Dunlop" of Rock Hill, South Carolina. At the time of her visa application she stated she was single and had one child, Nicholas John Dunlop, born November 28, 1947 in England. The records also show that this child was issued an immigration visa in the name of Nicholas John (Dunlop) Rosson by the American Consulate in London, England, May 19, 1950. On the visa application of the child it is shown that John Franklin Dunlop of Rock Hill, South Carolina, is his

father (R 11,12; Pros Exs 1,8).

Mrs. John F. Dunlop testified that prior to her marriage to the accused her name was "Miss Jean Rosson". She was born in England and arrived in this country from that place on 27 May 1950, and moved to South Carolina on 2 June. She married the accused on 25 November 1950. (R 12,13)

David P. Belcher, Rock Hill, South Carolina, first became acquainted with the accused in the early part of 1950. The accused bought a five room house "next door" to his and lived there for approximately six months. A woman whom the witness identified as Mrs. John F. Dunlop and a little boy moved in with the accused about 5 June 1950. The accused introduced this woman as his wife and she lived there with the accused most of June, July and August. They appeared to enjoy a "normal family life." The witness became quite friendly with the accused and attended Sunday School and church with him. The general reputation of the accused throughout the community was very good (R 13, 14).

William A. Tipping, Rock Hill, South Carolina, testified that sometime in March or April of 1950 the accused became his neighbor and lived in a five room house, across the street. A woman named "Jean," who Tipping supposed was his (accused's) wife and "their son," lived with the accused. The accused and "Jean" lived in Rock Hill from sometime in June until about September 1950 (R 15,16).

Eva Mae Rhodes, a housewife, first met the accused early in 1950 when he became her neighbor. The accused and a woman, who introduced herself to the witness as his (accused's) wife, lived at this house from about the first part of June to 26 August 1950, and their family life appeared "as any normal married couple" (R 18,19).

There was received in evidence without objection the following documents: Prosecution Exhibit 9, Application of John F. Dunlop (accused) and Jean M. Dunlop for membership into Oakland Baptist Church, Rock Hill, South Carolina, initiated 9 July 1950; Prosecution Exhibit 10, a written statement dated 16 July 1950, of Mrs. Jean M. Dunlop formerly of England and now residing at Rock Hill, South Carolina, expressing a desire to join the Oakland Avenue Baptist Church and to be baptized; Prosecution Exhibit 11, a church membership card indicating that Mrs. John F. Dunlop was baptized on 20 August 1950; Prosecution Exhibit 12, a church membership card of the Oakland Baptist Church, Rock Hill, South Carolina, showing accused as a member on 9 July 1950 (R 23,24).

Lieutenant Colonel Leon B. Humphrey, Executive Officer, Detachment 9, South Carolina Military District, testified that he investigated the conduct of the accused on or about 16 June 1950 at the request of his commanding officer. Before questioning the accused Colonel Humphrey advised him of his rights under Article of War 24 and the accused responded that he understood "those rights." The accused said "he married the first Mrs. Dunlop at Windsor, Canada, on 25 July 1943. That he met the second wife in Basingstoke, England, in 1945; that he was not married to the second Mrs. Dunlop and that the second Mrs. Dunlop was his common law wife and that they were never legally married." The accused further stated that he had "applied" for a divorce from his first wife in October 1949 but he had not received a final decree at the time of this investigation. The "second Mrs. Dunlop" arrived in New York from England on 27 May 1950, the accused having paid for her passage, and came directly to Rock Hill, South Carolina, where he introduced her to the people of that community as his wife (R 24-27).

It was stipulated that if Lieutenant Colonel Samuel G. Eddy, Assistant Inspector General, Third Army, Atlanta, Georgia, were present in court and sworn as a witness he would testify substantially as follows: On 6 July 1950 he interviewed the accused and advised him that he was investigating a complaint of illegal cohabitation against him and explained to him his rights under the 24th Article of War. Thereafter the accused made certain statements and answered certain questions relative to the situation out of which the complaint arose. He admitted that his wife was living in Canada; that he occupied the same dwelling and lived as man and wife with Miss Jean Rosson in Rock Hill, South Carolina, and that "all the people here think she is my wife." He made no attempt to dispel that belief among the people there because "I intend to marry her as soon as the divorce [from my wife] is final." He has three children, two "by the first wife," and "one with this young lady." The accused went into details concerning the estrangement between himself and his wife, who, he stated, had declined to join him overseas. Consequently he sought a divorce from her sometime in November of 1949. He first met Miss Rosson in England in 1945. After his wife failed to join him overseas, he "fell in love with" Miss Rosson. Based upon his belief that his wife would sign the divorce papers he sent for Miss Rosson and she arrived in this country 27 May 1950. Concerning the predicament the accused got himself into, he stated, "I had no thought of violating any code of the military service." He admitted, however, that he was "aware, that if it became known generally in Rock Hill that [he] was living with a person who is not [his] wife" the "social reaction" might be detrimental to the service (R 28-36).

b. For the Defense

The accused having been advised of his rights as a witness elected

to testify under oath. He stated his "original home" is in Arkansas. He joined the "Armed Forces" in July 1937. On 25 July 1943 he was married to Stella Woloch of Windsor, Ontario, Canada, and two children were born of this union. At the time of his marriage the accused was stationed at Fort Benning, Georgia. His wife accompanied him to that post where they stayed approximately one year, after which time he was transferred to Camp Robinson where she also accompanied him. In February 1945, the accused was ordered to England and, as dependents were not permitted to go overseas at that time, the accused's wife returned to the home of her parents in Canada. In England the accused became acquainted with "Miss Jean Rosson" whom he used to see on occasion, but did not at that time propose matrimony to her. Miss Rosson knew he was married. After a seven months period in England the accused was "returned to the States and took up duty at Camp Robinson, Arkansas," where he was joined by his wife. The accused was subsequently transferred to Seattle, Washington, his wife going with him, and after about a month and a half at that place she left him and went to Canada. The accused was sent to Austria, the "latter part of October or first of November 1946" and, as soon as he was permitted, he "put in for Department of Army Orders to have [his wife] join [him] in spring of 1947." The accused's wife wrote informing him that she had been authorized to proceed overseas, but stated "that she didn't want to come at this particular time." It came as a "terrific shock" to the accused, but he continued to correspond with her. At a later date she expressed to the accused her desire to go, and he again requested Department of the Army orders which she received but also declined. Because she would not join him the accused's "reaction" was that the "relationship" between him and his wife was "completely gone." Soon after the receipt of the last letter from his wife, the latter part of February 1947, the accused took leave and went to England to visit Miss Rosson, who, on 28 November 1947, gave birth to his child. It was not however until the following June or July that the accused was informed of this event. A considerable time later he communicated with his wife and apprised her of the results of his extra-marital relationship with Miss Rosson, but nevertheless again urged her to join him or obtain a divorce. His wife agreed that upon his return to the "States" he "would get a divorce." The accused returned to the "States" in November 1949 and proceeded to Canada for a visit with his wife "but she would have nothing to do with" him. The accused and his wife consulted attorneys in Canada and Detroit relative to obtaining a divorce at those places and were informed that the courts there lacked jurisdiction. It was then agreed between them that the accused "should get the divorce in Arkansas," where he maintained his domicile. The accused, accordingly, instituted divorce proceedings in Arkansas on 9 November 1949. His wife, however, displeased with the property settlement which she had previously agreed to, indicated that she would not sign the necessary court papers, but instead desired a reconciliation with him. The accused, happy about

this prospect, purchased a house in Rock Hill for his family and also purchased furniture. On 24 December 1949 he journeyed to Canada for the purpose of moving his family to Rock Hill. His wife and children appeared happy to see him and preparations were made for the trip to Rock Hill. As the time for their departure neared, however, Mrs. Dunlop changed her mind and stated "she would not go. She said she didn't care any more for" him, adding, "This young lady in England, you go ahead and live with her and let's get a divorce." The accused returned to South Carolina and thereafter tried in vain to communicate with her. In the spring of 1950, when it became apparent to the accused that his wife would not "live with" him, he wrote to Miss Rosson explaining this "fact" and proposed marriage to her, which she accepted. At his suggestion, Miss Rosson, together with the child fathered by the accused, arrived in this country from England the first part of June 1950. As the accused was "hard pressed financially," he "decided to let her stay in the house," that he "had bought." Moreover he "thought the decree would be a matter of a short time; then /they/ would be married." He admitted that during the period alleged they lived there as "normal man and wife." He admitted that from "the moral standpoint" he "figured it was adultery." The accused finally obtained his divorce decree from Stella Woloch Dunlop on 22 November 1950 and on 25 November 1950 he married Jean Rosson (R 42-60, Def Exs E,F,J.K).

W. A. Barron, Rock Hill, South Carolina, a major in the National Guard, testified that he commands a unit of the National Guard in Rock Hill and that the accused was assigned to Rock Hill as an "instructor-advisor" to the National Guard. The accused performed his work in a superior manner, and was "very cooperative and the best /instructor/ we ever had in Rock Hill." The accused had been active in church work, and taught a men's "Bible Class." He also spoke at the Lions Club meetings and other civic organizations. In December 1949, the accused had remarked to the witness that he intended to bring his wife and children down from Canada and sought advice on buying a house at Rock Hill. Around June or the latter part of May 1950, a "lady from England," and a child arrived at Rock Hill. The accused led the witness to believe that he had been divorced and had remarried this woman. The witness did "not feel" that the accused "did anything to bring discredit on the service" (R 37-40).

Mrs. John F. Dunlop (nee Jean M. Rosson), recalled as a witness for the defense, testified that she first met the accused in England in March 1945. He visited her at various times during that period and told her that he was married and had two children. Notwithstanding this fact, however, she fell in love with him and at a later date when he was transferred to Austria she kept up correspondence with him. The accused visited her in 1947 while he was stationed in Austria and in the latter part of that year she gave birth to his child. At no time during this period had the accused proposed matrimony to her. The witness ceased corresponding with him from March 1949 to October 1949. In March 1950 the accused, for

the first time, proposed marriage to her and asked her to come to America, which she did. Upon her arrival with their child, she went directly to Rock Hill, South Carolina, where she was met by the accused. He told her he was still married and they discussed the possibility of renting separate quarters but she "didn't have any money." The accused continued his effort to "complete his divorce" (R 64-68).

Three witnesses, including a retired lieutenant Colonel of the National Guard, testified as to the excellent reputation of the accused in the community of Rock Hill, South Carolina, and to his superior ability as an Army officer (R 62-64).

4. Discussion

The accused, a married man, is charged with wrongfully, unlawfully and openly living and cohabiting with Jean Rosson, a woman not his wife, at Rock Hill, South Carolina, from about 27 May 1950 to about 26 August 1950. This offense as charged under the 96th Article of War is also charged as a violation of the 95th Article of War with the added allegation that such conduct was dishonorable.

The following definitions of cohabitation have been recognized by the Board of Review:

> "Living together; living together as husband and wife."
>
> "Cohabitation means having the same habitation, not a sojourn, a habit of visiting or remaining for a time; there must be something more than mere meretricious intercourse." (Black's Law Dictionary, 3d Edition, p 347)

Cohabitation has also been defined as -

> "The act or state of a man and woman not married, who dwell together in the same house, behaving themselves as man and wife." (Bouvier's Law Dictionary, Rawles 3rd Revision, Vol. 2, p 1868) (CM 281188, Greene, 54 BR 77,80; CM 218647, Moody, 12 BR 119,130; CM 328133, Konno, 76 BR 313,330)

Continuity in the ostensible relationship of man and wife must be therefore shown. It is established by the evidence for the prosecution and admitted by the accused that at the time and place alleged, while he had a lawful wife living in Canada, the accused and Miss Jean Rosson lived together as man and wife, that they were each introduced as the spouse of the other, and were generally regarded as a married couple. Their conduct over a four month period at Rock Hill, South Carolina,

was but an incident of an extra-marital affair which had begun over three or more years before in England. Accused asserted that he fell in love with Miss Rosson after his wife refused without good reason to join him overseas, and thereby seeks to justify his conduct by which he fathered a son by Miss Rosson. He further stated that thereafter when he returned from overseas he unsuccessfully attempted to effect a reconciliation with his wife. Failing in this, he brought Miss Rosson and their child from England to the United States where she lived with him as man and wife and where he openly held her before the public as his lawful wife. He justified this action on the basis that he expected his divorce to be granted prior to Miss Rosson's arrival and that thereafter he had her and their child stay at his home because pecuniary difficulties prevented his establishing her elsewhere and because of the probable unfavorable reaction in the community. On the other hand, Mrs. Dunlop denied his assertions and stated that the reason she could not join accused the first time he arranged for the trip in April 1947 was because her younger child was seriously ill, and the second time, in the spring of 1948, she knew of her husband's extra-marital relations with Miss Rosson. Actually these relations with Miss Rosson had begun prior to April 1947 as indicated by the fact that their child was born in November 1947. Accepting the facts in the light most favorable to the accused, however, that his estranged wife, and mother of his two legitimate children, may have been unreasonable and obstinate in refusing to join him overseas or repelling his overtures for reconciliation; that he fell in love with his paramour, who subsequently bore him a child; that they were able to live "as any normal married couple," and planned as soon as time permitted to be legally married, in no way constitute a defense to the offenses alleged, nor does his subsequent valid marriage to his accomplice excuse him from criminal liability therefor. Unlawful cohabitation in that it is conduct "unbecoming an officer" and "of a nature to bring discredit upon the military service" is violative of Articles of War 95 and 96. (CM 281188, Greene, Supra; CM 250939, McCaffree, 33 BR 95,99,100)

5. Attached to the record of trial is a recommendation for clemency signed by defense counsel and the entire court recommending that the dismissal from the service of the accused be suspended and so much of the sentence as provides for forfeiture of all pay and allowances be mitigated to forfeiture of one hundred dollars per month for six months.

6. Records of the Department of the Army show that the accused is 39 years of age, married, and the father of two children by his former wife and one child by his present wife. He was graduated from Quachita College, Arkadelphia, Arkansas, in 1937. In civilian life he was employed as a salesman. He was commissioned a second lieutenant

on 24 May 1937 and promoted successively to first lieutenant on 7 June 1940, to captain on 2 June 1942, and to major on 27 January 1948. He has had foreign service in the Asiatic Pacific and European Theaters. He is entitled to wear the Asiatic Pacific ribbon with one bronze service star. His adjectival ratings from 21 September 1940 to 30 June 1947 show two of "Very Satisfactory," fifteen of "Excellent," and three of "Superior." His overall efficiency ratings of record are 072,099,059,099,072 and 077.

7. The court was legally constituted and had jurisdiction over the accused and of the offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. 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 and to warrant confirmation of the sentence. A sentence to dismissal is authorized upon conviction of a violation of Article of War 96 and is mandatory upon conviction of a violation of Article of War 95.

Robert Bacon, J.A.G.C.

Samuel S. Cowen, J.A.G.C.

Geo Lynch, J.A.G.C.

(196)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 344452

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Major John Franklin Dunlop, 0-351087, 3431 Area Service Unit, Fort Jackson, South Carolina, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution.

Robert W. Brown

Robert W. Brown, Brig Gen, JAGC C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr.

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action.

Franklin P. Shaw

FRANKLIN P. SHAW
Major General, USA
Acting The Judge Advocate General

7 February, 1951

(GCMO 17, Feb 14, 1951)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C

JAGH CM 344461

MAR 2 3 1951

UNITED STATES	)	SIXTH ARMY
v.	)	Trial by G.C.M., convened at Presidio of San Francisco, California, 8,9,10 November 1950. Dismissal, total forfeitures after promulgation, confinement for five (5) years, and to pay the United States a fine of $1,500.00.
First Lieutenant ISAAC JOSEPH HIGGINS (02033596), 9375th Technical Service Unit, Sierra Ordnance Depot.	)	

OPINION of the BOARD OF REVIEW
MILLER, FITZHUGH and IRELAND
Officers of The Judge Advocate General's Corps

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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 and The Judicial Council.

2. The accused was tried upon the following Charges and Specifications:

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

Specification: In that First Lieutenant Isaac J. Higgins, Ordnance Department, did, on or about 30 December 1949, at Herlong, California, present for payment a claim against the United States to Chief Warrant Officer John J. Napora, an officer of the United States, duly authorized to pay such claim, in the amount of Three Hundred Three and 99/100 dollars ($303.99), for subsistence and travel from Herlong, California, to Camp Lee, Virginia, and return, for the period 19 October 1949 to 22 December 1949, a portion of which claim was false and fraudulent, and was then known by the said First Lieutenant Isaac J. Higgins to be false and fraudulent, in that he had at Camp Lee, Virginia, on or about 2 November 1949, presented and had been paid One Hundred Thirteen and 99/100 Dollars ($113.99) on account of subsistence and travel from Herlong, California, to Camp Lee, Virginia, for the period 19 October 1949 to 28 October 1949.

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

Specification 1: In that First Lieutenant Isaac J. Higgins, Ordnance Department, on or about 13 January 1950, did, at Herlong, California, feloniously steal Seven Hundred Fifteen and 50/100 Dollars ($715.50), lawful money, of the United States, the property of the United States.

Specification 2: In that First Lieutenant Isaac J. Higgins, Ordnance Department, on or about 28 February 1950, did, at Herlong, California, feloniously steal Two Hundred Ninety-Seven Dollars ($297.00), lawful money of the United States, the property of the United States.

Specification 3: In that First Lieutenant Isaac J. Higgins, Ordnance Department, on or about 6 March 1950, did, at Herlong, California, feloniously steal One Hundred Seventy-Five and 50/100 Dollars ($175.50), lawful money of the United States, the property of the United States.

Specification 4: In that First Lieutenant Isaac J. Higgins, Ordnance Department, did, on or about 24 March 1950, at Herlong, California, feloniously steal Three Hundred Forty-Four and 25/100 Dollars ($344.25), lawful money of the United States, the property of the United States.

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

Specification 1: In that First Lieutenant Isaac J. Higgins, Ordnance Department, as Sales Officer, Sierra Ordnance Depot, in order to conceal and cover up his failure to deposit with the Disbursing Officer, Sierra Ordnance Depot, Seven Hundred Fifteen and 50/100 Dollars ($715.50) received by him, the said First Lieutenant Isaac J. Higgins, on 13 January 1950 from the Post Engineer for deposit with such Disbursing Officer, did, at Herlong, California, on or about 31 January 1950, in posting in his Sales Officer's Account for the month of January 1950, knowingly and wilfully use a false and altered total entered on his Voucher Number January 4 P (the final report of deposit (Form 10-87) for January 1950), knowing such total to be false and altered, said total being the false and altered cumulative total Twenty-Five Thousand One Hundred Forty-Nine and 66/100 Dollars ($25,149.66), he, the said First Lieutenant Isaac J. Higgins, well knowing the correct cumulative total was Twenty-Four Thousand Four Hundred Thirty-Four and 16/100 Dollars ($24,434.16), and not Twenty-Five Thousand One Hundred Forty-Nine and 66/100 Dollars ($25,149.66).

Specification 2: In that First Lieutenant Isaac J. Higgins, Ordnance Department, as Sales Officer, Sierra Ordnance Depot, in order to conceal and cover up his failure to deposit with the Disbursing Officer, Sierra Ordnance Depot, Two Hundred Ninety-Seven Dollars ($297.00), received by him, the said First Lieutenant Isaac J. Higgins, on 24 February 1950, from the Post Engineer for deposit with such Disbursing Officer, did, at Herlong, California, on or about 28 February 1950, in posting in his Sales Officer's Account for the month of February 1950, the amount of money actually deposited by him as Sales Officer for the month of February 1950, knowingly and wilfully use a false and altered total entered on his Voucher Number February 4 K (the final report of deposit (Form 10-87) for February 1950), knowing such total to be false and altered, said total being the false and altered cumulative total Sixteen Thousand Three Hundred Fifty-Four and 04/100 Dollars ($16,354.04), he, the said First Lieutenant Isaac J. Higgins, well knowing the correct cumulative total was Sixteen Thousand Fifty-Seven and 04/100 Dollars ($16,057.04), and not Sixteen Thousand Three Hundred Fifty-Four and 04/100 Dollars ($16,354,04).

Specification 3: In that First Lieutenant Isaac J. Higgins, Ordnance Department, while Sales Officer, Sierra Ordnance Depot, and charged with the duty of keeping accounts and records, with intent to deceive and to conceal and cover up his failure to deposit with the Disbursing Officer, Sierra Ordnance Depot, Two Hundred Ninety-Seven Dollars ($297.00), received by him, the said First Lieutenant Isaac J. Higgins, on 24 February 1950, from the Post Engineer for deposit with such Disbursing Officer, did, at Herlong, California, make on his Voucher Number February 4 K, report of deposit (Form 10-87) for 28 February 1950, several false entries, but in particular he, the said First Lieutenant Isaac J. Higgins, falsely entered One Thousand Seven Hundred Eighty-Nine and 70/100 Dollars ($1,789.70) as the amount he deposited that day with such Disbursing Officer, well and truly knowing said amount to be false, that in truth and fact the correct amount of money deposited with such Disbursing Officer was only One Thousand Four Hundred Ninety-Two and 70/100 Dollars ($1,492.70) on that day.

He pleaded not guilty to, and was found guilty of all the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, to pay the United States a fine of $1,500.00, and to be confined at hard labor, at such place as proper authority may direct, for ten years. The reviewing authority approved the sentence, but reduced the period of confinement to five years, and forwarded the record of trial for action under Article of War 48.

3. Evidence.

a. Charge I and its Specification.

(1) For the prosecution.

The accused, First Lieutenant Isaac J. Higgins, Ordnance Corps, was on duty at Sierra Ordnance Depot, Herlong, California, from October 1947 through March 1950 (R 209; Pros Exs 9, 10, 21a to 21j). By Paragraph 4, Special Orders Number 93, Sierra Ordnance Depot, Herlong, California, dated 17 October 1949, the accused was directed to proceed on or about 19 October 1949 to Camp Lee, Virginia, for temporary duty of approximately five weeks to attend the Sales Officer School, and upon completion of such duty to return to his permanent station with two short periods of additional temporary duty at two ordnance depots en route (Pros Ex 1). He reported as directed (not later than 28 October 1949) and, upon completion of the school course and the additional temporary duty en route, returned to his permanent station the latter part of December 1949 (R 16).

On 28 October 1949 at Camp Lee, Virginia, the accused submitted a voucher for per diem and reimbursement for travel by private automobile (D.O. Voucher No. 7905, Pros Ex 4) for the period 19-28 October 1949, in the amount of $113.99, covering travel from Sierra Ordnance Depot, Herlong, California, to Camp Lee, Virginia. United States Government Check Number 154,557, 2 November 1949, in the amount of $113.99, was drawn to the order of the accused and was indorsed by him (Pros Ex 5, R 16). From the indorsement thereon, it appears that this check was negotiated at the A & P Food Store No. 115, Colonial Heights, Virginia, and was paid through The Citizens National Bank of Petersburg, Virginia, on 4 November 1949 (Pros Ex 5).

On 28 December 1949, after return to Sierra Ordnance Depot, the accused went to the office of the Agent Finance Officer of the Depot, submitted his itinerary, and a record of the dates and travel involved (R 16). From this information, a claim for per diem and reimbursement for travel by private automobile was prepared (D.O. Voucher No. 83743, Pros Ex 3), dated 30 December 1949, covering accused's subsistence and travel from the Depot to Camp Lee and return, in the amount of $303.99 for the period 19 October 1949 to 22 December 1949 (R 16-18). The accused certified thereon that the account was true and that payment therefor had not been received, and he was subsequently paid $303.99 in cash by the Agent Finance Officer (R 16, 17, 18, 25).

About a month thereafter, it came to the attention of the Agent Finance Officer, who in turn brought it to the accused's attention, that the accused had received a prior payment for a portion of this claim at Camp Lee (R 23-25). The accused stated to him that he had executed a voucher therefor at Camp Lee, "but had not received payment on that voucher" (R 23, 28). After several requests for reimbursement, the

overpayment in the amount of $113.99 was collected by deduction from the accused's pay on the order of the Commanding Officer of Sierra Ordnance Depot (R 21,26,31; Pros Ex 5a). The accused did not protest the deduction (R 29, 31).

(2) For the defense.

After being warned of his rights as a witness, the accused elected to take the stand to testify under oath (R 204, 205). He stated that on arrival at Camp Lee, Virginia, he gave all pertinent data as to travel pay to the Officer Personnel Section and on the basis of this information the Section prepared his travel voucher which he signed, after which it was forwarded to the Finance Office (R 211, 232; Pros Ex 4). Later, when he was informed the check was ready, he "went up during the noon hour and picked up the check" (R 233). He placed his signature on the back of the check as an indorsement preparatory to cashing the check (R 211, 234). He then learned the Finance Office seemed to be paying other officers more money for travel involving a shorter distance than that traveled by the accused and he complained to Captain Aholt, the Finance Officer (R 211, 234). Captain Aholt told him, "That's all we'll pay you and if you're not satisfied with it, you return it and we'll cancel that and you can take it up with your home station" (R 211). The accused elected to return the check and he stated "so I gave the check and the voucher to Captain Rice [his class "President"] to send back to the Finance Office" (R 212). Captain Rice handled the transaction because "The policy with the school was that you turned over any business that you had to the President of the course and he would designate one person to transact all the business for the entire class" (R 211). The accused thought probably Lieutenant Gray acted for Captain Rice in returning the check and voucher to the Finance Office (R 212, 213). Accused did not cross out or void his indorsement because "it was a Government check and I was leary of obliterating anything on them" (R 213). Later a copy of the voucher was returned to the accused with all signatures marked out by the stamp, "Cancelled" (R 212, 213; Def Ex A). Neither Captain Rice nor Lieutenant Gray returned the cancelled voucher to the accused, but he got it out of the school box, which he said was "the normal procedure for anything" (R 212). The accused was asked, "Did you receive, or did you cash that check and receive that amount of money from the check?"; his reply was, "I did not" (R 213). The next indorsement appearing under the signature of the accused on the back of the check is that of "A and P Food Store, No. 115, Colonial Heights, Virginia" (Pros Ex 5). This stamped indorsement indicates that the check was cashed at that store, but the accused denied that he cashed it (R 235). Asked if he had ever been in the store, he said "I imagine I have been in there" (R 235). He denied knowing who cashed the check (R 235). The accused stated he knew that when a voucher is cancelled by a Property Officer, the officer making the cancellation is supposed to sign his name in full under the stamped word "cancelled" (R 236). Questioned about the lack of either name or initials of the cancelling officer, the accused said,

"that was a question that sort of bothered me," but "I didn't pay too much attention" (R 236). When a duplicate copy of the voucher arrived at Sierra Ordnance Depot, having been forwarded from Camp Lee, Virginia, the accused noticed the duplicate bore no cancellation (R 236, 237). The accused showed his copy with the "cancelled" marks to Captain Minor, the Post Adjutant, but he did not show it to Chief Warrant Officer Napora, the Agent Finance Officer, or to Mr. Johnson, the Fiscal Officer, because he said, "I was transacting all the entire thing, from beginning to end with the Adjutant" (R 236-239).

b. Charge II and Charge III and all Specifications of each Charge.

(1) For the Prosecution.

(a) In general.

Under the four specifications of Charge II, accused is alleged to have stolen four separate sums of money, the property of the United States, on certain dates during the months of January, February and March 1950, in violation of Article of War 93. Each specification relates to a transaction involving the delivery to the accused, in his capacity as Sales Officer, of a sum of money representing the proceeds from sales of coal and the alleged stealing of such sum of money. The three specifications of Charge III, in violation of Article of War 96, are concerned with three alleged false entries on Army accounting records to conceal the failure to deposit two of the coal payments involved in Charge II. Therefore, it seems advantageous for clarity and convenience to combine the evidence relating to both Charges by grouping as follows:

Specification 1, Charge II with Specification 1, Charge III
Specification 2, Charge II with Specifications 2 and 3, Charge III
Specification 3, Charge II
Specification 4, Charge II

Preliminary to a further discussion of the evidence, it is desirable to refer briefly to the Army accounting system as bearing on the records and reports the accused was required to maintain and which he is alleged to have falsified, as charged in Charge III. At the request of the Trial Judge Advocate, the court stated it would take judicial notice of the pertinent provisions of Army Regulations 35-6660, dated 15 November 1945, together with Change 4, dated 21 July 1947 and Change 5, dated 25 June 1948; Technical Manual 10-215, Sales Commissary Operation, Department of the Army, dated 24 June 1948; and Technical Manual 14-505, Agent Finance Officers, War Department, dated 1 September 1945, and Change I, dated 2 January 1946 (R 66, 67). The accounting procedure, in so far as it relates to the accused as Sales Officer, is as follows:

Sales Officer's Account. The sales officer is required to maintain a record on a monthly basis of all transactions and property for which he is accountable and responsible, the account for one month being closed

and balanced and a new account being opened for each ensuing month. As the record is maintained on distribution-journal sheets, it is frequently referred to in this case as a "Daily Distribution Journal." Columns are provided for date, voucher number, description of voucher and "Debit" and "Credit" entries. All vouchers to the account are numbered in a single series beginning with 1 for each month; are posted in as nearly cronological order as possible; and are filed with the account for the month to which they pertain. Cash receipts are vouchered and entered as a "Debit" entry. Subsequently, when such cash receipts have been deposited with the disbursing officer, or his agent, the total of such deposits for the month constitutes a "Credit" entry, properly entered as "Report of Deposits." Since the distribution journal is a permanent record of original entry and will not be recopied for audit or for other purposes, it is prescribed that all vouchers, page totals, and final totals be entered in a permanent form in ink or by typewriter or mechanical posting machine. When vouchers have been entered erroneously in the account, it is also prescribed that corrections be made by drawing a narrow but not obliterating line through the entry, and entering the correct entry under the same voucher number on the next available line with a cross reference to the original entry. (TM 10-215, supra, par. 89a, 89b, 89e, 89f, and 89i, and Fig. 56, pp. 136-139).

Turn in of cash. Since the sales officer maintains the money sales account at the station, it is necessary that sales made by other agencies at the post be processed through the sales officer's account. Accountability for the items sold, together with the cash proceeds derived from the sales, are transferred to the sales officer by the selling agent in the manner prescribed in Army Regulations 35-6660, supra. The transfer is accomplished by means of an Army Shipping Document (DA AGO Form 450-5-C, formerly WD AGO Forms 450-5-C and E) prepared in three copies. It is prescribed that copy No. 1 be signed and retained by the sales officer as a debit voucher to his sales account; that copy No. 2 be signed by the sales officer and returned to the selling agency to indicate the date of transfer and acknowledgement of receipt of funds; and that copy No. 3 be forwarded by the selling agency to the auditor for auditing purposes. Thus, in addition to the accounts of the sales officer, there is a duplicate record of the transaction in the accounts and records of the selling agency (TM 10-215, supra, par 84, Fig. 52, p. 126, and Chart 27, p. 127). In this case, in addition to signing the shipping document, the accused entered thereon his own (Debit) voucher number for the appropriate month (R 44, 47, 53 - 54, 60; Pros. Exs. 7, 8, 9 and 10).

Report of Deposits. The sales officer is required to deposit all money received by him with the nearest disbursing officer, or his agent, on a report of deposits prepared in quadruplicate. In this case, since the local representative of the disbursing officer was an agent finance officer, more than four copies of the report were employed. Deposits are to be made by the sales officer whenever the money on hand at the end of the business day, exclusive of the change fund held on memorandum receipt, exceeds $200.00 and, on the last business day of the month,

without regard to the amount. The Report of Deposits (WD AGO Form 10-87) provides space for the name and designation of the depositor, the period covered, and the sections concerned (Such as "Coal" and "Overhead"), and columns for the amount of "Funds Deposited Today", the amount "Accumulated From Last Report", and the amount of "Cumulative Total", with space for totals of each of the columns. It is prescribed that each of the copies of the report be dated and signed by the sales officer and show the sales officer's voucher number; and that the same basic voucher number be assigned, namely number 4 (different reports are distinguished by sub-lettering in sequence, as "Jan - 4 - a" for the first report of the month, "Jan - 4 - b" for the second, etc.). Space is also provided on the report for a signed receipt by the finance officer, or his agent, of the amount of cash deposited by the sales officer, the date of receipt and the finance officer's voucher number. The sales officer is required to maintain a file of the receipted reports of deposit, with the final report for the month on top of the file. At the end of the month the reports, fastened together, are placed as one voucher (Voucher 4) in the voucher file; and the amount of the "Cumulative Total" of deposits from the final report of deposits is then entered directly on the sales officer's account as a "Credit" entry. Thus, a sales officer is required to debit his account for cash received from a selling agency and to credit his account with the cumulative total of deposits actually made to the disbursing officer, or his agent. (TM 10-215, supra, pars. 80, 81 and 84, Fig. 47, p. 117).

The procedure relating to deposits and the distribution of the several copies of the report of deposits is prescribed (TM 10-215, supra, Chart 24, p. 119). In this case, the Agent Finance Officer, Chief Warrant Officer John J. Napora, received five copies of each report of deposits, executed by the accused, accompanying the money being deposited (R 111). After checking the report and the deposit, Mr. Napora would date and sign all copies of the report in the receipt portion thereof, leaving the Finance Officer's Voucher Number blank, to be entered at the office of the Finance Officer, Oakland Army Base. For identification purposes, he would stamp on the several copies "AG. OFF. Vou. No. ____" and enter his own voucher number. One copy of the report was returned to the accused; one copy was retained by the Agent Finance Officer; and three copies were forwarded to the Finance Officer, either on the 5th or 20th of each month, stamped "This voucher turned in to Disbursing Officer", with the stamped date of forwarding (R 111 - 113). When the forwarded copies were received by the Finance Officer, the Finance Officer's Voucher Number was entered in the receipt portion of the report (R 130). The finance officer returned one copy of the report to the accused; forwarded one copy to the Accounting Division, Army Finance Center, St. Louis, Missouri; and retained one copy (R 114, 130-131). When the accused received the copy bearing the Finance Officer's Voucher Number, he was required to retain it as part of his sales officer's account and forward the other copy, previously retained to the Accounting Division (R 114-115). Thus, accused's returned copy and one of the copies received by the Accounting Division, would show three distinct voucher numbers - that of the Sales Officer and Agent Finance Officer, both entered at Sierra Ordnance Depot, and that of the Finance Officer,

entered at Oakland Army Base (R 112, 114-115, 130-131). It should be noted that there are four sets of records with reference to accounting for each deposit, to wit: the records of the Sales Officer, the Agent Finance Officer, the Finance Officer, and the Accounting Division, Army Finance Center, St. Louis, Missouri (R 114, 130).

The accused was assigned the principal duty of Sales Officer at Sierra Ordnance Depot, Herlong, California, effective 1 January 1950 (Pros Ex 6). On about 10 May 1950, Chief Warrant Officer Napora made an audit of the Sales Officer's Accounts and found discrepancies for the months of January, February, and March (R 69-77). Comparison of documents in the Sales Officer's Accounts with duplicate copies in other agency files disclosed that the Sales Officer's documents had been altered to cover an apparent shortage (R 124-127).

(b) Specification 1, Charge II, and Specification 1, Charge III.

These specifications relate to stealing $715.50, the property of the United States, on or about 13 January 1950, and to the use of a false entry in the Sales Officer's Account for January 1950 of an altered cumulative total of deposit, the discrepancy between the correct and altered totals being $715.50.

On 13 January 1950, Captain Paul V. Brausa, the Post Engineer, Sierra Ordnance Depot, made a deposit of $715.50 with the Sales Officer, the accused (R 43). The money represented cash sales of coal to civilian employees on the post and was the property of the Government (R 40-41). The accused receipted two War Department Shipping Documents (WD AGO Form 450-5-C) by placing on the form his Sales Officer Voucher No. "Jan. 277-50" and his signature (Pros Exs 7 and 22, R 42-44). The accused made no chronological debit entry on his Daily Distribution Journal (Pros Ex 12, pp. 5, 6; R 73) to show the deposit of 13 January 1950 and did not make a deposit of the money on that day (Pros Ex 14-a; R 87-88; the coal deposit of $549.99 shown on Pros Ex 14-a appears to represent receipts from the Post Engineer on 11 and 12 January, less overhead - see Pros Ex 12, p. 5). However, under date of 16 January, the following Monday and the next business day, accused made a debit entry in his own handwriting on page 6 of Prosecution Exhibit 12, "277a - Post Engineer -- $715.50" (R 141; Pros Ex 24, R 174). Prosecution Exhibits 13-a through 13-p, inclusive, were introduced without objection (R 34-35, 73-74, 81-82). These exhibits are the Reports of Deposit (WD AGO Form 10-87) for the month of January 1950 from the files of the Sales Officer (R 73-74). Prosecution Exhibits 14-a to 14-j inclusive, introduced without objection, are photostatic copies of the Reports of Deposit for the period 13 January to 31 January 1950, inclusive, retained in the files of the Agent Finance Officer (R 35-36, 78, 80-81).

Prosecution Exhibits 15a to 15j, inclusive, were admitted without objection and constitute another set of copies of the Reports of Deposits for the period 13 January to 31 January 1950, inclusive, originating in the office of the accused and thereafter forwarded through the Agent

Finance Officer and the Finance Officer, Oakland Army Base, to the General Accounting Office, St. Louis, Missouri (R 90-91). This set of Reports of Deposits shows on each report the voucher number of the accused Sales Officer, the Agent Finance Officer, and the Finance Officer, Oakland Army Base, and each report (except for the addition of the Finance Officer's Voucher Number) is identical with the corresponding report taken from the Agent Finance Officer's files, Prosecution Exhibits 14-a to 14-j, inclusive. A comparison of these three sets of prosecution exhibits, to wit: Prosecution Exhibits 13-g through 13-p (from the Sales Officer files), Prosecution Exhibits 14-a through 14-j (from the Agent Finance Officer files), and Prosecution Exhibits 15a through 15j (from the General Accounting Office files) indicates that the only differences as to amounts are found in the set of reports in the Sales Officer files. On Prosecution's Exhibit 13-g for 13 January 1950, the item of "Overhead" has been erased and increased by $21.47 in the "Funds Deposited Today" and "Cumulative Total" columns; the item of "Coal" has been erased and increased by $694.03 in the same columns; and the "Total for deposit" for the two columns has been erased and increased by $715.50. Thereafter, beginning with the Sales Officer's copy of report dated 16 January 1950 (Pros Ex 13-h) and carried forward in each report to the final report, 31 January 1950 (Pros Ex 13-p), there are erasures and new typewritten figures relating to "Overhead" and "Coal" in the "Accumulated From Last Report" and "Cumulative Total" columns and in the "Total for deposit" for the two columns, which raise the cumulative total amounts exactly by $715.50 over the corresponding totals in the copies of reports from the Agent Finance Officer and the General Accounting Office files. The final cumulative total shown by the Sales Officer's copy of report is $25,149.66 (Pros Ex 13-p), while that shown on the copies of the Agent Finance Officer and the General Accounting Office is $24,434.16, a difference of $715.50 (Pros Ex 14-j and 15j). The "raised" figure of $25,149.66 was carried over to the Sales Officer's Account and entered as a credit item "Report of Deposits", Voucher No. 4, on page 17, Prosecution Exhibit 12. It was the use of this "raised" figure instead of the cumulative total $24,434.16, as shown in Prosecution Exhibits 14-j and 15j, that is the basis of the offense alleged in Specification 1, Charge III.

Mrs. Frances P. Warner was a clerk who worked in the office of the accused "from the first of January 'til the last of February" (R 140). Her duties included preparing all Reports of Deposit and keeping the Distribution Journal (the Sales Officer's Account) (R 141). These records were kept "under lock and key" in a file cabinet (R 142). Asked, "Who kept the key?", she replied, "I had one, and Lieutenant Higgins had one" (R 142). She never prepared any Reports of Deposits which, when she turned them over to accused, had any erasures, alterations, or obliterations (R 145). She testified, when shown Prosecution Exhibits 13-a through 13-p, "I didn't type the changes on this particular one, or -- nor this one, nor any of them" (R 144). Mrs. Warner closed out the Distribution Journal for January at the end of the month but she did not put on any of the penciled figures at the bottom of each page from page 6 through 16, nor did she use the closing figures which now appear on page 17 of the Distribution Journal (R 142). Mrs. Warner never worked overtime (R 142). The

entry at the bottom of page 6, Prosecution Exhibit 12, "277A Post Engineer $715.59" is in the accused's handwriting and was not on the journal sheets during the month of January 1950 while she was working on the books (R 141-142).

(c) Specification 2, Charge II and Specifications 2 and 3, Charge III.

These specifications relate, respectively, to stealing $297.00, the property of the United States, on or about 28 February 1950; to the use of a false entry, in the Sales Officer's Account for February 1950, of an altered cumulative total of deposit, the discrepancy between the correct and altered totals being $297.00; and to the false entry, in the Sales Officer's Voucher No. 4 for 28 February 1950, of a cumulative total of deposit, the discrepancy between the correct and false totals being $297.00.

On 24 February 1950, Captain Paul V. Brausa, the Post Engineer, Sierra Ordnance Depot, made a deposit of $297.00 in cash, representing the proceeds from sales of coal to civilians (R 48). He paid the money to the accused as Sales Officer and presented to him Army Shipping Document (DA AGO Form 450-5-C) in duplicate, and received back a copy signed by the accused as Sales Officer and bearing the Sales Officer voucher number "Feb. - 451-50." (Pros Exs 8 and 11; R 48, 50, 75). No entry was made in the Sales Officer's Account on the day of the transaction, 24 February 1950, which was also the day when it should have been recorded by appropriate entry in the Daily Distribution Journal, but later, probably after the account was closed at the end of the month, the $297.00 item was inserted in the middle of the transactions recorded for 20 February 1950 (Pros Ex 16, p. 10; R 74, 146). The notation "451 - Post Engineer - 297.00" is in the accused's handwriting (R 146). The exhibit shows that the entry was written over a prior entry.

The Sales Officer's file copy of the Report of Deposits bearing Voucher No. "Feb. 4K," dated "28 Feb 1950," showed $1789.70 as deposited that day and the cumulative total for the month of February, as $16354.04 (Pros Ex 17-K; R 74, 96). There are obvious erasures relating to the items of "Overhead" and "Coal", in the "Funds Deposited Today" and "Cumulative Total" columns and in the "Total for deposit" for each of these columns. Each erasure is initialed "I.J.H." (Pros Ex 17-K). However, copies of the same Report of Deposits, bearing the same Sales Officer's voucher number, from the files of the Agent Finance Officer (Pros Ex 18; R 92) and General Accounting Office (Pros Ex 19; R 101), and in the records of the Finance Officer, Oakland Army Base (R 136-137), show the correct figures to be $1492.70 total for deposit 28 February 1950 and $16,057.04 cumulative total for the month of February. The difference in the total on the Sales Officer's file copy from that on all other copies and records is $297.00, the exact amount the accused is charged with stealing, as alleged in Specification 2, Charge II (R 96-100). The act of the accused in allegedly raising the "Total For Deposit" for the day, 28 February 1950, as shown on Prosecution Exhibit 17-K, forms the basis of the offense alleged in Specification 3, Charge III.

The accused used the "raised" cumulative total of $16,354.04, as shown on his office file copy of the Report of Deposits (Pros Ex 17-K), instead of the apparently true total of $16,057.04, as shown in the records of the Agent Finance Officer, the Finance Officer, and the General Accounting Office (Pros Exs 18 and 19; R 96-100, 136-138), for the purpose of making the closing entry shown as "4 - Report of Deposits - 16354.04" on page 13 of his Sales Officer's Account for February 1950 (Pros Ex 16). It was the use of this last total by the accused which is the basis of the offense alleged in Specification 2, Charge III.

Chief Warrant Officer Napora made a complete audit of the Sales Officer's Accounts for February and compared the records in accused's office with corresponding records in the files of the Agent Finance Officer, the Finance Officer and the General Accounting Office (R 68-69, 72, 76, 91-100). When Mr. Napora noticed erasures and initials on the Sales Officer's Report of Deposits (Pros Ex 17-K), he asked the accused for an explanation and the accused "could not, at that time, tell me" (R 97). The accused, however, said that the initials "appeared to be his initials" (R 97). When Mr. Napora found that the raised cumulative total, as shown on the Sales Officer's copy of final Report of Deposits (Pros Ex 17-K), had been used as a closing credit entry in the Sales Officer's Account for February 1950 (Pros Ex 16, p. 13), he brought the alterations and erroneous entries to the accused's attention and the accused "didn't seem to have an explanation" (R 99). While Prosecution Exhibit 16 shows a debit entry as of 20 February 1950 to record a cash receipt of $297.00, none of the Reports of Deposits made by the accused for February 20, 21, 23 or 24 show any amount reflecting a deposit of $297.00 for the items of "Coal" and "Overhead" (Pros Ex 17-g through 17-j; R 99-100). However, the deposits for the final report are "raised" over actual deposits by $297.00, this amount being reflected in a discrepancy of $8.91 relating to "Overhead" and a discrepancy of $288.09 relating to "Coal" such increases being employed in the columns "Funds Deposited Today" and "Cumulative Total." The entire amount of the "raise", $297.00, is reflected in the total for deposit and final cumulative total (Pros Ex 17-K; R 96-100).

(d) Specification 3, Charge II.

This specification charges the accused with stealing $175.50, the property of the United States, on or about 6 March 1950.

On 6 March 1950, Captain Paul V. Brausa, the Post Engineer, made another deposit with the accused in the amount of $175.50 for the purpose of turning in additional monies collected for sales of coal (R 51). The accused placed his signature and Sales Officer voucher number "Mar - 74 - 50" on an Army Shipping Document bearing the Post Engineer voucher no. 1347-50 (Pros Ex 9; R 51-53). The Shipping Document was submitted in triplicate and the Post Engineer received back one copy from the accused to be used as a receipt (R 51). No entry was made in the Sales Officer's Account for March 1950 to record the money involved in this transaction (Pros Ex 20). However, on page 2, Sales Officer's Account for that month there is an entry of the figures "74" in the voucher column, although no

date or amount is shown (Pros Ex 20, p. 2; R 103). Mr. Napora, in his audit of the Sales Officer's Accounts for March 1950, examined all relevant records and vouchers and concluded that the money receipted for by the accused on the Post Engineer's copy of the Shipping Document for $175.50 (Pros Ex 9) had not been recorded and did not appear on the Sales Officer accounts (R 101, 102).

(e) Specification 4, Charge II.

This specification charges the accused with stealing $344.25, the property of the United States, on or about 24 March 1950.

On 7 March 1950, Mrs. Antonette Boneck, a clerk, was authorized by Major S. N. Ackerman, the Post Engineer, to make cash sales of coal and to make deposits of money received as the proceeds of such sales (R 56-59). On 24 March 1950, Mrs. Boneck acting for the Post Engineer, turned in $344.25 to the accused for deposit, together with three copies of Army Shipping Document, DA AGO Form 450-5-C (Pros Ex 10; R 58-59). The accused accepted the money and took it into his office where he counted it and verified the amount (R 60). He then affixed his Sales Officer's voucher number "Mar - 555 - 50" on the lower left hand corner and receipted the Shipping Document copies by signing his name as Sales Officer (Pros Ex 10; R 60-61). The accused returned two copies to Mrs. Boneck, which she later turned in to the Post Engineer (R 61). This $344.25 receipt of cash was never posted in the Sales Officer's Account for March 1950 (Pros Ex 20, pp. 12 thru 15). None of the Reports of Deposits for the month of March 1950 reflect a deposit of that amount (Pros Exs 21a thru 21j). Mr. Napora found an entry in the Sales Officer's Account under the date of 24 March 1950 which is assigned the voucher number "555" from the Post Engineer but the amount is $297.00 instead of $344.25 (R 104). He then reported the "discrepancy" as one of the items in a total shortage of $1532.25 (R 104-106). Mr. Napora obtained the Post Engineer's copy of the Shipping Document covering this deposit of $297.00 and found the Post Engineer's copy, dated 24 March 1950, bore the Sales Officer's voucher number "Mar - 593 - 50" and not "Mar - 555 - 50" (Pros Ex 25; R 175, 176). Reference to the Sales Officer's Account shows that Sales Officer's voucher number "Mar - 593 - 50" on that record refers to a Post Ordnance Officer deposit of $32.85 (Pros Ex 20, p. 13). Mr. Napora concluded that the $344.25 deposit and the $175.50 deposit discussed above, both from the Post Engineer, although receipted by the accused Sales Officer, "were not in his accounts, were not accounted for for that month" (R 102).

(2) For the defense. - All Specifications of Charge II and Charge III.

As previously stated, accused was warned of his rights as a witness and elected to testify under oath. The accused testified at some length as to the accounting system he used as Sales Officer. In general, his description of the accounting system is the same as the procedure described in paragraph 3b (1)(a) of this opinion and need not be repeated. The accused

said that during January 1950 he collected some $2000.00 of accumulated charge sales and that the turn-in of this money was effected by use of a "447", "property turn-in slip". He was shown Prosecution Exhibit 12 (Sales Officer's Account for January 1950) and was asked if he made the entry "277A, Post Engineers", and he replied that he posted the entry himself (R 220). He denied that he was responsible for any of the figures in the footings or subtotals at the bottom of the pages of Prosecution Exhibit 12. About some of these figures, he said "Some of them I didn't recall ever seeing them before" (R 220-221). He explained why "A" had been added to the "277" Post Engineer Voucher number, as follows:

> "*** if I recall this incident, and it is normal practice, why, I received this voucher and asked for the number, and gave it the number, and placed it in the outbasket, and in the meantime, the clerk had forgotten that she had given out this number, so she put in another 277 number of an Ordnance Property Voucher and then she came to this number and wanted to know what to do with it, and I said the only thing to do is give it an 'A' number. ***." (R 220)

The accused said when he closed his account for January, his books balanced except for a $1.76 item which he later found and corrected (R 224). He also said that his accounts were in balance when he closed for the months of February and March (R 227-228). The accused denied that he took or received any of the money, the property of the United States (R 228). He also denied that he knowingly falsified any records or documents (R 229). At the time he closed out the January 1950 account, he stated he could not have had the final Report of Deposits as returned from the Finance Officer, Oakland Army Base (R 225). Instead, he used the "unvouchered" copy signed by the Agent Finance Officer (R 225). He said the copy, Prosecution Exhibit 13-p, and the altered figures "could not have been in my files at the time I compared it" (R 225). The accused said the total for entry "4" of $25,149.66 on page 17 of Prosecution Exhibit 12 was not in his writing and he did not know who entered the total for the month of $25,234.44 (R 249-251). He was asked to explain why the Sales Officer's copy of Report of Deposits (Pros Ex 13-p) should be different from the Agent Finance Officer's copy (Pros Ex 14-j). He answered, "Well, personally, I can't explain. The one of them is different, and as far as I - - I don't know why or when" (R 253). The accused was asked "Did you deposit with the Agent Finance Officer at any date subsequent or on 13 January 1950, the sum of $715.50 which you received from Captain Brausa?" to which he answered, "Oh, I couldn't definitely say" (R 256). The Trial Judge Advocate then asked, "That is your final answer?" and the accused stated, "Yes sir, because I don't keep up with those every time I deposit, what it is for and so forth" (R 256).

The explanation the accused made of the handling of the $297.00 deposit from Captain Brausa on 24 February 1950 follows the same general pattern. He posted voucher number "451" over a previously erased entry (Pros Ex 16, p. 10; Pros Ex 8; R 226, 256). The accused admitted the handwriting was his own (R 256). He testified:

"*** A lot of money orders came in that were in excess of 30 days old. Sometimes they would be entered and then we'd have to turn them back because I had no alternative. Once I picked them up, I had to close -- it takes quite some time to get one of those back. I had requested that she specifically check those before this is finally entered, or any signature signed or anything, but once in a while, and like I said, that is what happened here. They entered one and rather than leave a blank space, which you shouldn't if you can possibly avoid it in a ledger, it was gone back and this voucher posted to fill in the blank space due to the fact of a money order being over 30 days old and the shipping document or money order being returned to the Field Service Ordnance Property Officer." (R 227).

Between 1 March and 5 March, he checked the Reports of Deposits and the February Daily Distribution Journal and the accounts were balanced (R 227). On cross-examination, he could not explain the discrepancy between his Sales Officer copies of the Reports of Deposits and those of the Agent Finance Officer (R 260). He conceded that "*** from all indications it would appear possible" the copy from the Agent Finance Officer reflected the correct amount of deposit (Pros Ex 18), rather than the amount shown on his copy (Pros Ex 17-K; R 261). He finally concluded as to Prosecution Exhibit 17-K that "somebody was trying to cover up something most likely. *** I know it was definitely not me" (R 263-264). He placed the blame on Mrs. Warner, the clerk, and stated "it leaves me no alternative /but/ to think it was the clerk. *** She had assess /access/ to all the cash in the office and all the money orders also" (R 264).

The accused was questioned about the $175.50 deposited by Captain Brausa on 6 March 1950 (R 268). He admitted that the Shipping Document, Prosecution Exhibit 9, bears his signature and voucher number, and that no entry of the transaction had ever been made in the Daily Distribution Journal for the month of March (R 268). Asked if he ever made a deposit of that money, he stated "In checking over, no. Apparently not, sir", and could not explain why no deposit had been made (R 270).

On cross-examination the accused admitted that he placed his signature on the Shipping Document, Prosecution Exhibit 10, representing the deposit of $344.25 made by Mrs. Antonette Boneck on 7 March 1950 (R 264-265). He also said the money "Probably was received in my office, yes sir" (R 264) The accused said he did not know his copy of the $344.25 voucher was missing from his files until Mr. Lund performed his audit (R 266). He was asked, "Did you ever deposit the sum of $344.25 with the Agent Finance Officer?", to which he answered "Since this has all come out, apparently not, sir" (R 267). The accused said it was possible Mrs. James, a clerk, took the money (R 268). He testified:

"I'd hate to make an accusation of anyone. But I have but one alternative left. If either one of the clerks had ever reported to me there was a sum of money missing, there would be a way of answering it, but it was never brought to my attention that we were short in any of the accounts." (R 268)

The accused testified that he was born 1 February 1916 at Bassett, Arkansas. He finished high school and enlisted in the Army 21 September 1936 at Fort Sill, Oklahoma, for three years. He was discharged in 1939 as a Staff Sergeant (R 202-206). On 2 May 1942, he was drafted at Lawton, Oklahoma, and was sent to various camps before going overseas in August 1943 as a motor sergeant with the 411th Ordnance Company (R 206-208). He served in North Africa and Italy until 1945, at which time he was transferred to the 3488th Ordnance Company and sent to Hollandia, New Guinea (R 207-209). He then went to the Philippines and transferred to the 1135th Counter Intelligence Corps Detachment in the grade of Master Sergeant (R 209). He was commissioned a Second Lieutenant, Ordnance Department, by direct appointment on 9 December 1946 and was promoted to First Lieutenant on 22 June 1948 (R 209-210).

The accused admitted on cross-examination that he had been convicted in 1941 of forgery, second degree, in the State of Oklahoma and that he had served time in the penitentiary at McAlester. He claimed that he pleaded guilty "under duress" and that for this reason his uncle took the case to the Criminal Court of Appeals and had the case reversed. He said "it was later rescinded and 'reminded' /remanded/ and I was released. *** I was not paroled. I was dismissed" (R 273). A certified copy of the judgment of conviction was admitted in evidence over defense objection (Pros Ex 27; R 292). The accused admitted that on 19 January 1950 he had answered "No" in response to the question whether he had ever undergone arrest, indictment, or conviction for any civil offense other than minor traffic violations, appearing on WD AGO Form 643A, dated 1 September 1946 (R 273-274).

By stipulation the testimony of Mr. Harvey L. Lund, taken at the pretrial investigation, was read into evidence (R 180). Mr. Lund made an audit which disclosed discrepancies between the Sales Officer's accounts and those of the Finance Officer. The Records of Deposits for January, February and March did not agree as between the two offices (R 186). He had two vouchers from the Post Engineer for which he could find no debit voucher in accused's March account, namely, a voucher in the amount $175.50, dated 6 March 1950 (See Pros Ex 9; R 53), and a voucher in the amount of $344.25, dated 24 March 1950 (See Pros Ex 10; R 62) (R 183). Mr. Lund stated, "My hard and fast conclusion is that someone got off with money, as to who, I am not willing or qualified to say" (R 189).

Mr. Daryl E. Johnson, Administrative Assistant of the Depot Miscellaneous Services Division, observed Mrs. Warner's activities in the Sales Officer's office from about 2 January to 10 January 1950 (R 194). During that time she received cash from civilians during Lieutenant Higgins' absence but the witness did not know what bills were being paid (R 193).

Mr. Charles F. Parsons, Chief of Police, Herlong, California, had opportunity to observe the work in the accused's office. He saw Mrs. Warner receive money in a canvas bag which she turned over to the accused. He never saw her receive money otherwise and did not see her open the safe although she might have had access to it. He saw accused receive funds from Captain Brausa (R 198-200).

4. Discussion.

a. Charge I and its Specification.

The accused, was charged with and found guilty of presenting a false claim against the United States for subsistence and travel pay, a part of which he had previously been paid, in violation of Article of War 94. The form of the specification substantially follows that prescribed by the Manual for Courts-Martial for presenting false claim. (MCM, 1949, Appendix 4, Form No. 99, p. 324).

In discussing this offense, the Manual for Courts-Martial states:

"The claim must be presented, directly or indirectly, to some person having authority to approve or pay it. False and fraudulent claims include not only those containing some material false statement, but also claims which the person presenting knows to have been paid or for some other reason knows he is not authorized to present or upon which he knows he has no right to collect". (MCM, 1949, par. 181b., p. 249)

The elements of proof are stated to be:

"(a) That the accused presented or caused to be presented for approval or payment to a certain person in the civil or military service of the United States having authority to approve or pay it a certain claim against the United States as alleged; (b) that such claim was false or fraudulent in the particulars alleged; (c) that when the accused presented the claim or caused it to be presented he knew it was false or fraudulent in such particulars; and (d) the amount involved, as alleged." (MCM, 1949, par 181b, p. 249)

The facts bearing on this offense are undisputed in certain respects. The accused, while on duty at Sierra Ordnance Depot, Herlong, California, was directed under appropriate orders to proceed on temporary duty to Camp Lee, Virginia, and, on completion of his course, to return to his permanent station. He complied with his orders and on return to his home station he submitted a claim for travel pay and subsistence covering his trip to Camp Lee and return. His voucher, certifying that the account was true and had not previously been paid, was approved and the accused was paid the sum of $303.99 in cash by the Agent Finance Officer on 30 December 1949. The accused in his own testimony admits all the essential details of this transaction.

The accused also admits that on 28 October 1949 at Camp Lee, Virginia, he made claim for travel and subsistence for the period of 19-28 October 1949. Upon approval of the voucher, a government check in the amount of $113.99, drawn to the order of the accused, was issued and delivered to the accused by the Finance Officer, Camp Lee, Virginia. The accused admits he went to the Finance Office and received the check in question and that he subsequently placed thereon his indorsement preparatory to cashing the check. From this point in the transaction to its completion, there is sharp dispute as to the facts.

The prosecution introduced the cancelled check for $113.99, bearing the indorsement of the accused, a second indorsement of A. and P. Food Store No. 115, Colonial Heights, Virginia and a final indorsement of the Citizens National Bank of Petersburg, Virginia (Pros Ex 5). On its face, this check indicates a negotiation by the accused through the A. and P. Food Store in the normal course of business. The accused has an explanation which, if true, would constitute a legal defense. He claimed that, after receiving the check and indorsing it, he learned that other officers were getting more money for traveling shorter distances than he had travelled and he complained to the Finance Officer. The Finance Officer told him "that's all we will pay you" and invited the accused to return the check if he was not satisfied. The accused stated that he decided to do as advised and that he then turned over the indorsed check to Captain Rice, his class president, for return and cancellation. The accused thought Captain Rice did not take the check to the Finance Office himself but that Lieutenant Gray, acting for Captain Rice, probably took it. Shortly after this, the accused received a copy of his voucher on which all the signatures were stamped "cancelled" but the signature or initials of the cancelling officer did not appear. The accused said he knew that when a property voucher is cancelled, the officer responsible for the cancellation "has to sign it with his full signature" and that when he noticed the omission "that sort of bothered me" but "I didn't pay too much attention."

After the accused had returned to Sierra Ordnance Depot, he was shown another copy of his voucher forwarded from Camp Lee and he noticed it had no "cancelled" marks on it, but he apparently did nothing about this. When called upon to make reimbursement for the $113.99 prior payment, the accused said he had made claim at Camp Lee but did not receive payment. At the same time, he promised to "take care of the matter." After several more official requests for reimbursement had failed to obtain payment from the accused, the $113.99 repayment was collected by deduction from his pay by order of the Commanding Officer of Sierra Ordnance Depot. The accused made no protest of the deduction from his pay.

By its finding of guilty, the court resolved the controverted fact issue against the accused. This the court was entitled to do by a reasonable use of discretion and after weighing all of the available evidence (CM 325457, McKinster, 74 BR 233, 241) and the court's finding is entitled to considerable weight by reason of the superior position it enjoyed in seeing the witnesses and hearing them testify (CM 323161, Lacewell, et al,

72 BR 105, 109). See also, to the same effect, CM 335526, Tooze, 3 BR-JC 313, 340, 341, 352; CM 338993, Pelkey, 6 BR-JC 289, 303, 308-309.

It is difficult to see how the court could have reached any different conclusion. The accused is a mature officer and at the time of the offense had over 10 years of Army service. During such service, he undoubtedly became familiar with the details of handling government vouchers and checks. It is almost impossible to believe that such a person would turn back to Finance an indorsed government check without first cancelling or marking off his indorsing signature. It also seems unlikely that the accused would have allowed anyone else to return his indorsed check for him. Vaguely, and by innuendo and inference only, he intimates that Captain Rice, Lieutenant Gray, or perhaps, someone in the Camp Lee Finance Office could have taken his check and cashed it. He seems willing to involve as many persons as possible, thereby spreading the blame, without making any direct individual accusation. He tacitly admits that he knew the "cancellation" of his voucher was worthless and devoid of any legal protection to him, yet he did nothing about it. When he was shown the forwarded copy from Camp Lee, lacking the "cancelled" marks, he took none of the actions normally to be expected in such a case. He did not ask for an investigation by the Inspector General or a Board of Officers, or do anything, except talk with the Adjutant at Sierra Ordnance Depot when called. He has presented no witness or any evidence corroborative of his story. He denies cashing the check at the A. and P. Store although he admits, "I imagine I have been in there." When demand was made officially for reimbursement to the government, he agreed to pay back the amount, but failed to do so. Eventually, a forced collection was made by stopping his pay, which he did not protest.

These cumulative inconsistencies convince the Board of Review that the story of the accused is false and that he is not worthy of belief. The Board is of the opinion that the accused presented a false claim against the United States at the time and place and in the amount as alleged, then knowing the claim was false in the particulars as alleged. All elements of proof are present and we conclude that the evidence is sufficient beyond a reasonable doubt to support the court's findings of guilty of Charge I and its Specification.

b. Charge II and all of its Specifications.

Each Specification charges the accused with stealing a sum of money of a value over $50.00, property of the United States, in violation of Article of War 93. Specifications 1, 2, 3 and 4 are each in the form prescribed by the Court-Martial Manual (MCM, 1949, Appendix 4, Form No.92, p. 323).

The elements of proof are:

"(a) The appropriation by the accused of the property as alleged; (b) that such property belonged to a certain other person named or described; (c) that such property was of the

value alleged, or of some value; and (d) the facts and circumstances of the case indicating that the appropriation was with the intent to deprive the owner permanently of his interest in the property or of its value or a part of its value." (MCM, 1949, Par. 180g, p. 240)

The accused received four deposits of United States money, the property of the United States, from the Post Engineer. Three of these deposits were made by Captain Brausa, the Post Engineer, in person, in the amounts of $715.50 (Specification 1), $297.00 (Specification 2) and $175.50 (Specification 3). The fourth, in the amount of $344.25 (Specification 4), was deposited with the accused by Mrs. Antonette Boneck, acting for the Post Engineer. In addition to the testimony of the persons making these deposits, there is in evidence the receipted voucher (Shipping Document), signed by the accused and bearing the Sales Officer's voucher number, covering each separate deposit. The accused admitted his signature on all Shipping Document vouchers and either admitted that he received the deposits himself, or that in the case of the $344.25 amount it "probably was received in my office." In the case of the $715.50 and $297.00 deposits, it was shown that the accused falsified his accounts, as will be hereafter discussed in connection with the discussion of Charge III. The accused does not deny receipt of any of these sums of money, although he states that he did not get any of the money and at the closing of each month's accounts for January, February and March, he thought his books balanced. He vaguely blames Mrs. Warner, a clerk, for the shortage of the $297.00 deposit and accuses Mrs. Jones, another clerk, of taking the $344.25 deposit.

The following statements of law are applicable to this case:

"'*** There is a well established legal presumption that one who has assumed the stewardship of another's property has embezzled such property if he does not or cannot account for or deliver it at the time an accounting or delivery is required of him. The burden of going forward with the proof of exculpatory circumstancesthen falls upon the steward and his explanatory evidence, when balanced against the presumption of guilt arising from his failure or refusal to render a proper accounting of or to deliver the property entrusted to him, creates a controverted issue of fact which is to be determined in the first instance at least by the court (CM 276435, Meyer, 48 BR 331, 338; CM 301840, Clarke, 24 BR (ETO), 203, 210; CM 262750, Splain, 4 BR (ETO) 197, 204; CM 320308, Harnack). **A person in charge of trust funds who fails to respond with or account for them when they are called for by proper authority cannot complain if the natural presumption that he has made away with them outweighs any uncorroborated explanation he may make, especially if his explanation is inadequate and conflicting (CM 251225, Johnson, 33 BR 177, 181; CM 251409, Clark, supra).' (CM 323764, Mangum, 72 BR 403)".

"'The fact of fraudulent conversion in embezzlement may be evidenced by *** a deliberate falsification *** by rendering a false return or account *** in which a fictitious balance is made to appear or which is otherwise falsified or purposely misstated.' (Winthrop's Military Law and Precedents, Reprint 1920, page 705)" (CM 334270, Stricklin, 1 BR-JC 141, 155-156; CM 340473, Morton, 6 Br-JC 49, 70-71).

No useful purpose will be served in prolonged discussion. The Board of Review is convinced beyond a reasonable doubt that the accused appropriated the property of the United States of the value and under the circumstances alleged. In our opinion the evidence is legally sufficient to sustain the court's finding of guilty of all of the Specifications of Charge II and of Charge II.

c. Charge III and its Specifications.

Specifications 1 and 2 charge the accused with having used false entries in his Sales Officer's Accounts in order to conceal his failure to deposit certain government money with the Disbursing Officer, in violation of Article of War 96.

Upon arraignment, the record of trial shows that the following words were omitted from Specification 2, as it appears on the charge sheet:

"*** the amount of money actually deposited by him as Sales Officer for the month of February 1950, ***".

The omitted words are descriptive only; the specification additionally contains a detailed description of the false and altered total allegedly used, its source, and the alleged correct cumulative total. Thus, the specification unequivocally states sufficient facts to apprise the accused fully of the offense charged. The words may, therefore, be regarded as surplusage and their omission is harmless as to the accused (CM 244946, Forbes, 29 BR 73, 80; CM 319411, Meyers, 68 BR 281, 284). With these words deleted, Specifications 1 and 2 are identical in form, inasmuch as Specification 1 does not include similar descriptive language with reference to the Sales Officer's Account for January 1950.

Specification 3 alleges that the accused, while Sales Officer and charged with the duty of keeping accounts and records, made false entries on a Report of Deposit for the purpose of concealing his failure to deposit certain government money with the Disbursing Officer.

The 96th Article of War is intended to make punishable as a military offense certain acts or omissions, not specifically mentioned in the other articles, including "all disorders and neglects to the prejudice of good order and military discipline" and "all conduct of a nature to bring discredit upon the military service" (AW 96). The phrase "all disorders and neglects" includes acts of "immorality; dishonesty; fraud or falsification"

(Winthrop, Military Law and Precedents, Second Edition (Reprint 1920) sec. 1121, p. 722).

> "'To the prejudice of good order and military discipline' refers only to acts directly prejudicial to good order and military discipline and not to acts which are prejudicial only in a remote or indirect sense." (MCM, 1949, par 183a; p. 255); and "discredit", as used in the article, means "to injure the reputation of" the military service (MCM, 1949, par 183b, p. 256).

All three Specifications of Charge III allege fraud and falsification of certain entries in Army accounting records by the accused as Sales Officer in order to conceal his failure to deposit with the Disbursing Officer two sums of money received by him for deposit (the stealing of these sums was charged in two specifications of Charge II). Each specification, in our opinion, properly pleads an offense under Article of War 96 not only as a disorder and neglect to the prejudice of good order and military discipline but also as conduct of a nature to bring discredit upon the military service.

The evidence adduced for the prosecution under these pleadings may be briefly summarized as follows:

Specification 1.

On 13 January 1950, Captain Brausa, Post Engineer, deposited $715.50 with the accused as Sales Officer. The accused receipted a Shipping Document and placed thereon his signature and Sales Officer's Voucher number. The accused did not forward this deposit to the Agent Finance Officer, or the Disbursing Officer, the proper officer to receive the money "through channels", and he did not, on the date of receipt of the money, record the deposit on his Daily Distribution Journal or Report of Deposits. However, on the final cumulative figures for the total deposits for the month shown on Voucher Number January 4 P; (Pros Ex 13-p), the total was raised from $24,434.16 to $25,149.66 (Pros Exs 14-j, 15j), and this raised figure was used as a closing entry on his Sales Officer's Account for the month of January 1950 (Pros Ex 12).

Specifications 2 and 3.

On 24 February 1950, Captain Brausa made another deposit with the accused in the amount of $297.00. The procedure was much the same as in the case of the $715.50 deposit. The accused gave the Post Engineer a receipted Shipping Document bearing his signature and voucher number to acknowledge receipt of the payment, but made no entry at the time in his Daily Distribution Journal and did not show the deposit on his Report of Deposits for the day. Later, on or after 28 February 1950, he initialled certain erasures on the final Report of Deposits for the month of February 1950, (Voucher Number February 4K; Pros Ex 17-k), entering a raised figure

for the cumulative total of deposits for the month and a raised figure for the deposits for 28 February 1950 (Pros Ex 18-19), and then used the raised cumulative total as a closing entry in his Sales Officer's Account for the month (Pros Ex 16). The cumulative total of deposits was raised from $16,057.04 to $16,354.04 and the total deposit for 28 February 1950 was raised from $1,492.70 to $1,789.70.

The accused, testifying under oath with reference to the deposits in question, admitted that debit entries on his January and February Sales Officer's Accounts were in his handwriting, but denied that he stole the money and insisted that he thought that his books balanced for each month. When pressed for more definite explanation, he stated, "I can't definitely say."

The Board of Review is convinced beyond any reasonable doubt that the accused deliberately falsified his accounts and records as alleged and for the purpose of concealing his failure to deposit the sums of $715.50 and $297.00 with the Disbursing Officer. It is our opinion, therefore, that the evidence is legally sufficient to sustain the Court's findings of guilty of all Specifications of Charge III and of Charge III.

d. Lack of Credibility of the Accused.

The Board of Review has given careful study to the testimony of the accused as it relates to each separate offense charged against him. The cumulative effect of this study has been to convince the Board that he is not worthy of belief as to any controlling feature of the entire case. He admitted a civilian conviction for forgery, then promptly claimed "duress" and a reversal which the court records do not reflect. Further he admitted an official false statement made on his Personal History Statement, WD AGO Form No. 643A. These two admissions strengthen our belief that he is lacking in credibility.

5. The reviewing authority designated a United States penitentiary, reformatory, or other such institution as the place of confinement. Paragraph 87b, Manual for Courts-Martial, 1949, provides on page 97:

> "If the sentence of a general court-martial as ordered executed provides for confinement, the place of confinement will be designated. In cases involving *** dismissal and confinement of officers, *** the confirming authority will designate the place of confinement."

In the instant case, pursuant to the provisions of Article of War 48(c)(3), the confirming authority is the Judicial Council, acting with the concurrence of The Judge Advocate General (CM 341945, Meagher, 7 BR-JC 249, 256-257).

6. Personal History.

The accused was born 1 February 1916 at Bassett, Arkansas, and is therefore 35 years of age. He completed 4 years of high school at Lawton, Oklahoma, in 1935 and, on 21 September 1936, enlisted in the Army for 3 years at Fort Sill, Oklahoma. He was discharged as a Staff Sergeant, 20 September 1939. He lists his main civilian occupation as automobile mechanic for the period 1939-1941 and his secondary civilian occupation as taxi driver for 1941-1942. On 2 May 1942 he was inducted at Lawton, Oklahoma, and, according to his testimony, saw service as a motor Sergeant in an Ordnance Company in North Africa, Italy, New Guinea, and the Philippines, although no entries as to this service appear on his WD AGO Form No. 66-1, except with reference to service in the Philippines. He transferred to the 1135th CIC Detachment in the Philippines in the grade of Master Sergeant. On 9 December 1946, he was commissioned a Second Lieutenant by direct appointment and, on 22 June 1948, was promoted to First Lieutenant. As an officer he received over-all numerical ratings on his efficiency reports as follows: 101, 113, 075, 105, 101, and 071, in this order. There is no record of previous military convictions. In 1941, he was convicted of forgery, second degree, and served a one year sentence, less good time, at the Oklahoma State Penitentiary, McAlester, Oklahoma.

He is married and has four children, three of them being within the ages of three months and two years. According to information supplied by his wife, the accused also has his mother and his sister's orphaned infant child dependent upon him for support.

7. Consideration has been given to a letter from the accused's wife, Mrs. Dorothy Higgins, dated 1 January 1951, requesting clemency.

8. Note has been taken of correspondence, outside the record, which indicates that the accused's conviction for forgery in the State of Oklahoma was never appealed or reversed. Instead, such correspondence confirms that the accused served his full time, less good time, at the State Penitentiary, McAlester, Oklahoma.

9. The court was legally constituted and had jurisdiction of the person and of the offense. No errors injuriously affecting the substantial rights of the accused were committed at the trial. 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 as approved by the reviewing authority, and to warrant confirmation of the sentence. A sentence to

dismissal, total forfeitures after promulgation, to pay the United States a fine of $1500.00, and confinement at hard labor for five years is authorized upon conviction of Articles of War 93, 94 and 96.

Reginald C. Miller, J.A.G.C.

William C. Fitzhugh, J.A.G.C.

Arthur P. Ireland, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

Harbaugh, Brown and Schindler
Officers of The Judge Advocate General's Corps

In the foregoing case of First Lieutenant Isaac Joseph Higgins, 02033596, 9375th Technical Service Unit, Sierra Ordnance Depot, upon the concurrence of The Judge Advocate General the sentence as modified by the reviewing authority is confirmed and will be carried into execution. A United States Penitentiary is designated as the place of confinement.

Robert W. Brown
Robert W. Brown, Brig Gen, JAGC

Irvin Schindler
Irvin Schindler, Colonel, JAGC

J. L. Harbaugh, Jr.
J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action.

Franklin P. Shaw
FRANKLIN P. SHAW
Major General, USA
Acting The Judge Advocate General

23 April 1951

(GCMO 48. May 3, 1951).

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGK - CM 344522

FEB 9 1951

UNITED STATES v. First Lieutenant WILLIAM H. BUTCHER (O-2035923), Battery D, 23d AAA (AW) Battalion (SP), Fort Jackson, South Carolina	FORT JACKSON, SOUTH CAROLINA Trial by G.C.M., convened at Fort Jackson, South Carolina, 22 December 1950. Dismissal and total forfeitures after promulgation.

OPINION of the BOARD OF REVIEW
BARKIN, WOLF and LYNCH
Officers of The Judge Advocate General's Corps

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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 Judicial Council and The Judge Advocate General.

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

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

Specification: In that First Lieutenant William H. Butcher, Battery D, 23d AAA (AW) Battalion (SP) Fort Jackson, South Carolina, did, during the months of October, November, and December, 1949, January, February, September, and October, 1950, without due cause, dishonorably fail and neglect to support and maintain his lawful wife, Madalyn Butcher.

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

Specification 1: In that First Lieutenant William H. Butcher, *** while legally charged by the District Court of the City and County of Denver, Colorado, with the duty of paying the sum of one hundred and twenty-five dollars ($125.00) per month on the thirtieth day of each and every month for the care, support and maintenance of his lawful wife Madalyn Butcher, did, during the months of October, November, and December, 1949, January, February, September, and October, 1950, wrongfully, unlawfully and discreditably fail to

discharge his duty to care for, support and maintain his lawful wife, Madalyn Butcher.

Specification 2: In that First Lieutenant William H. Butcher, ***, then Master Sergeant William H. Butcher, 39th Infantry Regiment, did at Fort Dix, New Jersey and Fort Jackson, South Carolina, while legally charged by the District Court of the City and County of Denver, Colorado, with the duty of paying the sum of one hundred and twenty-five dollars ($125.00) per month on the thirtieth day of each and every month for the care, support and maintenance of his lawful wife, Madalyn Butcher, did, during the months of March, April, May, June, July, and August, 1950, wrongfully, unlawfully and discreditably fail to discharge his duty to care for, support and maintain his lawful wife, Madalyn Butcher.

He pleaded not guilty to, and was found guilty of, all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence

a. For the Prosecution

The evidence pertaining to the findings of guilty is summarized as follows: The accused is in the military service of the United States (R 15). The accused and Madalyn Johnson Butcher, after an acquaintanceship of about 12 years, were legally married on 19 December 1944, at Huntington, West Virginia, and the status so created existed on 28 November 1950 (R 11,13; Pros Exs 1,3). The parties lived together intermittently until the accused went overseas in November of 1946. Long and frequent separations were occasioned during this interval (1944-46) by the military service of the accused and the tubercular condition of his wife which required her hospitalization. She was a resident patient at various sanitariums for treatment for pulmonary tuberculosis. In each case her expenses were defrayed by the accused, who furnished her with about one hundred and twenty-five ($125.00) dollars per month (Pros Ex 3).

In the fall of 1945, accused went to West Virginia on an emergency leave. En route he spent the night with a woman in Lynchburg, Virginia. Upon arrival in West Virginia he informed his wife of this, and accused her of having made a trip to Columbus, Ohio, in the company of an old

admirer, and of having spent the night with him in a hotel in Columbus. He charged her with having had sexual relations with this man. Mrs. Butcher denied all the accusations. She said she had never been to Columbus, Ohio, and had never had improper relations with a former admirer (Pros Ex 3).

In April of 1947, Mrs. Butcher removed to Colorado, in the hope the climate there would improve her health. She entered Fitzsimmons Army Hospital in Denver, Colorado, in October, 1947, as the dependent wife of accused (Pros Ex 3).

In December, 1948, accused returned from overseas, and was stationed at Camp Carson, Colorado. He visited Mrs. Butcher at Fitzsimmons Hospital on the week ends. During this month and on the occasions of his visits the accused and his wife engaged in sexual intercourse five times (Pros Ex 3).

On or about 20 December 1948, Mrs. Butcher and another patient at Fitzsimmons Hospital, neither of whom was to receive a Christmas pass, accepted the invitation of the ward physician of Fitzsimmons Hospital to go for a drive. From about 1300 until 1500 hours the three drove around the City of Denver sightseeing. In January, 1949, Mrs. Butcher had her fifth major chest operation. She had become pregnant as the result of the sexual intercourse she and the accused had engaged in during the month of December, 1948, and in March she was advised by her physicians to submit to a therapeutical abortion. With the consent of accused an abortion was performed on her in March, 1949. In April of 1949 the accused and his wife discussed their domestic differences, but reached no agreement with respect thereto. Until May of 1949 the accused continued to contribute about one hundred and twenty-five ($125.00) dollars per month for the support and maintenance of his wife. In that month he discontinued all payments to her except payment of her mess bills at the hospital. Mrs. Butcher engaged an attorney to institute suit against the accused for separate maintenance. Such an action was commenced against him in the District Court for the City and County of Denver, State of Colorado, on 18 July 1949 (Pros Ex 3). A hearing was had upon the issue of alimony pendente lite, Mrs. Butcher appearing through deposition and by counsel and the accused appearing in person, unrepresented by counsel (Pros Ex 3, R 15; Pros Ex 5). An order, a certified copy of which was admitted in evidence without objection, was entered by the above-named court on 11 October 1949 (R 12, Pros Ex 2A). The court therein directed as follows:

> "IT IS ORDERED, ADJUDGED AND DECREED by the Court that the defendant, William H. Butcher, pay into the Registry of this Court the sum of One Hundred Twenty Five ($125.00) Dollars per month for the care, support and maintenance of the plaintiff; said payments to begin on October 30, 1949,

and to be made on the 30th day of each and every month thereafter until the further order of the Court herein."

As of 30 November 1950 the accused had never made any payment into the Registry of Court as directed by the above order (Pros Ex 2, Pros Ex 3). Accused's only contributions to the support of his wife, after the order, were payments of her mess bills at Fitzsimmons Hospital for the months of November, 1949, until March, 1950, inclusive, of amounts of approximately fifty-five ($55.00) dollars per month and in November, 1949, a check in the sum of forty ($40.00) dollars bearing the notation "For lying." Another check in the sum of eighteen dollars and twenty-five cents ($18.25), bearing the notation "For being a sucker," was returned to accused (Pros Exs 2,3,4 and 5).

Accused, by his counsel, proffered Mrs. Butcher a cash payment for a divorce settlement. By the terms of his offer, he was to pay her five hundred ($500.00) dollars upon entry of an interlocutory decree of divorce and an additional one thousand ($1,000) dollars upon entry of the final divorce decree. Mrs. Butcher rejected the offer (Pros Exs 3 and 5).

Exclusive of the payments of the mess bills at Fitzsimmons Hospital and the two checks referred to above, the accused has contributed nothing to the support of his wife since May 1949 (Pros Ex 3). After deducting the payments above mentioned, he is in arrears in the amount of $1,310.00 in the monthly payments ordered by the District Court (Pros Ex 5).

b. For the Defense

The rights of the accused as a witness were explained to him and he elected to testify in his own behalf (R 19).

He stated that he was born 10 December 1921 at West Hamlin, West Virginia. He completed grade school and one year of high school, leaving to enter the "CCC" to help support his family. After 18 months of service in that organization, he was honorably discharged and thereafter performed odd jobs and worked on a farm. On 18 January 1940 he enlisted in the United States Army. He served in Hawaii from March 1940 until July 1943 when he was transferred to Australia. There he went to Officers Candidate School, was commissioned a second lieutenant on 26 January 1944, and was subsequently promoted to first lieutenant on 6 November 1945. He first saw action on 7 December 1941 when the Japanese attacked Pearl Harbor. He subsequently saw action in New Britain, New Guinea, and Aitape, and participated in three battles. He was wounded in New Guinea, for which he was hospitalized in the United States from 27 December 1944 to 15 April 1945 when he was placed "on inactive service due to disability." On 18 June 1945, he was recalled to active duty. He has never been court-martialed, reprimanded, or punished under Article of War 104 (R 19-20,26).

The accused acknowledged his valid marriage to Madalyn Johnson Butcher on 18 December 1944 (R 21), and did not controvert its continuance through 30 November 1950. Accused and his wife cohabited for eight days after their marriage, when, his leave having expired, accused returned to his station. On 15 April 1945 accused was relieved from active duty and he and his wife lived together from that date until 18 June 1945, since which date accused has "had nothing to do with her, except when I went to her home and to the hospital where she was a patient." Accused and his wife quarreled about monetary matters, and on 16 June 1945 they agreed to separate. For a few months thereafter accused sent her ninety-five ($95.00) dollars per month and then increased the monthly sum to one hundred ($100.00) Dollars. Mrs. Butcher was a resident patient of various sanitariums. In each, her expenses were borne by accused. In April, 1947, she went to Colorado, and accused paid her traveling expenses. He continued to send Mrs. Butcher one hundred ($100.00) dollars per month until October, 1947, when they agreed that accused should deposit one hundred and fifty ($150.00) dollars per month to their joint account in the First National Bank of Denver, Colorado (R 21,22).

In December 1948, accused visited his wife at Fitzsimmons Army Hospital, where she was a patient. He and his wife did not engage in sexual intercourse during these visits (R 29,30). There had been marital differences between the two during most of their marriage. In September 1946, just prior to accused's departure for overseas duty, Mrs. Butcher admitted to accused that she had made a trip from Huntington, West Virginia, to Columbus, Ohio, with a man with whom she had had a long affair prior to her marriage. She confessed that she and her old admirer had spent the night together in Columbus, Ohio. The accused and his wife had an argument in 1949 in which accused censured Mrs. Butcher for the above incident, and accused her of improper relations with her traveling companion. She replied, "So what?" and "There is nothing you can do and nothing you can do about it" (R 22).

Subsequent to this conversation with his wife, accused consulted a Colorado attorney with a view to obtaining a divorce. He was advised that a divorce in the Colorado courts was impossible due to his nonresidence in that state and insufficiency of evidence of his wife's infidelity (R 22-23).

On the last day of April, 1949, accused and Mrs. Butcher had another conversation, in which he reminded her of her apparent inability to save money, but told her he was willing to forget their differences and to share a home with her. This offer she refused and stated that the only condition under which she would live with accused was that she be given all the accused's money. Following this conversation, accused discontinued the joint bank account. Thereafter, and until 30 November 1950,

accused contributed to his wife's support by paying her mess bills of approximately $55.00 a month at Fitzsimmons Hospital, until her discharge therefrom in April, 1950, and by sending her one check for forty ($40.00) dollars (R 23).

In June, 1949, accused received correspondence from an attorney who represented Mrs. Butcher. He called on the attorney and offered to pay Mrs. Butcher one hundred and twenty-five ($125.00) dollars per month if she would agree to a divorce. Later, accused visited his wife and sought to persuade her to agree to a divorce. Accused offered her one hundred and fifty ($150.00) dollars per month in return for a divorce. She refused and told him, "Why should I divorce you as long as you are in the Army? I am your legal wife and the Army is going to see that you pay me" (R 24). Instead of agreeing to a divorce, she applied to the District Court for the City and County of Denver, State of Colorado, for separate maintenance. A hearing was held in October, 1949, upon the single issue of alimony pendente lite which resulted in the issuance of an order directing accused to pay into the Registry of that court the sum of one hundred and twenty-five ($125.00) dollars per month for the support and maintenance of his wife. The order was explained to accused and he fully understood it, and he later received copies of the order (R 23,26-28).

Subsequent to the issuance of this order accused made several offers of cash payments and monthly allowances to his wife in an effort to persuade her to procure a divorce. Since the date of his last offer and before a reply thereto was received, this court-martial proceeding was instituted (R 24,25).

The accused has not complied with the order of the District Court nor has he contributed anything to the support of his wife since May, 1949, except payments of the mess bills at Fitzsimmons Hospital of about fifty-five ($55.00) dollars per month for the months of May, 1949, to April, 1950, inclusive, and one check in the amount of forty ($40.00) dollars which he gave to his wife (R 23,24,27,29).

The accused has failed to support his wife because of her admitted adultery, her refusal to share a home with him, and her refusal to divorce him (R 28).

Upon the date the first payment under the order of the District Court became due (30 October 1949) accused was serving in a commissioned status. He continued in this status until, pursuant to his request, he was relieved from active duty on 29 March 1950. On 30 March 1950 he enlisted in the Army as a master sergeant. On 20 September 1950, he was honorably discharged, and on the following day, 21 September 1950, entered on active duty as a commissioned officer. (R 26,29,30)

The transcript of the record of "Madalyn Butcher, Plaintiff vs. William H. Butcher, Defendant," was introduced in evidence by the defense as Defense Exhibit E (R 33). The defense directed the court's attention to the following excerpt therein:

> "COURT: This is a temporary matter you understand, Lieutenant, and the only question is what her need is and your ability to pay. The main issue about the marriage and so forth, is not at stake here at all."

4. Jurisdiction

Accused has, in effect, been charged with nonsupport of his wife for the period October 1949 - October 1950, inclusive.

With reference to accused's military status during the period in question, Department of the Army records and the accused's testimony show that accused was successively a commissioned officer, an enlisted man, and, again, a commissioned officer.

Accused was relieved from active duty as an officer on 29 March 1950 by paragraph 53, Special Orders Number 24, Headquarters Fort Dix, New Jersey, 29 March 1950, which states in pertinent part as follows:

> "DP the fol named offs (on scd 0-29 Able) are reld fr asgd 1262nd ASU Dec 24 (Sep) and are reld from AD and revert to inact, ORC or NG status not due to phys dsabl eff 29 Mar 50 on which date they WP to home indicated below. Lump sum pmt for unused accrued lv is authd. Offs will be given DD Form 214 (Rept of Sep fr the Armed Forces of the US) and DD Form 217A (Cert of Svc). AUS apmts made UP OPA 1947 & AUS(AC) apmts terminate on date offs revert to inact status. Qrs will terminate 29 Mar 50 (Par 42 AR 210-10 dtd 6 May 47). PCS TDN TPA 2100425 1-22-222 P 431-02 03 04 07 S99-999. Auth for Sep is Sec 515 (d) OPA WD Bul 18 1947."

Accused's enlistment record shows that he on 30 March 1950 at Fort Dix, New Jersey, enlisted in the Regular Army for a period of three years.

By paragraph 20, Special Orders No. 174, Department of the Army, Washington 25, D.C., 7 September 1950, accused, with his consent, was appointed and commissioned in the Army of the United States in the "AUS grade" of first lieutenant effective on entry on active duty, 21 September 1950. The accomplishment of his discharge from his enlisted status on the day prior to entry on active duty was directed.

Accused's service record for the enlistment under consideration

contains a DD Form 214, Report of Separation from the Armed Forces of the United States, purportedly accomplishing accused's honorable separation from the Army on 20 September 1950. The mentioned Report of Separation cites as reason and authority for the separation "AR 615-365 & par 20 SO 174 Wash - DC." "Par 20 SO 174" cited is evidently paragraph 20, Special Orders 174, Department of the Army, the pertinent provisions of which are set forth above.

"AR 615-365" is the abbreviation for Army Regulations 615-365, Department of the Army, Washington 25, D. C., 19 July 1949. Therein it is provided as follows:

> "2. Delegation of authority to order discharge.--Authority to order discharge or release from active duty of individuals for the convenience of the Government is delegated to the commanders specified in paragraph 7, AR 615-360--
>
> a. To accept a commission or appointment (as officer or warrant officer) in any of the armed forces of the United States; and to accept appointment and entrance in any of the service academies. Prior to such discharge, the discharging authority will be in possession of documentary evidence from the proper authority that the individual is acceptable and will be commissioned or appointed as above, and will be called to active duty or enter service academy immediately if discharged."

Military defense counsel in a brief attached to the record of trial asserts that "A certificate of honorable discharge was delivered to the accused on 20 September 1950." We here accept the quoted assertion of military defense counsel as fact.

The question thus presented is whether the changes in accused's military status from officer to enlisted man and from enlisted man to officer served to interrupt his general status as a person subject to military law. The general rule recognized "is that court-martial jurisdiction over officers, cadets, soldiers, and others in the military service ceases on discharge or other separation from such service and that jurisdiction as to an offense committed during a period of such service thus terminated is not revived by reentry into the military service (par 10, MCM 1949). This rule is not without exception. Thus, it is stated that "In certain cases, if the person's discharge or other separation does not interrupt his status as a person belonging to the general category of persons subject to military law, court-martial jurisdiction does not terminate. Thus, when an officer holding an emergency commission was discharged from that commission by reason of his acceptance of a commission in the Regular Army, there being no interval between services under the respective commissions, it was held that there was no termination of the officer's military status - merely the accomplishment of

a change in his status from that of a temporary to that of a permanent officer ***" (MCM, 1949, supra, p 10).

Decisions of the Office of The Judge Advocate General apposite to the stated exception are to be found in paragraph 369(3), Digest of Opinions of The Judge Advocate General (1912-1940). Therein it is held that military jurisdiction was not interrupted by (1) a change in status from contract surgeon to commissioned officer (id, subpar 1); (2) a change in status from enlisted man to officer (id, subpar 2); (3) a change in status from officer in the United States Guard to officer in the Infantry, United States Army (id, subpar 3); (4) a Regular Army officer to Regular Army officer in a lower grade (id, subpar 6). Other cases involving discharges of enlisted men for the purpose of enlistment and the subsequent reenlistment of the enlisted men pursuant to the terms of the discharges hold that there was no break in military jurisdiction over the enlisted men (CM 212084, Johnson, 10 BR 213; CM 337089, Aikins and Seevers, 5 BR-JC 331,348-358). The rationale of the exception to the general rule here stated appears to be that a mere change in a particular status of one in the general status of a person subject to military law has no effect upon his general status. In those cases involving the "discharge" of enlisted men "for the convenience of the government" for the purpose of effecting a new enlistment or for the purpose of passing from an enlisted status to a commissioned status, the "discharge for the convenience of the government" operates merely to discharge from particular status and not for the purpose of discharging from the general status. Thus the Assistant Comptroller of the Treasury stated:

> "It has been uniformly held by the accounting officers of the Treasury that a soldier discharged before expiration of his term of enlistment for the purpose of reenlisting, or released from his contract of enlistment in order to enable him to continue in the military service in a different capacity, is not 'discharged from the Army' within the meaning of the travel-pay law and is not entitled to travel pay on such discharge. United States v. Sweet, 189 U.S., 471; Digest 2d Comp. Dec., vol. 3, sec. 880; 2 Comp. Dec., 504; 24 id., 345; 25 id., 347; 26 id., 729. Whether a soldier is discharged for the convenience of the Government for the purpose of reenlisting or whether he is discharged for his own convenience for the purpose of reenlisting, the fact remains that he is not discharged from the Army within the meaning of the travel-pay law. Fundamentally it is a discharge for the purpose of reenlistment, and it is immaterial whether it is called for the convenience of the Government or for the convenience of the soldier. ***" (27 Comp.Dec., 980; see also 6 Comp. Gen. 842).

That a discharge for the convenience of the Government for the purpose of effecting a change in particular status of one in the general status of a person subject to military control is not a discharge from the general status is best illustrated by reference to another exception to the general rule:

> "If a soldier obtains his discharge by fraud, the discharge may be canceled and the soldier arrested and returned to military control. He may also be required to serve out his enlistment and may be tried for his fraud." (MCM, 1949, par 10)

To illustrate, where a soldier obtains his discharge prior to the expiration of his contractual term of service upon his fraudulent representation that he will reenlist but does not, it is obvious that his enlistment has not been terminated and that there would be no lapse in military jurisdiction over him. In any case involving a discharge for the convenience of the Government for the purpose of effecting a change in particular status where the "discharge" did not fulfill the terms of the discharge, there is a presumption that the discharge was obtained by fraud (Dig Op JAG 1912, p 457). It is apparent, therefore, that in those instances wherein a person in the military service is discharged prior to the expiration of his contractual term of service for the purpost of reenlistment or to continue in the military service in a different capacity and fails to fulfill the terms of the discharge, there is a valid presumption that military jurisdiction over such person has not lapsed. We are unable to perceive any cogent reason for stating there has been a lapse of military jurisdiction where the "dischargee" complies with the terms of a discharge which has for its intendment the "dischargee's" continuous military service.

To recapitulate, unless the discharge given has for its intendment the termination of the "dischargee's" military service and his return to civilian life, to which type of discharge a military person is entitled as a matter of right at the termination of a contractual term of service, there is in fact no discharge from the military service. A discharge for the convenience of the Government to effect, for example, the transition from enlisted service to commissioned service, merely terminates the "dischargee's" enlisted service and not his military service.

The instant case is illustrative of both the general rule and exception thereto as herein discussed.

On 29 March 1950, accused was relieved from active duty as an officer, and the orders accomplishing such relief manifested the intent that the accused be wholly released from the Army and his return to civilian life. There were no strings attached. Upon his receipt

of such orders military jurisdiction over the accused ceased. Offenses, other than those violative of Article of War 94, committed by him during the service thus terminated, are not subject to military jurisdiction.

On 30 March 1950, accused enlisted in the Army for a term of three years. He did not thereby revive Army jurisdiction over offenses committed by him during the service terminated on the preceding day. He did, however, subject himself to Army jurisdiction over offenses committed by him in the then subsisting service. With accused's consent, he was on 7 September 1950 appointed first lieutenant, ORC, in the Army of the United States, effective upon his entry on active duty on 21 September 1950. On 20 September 1950, two years, seven months and ten days prior to the expiration of his contractual term of service, he received a discharge for the convenience of the Government, for the purpose of allowing him to report for active duty as an officer on the next day. The following day, 21 September 1950, he entered on active duty as an officer and is presently serving in such capacity. Under the rules hereinbefore stated, we find that the discharge received by the accused on 20 September 1950 served merely to terminate his enlisted service but not the military service to which he had engaged himself on 30 March 1950, that the accused has served continuously since 30 March 1950, and that offenses committed by accused on and after 30 March 1950 are subject to military jurisdiction.

5. Discussion

Specifically, accused was found guilty of dishonorably failing to support his wife during the months October, November, December, 1949, January, February, September and October, 1950, in violation of Article of War 95 (Chg I, Spec); of failing to discharge the obligation imposed upon him by the District Court of the City and County of Denver, Colorado, to pay $125.00 monthly on the thirtieth day of each month for the support of his wife during the months set forth in the Specifications of Charge I (Chg II, Spec 1) and during the months of March, April, May, June, July and August 1950 (Chg II, Spec 2) in violation of Article of War 96. It follows from the conclusion attained in paragraph 4, supra, that so much of the findings of guilty which pertain to the months October, November, December, 1949, January and February 1950 must be disapproved since so much of the offenses charged as were committed during those months were without the jurisdiction of the court. Subtracting from the findings that which may not be sustained on jurisdictional grounds, we find that accused has been found guilty substantially of failing to support his wife from 30 March 1950 to and including October 1950.

The evidence shows that in September 1949 accused was ordered by the District Court of the City and County of Denver, Colorado, to whose

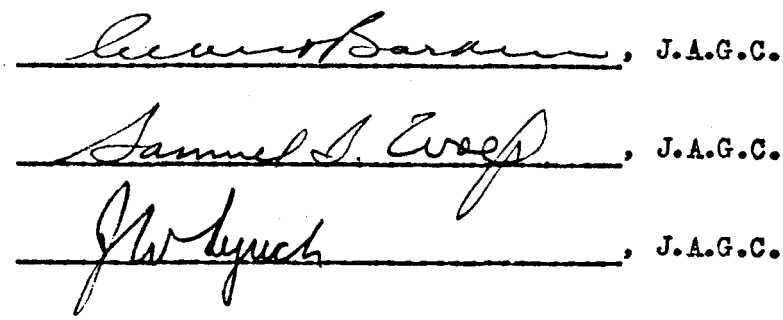
jurisdiction accused had evidently submitted himself in an action for separate maintenance brought by his wife, to pay the sum of $125.00 monthly into the Registry of the court on the 30th day of each month for the support of his wife. In the period with which we are here concerned accused paid his wife's mess bill of approximately $55.00 a month at the Fitzsimmons General Hospital for the months of March and April 1950. These two payments constitute the sole support accorded his wife by accused during the period with which we are concerned. The measure of accused's ability and duty to support his wife, as determined by a court of competent jurisdiction, is $125.00 a month. At no time during the period with which we are concerned have accused's contributions approximated that amount, and, since April 1950, accused has contributed nothing to her support.

Accused has failed to support his wife and admittedly has studiously and contumaciously disobeyed the valid order of a civil court, with which he was legally obliged to comply, to pay a certain sum monthly for his wife's support. No issue of financial inability has been raised by accused. His conduct as summarized is violative of both Articles of War 95 and 96 (CM 236204, Barth, 22 BR 327,337; CM 286270, Love, 56 BR 159, 169; CM 247766, Burk, 31 BR 33,36). Accused's uncorroborated and controverted complaints concerning his wife, her alleged admission of adultery, refusal to cohabit with him, and extravagance prior to the alimony decree are not material to the issue of nonsupport. A military court is without power to issue a decree of divorce. To acquit the accused of the several specifications of nonsupport upon the basis of his allegations concerning his wife would be to accomplish indirectly what could not be accomplished directly, the release from the obligations attendant upon a valid marriage, and in this case, obligations reinforced by a decree of a court of competent jurisdiction. The findings of guilty other than those pertaining to the months of October, November, December, 1949, January and February, 1950, are warranted by the evidence.

6. Accused is 29 years of age and married. He completed one year of high school and had 18 months service in the Civilian Conservation Corps terminated by an honorable discharge. He had enlisted service in the Army from 18 January 1940 until he was commissioned a second lieutenant on 25 January 1944. He was subsequently promoted to first lieutenant on 6 November 1945. He was placed on inactive service from 15 April 1945 until 18 June 1945 when he was recalled to active duty. He was relieved from active duty on 29 March 1950 and the following day enlisted as a master sergeant for a term of three years, being discharged from that enlistment on 20 Sept. 1950 for the convenience of the Government for the purpose of accepting a commission and reporting to active duty as an officer on 21 September 1950. He has been serving as an officer since the latter date. He served in the Pacific

from February,1940 until October,1944, and in Austria from October,1946, to January,1948. He has been awarded the Bronze Star Medal for exemplary conduct in combat, and the Purple Heart. His efficiency ratings of record are "Very Satisfactory" (3), "Excellent" (4), and "Superior" (3). His overall efficiency ratings of record are "063," "056," "093," "072," "067," and "104."

7. The court had jurisdiction of the person and, except as hereinbefore noted, of the offenses. As to the offenses of which the court had jurisdiction, no errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally insufficient to support so much of the findings of guilty of the Specification of Charge I and of Specification 1 of Charge II as pertain to the months of October, November, December, 1949, January and February,1950, legally sufficient to support the other findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence to be dismissed the service is mandatory upon conviction of a violation of Article of War 95 and authorized upon conviction of a violation of Article of War 96.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DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGU CM 344522

UNITED STATES v. First Lieutenant WILLIAM H. BUTCHER, 0-2035923, Battery D, 23d AAA (AW) Battalion (SP), Fort Jackson, South Carolina	)	FORT JACKSON, SOUTH CAROLINA Trial by G.C.M., convened at Fort Jackson, South Carolina, 22 December 1950. Dismissal and total forfeitures after promulgation.

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Opinion of the Judicial Council
Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

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1. Pursuant to Article of War 50d(2) the record of trial in the case of the officer named above and the opinion of the Board of Review have been submitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon trial by general court-martial the accused pleaded not guilty to, and was found guilty of, dishonorably failing and neglecting, without due cause, to support his wife during the months of October 1949 through February 1950 and the months of September and October 1950, in violation of Article of War 95 (Specification, Charge I); wrongfully, unlawfully and discreditably failing during the same months to discharge his duty to care for, support and maintain his wife, while legally charged by a Colorado Court with the duty to pay his wife $125 per month for her care, support and maintenance (Specification 1, Charge II); and similarly failing to perform the same duty during the months of March through August 1950, while similarly legally charged, when he was a master sergeant (Specification 2, Charge II), both in violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The Board of Review is of the opinion that the record of trial is legally insufficient to support so much of the findings of guilty of both the Specification of Charge I and Specification 1 of Charge II as pertains to the months of October 1949 through February 1950, and legally sufficient to support the other findings of guilty and the sentence and to warrant confirmation of the sentence.

3. The evidence is stated in detail in the opinion of the Board of Review and will be repeated here only to the extent necessary to make

intelligible our discussion of certain questions of law raised by the record.

The accused and his wife, whom he married in December 1944, have lived together very little as man and wife due to her confinement in sanatoria as a result of pulmonary tuberculosis, to his military career, and according to him, to his disagreement with her over her alleged financial mismanagement (R 11, 12, 21, 22; Pros. Ex 3). Up until March 1949, however, no outwardly serious rift developed, although the accused testified that they had separated in June 1945 after a quarrel over her improvidence (R 21). At any rate, he supported her until March 1949 either by sending her $125 per month or by paying her expenses when she was confined to the hospital. In April 1947 she went to Colorado for her health and in October of that year entered the Fitzsimmons General Hospital (R 12; Pros Ex 3). On the occasion of her admission into the hospital the accused entered into an arrangement with his wife whereby he deposited $150 per month in a joint checking account (R 12, 22; Pros Ex 3).

In May 1949 a serious dispute developed between the accused and his wife, ostensibly over financial matters, and he ceased to make deposits in their joint checking account and limited himself to paying her mess bill at the hospital (R 12, 22; Pros Ex 3). She began a suit for separate maintenance against him in July 1949 in the District Court of Denver, Colorado. He was present, unrepresented by counsel, at a hearing on her request for alimony pendente lite and the court entered a decree ordering him to pay $125 per month on the 30th day of every month beginning 30 October 1949 (R 12, 24, 33; Pros Ex 3, Def Ex E). Except for one payment of $40 and the payment of her mess bills at the hospital, the accused did not comply with this decree (R 12, 14; Pros Exs 3, 5). On 5 April 1950 his wife, at his request, was discharged from the hospital (R 12, 23; Pros Ex 3). At the time of the trial, according to his wife's attorney, the accused owed the sum of $1,310 under the decree (R 14; Pros Ex 5).

According to the accused, although denied by his wife, he offered her a "home" in the spring of 1949, but this attempted reconciliation came to nothing when she insisted on his giving her all his money (R 23). Subsequently, according to his testimony, he successively proposed to pay her $50 per month plus hospital expenses, $125 per month, and $150 per month if she would only divorce him or agree to his divorcing her (R 24, 25, 31). Finally, his attorney suggested to her attorney a lump sum payment of $1,000, later raised to $1500, if she would obtain a divorce, but this was rejected by a counteroffer wherein her attorney asked that the accused pay all arrears of alimony, pay her $125 per month during the six months' period between the entry of an interlocutory decree and a final decree of divorce, and pay $1000 when the decree became final (R 12, 25, 32, 33; Pros Ex 3; Def Exs A, B, D). He did not obey the terms of the Colorado decree because he "insisted on getting (his) freedom" (R 29).

The accused's wife was tubercular when he married her (R 29). During the course of their married life she had been hospitalized from October 1945 to April 1946, from November 1946 to March 1947, and from

October 1947 to April 1950 (R 13, 21, 22; Pros Ex 3). She had undergone five operations on her chest (R 13; Pros Ex 3) the last - a partial lobectomy - having been performed on 31 January 1949 (R 13; Pros Ex 4). During most of 1948 she was either a class 1 patient totally confined to bed or a class 2 patient permitted to get out of bed only for the purpose of being wheeled to the bathroom. Thereafter she was a class 3 patient and she was made a class 4 patient (one who is ambulatory four hours per day) only for the purpose of discharging her from Fitzsimmons General Hospital (R 13; Pros Ex 3).

The accused's testimony and Department of the Army records show that by paragraph 53, Special Orders Number 24, Headquarters Fort Dix, New Jersey, 29 March 1950, the accused was relieved from active duty as an officer. On 30 March 1950 he enlisted as a master sergeant in the Regular Army at Fort Dix, New Jersey, for a period of three years.

Paragraph 20, Special Orders No. 174, Department of the Army, Washington 25, D.C., 7 September 1950, provided that:

> "20. DP under provisions of subsections 515 (c) and 515 (d) Officer Personnel Act of 1947 each of the following officers of the permanent grade shown after his name is with his consent appointed and commissioned in the Army of the United States in AUS grade indicated effective upon entry on EAD and ordered to EAD under such appointment on the effective date of duty (EDCMR). Such appointment will remain in effect during period of this tour of active duty and will terminate immediately upon relief therefrom. Officer will proceed on effective date of duty (EDCMR) from present location to assigned station or personnel center indicated. Oath of Office (WD AGC Form 71) for this AUS appointment will be executed immediately upon arrival at first duty station. Entry on active duty and acceptance of this appointment will terminate any prior temporary appointment in the Army of the United States but will not affect permanent grade, branch or component shown. Any of following named officers who are members of Inactive or Honorary Reserve are transferred to Active Reserve in grade and section (branch) indicated effective date of entry on active duty. If applicable discharge from enlisted or warrant officer status will be accomplished by the individual's commanding officer on the day prior to effective date of duty. TDN. PCS. TPA only for officers whose status on day prior to entry on this tour of duty was that of an enlisted man or warrant officer on active duty. * * *

AUS grade, name, ASN home address, date of rank in AUS, permanent grade, branch and component; year of birth	Effective date of duty EDCMR	Branch detailed, sta or oversea comd, Asg, allocation, MOS and category (if not detailed to a branch, duty will be performed in current Reserve or NGUS branch

*	*	*	*
1ST LT WILLIAM H. BUTCHER 02035923, Barboursville, W Va (now MSGT RA 6998713 Co C 39th Inf Regt, Ft Dix, NJ) (9 Dec 1945) 1st Lt Inf-USAR 1921.		21 Sep.	9th Inf Div, Ft Dix, NJ (Allocation RZI-55) MOS 2622 (Cat III)."

An affidavit of Corporal William J. Thomas, discharge clerk, Personnel Section, 13th Infantry, dated 16 March 1951, states that he delivered to the accused on 20 September 1950 about 0900 hours WD AGO Form 55 (Certificate of Discharge) and the original of DD Form 214 (Report of Separation). The accused's service record contains a copy of DD Form 214. Under the legend "Reason and Authority for Separation" it states, "AR 615-365 Par 20 SO 174 Wash - DC." His 201 Files contain a copy of WD AGO Form 71 which shows that he took the oath of office as a first lieutenant in the Army of the United States on 21 September 1950 and a copy of DD Form 220 showing he entered on active duty as an officer the same day.

4. This record presents two jurisdictional questions, namely, whether there was jurisdiction to try the accused for offenses committed prior to 30 March 1950 when he reverted to an inactive status as an officer and enlisted as a master sergeant, and whether there was jurisdiction to try the accused for offenses committed prior to 21 September 1950 when he was discharged as an enlisted man and commissioned a first lieutenant. We find it unnecessary to decide these questions, however, in view of the fact that, for reasons set forth more fully below, we are of the opinion that the sentence is fully supported by the findings of guilty of those derelictions alleged in the Specification of Charge I and in Specification 1 of Charge II which involve the period from 21 September 1950 to the end of October 1950.

5. It has consistently been held that the failure of a member of the Army to support his dependents is punishable under the Articles of War if it occurs in such circumstances as to bring disgrace or discredit on the military service (CM 236819, Solander, 23 BR 141; CM 270942, MacDonald, 46 BR 1; CM 286270, Love, 56 BR 159; CM 288020, Sorensen, 56 BR 319; CM 325112, Halbert, 74 BR 89). Likewise it has been held that the failure to fulfill this obligation as formalized by a decree of a court of competent jurisdiction is a military offense (241.3, 20 July 1922, Dig Op JAG 1912-40, sec 453 (16), p 344; SPJAG 242.4, 18 June 1942, 1 Bull JAG 23; CM 236204, Barth, 22 BR 327; CM 236819, Solander, supra; CM 247766, Burk, 31 BR 33), although with respect to the sentence the failure to support generally and the failure to support according to the decree may well be considered a single offense (CM 236819, Solander, supra).

Excising from the specifications the period prior to 21 September 1950, there remain the allegations that he failed to support his wife generally from 21 September 1950 to the end of October 1950 and that he failed to support her in accordance with the decree of the Colorado court in September and October 1950.

The accused's general obligation to support his wife was formalized by a decree of the Colorado court having jurisdiction in the premises (Dye v. Dye (1897), 9 Col. App. 320, 48 P 313; Badger v. Badger (1921), 69 Col. 564, 196 P 861). Although the merits of the controversy between the accused and his wife were not in issue at the hearing on the granting of alimony pendente lite (Bagot v. Bagot (1920), 68 Col. 562, 191 P 96), the accused could have appealed from the order (Dye v. Dye, supra; Daniels v. Daniels (1886), 9 Col. 133, 10 P 657) or could have pressed for a final determination of the main suit. Instead, he chose to ignore the decree and bargain with his wife for a divorce. His accrued obligation cannot be cancelled even by the court which entered the decree (Weston v. Weston (1926), 80 Col. 323, 251 P 534), and for failure to discharge this obligation he is amenable to contempt proceedings in Colorado (In re Popejoy (1899), 26 Col. 37, 55 P 1083, 77 Am St Rep 222) or to any other process which Colorado affords to collect accrued alimony.

This failure to discharge the duty to support his wife as formalized by the decree of the Colorado court was not the result of inadvertence or the temporary result of a quarrel. It was part of a deliberate plan to obtain her consent to a divorce, a condition which he had no right to impose. Moreover, he knew that his wife's health was such that she could not support herself. She was afflicted with pulmonary tuberculosis when he married her and it was so active that she spent a substantial period of her married life in the hospital. Five operations had been performed on her chest or lungs in an attempt to alleviate her condition. The accused must have known that there could be only one result of his failure to discharge his obligation to his wife: that she would be thrown on the charity of relatives or friends or that she would become a public charge. In these circumstances we are of the opinion that his failure to support his wife even for a period of forty-one days is a violation of the 95th Article of War. Similarly, we are of the opinion that his failure to discharge in September and October 1950 the duty to support his wife as formalized by the Colorado decree constitutes a violation of the 96th Article of War.

6. For the foregoing reasons the Judicial Council is of the opinion that the record of trial is legally sufficient to support so much of the findings of guilty of the Specification of Charge I and Specification 1 of Charge II as pertains to the period beginning 21 September 1950 and ending 31 October 1950, and legally sufficient to support the findings of guilty of Charges I and II and the sentence, and to warrant confirmation of the sentence. The Council expresses no opinion as to the legal sufficiency

of the record to support the findings of guilty pertaining to the period prior to 21 September 1950.

Robert W. Brown

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr.

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

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DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of First Lieutenant William H. Butcher, 0-2035923, Battery D, 23d AAA (AW) Battalion (SP), upon the concurrence of The Judge Advocate General only so much of the finding of guilty of the Specification of Charge I is approved as involves a finding that the accused did, during the period from 21 September 1950 to 31 October 1950, both dates inclusive, without due cause, dishonorably fail and neglect to support and maintain his lawful wife, Madalyn Butcher; only so much of the finding of guilty of Specification 1 of Charge II is approved as involves a finding that the accused, while legally charged as alleged with the duty alleged, did, during the period from 21 September 1950 to 31 October 1950, both dates inclusive, wrongfully, unlawfully and discreditably fail to discharge his duty to care for, support and maintain his lawful wife, Madalyn Butcher; the findings of guilty of Charges I and II are approved; no action is taken with respect to so much of the findings of guilty of the Specification of Charge I and Specification 1 of Charge II as pertains to the period from 1 October 1949 to 20 September 1950, both dates inclusive, or with respect to the findings of guilty of Specification 2 of Charge II; and the sentence is confirmed and will be carried into execution.

Robert W. Brown
Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait
C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr.
J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action.

Franklin P. Shaw
FRANKLIN P. SHAW
Major General, USA
Acting The Judge Advocate General

26 April 1951

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D.C.

JAGH CM 344523 — 26 January 1951

U N I T E D S T A T E S	)	SECOND ARMY
v.	)	Trial by G.C.M., convened at Fort George G. Meade, Maryland, 8 November 1950. Dismissal and total forfeitures after promulgation.
Second Lieutenant JAMES H. JOHNSON, 02033688, 68th Chemical Smoke Generator Company, Army Chemical Center, Maryland.	)	

OPINION of the BOARD OF REVIEW
MILLER, FITZHUGH, and IRELAND
Officers of The Judge Advocate General's Corps

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 and the Judicial Council.

2. The accused was tried upon the following Charges and Specifications:

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

Specification: In that Second Lieutenant James H. Johnson, Chemical Corps, 68th Chemical Smoke Generator Company, did at Bel Air, Maryland, on or about 10 July 1950, with intent to defraud, falsely make and forge the name "Robert Schram, 1st Lt., Cml C", to a certain promissory note in the following words and figures, to wit:

"P.O._____ 10 July 1950 $150.00
1 August 1950 after date I, we, or either of us, promise to pay to the order of Commercial and Savings Bank, Bel Air, Maryland
One hundred and fifty and $\frac{no}{100}$ - - - - - - - - - - - - - - - - - Dollars
with interest at the Commercial and Savings Bank, 65-114
Bel Air, Md.
Value received. The maker or makers and endorsers of this note hereby waive all exemptions and the said maker or makers and endorsers hereby authorize and empower any attorney of any court of record in the State of Maryland, or elsewhere, to appear for him or them either before or after maturity, and in his or their

name to confess judgment, without stay of execution, against him or them in favor of the holder in any court having jurisdiction, or before any justice of the peace for the above amount with interest, costs, and ten per cent commission to attorney for services rendered in collecting same.

68th Cml Smk Gen Co.	James H. Johnson (02033688)	(Seal)
A.C.C. Maryland	2nd Lt. Cml C	
E.P.G., A.C.C., Md.	Robert Schram	(Seal)"
	1st Lt. Cml C	

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

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

Specification 1: In that Second Lieutenant James H. Johnson, Chemical Corps, 68th Chemical Smoke Generator Company, did at Bel Air, Maryland, on or about 10 July 1950, with intent to defraud, willfully, unlawfully and feloniously utter as true and genuine a certain promissory note, in words and figures as follows:

"P.O._____10 July 1950 $150.00
1 August 1950 after date I, we, or either of us, promise to pay to the order of Commercial and Savings Bank, Bel Air, Maryland One hundred and fifty and no/100 - - - - - - - - - - - - - - - - Dollars
with interest at the Commercial and Savings Bank 65-114
Bel Air, Md.
Value received. The maker or makers and endorsers of this note hereby waive all exemptions, and the said maker or makers and endorsers hereby authorize and empower any attorney of any court of record in the State of Maryland, or elsewhere, to appear for him or them either before or after maturity, and in his or their name to confess judgment, without stay of execution, against him or them in favor of the holder in any court having jurisdiction, or before any justice of the peace for the above amount with interest, costs, and ten per cent commission to attorney for services rendered in collecting same.

68th Cml Smk Gen Co.	James H. Johnson 02033688	(Seal)
A.C.C. Maryland	2nd Lt. Cml C	
E.P.G., A.C.C., Md.	Robert Schram	(SEAL)"
	1st Lt. Cml C	

a writing of a private nature, which might operate to the prejudice of another, which said promissory note was, as he, the said Second Lieutenant James H. Johnson, then well knew falsely made and forged.

Specification 2: In that Second Lieutenant James H. Johnson, Chemical Corps, 68th Chemical Smoke Generator Company, did, at Army Chemical Center, Maryland, on or about 22 August 1950, with intent to deceive Captain Elmer J. Holzworth, Chemical Corps, officially state to Captain Elmer J. Holzworth, Chemical Corps, that he had sent a Seventy-five Dollar ($75.00) payment to the Commercial and Savings Bank, Bel Air, Maryland, to apply on his unpaid note, which statement was known by the said Second Lieutenant James H. Johnson, Chemical Corps, to be untrue, in that he, the said Second Lieutenant James H. Johnson, Chemical Corps, had not, in fact, sent a Seventy-five Dollar ($75.00) payment to the Commercial and Savings Bank, Bel Air, Maryland, to apply on his unpaid note.

CHARGE III: Violation of the 95th Article of War. (Finding of not guilty).

Specifications 1,2 and 3: (Findings of not guilty).

The accused pleaded guilty to the Specification of Charge I and Charge I, all Specifications of Charge II and Charge II, and not guilty to all Specifications of Charge III and Charge III. He was found not guilty of Charge III and its Specifications, guilty of Charge I and its Specification, and guilty of Charge II and its Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct for one year. The reviewing authority approved the sentence, but remitted the period of confinement, and forwarded the record of trial for action under Article of War 48.

3. Evidence.

a. For the prosecution.

A written stipulation, entered into between the trial judge advocate, the defense counsel and the accused, was received in evidence as Prosecution Exhibit 1 (R 9). A promissory note, dated 10 July 1950, in the amount of $150.00 payable 1 August 1950 to the Commercial and Savings Bank, Bel Air, Maryland, bearing the signatures of Second Lieutenant James H. Johnson and First Lieutenant Robert Schram, as co-makers, was received in evidence without objection as Prosecution Exhibit 2 (R 9). The stipulation read as follows:

"It is stipulated by and between the trial judge advocate, defense counsel and 2nd Lieutenant James H. Johnson, 02033688, the accused, that if Mr. H. R. Fletcher were present in court and sworn as a witness he would testify that he is the cashier of the Commercial and Savings Bank, Belair, Maryland, and that on or about 10 July 1950 the accused, Lieutenant Johnson presented a promissory note in the amount of $150.00, attached hereto and marked Prosecution Exhibit No. 2 for identification, said note being made payable to the Commercial and Savings Bank, Belair, Maryland,

"Mr. Fletcher would further testify that at the time Lieutenant Johnson presented the said note and requested the loan for which the note had been executed that the purported name of Lieutenant Robert Schram had already been subscribed on the said note as the co-maker. Because of the purported signature of Lieutenant Schram as a co-signer, Lieutenant Johnson was loaned the sum of $150.00 in exchange for the said note. Mr. Fletcher will further testify that he has had 27 years experience in the banking business and that his daily duties during these 27 years have required that he compare signatures in order to arrive at the authenticity of various notes, checks and other papers presented to him in the course of his duties in the banking business, and that as a result of this experience he is now able, upon examination, to recognize signatures; that on 10 July 1950 at the time the said note was presented he did not have available to him the true signature of Lieutenant Schram and, therefore, accepted the purported signature on the said note as being that of Lieutenant Schram but since that date he has examined the true signature of Lieutenant Robert Schram as actually written by Lieutenant Schram and the purported signature 'Robert Schram' as written on the note identified as Prosecution Exhibit No. 2, and in his opinion Lieutenant Schram did not inscribe the name 'Robert Schram' as appears on the note identified as Prosecution Exhibit No. 2. Further, that he has examined the true signature of Lieutenant James H. Johnson and in his opinion the name 'Robert Schram' as appears on the note identified as Prosecution Exhibit No. 2 is in the handwriting of Lieutenant Johnson, the accused.

"Mr. Fletcher would also testify that he has examined the records of the Commercial and Savings Bank of Belair, Maryland, he being an assistant custodian thereof, said records being kept in the regular course of business and required to be kept by banking regulations and as of 28 August 1950 according to said records Lieutenant Johnson had not paid the said note identified as Prosecution Exhibit No. 2 or any part thereof. Mr. Fletcher would also

testify that on or about 4 September 1950 Lieutenant Johnson made a partial payment on the said note identified as Prosecution Exhibit No. 2 in the amount of $50.00 and that on 1 November 1950 Lieutenant Johnson paid the balance due on the said note and at the present time Lieutenant Johnson owes the Commerical and Savings Bank nothing on account of the said note identified as Prosecution Exhibit No. 2.

"Mr. Fletcher would also testify that examination of the same banking records referred to above shows that $150.00 was credited to the account of Lieutenant Johnson on 11 July 1950 as the proceeds of the note executed on 10 July 1950 and identified as Prosecution Exhibit No. 2." (Pros Ex 1)

First Lieutenant Robert J. Schram, Chemical Corps, Army Chemical Center, Maryland, testified that, as far as he knew, he was the only Lieutenant Schram stationed at the Army Chemical Center during July 1950. He has known the accused since he reported in at the Arsenal prior to Christmas 1949, but he has never indorsed or co-signed a note with the accused (R 10). He did not sign or authorize anyone to sign his name on the promissory note received in evidence as Prosecution Exhibit 2. On 10 July 1950, he was in Gladstone, Michigan. He had left the Army Chemical Center 30 June 1950 and did not return until 1 August 1950 (R 11). Upon cross-examination, Lieutenant Schram stated that he lived in the same Bachelor Officers' Quarters with the accused, that he had been out with him socially, that accused's reputation with the rest of the men was all right and that he did not know that accused was suffering from great financial difficulty at that time (R 11).

On 22 August 1950 Captain Elmer J. Holzworth, Chemical Corps, was the Commanding Officer of the 68th Chemical Smoke Generator Company, at the Army Chemical Center, Maryland. The accused was an officer in his company (R 12). Prior to that date, Captain Holzworth had received a telephone call from another officer concerning a note upon which accused was indebted to the Commercial and Savings Bank in Bel Air, Maryland. He asked the accused what he was going to do about it and accused replied that he was going to take care of it and that the money was on the way to the bank. A few days later the witness asked the accused what happened to the money in the bank and accused said that his wife had failed to put it in the mail (R 12). On 22 August 1950 in the company orderly room, the witness, as accused's commanding officer, asked him officially what he had done about the note. The accused said he had sent $75.00 to the bank and was going to take care of the rest of it on pay day (R 12-13).

Upon cross-examination, Captain Holzworth stated that he had no complaints about accused's performance of duty - it was satisfactory.

He knew that accused was in financial difficulty because he, as accused's commanding officer, had been receiving letters from the attorney for accused's wife to the effect that accused owed some back alimony payments. On two or three occasions he had advised the accused to contact the attorney and get the matter straightened out (R 13-14).

b. For the defense.

The accused, having been advised of his rights as a witness by the law member, elected to take the stand and testify under oath (R 15). He stated that he is 24 years of age and first entered the military service on 15 May 1943. After "boot training," he was graduated from the Hospital Corps School and was, thereafter, assigned to an "LST." In February 1944 he departed from the United States. He participated in the Normandy Invasion landings and returned to the Zone of Interior in July 1944. After graduation from the Medical Field Service School at Camp LeJeune, North Carolina, he was assigned to the school as an instructor in medical supply and clerical work. In February 1945 he was sent to Guam, later participating in the Iwo Jima Campaign with the 3rd Marine Division. After occupation duty in Japan, he returned to the United States in January 1947 and was discharged from the Navy 8 April 1947 (R 15). The accused further testified that he was awarded the Naval Presidential Citation with one star, a Navy Unit Citation, a letter of commendation from the Secretary of the Navy and a valor award. He is also entitled to wear the Naval Good Conduct Ribbon, the European Theater Ribbon with one star for the Normandy Invasion and bronze arrowhead, the Asiatic-Pacific Ribbon with one star for the Iwo Jima campaign and various service ribbons (R 16).

On 15 March 1947, while on terminal leave from the Navy, the accused married. Because he experienced difficulty obtaining employment to support himself and his family, he enlisted in the Army as a sergeant 10 February 1948 and was assigned to the medical battalion, 2nd Armored Division, Camp Hood, Texas. Accused advanced from platoon sergeant to first sergeant of his company. He trained one-year enlistees in medical subjects and worked in the station hospital and laboratory. Later he became battalion operations sergeant and battalion sergeant major. Although he was assigned quarters, his wife refused to join him at Camp Hood, and in December 1948 he was advised that his wife desired a divorce. After an apparent reconciliation, his wife still refused to join him. On 15 April 1949, accused was assigned to the Officers' Candidate School at Fort Riley, Kansas, where he completed a six-months course. He reported to the Army Chemical Center on 3 November 1949 at which time he thought that he was still married (R 16-17).

In the latter part of March, 1950, because the accused had been drawing a rental allowance, he was requested by the Finance Officer at

the Army Chemical Center to sign a statement that he was married. Accused complied because there was no doubt in his mind that he was married. Thereafter he was informed that he had been divorced in December 1948 and that his wife had remarried in January 1949. Charges, alleging an attempt to defraud the Government and making a false official statement, were preferred, and accused was placed in arrest in quarters 7 April 1950. Investigation revealed that there was no basis for the charges and he was released from arrest the last of May 1950. Accused had never been notified of the divorce action and was not aware that a divorce had been obtained (R 17).

On 31 March 1950 accused was informed that he was indebted to the Government for over three hundred dollars. He was not paid for March and received about one-half of his pay for April (R 17).

In June 1950, the accused borrowed $100.00 from the Commercial and Savings Bank in Bel Air which loan he repaid on the 1st of July, leaving him about $35.00 or $40.00. About this time accused's company commander, Captain Holzworth, discussed with him his wife's divorce and advised him to contact her attorney. Later, the captain informed the accused that the attorney intended to report the accused to The Adjutant General. He was advised to put some money away to prevent that contingency. On 10 July 1950 the accused borrowed $150.00 from the Bel Air Commercial and Savings Bank. It was upon the note for that loan that accused signed Lieutenant Robert Schram's name as co-maker (R 18). Although he intended to pay the note, he did not do so in August because he wanted to be able to send part of the money to his ex-wife, in the event her attorney wrote to the Adjutant General. When Captain Holzworth asked the accused about the note, he first said that he was preparing to take care of it. Two days later he told the captain, in reply to his inquiry as to the final disposition of the note, that he had sent $75.00 as a partial payment to the bank and that he would be able to pay off the remainder of the note the next pay day. Accused, in fact, had given the money to someone else to send to the bank and that person had not done so. At the time of trial, accused was not indebted to the Government or the Commercial and Savings Bank (R 19).

Upon cross-examination, the accused admitted that he wrote the name "Robert Schram, 1st Lt, Cml C" upon the note received in evidence as Prosecution Exhibit 2, that he was signing the name of the Lieutenant Robert Schram who appeared as a prosecution witness and that he did not have Lieutenant Schram's permission to sign his name on the note (R 19-20). He believed he could not have obtained the $150.00 loan if Lieuten- Schram's signature had not appeared on the note. Upon presentation of the note so signed (Pros Ex 2) to the Commercial and Savings Bank, accused's account was credited with $150.00 against which checks were drawn and money received (R 20). On the day, 22 August 1950, that accused told

Captain Holzworth that he had sent $75.00 to the bank, he did not know that the person to whom he had given it had not sent the money to the bank (R 20-21).

Major George K. Groves, Chemical Corps, Army Chemical Center, testified that the accused has been attached to his organization since 1 September 1950, during which time accused's performance of duty has been very satisfactory. Witness would like to have accused remain under his command if there was a suitable position for him (R 22).

It was orally stipulated between the prosecution, the defense and the accused (R 22) that if Major G. W. Batts, Finance Corps, Army Chemical Center, Maryland, were present in court, he would testify that on 17 March 1950 he talked to the accused concerning an overpayment of rental allowance. Based upon competent documents, it was determined that accused's wife had divorced him prior to 14 October 1949 and that he had been overpaid approximately $360.00 by the Government. Accused's salaries for March and part of April were posted against this indebtedness and accused is not now indebted to the Government insofar as rental allowances are concerned.

4. Discussion.

The accused was charged with and found guilty of forgery of a promissory note in violation of Article of War 93 and of uttering the forged promissory note in violation of Article of War 96.

> "Forgery is the false and fraudulent making or altering of an instrument which would, if genuine, apparently impose a legal liability on another or change his legal liability to his prejudice." (MCM, 1949, Par. 180i, p.243), and

> "To constitute this offense [uttering a forged instrument] there must be a knowledge that the instrument is a forgery, and there must be an intent to defraud. The intent to defraud may be implied if knowledge of the falsity of the document is shown. It is not necessary that the instrument actually be passed. A mere offer coupled with a representation that it is good is a sufficient uttering." (MCM, 1949, Par. 183c, p.259).

The uncontradicted evidence, presented by the prosecution, as well as accused's pleas of guilty and his judicial admissions, established conclusively that the accused falsely signed Lieutenant Schram's signature to a promissory note, an instrument which, if genuine, might operate to Lieutenant Schram's prejudice, and uttered said note by presenting the same to the Commercial and Savings Bank for credit to accused's account. Such evidence warrants the findings of guilty of forgery of

the promissory note and the utterance thereof (CM 334270, Stricklin, 1 BR-JC 141,157; CM 335738, Carpenter, 2 BR-JC 245,257). It is noted that upon accused's plea of guilty to Specification 1 of Charge II, uttering a forged instrument, the law member's explanation of the meaning of his plea pertained to the offense of forgery rather than to the offense of uttering a forged instrument. However, in view of the evidence presented aliunde the plea, accused's substantial rights were not injuriously affected by the erroneous explanation.

The accused was also found guilty of making a false official statement to Captain Holzworth with intent to deceive him, knowing such statement was untrue, in violation of Article of War 96.

To support a conviction of this offense the evidence must show that the accused made the alleged statement, that it was official, that it was false, that he knew it to be false, and that the statement was made with an intent to deceive the person to whom it was made (CM 334658, Flanagan, 1 BR-JC 233,234; CM 335051, Bishop, 2 BR-JC 13,16; CM 339494, Clifford, 5 BR-JC 131,138).

The evidence established conclusively that the accused made the statement as alleged, that the statement was an official reply to an inquiry by accused's commanding officer and that it was false. However, the accused testified that at the time he made the statement to the Captain, he did not know that the person to whom he had given the money to send to the bank had not done so. This testimony was, in effect, a denial of knowledge that the statement was false and of intent to deceive, both necessary elements of the offense, and, therefore, inconsistent with accused's plea of guilty.

When after a plea of guilty, an accused makes a statement inconsistent with the plea, or when it appears to the court that he entered a plea of guilty improvidently or through lack of understanding of its meaning and effect, the court is required to proceed as though the accused had pleaded not guilty (AW 21; MCM, 1949, Par. 71, p.67). At the outset of the trial upon accused's plea of guilty to making a false official statement, the law member made the following explanation to the accused:

> "As to specification 2 of Charge II, by your plea of guilty you have admitted that you were fully aware at the time you made an official statement to Captain Holzworth that that statement was untrue and that you intended at the time you made that statement to deceive Captain Holzworth in the manner as alleged in the specification. Do you understand that?"

To this explanation the accused replied that he understood and that he desired to have his plea stand. It is noted also that the person to whom

accused is alleged to have given the money was not named or called as a witness by the defense. While accused's testimony may be inconsistent with his plea of guilty and such plea may have been improvidently entered, in view of the testimony presented by the prosecution and the accused's own admissions, the evidence was so compelling that the court was clearly justified in finding accused guilty of the offense alleged (CM 290025, Burbank, 57 BR 41,45; CM 315844, Bryant, 65 BR 119,125-126).

5. Consideration has been given to the brief of First Lieutenant Robert M. McIntosh, JAGC, Defense Counsel for the accused, which was forwarded with the record of trial.

6. The accused was born 2 April 1926 in Clinton, Iowa. His father died a few months before accused was born, but his mother is living and is employed. He was married 15 March 1947 and has a daughter 2 years old. His first wife obtained a divorce from him in December 1948, and accused has since remarried. He completed three years of high school in Bloomington, Illinois, and at the age of 17 years, with his mother's consent, enlisted in the Navy 14 May 1943. During his service in the Navy as a surgical technician, he participated in the Normandy Invasion landing in Europe and also in the Iwo Jima campaign in the Far East. He was awarded the Naval Presidential Citation with one star, a Navy Unit Citation, and a letter of commendation from the Secretary of the Navy with a valor award. He was discharged from the Navy 8 April 1947.

Subsequent to his discharge, the accused did automobile body and fender repair work. On 10 February 1948 he enlisted in the Army for three years as a sergeant and was assigned to the 48th Medical Battalion, Camp Hood, Texas. In April 1949, he was selected to attend the Army Officers' Candidate School at Fort Riley, Kansas, and after completion of a six months' course, was commissioned a second lieutenant in the Chemical Corps on 14 October 1949. He was assigned to the Army Chemical Center, Maryland, where he has served continuously since 2 November 1949. His efficiency ratings reveal a numerical rating of 106 for the period from 24 October 1949 to 29 January 1950 and a numerical rating of 063 for the period 8 June 1950 to 31 July 1950. Due to the fact that accused was under investigation, no rating was given for the period 27 April 1950 to 7 June 1950.

7. The court was legally constituted and had jurisdiction over the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. 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, as modified by the reviewing authority, and to warrant confirmation of the sentence. A

sentence to dismissal and total forfeitures after promulgation is authorized upon conviction of an officer of violations of Articles of War 93 and 96.

Reginald C. Miller, J.A.G.C.

William C. Fitzhugh, J.A.G.C.

Arthur P. Ireland, J.A.G.C.

(254)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 344523

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Second Lieutenant James H. Johnson, 02033688, 68th Chemical Smoke Generator Company, Army Chemical Center, Maryland, upon the concurrence of The Judge Advocate General the sentence as modified by the reviewing authority is confirmed and will be carried into execution.

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action.

FRANKLIN P. SHAW
Major General, USA
Acting The Judge Advocate General

2 February 1951

(GCMO 16, Feb 9, 1951).

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGK - CM 344592

FEB 6 1951

UNITED STATES v. Second Lieutenant RONALD W. JONES (0-1688733), Headquarters 25th Transportation Traffic Regulation Battalion.	UNITED STATES FORCES IN AUSTRIA Trial by G.C.M., convened at Innsbruck, Austria, 21 December 1950. Dismissal, total forfeitures after promulgation, and confinement for one (1) year.

OPINION of the BOARD OF REVIEW
BARKIN, WOLF and LYNCH
Officers of The Judge Advocate General's Corps

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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 Judicial Council and The Judge Advocate General.

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

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

Specification: In that Second Lieutenant Ronald W. Jones, then a member of 7602 General Depot, now a member of Headquarters 25th Transportation Traffic Regulation Battalion, did, at Innsbruck, Austria, on or about 13 November 1950, feloniously and unlawfully kill Beatrix Hedwig Kadla, by shooting her in the body with a pistol.

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

Specification: In that Second Lieutenant Ronald W. Jones, then a member of 7602 General Depot, now a member of Headquarters 25th Transportation Traffic Regulation Battalion, did, at Innsbruck, Austria, on or about 2 November 1950, wrongfully violate paragraph 6a(4) Headquarters United States Forces in Austria Circular Number 7, dated 8 February 1950, by purchasing a pistol without having been granted specific authority to purchase the said pistol.

He pleaded not guilty to all charges and specifications. He was found

guilty of the Specification of Charge I, except for the words "feloniously and" and the words "by shooting," and substituting for the latter words "by negligently shooting"; of the excepted words, not guilty, of the substituted words, guilty; of Charge I, not guilty, but guilty of a violation of the 96th Article of War. He was found guilty of the Specification of Charge II and of Charge II. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence

a. For the Prosecution

The evidence pertinent to the findings of guilty is summarized as follows:

Accused is in the military service and at the times in issue was a member of the 7602 General Depot, Camp Rum, Innsbruck, Austria (R 26-27).

On 2 November 1950 at Innsbruck, Austria, accused purchased from Herbert Mahrholdt, gunsmith, a "SOL" pistol which Mahrholdt had previously reserved for him and a case of 66 calibre .32 cartridges. Mahrholdt identified Prosecution Exhibit 1 as a receipt which he gave accused. The receipt indicated the serial number of the pistol as "17586." Mahrholdt further identified Prosecution Exhibit 2 as the pistol which he had sold to accused (R 8-11).

Upon motion of the prosecution, the court took judicial notice of USFA Circular No. 7, Headquarters U.S. Forces in Austria, APO 777A, U.S. Army, dated 8 February 1950 (R 43). Paragraph 6a(4) thereof provides as follows:

> "(4) The purchase or otherwise acquiring of a handgun is prohibited unless specific authority is granted in each case, as prescribed below.
>
> (a) Area commanders are authorized to approve requests for permission to purchase or otherwise acquire a handgun.
>
> (b) Approval of requests to acquire a handgun will be stringently controlled. Ordinarily such requests will not be approved for military personnel below grade three."

Accused had neither requested nor been granted permission to acquire a handgun by his area commander, Colonel Robert W. Marvin. All requests for such permits were personally acted upon by Colonel Marvin, and no one else had been authorized to grant such a permit to the accused (R 27).

Mr. and Mrs. Franz Salchner reside at No. 10 Rudolf Grinzstrasse, Innsbruck, Austria. Accused occupied an apartment in the same house which he had rented from Mr. and Mrs. Salchner (R 12,18). In the early evening of 2 November 1950 Mr. and Mrs. Salchner were at home. They heard accused enter his apartment and exchange greetings with Miss Beatrix Kadla, the deceased. Shortly thereafter they heard a "suspicious noise." They immediately rushed to the kitchen of accused's apartment to investigate (R 13,19-20). They found Miss Kadla sinking to the floor with a wound in her neck, and saw a pistol lying on the table (R 13,20). The accused was crying, "Doctor, doctor, hospital" (R 20). Mr. Salchner took the pistol and deposited it in the cellar of the house (R 13). Mrs. Salchner and accused placed Miss Kadla on a couch and accused left the room to telephone for an ambulance. He secured the help of another tenant of the house, Sergeant Rocco Galletta, who drove accused and the wounded girl to the surgical clinic of Innsbruck University (R 14,22). After Miss Kadla was admitted into the clinic, accused and Sergeant Galletta returned to the former's apartment (R 23). Mr. Salchner procured the pistol from where he had put it in the cellar and returned it to the accused, who unloaded it (R 14,23). Prosecution Exhibit 3, an empty cartridge case, was found by Salchner four or five days later behind the sideboard in accused's kitchen (R 15). Accused and Sergeant Galletta then proceeded to the residence of Colonel Robert W. Marvin (R 24). Accused told Colonel Marvin that a girl had been accidentally shot and tendered him a small pistol, identified as similar to Prosecution Exhibit 2. Colonel Marvin declined to accept the pistol and told accused to give it to the officer of the day (R 27).

Lieutenant Colonel John F. Stein identified Prosecution Exhibits 2, 2-A and 4, respectively, as a pistol, clip and box of ammunition given to him by accused on 3 November 1950 (R 28-29).

It was stipulated that Dr. Fritz Haas of the Surgical Clinic of Innsbruck, Austria, is a duly qualified medical expert, and that if he were present he would testify that on 2 November 1950, at about 1900 hours, Beatrix Hedwig Kadla, the person named in the Specification of Charge I of the instant case, was received in the above named clinic; that he examined her and found she was suffering from a bullet wound on her neck; that the bullet tore about two centimeters of the wall on the left side of the trachea, injured the pleura of the left lung, and caused an injury to the posterior wall of the right lung; that the patient was operated on immediately after her delivery to the clinic;

and that the projectile was located in the region of the base of the right lung (R 33, Pros Ex 6).

It was likewise stipulated that Dr. Franz Josef Holzer, Chief of the Institute for Forensic Medicine, Innsbruck, Austria, is a duly qualified medical expert, and that if he were present he would testify that Beatrix Hedwig Kadla, the person named in the Specification of Charge I of the instant case, died on 13 November 1950, at 0430 hours; that he performed an autopsy on her which disclosed that the immediate cause of death was bleeding, external and internal, into the right pectoral space, as well as suffocation caused by the inhalation of blood and that a calibre 7.65 bullet removed from the body of the victim was given by Doctor Holzer to Mr. G. D. Morley(R 34, Pros Ex 7).

It was further stipulated that "Beatrix Hedwig Kadla died on 13 November 1950 as a result of a gunshot wound inflicted on 2 November 1950; that the said Beatrix Hedwig Kadla is the same person named in the Specification of Charge I of the case under trial ***" (R 34, Pros Ex 8).

Other stipulations were admitted into evidence without objection which showed the following: Ballistics tests were performed which established that a "SOL" pistol, caliber 7.65, Serial No. 17586, fired the projectile taken from the body of the deceased, and that an expended cartridge case found in accused's kitchen was fired by the same weapon. The above described pistol is in good working order. A bolt on the left side of the pistol serves as a safety catch, which, when on the "Safe" position, makes the firing of the weapon impossible. The trigger resistance is between 1.75 and 2 kilograms. The firing of a shot from the weapon requires the following: (1) the presence of a cartridge in the barrel, (2) the opening of the safety catch, and (3) the application of pressure on the trigger (R 41-42, Pros Exs 10, 12).

Gerald D. Morley, an agent of the Criminal Investigation Division, saw the accused at Camp Rum, Innsbruck, Austria, on 7 November 1950. Agent Morley identified himself and advised the accused of his rights under the 24th Article of War. After he had had his rights explained to him and had indicated that he understood them, accused made a statement in writing to Agent Morley and signed it. There were no threats, promises, force, or duress employed in obtaining the statement from the accused (R 35,36). The statement wasreceived in evidence as Prosecution Exhibit 9 without objection by the defense (R 38).

Accused recited that he had been acquainted with deceased for a period of about five months and that she had a key to his apartment at Rudolf Grinzstrasse 10, Innsbruck. Deceased had asked accused to

procure for her a small pistol and permit, and on 2 November 1950 accused purchased for her a "'SOL' 7.65 automatic pistol and clip." Accused had not seen deceased for about two days but found her in the bedroom of his apartment when he arrived there at about 1730 hours the same day. They discussed their activities for the past two days and were "laughing and joking." With reference to what subsequently occurred, accused stated as follows:

> "*** I showed her the pistol at that time. *** We then went into the kitchen where Kadla began to make coffee. *** I took the pistol, clip and box of ammunition out of my right hand coat pocket and I believe I set it on the kitchen table. While Kadla was preparing the kitchen table I was fooling with the pistol. At about this time the coffee was ready and we sat down at the table.*** Kadla was sitting on my left side leaning on the end of the table while I sat in the middle sort of half turned toward her. *** I opened the box of ammunition and put a bullet in the chamber and worked the slide. The gun failed to eject so I field stripped it and removed the bullet from the chamber. I reassembled the gun and then loaded the clip with all the ammunition it would take. I then inserted the clip in the gun and worked the slipe and ejected the ammunition. *** The ammunition fell on the floor under the sink as I ejected them. *** I then went over to the sink and picked up all the ammunition I could find on the floor, again I do not know how many rounds I picked up. I then reloaded the clip with the rounds I had picked up from the floor. I had no reason in particular for loading the complete clip. I then went back to my seat at the table and we carried on a light conversation. During this time I was periodically fooling with the pistol. I then put the clip into the pistol and turned the pistol over and working the clip spring made sure the clip was properly seated. I am not sure whether or not I removed the clip from the gun but I am sure that I did not check the gun for clearance. I then made a sort of flourishing motion with my right hand and sort of presented the pistol barrel foremost to Kadla. She was sitting in a position which caused her to lean toward the table and when I gave her the gun I think my hand stopped about six to eight inches from her throat. I must have had my finger on the trigger when I gave her the pistol, I believe I held my middle finger on the trigger, because the gun went off. ***" (Pros Ex 9)

b. For the Defense

The accused, having been apprised of his rights as a witness, elected to testify in his own behalf.

Accused testified that he is 21 years of age and that he has been a second lieutenant since 2 September 1949, prior to which time he had enlisted service.

Sometime prior to 2 November 1950, accused accompanied by First Lieutenant Ernest E. O'Dell visited the gunsmith shop of Peter Mayerhof and Sons in Innsbruck, Austria, to ascertain the progress that had been made on a sporting rifle, which was being fabricated for him by the gunsmith. While there, accused's attention was attracted to several pistols on the counter and he examined them as he had been requested by Miss Beatrix Kadla, the deceased, to procure a small handgun for her. He found one he believed would be suitable for Miss Kadla and asked the gunsmith to lay it aside for him until he returned for his rifle, at which time he would purchase both weapons (R 45).

On 2 November 1950 accused returned to the gunsmith shop and purchased the pistol he had previously selected, together with a clip and a box of ammunition. Accused and some other officers at Camp Rum had discussed the necessity of securing a permit for the purchase of a handgun. These discussions had left accused with the impression that no permit was needed, but that it was only necessary to register such a weapon (R 44). Prior to buying the pistol accused had inquired of the gunsmith if a permit was necessary to the purchase. The gunsmith told him that he was authorized to sell handguns to Allied personnel without requiring a permit (R 45).

Carrying his purchases, accused went to his apartment to see if Miss Kadla was there. She was not, so he returned to Camp Rum. He remained there a short time and returned to his apartment. It was then about 1730 hours. At this time, Miss Kadla was at the apartment. Accused showed her the pistol. She seemed dissatisfied with it and indicated that it was too large. Accused dropped the gun into his pocket and he and Miss Kadla went to the kitchen for coffee. Accused placed the pistol on the table and examined it. When the coffee was ready Miss Kadla joined accused at the table, and the two discussed their plans for the evening. The accused opened the box of ammunition and placed a round in the chamber of the pistol, and worked the slide but the pistol failed to eject. He thereupon field-stripped the weapon, removed the cartridge from the chamber, and reassembled the pistol. He then loaded the clip, worked the slide until all the ammunition had fallen to the floor, retrieved the ammunition from where it had fallen, returned to the table, and reloaded the clip. He pushed the clip into the pistol and looked to see if it was firmly seated. It seemed loosely seated, so the accused "removed the clip and made a

motion towards Miss Kadla like that (indicating), and the gun exploded" (R 45-46). His intention was "to present it in front of her for her approval" (R 49). Although he did not intend to point the pistol at her, he must have done so, and his finger "must have been on the trigger because the gun went off" (R 50). Accused believed "the gun was clear" (R 46), because he "had just previously cleared the gun by working all the ammunition out of it" (R 49).

After the shot Miss Kadla began to sink to the floor. At that time Mr. and Mrs. Salchner rushed into the room and accused told them to get a doctor. He placed the injured girl on a couch and ripped her sweater down the front in order to locate the wound. Accused pressed his handkerchief to the wound in her neck to arrest the flow of blood. He instructed Mr. Salchner to hold the handkerchief, and he ran into the street to find someone to take Miss Kadla to the hospital. A car was outside and a lady informed him that it belonged to an American sergeant upstairs. He ran up the stairs and found an American soldier, Sergeant Rocco Galletta, the owner of the car. Sergeant Galletta drove accused and the wounded girl to the hospital, where she was admitted (R 47).

Accused received instruction in the use and handling of firearms in his basic training at Fort Knox, Kentucky. He was familiar with automatic pistols, and the weapon in question was not alien to him (R 48-49).

First Lieutenant Ernest E. O'Dell testified that he was with accused when the latter requested Mahrholdt to set aside a pistol for him. Accused had previously told O'Dell that he wanted a pistol for a woman. Lieutenant O'Dell also testified that at the time the only regulation of which he was aware with reference to the purchase of pistols required the registration of pistols 30 days after purchase (R 53).

Colonel Robert W. Marvin testified that accused had been a member of his command for six months; that accused had performed his duties in an efficient manner, and had done a "superior job"; that prior to the present incident accused's conduct has been good; that, in his opinion, accused has value to the military service (R 56).

A cable from "Brigadier General Owen J. Cleary of the Michigan State Guard, Retired," was received in evidence (R 54, Def Ex A). General Cleary stated that he has known accused for six years; that accused's reputation in his community is excellent; and that he believes accused to possess great potential value to the military service.

There was admitted into evidence the statement of Captain Thomas H. Martinez, Transportation Corps, 440th Transportation Company, who

stated that the accused had formerly been a member of his command; that he had performed his duties in an excellent manner; that he valued accused as "one of the finest young officers I have had under my command in the past several years"; and that he would be pleased to have accused serve as an officer in his unit at any time (R 54, Def Ex B).

It was stipulated that if Lieutenant Colonel John C. Golden, Commanding officer of the 25th Transportation Traffic Regulation Battalion, APO 174, were present he would testify that accused was formerly a member of his command; that, in his opinion, accused's overall value to the military service is "high excellent"; and that accused is "in every sense of the meaning an officer and gentleman" (R 55, Def Ex A for identification).

4. Accused was charged with feloniously and unlawfully killing Beatrix Hedwig Kadla by shooting her in the body with a pistol in violation of Article of War 93, and by exceptions and substitutions was found guilty of unlawfully killing the person alleged by negligently shooting her in the body with a pistol in violation of Article of War 96. In brief, accused was charged with involuntary manslaughter and found guilty of negligent homicide.

Involuntary manslaughter is defined as "homicide unintentionally caused in the commission of an unlawful act not inherently dangerous to human life, or by culpable negligence in performing a lawful act or an act required by law" (MCM, 1949, par 180a, p 234). Culpable negligence is described as "a negligent act or omission accompanied by a disregard for the foreseeable consequences to others of such act or omission" (MCM, 1949, supra). Upon all the evidence of record, including the evidence that the trigger resistance of the fatal pistol is between one and three quarters and two kilograms, the court could have found the classic instance of culpable negligence: "***Pointing a pistol in fun at another and pulling the trigger, believing, but without taking reasonable precautions to ascertain, that it would not be dangerous, ***" (MCM, 1949, supra). Negligent homicide, the offense here found is among the lesser offenses which may be included within a charge of involuntary manslaughter (MCM, 1949, supra). In our view of the case the proof sustains the more serious degree of homicide, involuntary manslaughter; such proof necessarily supports the finding of negligent homicide (CM 338668, O'Daniel and Martin, 6 BR-JC 243,254).

Accused was also found guilty of violating a directive of Headquarters United States Forces in Austria proscribing the acquisition of a pistol without specific authorization therefor in violation of Article of War 96 (Chg II, Spec). Accused admitted the purchase of a pistol without authorization as alleged but sought to defend on the ground that he had no knowledge of the directive. Inasmuch as the violated directive is of a general nature having the force of law and emanated from the headquarters of an independent overseas command, the equivalent of an overseas theater or department, lack of knowledge,

either actual or constructive, is not a defense (MCM, 1949, par 140b, p 189). The evidence including the judicial admissions of accused sustains the findings of guilty of the Specification of Charge II in violation of Article of War 96.

5. Records of the Department of the Army show that accused is 21 years of age, unmarried, and is a high school graduate. He had enlisted service from 31 July 1947 until he was commissioned a second lieutenant on 2 September 1949. He served in Japan from June 1948 to February 1949 and is currently serving in Austria. His overall efficiency ratings of record are "099" and "072."

Six of the seven members of the court have requested that clemency be accorded to accused, three members expressing the belief that dismissal of the accused "would not necessarily be to the best interests of the service or society." The Staff Judge Advocate recommended to the reviewing authority that the record be forwarded under the provisions of Article of War 48 with the recommendation that the sentence be commuted to forfeiture of $100.00 per month for a period of 18 months.

6. The court was legally constituted and had jurisdiction of the person and of the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. 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 and to warrant confirmation of the sentence. A sentence to dismissal is authorized upon conviction of a violation of Article of War 96.

Arthur Baum, J.A.G.C.

Samuel S. Cooper, J.A.G.C.

J. W. Lynch, J.A.G.C.

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DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Second Lieutenant Ronald W. Jones, 0-1688733, Headquarters 25th Transportation Traffic Regulation Battalion, upon the concurrence of The Judge Advocate General the sentence is confirmed but commuted to a reprimand and forfeiture of one hundred dollars pay per month for six months. As thus commuted, the sentence will be carried into execution.

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

MAR 20 1951

I concur in the foregoing action.

E. M. BRANNON
Major General, USA
The Judge Advocate General

3 April 1951

(GCMO 41, 10 April 1951).

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D.C.

JAGH CM 344614 | 7 February 1951

UNITED STATES v. Second Lieutenant EDGAR J. ST. JOHN, JR. (0-983999), 43rd Infantry Division, Camp Pickett, Virginia, on temporary duty with Headquarters Company, 1st School Battalion, 9829th Technical Service Unit, Corps of Engineers, The Engineer Center Regiment (Pipeline), Fort Belvoir, Virginia.	MILITARY DISTRICT OF WASHINGTON Trial by G.C.M., convened at Fort Belvoir, Virginia, 8 January 1951. Dismissal.

OPINION of the BOARD OF REVIEW
MILLER, FITZHUGH, and IRELAND
Officers of The Judge Advocate General's Corps

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 and the Judicial Council.

2. The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Second Lieutenant Edgar J. St. John, Junior, Corps of Engineers, 43rd Infantry Division, Camp Pickett, Virginia, on temporary duty with Headquarters Company, 1st School Battalion, 9829th Technical Service Unit, Corps of Engineers, The Engineer Center Regiment (Pipeline), Fort Belvoir, Virginia, did, at Fort Belvoir, Virginia, on or about 6 December 1950, unlawfully enter the L-4 Club House of the Engineer Mess, with intent to commit a criminal offense, to-wit: larceny, therein.

He pleaded not guilty to, and was found guilty of, the Charge and the Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor, at such place as proper

authority may direct for one year. The reviewing authority approved only so much of the findings of guilty of the Specification and Charge as involves a finding that the accused did, at Fort Belvoir, Virginia, on or about 6 December 1950, unlawfully enter the L-4 Club House of the Engineer Mess in violation of Article of War 96, and, because of the mitigating circumstances and the excellent war record of the accused, only so much of the sentence as provides that accused be dismissed the service. The record of trial was forwarded for action under Article of War 48.

3. Evidence.

a. For the prosecution.

Building L-4 at Fort Belvoir, Virginia, is a small Officers' Club, comprising a snack bar where food and beer are served, a combined television lounge and reading room, a storage room for food and beer (R 38), a club office (R 39) and a barber shop (R 8). On the night of 5-6 December 1950 there were in the club eight or nine slot machines containing the day's business, an Army field safe containing the day's receipts and a "working fund" of $600, located in the club office (R 38-39), and a cash register and safe, located in the barber shop (R 13-14).

On the evening of 5 December 1950 the accused was in this Officers' Club (R 36) and had had several beers (R 40). Shortly after 11:00 p.m. the accused asked Master Sergeant Dale W. Shore, who worked as a bartender in the club, to serve him another beer. Although it was after closing time, the sergeant served accused the beer at which time accused explained that he did not have enough money for the beer and arranged to pay the next time he came in (R 36-37). The accused at that time was not staggering or drunk in Sergeant Shore's opinion (R 37) and left the club prior to 11:15 p.m. (R 42) at which time the sergeant proceeded to close the club after making an inspection to determine that all doors and windows were properly secured (R 37-38). The accused was not associated with the club management and was not authorized to enter the club after it was closed (R 38,39). Upon cross-examination, Sergeant Shore stated that he checked the doors and windows on the inside only (R 40-41).

Building L-3 at Fort Belvoir is a Bachelor Officers' Quarters (BOQ) and is located about thirty feet away from Building L-4 (R 12,19). At approximately 1:00 a.m., 6 December 1950, Charles J. Glicken, a barber whose shop is in Building L-4, was in his room on the second floor of Building L-3 (R 8) and observed someone standing by a window outside of Building L-4, "fooling around with the screen" (R 9). The barber went downstairs and reported the incident to a group of officers who were playing pinochle on the first floor of the quarters (R 10,15,22). Included in this group were Captain Walter Z. Granecki and First Lieutenant Budd W. Boyer who was the Military Police Duty Officer that night (R 10,15,22).

Lieutenant Boyer accompanied the barber to the latter's room where they were joined shortly thereafter by Captain Granecki (R 15,23). They observed the accused, dressed in working clothes (R 18), attempt to lift the window at the side of Building L-4 (R 23). He picked up a bench or box or crate, which was in the rear of Building L-4, placed it against the side of the building and, standing on that, again made an effort to lift the same window, but the window did not open. He moved from one window to another, tampering or "fooling with the screens and windows" (R 16,23).

The accused then moved to the rear porch of Building L-4 (R 16,24) and Captain Granecki, Lieutenant Boyer and the barber moved into the captain's room, which is directly across from the rear porch, where they continued to observe the accused (R 16). A few moments later, Lieutenant Boyer went to his room, secured his pistol and holster, and, from the fire door at the end of Building L-3, again observed the accused on the back porch of Building L-4 (R 24). Both Captain Granecki and Lieutenant Boyer heard "scraping," "metallic" sounds coming from the back porch and both saw the accused remove a pane of glass from the rear door of the building, lay it on the porch and place his head and left arm inside the opening where he "tried or tampered with the locks and the knobs" (R 16, 24-25). They also noticed that the accused ran off the porch and hid each time headlights of automobiles, coming into the area, flashed across the building (R 16-17,24).

The night of 5-6 December 1950 was clear and the area where accused was operating was somewhat illuminated by lights in the adjoining buildings (R 12,19,24). Captain Granecki testified that "the light reflecting brought out the individual and you could actually almost see fingers, you could see it that clearly" (R 19), and Lieutenant Boyer stated that he could see the person clearly but could not identify him (R 24).

The actions of the accused were thus observed for twenty to twenty-five minutes (R 16,17). Lieutenant Boyer then went downstairs and telephoned the Operations Office of the Military Police for a patrol car, stating that he would attempt to make an apprehension (R 24-25). He again observed the accused on the back porch with his head and arm inside the door and started across the distance between the rear of Building L-3 and the back porch of Building L-4. Lieutenant Boyer shouted, "Stop where you are at, you're under arrest" (R 11,17,25). At this the accused "jerked started down the stairs and ran around the rear of the building (R 17,25), whereupon Lieutenant Boyer ran after him and shouted again, "Stop where you are at, I am armed, you are under arrest" (R 17). The accused continued to run and the lieutenant shouted pleadingly, "Stop, goddam it, I don't want to shoot you" (R 17).

Lieutenant Boyer was close behind during the pursuit and at no time lost sight of the accused (R 26,28). After loudly ordering the accused

to halt, the lieutenant fired into the air twice and, when the accused started to "pull away," fired at the accused three times. After the third shot, accused leaped up about three feet on to a cement coal bin in the rear of Building L-9 and then fell to the ground (R 26-27). The lieutenant ran up to the accused, flashed a light in his face and identified him as Lieutenant St. John. He then placed the accused in arrest and asked someone to call an ambulance (R 27). The accused appeared to be in a state of shock and asked, "Why did you shoot me?" (R 29).

In the opinion of both Captain Granecki and Lieutenant Boyer, the accused was not intoxicated. These opinions were based upon observation of the accused as he carried and stood upon the bench or box at the time he was tampering with the windows of Building L-4 (R 18,28).

At approximately 0215 hours, 6 December 1950, the Military Police made a physical inspection of the premises outside Building L-4. Plating of the door lock, the door knobs, three screws, four pieces of molding used to hold glass in the door and a pane of glass in three parts were found lying on the floor of the service entrance porch and some wood stripping used for holding a screen to the frame was found lying on the ground beneath a window of Building L-4 (Pros Exs 1 through 6, inclusive; R 32-35).

A written stipulation, entered into between the trial judge advocate, defense counsel and accused, was received in evidence as Prosecution Exhibit No. 7 (R 44), which stated, in effect, that if Major E. S. Bres, M.C., were present in court he would testify that on 6 December 1950 at 0300 hours he treated the accused for a perforating gunshot wound of the left thigh and lacerations, moderately severe, of the right thigh (Pros Ex 7).

b. For the defense.

Captain James R. Smith accompanied the accused from class to the Officers' Club about 5:00 p.m. on 5 December 1950. He had three beers with the accused and left the club between 6:00 and 6:15 p.m. Witness had seen the accused when he was intoxicated in which condition his appearance was the same as usual, but he became very boisterous (R 45-46). Upon cross-examination, the captain admitted that the accused was sober when he left him and that he did not see him again that evening (R 47).

First Lieutenant Agenor Willy Wachta testified that he had known the accused for over a year. He saw the accused in the Officers' Club at approximately 2300 hours, 5 December 1950. He stated, "I spoke to him. He was in a very antagonistic frame of mind. His eyes were bloodshot. He seemed to be in an inebriated condition. I tried to get him

to come home." (R 48). The accused would not leave with the witness. He was inebriated to the extent that he was not in full control of his faculties (R 49). Upon cross-examination, Lieutenant Wachta stated that the accused drank two cans of beer while he was present and that accused had a little pile of empty beer cans on the table beside which he was standing (R 51).

First Lieutenant George W. Nelson was in his quarters in Building L-9, Fort Belvoir, when about 1:45 a.m., 6 December 1950, "I heard someone shouting halt and I heard a shot and another halt and a shot and another halt and a shot" (R 53). He went outside his barracks and saw the accused lying on the ground. He walked over to the accused who opened his eyes and said, "George, what happened?". After calling an ambulance, Lieutenant Nelson returned to the accused and asked if he had been drinking. Accused said, "I don't know." At that time "he did not seem like he had any control of his faculties." (R 54). When asked to elaborate upon this statement, the witness stated "his voice wasn't steady" and "his tongue was thick and he appeared to me to be intoxicated." He knew accused had been shot yet he attributed accused's condition to intoxication rather than shock (R 54-55).

A written stipulation, entered into between the trial judge advocate, defense counsel and the accused, was received in evidence as Defense Exhibit A (R 55) which stated, in effect, that if Mr. John D. Moore, Manager of the Bristol County District for the Narragansett Electric Company, Bristol, Rhode Island, were present in court he would testify that the accused had worked directly under him as a meter reader; that his duties consisted of entering homes, dwellings and business establishments to read meters; that such was a position of trust; and that the accused performed these duties well and honestly for over one year and was promoted. In Mr. Moore's opinion, the accused is an exceedingly honest, sincere and trustworthy person and he would not hesitate to put him in positions requiring people of impeccable character and honesty (Def Ex A).

After being advised of his rights as a witness by the law member (R 56), accused elected to take the stand and testify under oath. He stated that he first entered the military service in July 1943. After completion of basic training at Camp Fannin, Texas, he was assigned to the Infantry and went overseas with the 24th Division in January 1944, to the Asiatic-Pacific Theater (R 57). While in combat he received two battle stars. Although he had not been wounded, he had been hospitalized twice for malaria and once for battle fatigue. Upon separation from the Army, he received a twenty per cent disability from the Veterans Administration; ten per cent for malaria and ten per cent for nervous conditions (R 58).

After his return to civilian life, he was first employed by the United States Rubber Company in Bristol, Rhode Island, where he worked

for about a year, and then he got a job with the Narragansett Electric Company. After his separation, he joined the National Guard of Rhode Island as a Staff Sergeant and, after serving six months, was commissioned. Prior to being commissioned, his disability had been removed by the Veterans Administration (R 59). His National Guard unit was called into active service 5 September 1950 and the division moved to Camp Pickett, Virginia, from which camp he was sent to school at Fort Belvoir (R 59-60).

On the evening of 5 January (December) the accused arrived at the Officers' Club and stayed there until it closed (R 60). He drank "over a dozen beers" (R 71). After drinking his last beer at approximately 11:10 p.m., he went directly to his quarters in Building L-9 about 55 to 60 yards away (R 60,67,71-72). At the time he left the club the accused had no money on his person or in his room (R 74). Upon arrival at his quarters, he prepared for bed but instead of going to bed he put on a field jacket and went outside about midnight (R 60,67,72). The next thing the accused knew was that he was lying on the ground and that he had been hurt. He could not remember anything between the time that he went outside until he found himself lying on the ground (R 60-61,68, 72).

The accused further testified that if he drinks to excess, he becomes "sullen, morose" and at unpredictable times seems to "black out." In this condition, he does not lose consciousness and is able to stand, but is not fully able to think or remember (R 61). This "blackout" condition has occurred twice in the past four years. His family doctor has advised him not to drink to excess (R 62). However, such advice was given in connection with a test for malaria and not because the accused had reported the "blackouts" to the doctor (R 65-66). At the time of the present incident he had drunk no whiskey (R 66). He stated, "All I ever drink is beer" but beer will bring on the condition (R 70).

c. Rebuttal for the prosecution.

A blood-alcohol report from the Station Hospital at Fort Belvoir, Virginia, was received in evidence as Prosecution Exhibit 8 (R 79). The report showed that a specimen of the accused's blood was collected at 0300 hours on 6 December 1950 and that a subsequent test revealed that the alcoholic content was negative (R 79). However, in the Army, the blood-alcohol test is considered only some evidence of intoxication and is not of itself conclusive (R 80).

4. Discussion.

The accused was charged with, and found guilty of, housebreaking in violation of Article of War 93. The reviewing authority approved only so much of the findings of guilty as involved a finding of guilty of unlawful entry in violation of Article of War 96.

Unlawful entry is a lesser included offense in the charge of housebreaking (CM 202846, Shirley, 6 BR 337,352; CM 307029, Duitz, 60 BR 65, 76).

The elements of proof necessary to sustain a conviction of the offense of unlawful entry are: (a) that there was an entry into the building as alleged and (b) that such entry was unauthorized or prohibited by official orders or regulations (CM 322500, Barnes, 71 BR 223,232; CM 322931, Wolsey, 71 BR 339,341).

In the instant case, the evidence clearly establishes an entry into the building as alleged. In fact, to effect his entry into the premises, the accused committed acts constituting both breaking and entering. In this connection the language of the Manual for Courts-Martial in discussing the offense of burglary is significant.

> "* * * if there is any removal of any part of the house designed to prevent entry, * * * it is sufficient. Opening a closed door or a window, * * *, or cutting out the glass of a window or the netting of a screen is a sufficient breaking. * * *.
>
> "An entry must be effected before the offense is complete, but the entry of any part of the body, even a finger, is sufficient; * * *" (MCM, 1949, par. 180d, p.236-237).

In view of the uncontradicted testimony of Captain Granecki and Lieutenant Boyer that they heard "scraping" and "metallic noises," saw accused remove a pane of glass from the rear door of Building L-4, and saw accused put his head and arm through the opening thus made, together with the material evidence of his operations subsequently discovered on the rear porch, there was ample proof that the accused effected an entry into the building sufficient to establish the first element of the offense of unlawful entry.

That the entry was unauthorized was established by Sergeant Shore's uncontradicted testimony that he had closed the club at approximately 2315 hours and that the accused was neither associated with the management of the club nor authorized to enter the club after it was closed. The efforts of the accused to effect entry by stealth further negative any consideration of lawful entry.

The accused contends that he remembers nothing of the incident with which he has been charged and insists that he was in a state of "blackout" as a result of the beer he had consumed during the evening. Although the evidence is conflicting on the question of the accused's drunkenness at the time of the offense, drunkenness is no defense to the charge of unlawful entry since such offense does not require specific intent. The applicable rule is: "Voluntary drunkenness, whether caused by liquor or

drugs, is not an excuse for a crime committed while in that condition; but it may be considered as affecting mental capacity to entertain a specific intent or state of mind, when a particular intent or state of mind is a necessary element of the offense" (MCM, 1949, par. 140a, p. 188).

Moreover, accused's actions belie his contention of "blackout." Over a period of 20-25 minutes he was seen tampering with first one window of Building L-4 and then another, procuring a bench or similar object to assist his efforts, concealing himself when disclosure appeared imminent, and finally fleeing upon discovery in an attempt to elude his pursuer. But even if the accused were in a state of "blackout," the record is devoid of indication that his abnormality stemmed from anything other than intoxication. Consequently, the alleged "blackout" is no defense as it is merely an incident of the accused's voluntary drunkenness (CM 305207, Shropshire, 18 BR (ETO) 235,238; CM 319168, Poe, 68 BR 141,171).

5. Consideration has been given to the letter on behalf of the accused from his mother, Mrs. Anna St. John, addressed to the President of the United States.

6. The accused is 26 years of age, married, and has two children, a boy three years and a girl 4 months old. Both of his parents are living. He was graduated from high school in Warren, Rhode Island, in 1942, and subsequently worked in the Naval Torpedo Station, Newport, Rhode Island, for eleven months. He was inducted into the Army 2 August 1943 and, after completing basic training at Camp Fannin, Texas, was assigned to the 24th Division. On 15 January 1944, he accompanied the Division to the Asiatic-Pacific Theater where he had extensive combat experience, participating in beachhead landings in the initial assault at Hollandia, Leyte, Mindoro, Maranduque and Mindanao. He is entitled to wear the Combat Infantryman Badge, Asiatic-Pacific Theater Ribbon with one star and one arrowhead, Philippine Liberation Ribbon with two stars and two arrowheads, Good Conduct Ribbon, Victory and Japanese Occupation Ribbons. He returned to the United States 10 January 1946 and was honorably discharged as a Staff Sergeant 17 January 1946.

After his separation the accused was first employed by the United States Rubber Company for about one year and then with the Narragansett Electric & Power Company as a meter reader. He enlisted as a sergeant in the National Guard of Rhode Island 13 April 1949, was commissioned a second lieutenant therein 10 November 1949, and was commissioned a second lieutenant, Corps of Engineers, National Guard of the United States, 13 January 1950. He was ordered into the active military service with his unit 5 September 1950 and accompanied the 43rd Infantry Division to Camp Pickett, Virginia. He was selected to attend the Engineer Basic Course at Fort Belvoir, beginning 27 October 1950, and was attending the thirteen-week course at the time of this offense.

No efficiency reports have been submitted since accused's entry into active military service 5 September 1950. There is no record of previous convictions or of civil offenses.

7. The court was legally constituted and had jurisdiction of the person and of the offense. No errors injuriously affecting the substantial rights of the accused were committed at the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty, as approved by the reviewing authority, and the sentence, as modified by the reviewing authority, and to warrant confirmation of the sentence. A sentence to dismissal is authorized upon conviction of a violation of Article of War 96.

Reginald C. Miller, J.A.G.C.

William C. Fitzhugh, J.A.G.C.

Arthur P. Ireland, J.A.G.C.

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DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 344614

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Second Lieutenant Edgar J. St. John, Jr., 0-983999, 43rd Infantry Division, Camp Pickett, Virginia, on temporary duty with Headquarters Company, 1st School Battalion, 9829th Technical Service Unit, Corps of Engineers, The Engineer Center Regiment (Pipeline), Fort Belvoir, Virginia, upon the concurrence of The Judge Advocate General the sentence as modified by the reviewing authority is confirmed and will be carried into execution.

Robert W. Brown (Absent on Temporary Duty)
Robert W. Brown, Brig Gen, JAGC C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr.
J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action.

E. M. Brannon
E. M. BRANNON
Major General, USA
The Judge Advocate General

13 February 1951

(GCMO 21, Feb 19, 1951)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C

JAGH CM 344670

APR 5 1951

UNITED STATES v. Major EDGAR R. PERRY (O-366068), Headquarters and Headquarters Company, Student Training Regiment, The Infantry School, Fort Benning, Georgia	THE INFANTRY CENTER Tried by G.C.M., convened at Fort Benning Georgia, 8 & 11 Dec 1950. Dismissal, total forfeitures after promulgation and confinement for one (1) year.

OPINION by the BOARD OF REVIEW
MILLER, FITZHUGH and IRELAND
Officers of The Judge Advocate General's Corps

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 and the Judicial Council.

2. The accused was tried upon the following Charges and Specifications:

CHARGE: Violation of the 96th Article of War

Specification 1: (Finding of Not Guilty)
Specification 2: In that Major Edgar R. Perry, Headquarters Student Training Regiment, The Infantry School, did at Fort Benning, Georgia, on or about 2 June 1950, wrongfully and unlawfully extort the sum of $125.00 from Corporal Robert L. Williams by threatening the said Corporal Robert L. Williams by criminal action concerning a certain check given by the said Corporal Robert L. Williams to the said Major Edgar R. Perry.

Specification 3: In that Major Edgar R. Perry, Headquarters Student Training Regiment, The Infantry School, did at Fort Benning, Georgia, on or about 10 July 1950, with intent to deceive Colonel Leland B. Shaw, who was then conducting an official investigation, state to the said Colonel Leland B. Shaw, by falsely answering the questions propounded to him, as below indicated:

119. Q. Did you ever loan Pfc Harris any money?
A. I did not.

120. Q. You did not?
A. I did not.

121. Q. Isn't it a fact that on 7 June 1950 you loaned him $13.00?
A. It is not a fact.

122. Q. And that at that time he gave you a check for $26.00?
A. He did not. The only two checks I have ever received were from Williams and Craig, and that was due to the fact that they were leaving the post and I was going on a twenty day leave myself.

128. Q. Isn't it a fact that on June 30th, Pfc Harris offered you $13.00 and you refused it and stated you wanted the $26.00 which was represented by a check?
A. That was all made up by Harris and Williams and there is not a word of it the truth.

129. Q. Did you ever take Harris on a ride through Lawson Field?
A. I took Harris on a ride to the CID office on 30 June. I carried him immediately to the CID office.

132. Q. Isn't it a fact, also, that you demanded the receipt and promised in exchange that you would give him his check for $26.00?
A. There was no such promise.

133. Q. Was there any receipt or check burned on that ride from Biglerville Mess to CID?
A. If there was, I didn't know anything about it.

135. Q. Were you ever out on Dixie Road with him in a car?
A. I never was.

136. Q. In other words, your statement at this time is that you never loaned Corporal Harris any money. Is that right?
A. That's right.

137. Q. At any time?
A. At any time.

138. Q. And that you never loaned him $13.00 and took a check for security in the amount of $26.00?
A. I never did. I deny that.

140. Q. Now, did Pfc Harris ever borrow any money from you at any time?
A. Not to my knowledge.

146. Q. And you gave me a list of everyone you loaned money to at the Biglerville Mess or on the post?
A. I never loaned any money to anyone.

148. Q. You never loaned small amounts of money to soldiers or military personnel?
A. I've loaned perhaps a quarter to a soldier but never made a record of it or expected anything back for it.

149. Q. Did you loan any amount - $5.00 or more - to soldiers or any military personnel?
A. No, sir.

150. Q. You never at any time collected any interest or remuneration of any type for loans of money to military personnel?
A. I never have. I have never needed to, Colonel.

152. Q. You deny at this time under oath that you have ever during your tour of duty here at Fort Benning loaned amounts of money, small or large, to military personnel for which you received interest or other remuneration of any type?
A. I deny it.

Which statement was known by the said Major Edgar R. Perry to be untrue.

ADDITIONAL CHARGE I: Violation of the 96th Article of War

Specification: In that Major Edgar R. Perry, Headquarters Student Training Regiment, The Infantry School, did, at Fort Benning, Georgia, on or about 10 July 1950, with intent to deceive Colonel Leland B. Shaw, who was then conducting an official investigation, state to the said Colonel Leland B. Shaw, by falsely answering the questions propounded to him, as below indicated:

94. Q. You do not deny that on 30 June 1950 you and Cpl Williams went down and talked to Mr. Brown, and that after that you went back to the Biglerville Mess and had lunch?
A. I do deny that.

95. Q. Did he ever give you $75.00 later on?
A. He did not. I might add that he did come to me and pay the whole thing off on the 30th day of June. He came to my house and paid me $125.00 and asked me to go to the CID and get the check and note, which I did. And that's the reason I have them in my personal possession.

96. Q. Then your testimony is that you didn't go to the bank to see Mr. Brown?
A. That's right

97. Q. And that he didn't bring you any money except on the 30th of June, when he brought you the entire $125.00?
A. About 10:00 at night at my house at 206 Austin Loop.

Which statement was known by the said Major Edgar R. Perry to be untrue.

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

Specification 1: (Finding of Not Guilty)

Specification 2: In that Major Edgar R. Perry, Headquarters Student Training Regiment, The Infantry School, did, at Columbus, Georgia, on or about 14 August 1950, knowingly, wilfully and wrongfully solicit Private First Class Freddie Marshall to prevent the attendance of Private First Class Elton Harris as a witness against him should he, the said Major Perry, be brought to trial by General Court-Martial.

Specifications 3 and 4: (Finding of Not Guilty on Motion by Defense)

The accused pleaded not guilty to the Charge and its Specifications and to Specifications 1 and 2 of Additional Charge II. He stood mute as to Additional Charge I and its Specification and Additional Charge II and Specifications 3 and 4 thereunder, whereupon the court entered a plea of not guilty as to those charges and specifications. He was found not guilty of Specification 1 of the Charge and Specification 1 of Additional Charge II and not guilty upon motion of the defense of Specifications 3 and 4 of Additional Charge II. He was found guilty of Specification 2 of the Charge, except the number "2" of the phrase "2 June 1950", substituting therefor the words "the last week of", and except the figure "$125.00", substituting therefor the figure "$75.00", of the excepted words, not guilty, of the substituted words, guilty; of Specification 3 of the Charge, except Questions and Answers number "122, 128, 129, 132, 133, 135, and 138", of the excepted questions and answers, not guilty; and of the Charge. He was also found guilty of Additional Charge I and its Specification, Specification 2 of Additional Charge II and Additional Charge II. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct for three years. The reviewing authority approved the sentence, but reduced the period of confinement to one year and forwarded the record of trial for action under Article of War 48.

3. Evidence.

The accused is Lieutenant Colonel (then Major) Edgar R. Perry, Headquarters and Headquarters Company, Student Training Regiment (STR), The Infantry School, Fort Benning, Georgia. At the time of the alleged offenses, he was the mess officer of the Student Officers' Mess, commonly known as the Biglerville Mess. The pertinent evidence of the record of trial pertaining to the findings of guilty is summarized as follows:

a. For the prosecution.

On 7 June 1950, Private First Class Elton Harris, Service Company, Student Training Regiment, Fort Benning, Georgia, went to the accused to borrow $13.00. Before making the loan, the accused said, "If you need it bad enough, you'll pay it back a dollar on the dollar", and required Harris to sign a check for $26.00 on the First National Bank, payable 30 June 1950 (R 10-11, 17). Both of them knew that Harris had no account in any bank (R 34).

About 2:00 p.m. on 30 June 1950, accused came to Harris while he was working and asked if he had accused's money (R 11). Upon receiving a negative reply, accused took Harris in his jeep to the company orderly room where he learned from the captain that Harris had been paid. Harris testified, "But I hadn't got all my money, and my wife--I gave her the money I had, because she had to go to the hospital. She had to go get some things up there, and I told him when she came back and I got the money I would pay him the $26. He said if I didn't pay him he would turn the check in and it would cost me $10,000. I offered to pay him half, and he said he didn't want half, he wanted it all." (R 12). At the time of this conversation between accused and Harris, Sergeant First Class Russell M. Miller was standing nearby and overheard the accused ask Harris when he was going to straighten up with him. Sergeant Miller did not hear money mentioned (R 37), or see evidence of a check (R 41), but later he talked to Harris about his debt to the accused (R 39).

Shortly thereafter, Harris telephoned the CID to find out if interest need be paid (R 12, 18). He then went to accused's office and, not finding him there, paid First Lieutenant Robert B. Meinerding, the assistant mess officer, $13.00 and received a receipt therefor (R 12, 44-45). Lieutenant Meinerding stated that upon accused's return, he gave him the $13.00 and told him that he had given Harris a receipt for the money. Accused appeared to know what it was for (R 45).

After leaving the money with the lieutenant, Harris went to the CID about 3:00 p.m. and made a report. He then returned to his job as barracks orderly in the organization (R 12). At about 4:30 p.m., as Harris was entering the company orderly room, accused drove up in a jeep and again asked Harris if he had accused's money. Harris said, "No, sir, my wife haven't come back, but I left some money for you". At accused's request

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Harris accompanied him in the jeep to the mess hall and then departed with him in a truck toward Lawson Field. Accused wanted to know why Harris had gone to the CID. Harris said, "Because you said it would cost me $10,000" and testified that the following conversation ensued:

> "Then he asked me, 'Where is the receipt for the $13?' I said, 'I have it in my pocket.' He said, 'Give it to me.' I said 'No, sir.' He said, 'I tell you what; you give me the receipt and we'll burn it up, and then we'll go to the CID and tell them everything is all squared up.' I said, 'all right, sir.' We went a little further, and he said, 'Get the receipt and burn it up, and I'll burn up the check.' I said, 'All right, sir.' I reached in my pocket and got the receipt and he tried to grab it. I tried to put it back in my pocket, and he said, 'No, here's the check.' So I took the check and the receipt and burned them up." (R 13-14).

Accused and Harris then drove to the CID office, arriving about 1700 hours (R 14, 46). Accused told Agent James O. Bailey that Harris wanted to withdraw a statement he had made to Agent Evans earlier in the day to the effect that accused had loaned Harris $13 sometime during the month and had him sign a check in the amount of $26 to be repaid on the following pay day (R 46). Harris acknowledged making such a statement to Evans, but stated that at the time he made it he was mad with Major Perry (accused), and that he wanted to withdraw the statement; that it was not true (R 14, 47). Agent Bailey scolded Harris for taking up their time with false accusations and he began to cry. Bailey then explained to Harris, "that in our work we tried to be impartial and fair to everyone, and that regardless of rank if the original statement was true, I wanted him to tell me at that time." Accused said, "Well, Harris, we better go." Bailey then asked Harris if he still maintained that his last statement concerning the accused was true, and Harris replied, "Yes, it will all be forgotten." Harris and accused then left the CID office together (R 47).

On their way back to the mess, accused said to Harris, "Don't ever say anything you can't prove because I can court-martial you". At that, Harris said, "Let me out", alighted from the truck and returned to the CID office (R 14). He told Agent Bailey that the allegation which he had made to Evans was the true statement and that he had been forced by the accused to come and make the second statement (R 14, 48, 51). He took Agent Bailey and Captain Emmet T. Brice, Chief of the CID, to the intersection of Sightseeing and Dixie roads where he showed them a small pile of burnt paper, alleged by him to be the ashes of the receipt and check (R 15, 51).

Harris also testified that twice before he had borrowed money from the accused and that each time he had been compelled to repay the money with interest (R 15-16).

Upon cross-examination, Harris stated that he called the CID about the payment of interest before he left the $13.00 for the accused and denied his statement to the contrary made at the pre-trial investigation (R18-19). He insisted he had stated that the accused had told him it would cost him $10,000, not $1,000, if accused turned the check in to the CID (R 19-20). He admitted that he knew Williams (R 24) and Marshall (R 29), but denied entering into a conspiracy with anyone to make up a story about the accused (R 31).

In May 1950, Sergeant Robert L. Williams, 25th Infantry Battalion, Separate, Fort Benning, Georgia, was a member of Service Company, Student Training Regiment, and worked in the mess hall for the accused. About 1 May 1950, the day after payday, Williams, who had lost his money gambling, approached the accused in the mess hall and asked to borrow $125.00. Accused said, "I would go on a note for you for $125", and it was agreed that Williams would pay accused $40 "interest" (R 60-61). A note (Pros Ex 3) was prepared and Williams obtained $125.00 from the bank (The Columbus Bank and Trust Company of Columbus, Georgia). At that time he gave the accused $25.00, leaving a balance of $15.00 owing to the accused on their agreement (R 61).

On the following payday, 31 May 1950, Williams gave accused $15.00 to pay off the "interest" and told him, "I'll pay the bank note off in the morning". However, he lost money gambling and failed to pay off the note. During the next several days Williams avoided the accused, but eventually they met outside of the orderly room. Williams accompanied accused to the mess office where accused prepared a check (Pros Ex 2) which Williams signed (R 62-63). Williams said, "Major, I don't have any money in any bank" and accused replied, "Williams, I just want you to sign this so I can hold it for you. I am not going to put it through any bank" (R 63). Arrangements were made to go to the bank the next morning to renew the note, but accused did not show up (R 64). Both then went on leave.

On the June payday, Williams went out to the mess hall where he was informed by all that the CID was looking for him because of the check. He became worried and waited for the accused to appear. Accused told Williams that he thought that he had gone to Washington (R 64, 65). Williams testified that the following conversation ensued:

> "I said, 'No, sir, you know I wasn't leaving until I got straight with you.' He said, 'I couldn't take no chances. I turned the check over to the CID. The CID is probably waiting to pick you up at Fort Dix.' He said, 'They probably wouldn't try to pick you up in Washington, because it's too big.' I said, 'Major, you mean you would really do that?' He said, 'Yes.' I said, 'You really would do that?' He said, 'I have done it.' I said, 'That was a bad check.' He said, 'Williams, what I want is the money.'

> I said, 'I guess I have to suffer the consequences; I don't have the money.' I said, 'There's no way we can map out anything?' He said, 'I don't know. Wait a minute.' He went into the mess hall and came out and said 'Let's go to the bank.' (R 65)."

Accused and Williams then went to the bank to see Mr. Brown, and during their discussion Williams said, "Is there any way I can make an allotment to the bank?" Mr. Brown replied, "Sure you can make it out to the bank, but you can make it out today and show it to us and tomorrow you can go back and cancel the allotment. The bank don't approve of that." and said to accused, "Either you have to pay it off as co-signer or he will have to pay it off." He informed them that the note would have to be paid off either the next day or the day after (R 65).

They returned to the mess hall together where they met the sheriff from Cusseta to whom accused said, "This is the boy I was trying to get you to pick up about that check". The two sat down at the same table while Williams ate after which Williams told accused that he was going up to the company to try to get some money. Accused said, "OK, I'll be in the mess hall until it closes. If you get any money between now and that time you can come down to the mess hall and give it to me. * * * If I'm gone, I'll be at home" (R 66). As Williams prepared to leave, he said, "Major Perry, I'll be on the post, and the CID's looking for me. I don't want to be picked up trying to get some money." and accused replied, "If the CID picks you up, just call me and I'll take care of it" (R 66). Having won some money at the day room, Williams first telephoned and then went to accused's home about 11:00 p.m. He paid the accused $75.00 and received a receipt (Pros Ex 4) therefor as payment on the check (R 67). Accused said, "Williams, that makes me feel good. That makes me think you're trying to get my money for me." and gave him a drink of whiskey. Accused then said, "Tomorrow morning, I'm going up to the CID office and tell them we are straight about the check and I don't want to have anything done to you about the check." He also told Williams that he would pay off the note the next morning and that Williams could bring him the $50.00 when he got it (R 68). A few days later Williams was summoned to the CID office and questioned about his dealings with the accused (R 68-69).

Sergeant Williams also testified that he had borrowed money four or five times from the accused prior to the present incident and that accused always charged him interest on these loans (R 70-71).

Upon cross-examination, Sergeant Williams testified that at the time of the trial he was supposed to owe the accused $50 but that he "actually, truthfully" owed him $10 and that the accused paid off the note at the bank (R 72). He admitted that in his statement to the Investigating Officer (Def Ex "D") he stated that he had borrowed from accused "about five times" and in his statement to the CID (Def Ex "E")

"about 15 times" (R 73-74). He testified that he was not threatened with criminal action by the accused if he didn't pay the note and that he was not afraid that he would be put in jail (R 75). On the other hand, Williams thought that he might get a court-martial for writing a bad check if accused gave the check to the CID (R 76).

In reply to questions by the court, Williams stated that it was understood that he would pay the note on the last of the month and that he was familiar with the way the bank handled these loans as he had been getting notes from them before (R 77). He has been borrowing money from the accused since 1949 and practically every month after he started working for him from January to May 1950 (R 79). Williams considered it a loan from the accused whether accused signed a note or gave him the money out of his pocket. "Generally, larger amounts he signed a note" (R 80).

Mr. George M. Brown, cashier of the Columbus Bank and Trust Company, Tenth Street Branch, of Columbus, Georgia, testified that he knew the accused and knew Robert L. Williams by sight. He recalled that they were in the bank during the month of June and is sure that they discussed a check for $125 written by Williams, marked "No Account", and a note by Williams for the same amount (R 57). Witness was unable to state the date of the discussion concerning the note and the check. He thought that the note was paid by accused. He identified Prosecution Exhibit No. 2 as a check presented by accused for payment which he marked "No Account, 6-26-50" and Prosecution Exhibit No. 3 as a note to the bank, dated 3 May 1950, signed by Robert L. Williams and accused, which he marked paid 1 July 1950 (R 58-59). Upon cross-examination, Mr. Brown stated that he could not remember whether Williams and the accused were in the bank together or whether there was any discussion about an allotment. He added that if an allotment were mentioned, he would have said that the bank could accept it, but not in payment of a note, because the allotment could be discontinued (R 59).

The court took judicial notice of Section 2305, Title 22, of the Code of the District of Columbia, relating to blackmail (R 82).

On or about 10 July 1950, Colonel Leland B. Shaw was Assistant Inspector General at The Infantry Center, Fort Benning, Georgia, at which time he conducted an official investigation into certain allegations concerning the accused (R 84-85). The questions propounded by Colonel Shaw as investigating officer and the answers given by Major Perry (Accused) were taken down verbatim in shorthand and transcribed by Mrs. Virginia Senior, a stenographer in the Inspector General's Office at Fort Benning (R 82-84). The numbered questions and answers in the 18-page report so transcribed and outlined in Specification 3 of the Charge and in the Specification of Additional Charge I were received in evidence as Prosecution Exhibit 5 and stipulated to be a true and correct transcript (R 87-88).

Corporal Albert Manning, Sr., Service Company, Student Training Regiment, testified that he has known the accused since July 1949 and that he worked for a short time in the Biglerville Mess (R 93). He stated that he had twice borrowed money from the accused; $5.00 in August 1949 and $12.00 in September 1949. On both occasions he had repaid the loan with interest (R 94-95).

At about 6:00 o'clock in the evening, 14 August 1950, Private First Class Freddie Marshall, Service Company, Student Training Regiment, Fort Benning, Georgia, was walking near Cusseta Road on the way to the grocery store from his home when the accused drove up in his automobile and asked Marshall if he knew where "Big Harris" lived. Although Marshall did not know the accused, he agreed to show him where Harris lived and, entering accused's car, directed him to the house. Accused said, "Well, I don't want to go there; I just want to find out where he stays" and "If anybody asked had you seen me up in here, tell them no". At Marshall's request, accused drove him back to the grocery store and parked in the rear. After inquiring accused's name, Marshall introduced him to the store's proprietor and, at Marshall's instigation, they both had a beer, which accused paid for. Accused then told Marshall that he wanted to talk to him (R 100-103). They re-entered the automobile where the following conversation occurred:

> "/Accused/ stated, 'How would you like to make $100?' I say, '$100 for what?' He said, 'You know Harris, don't you?' I say, 'Yes, sir'. He say, 'Well, Harris have pissed me off about money he owes me, which was $13, and I am up for a general court-martial,' and he says, 'If Harris appears against me, I'll get a general court-martial but if Harris don't appear, I won't get it.' So I says, 'What do you want me to do?' So he says, 'I want you to get rid of him some way, just anyway.' I say, 'What do you mean, sir?' He says, 'Well, like you get in a fight with him, or stab him, that would be self-defense, or have an automobile run over him, that's an accident.' I says to Major Perry, 'Sir, I'm a clean-living, decent citizen around here,' and I say, 'Everybody knows me around here.' He says, 'I could get some white people to do it, but the finger would be pointed at me.' I said, 'I am well known around here.' He says, 'That's what I mean--nobody would suspect you.' I say, 'No, sir, they won't.' I said, 'I can't give you an answer on this this afternoon.' I says, 'I'll give you a definite answer tomorrow.' (R 103)"

Accused drove away and Marshall later went to town where he met First Sergeant Low to whom he reported accused's proposition. Low told Marshall to tell Harris when he saw him and to come in and see the "CO". The next morning (15 August 1950) Marshall did not see the "CO" but met Harris to whom he related the story. Harris took him to see the authorities. He reported the incident and was directed to go down to the Provost Marshal in the afternoon. At that time, arrangements were made

for Marshall to meet the accused as planned and bring him to Marshall's house where any conversation between the two could be monitored (R 104-105).

At approximately 7:00 p.m. that evening, accused drove up to the entrance of the grocery store and Marshall entered the car. They drove around the store into the parking in the rear, where the following conversation ensued:

> "/Accused/ said, 'What do you think about this setup?' I said, 'Major, I've decided to go through with it,' but I said, 'The first question: $100 is a little money to kill a man for, sir.' He says, 'Don't you think we better let this go?' As it is my job to not let anything stop me, I say, 'We done gone too far now. I just as soon go on.' The major said, 'How are you going to do this?' I said, 'This is my problem.' I says to the major, I told him--I'm a little mixed up. He says, 'I don't have but $20, but what will you do it for?' I said, 'I don't know, sir. What will you give me?' He said, 'Will $200 be enough?' I says to the major, 'I'll knock over the map for $200, but I have to have some in advance.' He looks in his pocketbook and says 'I ain't got but $60.' I say, 'Yes, sir.' He says, 'How do I know you will do it?' I says, 'That's one thing we both have to do.' I says, 'I have to trust you and you trust me.' He says, 'How can I get in touch with you?' I say, 'I'll be here every afternoon at the grocery store.' He say, 'I'll be here on Monday, and if you haven't did the job I want my $60 back.' He says, 'If you have did the job, I'll give you the other $140.' He gives me $60. I fold it up and put it in my shirt pocket.' (R 105-106)"

Accused then left and Marshall returned home where the CID agents were waiting. He gave the three $20 bills to Agent Bailey who had Marshall date and initial them (R 106).

Upon cross-examination, Marshall stated, "In our whole conversation Major Perry never said the word of kill. He told me he wanted him out of the way. He didn't want him to appear against him at no cost" (R 110). He also admitted that the major (accused) did not at any time suggest that he (Marshall) use the $60 to make Harris change his testimony (R 111).

CID Agent Bailey was in the Marshall house during the afternoon and evening of 15 August 1950 for the purpose of witnessing an expected meeting between the accused and Marshall. At about 1930 or 1945 hours Marshall returned to the house alone and gave Bailey three $20 bills which they both marked (R 115-116). At about 2330 hours, 15 August 1950, Bailey and another CID agent escorted the accused from his home to the CID office where, after being advised of his rights under the 24th Article of War, the accused made a statement which was received in evidence as Prosecution

Exhibit 7 (R 123), but to be considered only with reference to Specifications 1 and 3 of the Charge and Specifications 1 and 2 of Additional Charge II.

b. For the defense.

Colonel William B. Moore, Army Field Forces Board No. 3, testified that he has known the accused about a year and a half and that his reputation for truth and veracity is "of the best" (R 132-133).

Lieutenant Colonel H. F. Haberman, Headquarters Student Training Regiment, testified that he is the Executive Officer of the regiment and has known the accused about a year and a half. Accused, as mess officer of the Biglerville Mess, was under Colonel Haberman's immediate supervision. In his opinion accused's character was "of the highest" and his efficiency was "regularly either high-excellent or superior; mostly superior". As to accused's reputation for truth and veracity, witness stated, "I believe he is considered to be exceptionally truthful and I have always considered personally that his veracity left nothing to be asked for" (R 134-136).

The defense introduced into evidence statements of Elton Harris to the Investigating Officer 28 July 1950 (Def Ex "A") and to the CID 5 July 1950 (Def Ex "B") and statements of Robert L. Williams to the Investigating Officer 15 August 1950 (Def Ex "C") and to the CID 5 July 1950 (Def Ex "D") (R 141-142).

It was stipulated that if Colonel Leland B. Shaw were recalled for further cross-examination, he would testify that in accordance with the prevailing practice of the Inspector General's Department Major Perry (accused) was not given an opportunity to read over the statement taken at the Inspector's investigation on 10 July 1950 (R 142).

Master Sergeant Lamar W. Ashe, Headquarters and Headquarters Company, Student Training Regiment, Fort Benning, Georgia, testified that he is a Food Technician and has known the accused approximately two years. Sergeant Ashe worked for twenty-two months as mess steward in the same mess for which accused was the Mess Officer. In fact, they used the same office (R 146-147). During this period, Sergeant Ashe on eight or ten occasions had heard colored mess personnel ask the accused for loans. The accused would have the man tell his story and then would arrange for him to get the money. The witness had seen the accused sign notes for colored personnel, but he had never heard the charging of interest mentioned (R 148). Although he knew Private First Class Elton Harris and Corporal Robert L. Williams, he was not referring to them when he spoke about a loan on furniture (R 149-150).

The defense introduced into evidence a photostatic copy of accused's Form 66-1 (Def Ex "E"); a Certificate of Achievement for the period 19

August 1946 to 5 April 1948 (Def Ex "F"); a newspaper clipping from the Atlanta Journal 18 July 1949, relating to the operation of the Biglerville Mess, together with a note to accused from the Commanding General, The Infantry Center (Def Ex "G"); a letter of appreciation from Lieutenant Colonel Hubert C. Schenck, 14 April 1948 (Def Ex "H"); a letter recommending promotion of the accused to the grade of Major, dated 19 October 1944 (Def Ex "I"); and the reserve commission of the accused as Lieutenant Colonel, Infantry, in the Army of the United States, dated 29 August 1947. (Def Ex "J") (R151-152).

It was stipulated that Mr. James S.Gordy would testify that accused owned four pieces of property in Muscogee County from which he received an average monthly rental income of $400 (R 152) and that Mr. Clyde Perry, accused's father, would testify that he knows that accused owns a farm consisting of approximately 320 acres, which has clear title, with a monthly income of approximately $400 (R 153). A tax receipt, dated 16 November 1950, pertaining to certain property of the accused in the City of Mineral Wells, Texas, was received in evidence as Defense Exhibit "K" (R 153).

It was also stipulated that Representative Robert L. Doughton of North Carolina would testify that he has known the accused and his family on both sides for many years and that there are no finer people in every respect in the 9th Congressional District of North Carolina, which he represents (R 154).

The consultation report of Lieutenant Colonel Rudolph S. Matthews, MCR, Psychiatrist, dated 6 September 1950, revealing that the accused had no demonstrable neuropsychiatric disease or disorder at the time of the examination, was received in evidence as Defense Exhibit "L" (R 155).

First Lieutenant Henry R. Thomas, Staff Judge Advocate Office, The Infantry Center, testified that he has been stationed at Fort Benning for approximately two months and is the regularly appointed assistant defense counsel in this case. In the preparation thereof he went twice to the intersection of Sightseeing and Dixie Roads for the purpose of making an examination of the area. He found the area to be occupied and the intersection under the constant supervision of the guards at the gate of the testing area for Field Board 3. His sketch of the area was introduced in evidence as Defense Exhibit "M". He admitted that he was not at Fort Benning on 30 June 1950 and did not know the condition of the area as of that date (R 156-159).

Defense counsel read to the court, without objection, certain questions and answers from accused's statement to Colonel Shaw 10 July 1950 other than those admitted in evidence as Prosecution Exhibit 5. The accused, in effect, denied therein that he had charged Corporal Craig anything for signing a note for him or that he had received any interest or remuneration; that he had any agreement with Corporal Williams

to receive any interest or additional money for his signature on a note or that Williams had paid accused either $25 when he cashed the note or $15 on 31 May or that he received any interest or other payment on a previous note; that Harris had offered to pay him $13 on 30 June 1950 or that he had taken Harris on a ride to Lawson Field or threatened him; and that he never loaned money to military personnel or ever collected any interest or remuneration of any type for loans of money to military personnel (R 160-161).

Accused, having been advised of his rights as a witness by the law member, elected to take the stand and testify under oath as to Specification 1 of Additional Charge II (R 163). He stated that he has been in the Army since 25 January 1942 and has had no previous trouble either military or civilian (R 163). He is married and has three children (R 167).

About 1700 hours, 14 August 1950, accused left Fort Benning and drove to a shop in town to get some seat covers. He was there about 15 minutes and, as he was driving along Glade Road on his return to his home at 3020 Cusseta Road, he saw Marshall whom he recognized as a member of Service Company, STR (R 163-164). Accused stopped and asked Marshall if he wanted a ride. Marshall entered the car and began the following conversation:

> "/Marshall/ says 'I know you, don't I?' And, I said 'I guess you do.' And, he says, 'You are the Major that runs Biglerville Mess, aren't you?' And, I said 'That is right.' And then, he says 'I have been' -- or 'I know about the trouble you have been having with' -- he called him 'big-foot Harris' (R 165)."

Accused then asked Marshall if Harris didn't live around there and Marshall pointed out the place where Harris lived. At Marshall's request, accused drove him to Nat's Super Market where he was introduced to Mr. Nat and had a beer with Marshall (R 166-167). Accused testified that:

> "Then Mr. Nat went back in the store and I asked Marshall, I said 'Marshall, are you sure you are a good friend of Harris'?' And, he said -- he says, 'I really am.' And I said 'You know that Harris has been lying on me, don't you?' And, I said 'if I could get some good friend of his to talk to him maybe I could get the whole thing straightened out. That every time I tried to say anything to him he refused to talk to me.' (R 167-168)"

Marshall said that Harris was going to be at a dance at Phenix City that evening and suggested that, if he, Marshall, could get $5.00, he would attend, find out how Harris "felt about the whole thing" and let accused know the next afternoon. Accused gave Marshall the $5.00 (R 168).

On the 15th, about 6:00 p.m., accused returned to Nat's Super Market and Marshall ran out and jumped into the car. At that moment Sergeant Keyes of the Provost Marshal Office came up, looked at accused and walked across the street. Accused drove the car around the store into the parking lot in the rear and began the following conversation:

"I says 'Marshall, did you get a chance to talk to Harris last night?' And, he said 'no, I didn't last night but' he said 'I talked to him out at the company this morning.' 'Well', I said 'how does he feel about the whole thing?' 'Well', he says 'it can be did with a little money.' And, I said 'what do you mean a little money?' '$10.00?' And he said, 'No, it will take more money than that.' And, I said 'well, let's just forget the whole thing, then.' (R 169)"

* * *

"He says 'no', he said 'I can straighten this whole thing out,' He said 'very simple if you are willing to put out the money.'

* * *

"Well, I pulled out my pocketbook and looked at it just to see how much I had. I didn't know for sure, and I had about, oh, seventy some dollars in my pocketbook, and I noticed these three 20-dollar bills, and I said to him 'if you will get it all straightened out for me I will give you these three 20-dollar bills.'

* * *

"He took them and said for me not to worry, that he would take care of everything, that he would fix it all up for me (R 170)."

The accused then stated, "The only thing I wanted him to do was to get him to agree to stop trying to frame me, and to tell the truth about the whole affair (R 171)."

c. Rebuttal for the prosecution.

Private First Class Freddie Marshall was recalled as a witness for the prosecution. He stated that he did not know accused's name prior to the time that he introduced him to Mr. Nat on the night of August 14th and denied that at the time accused picked him up he had said, "I know you; you are the Major that runs the Biglerville Officers' Mess." and "I know about the trouble that you are in." In fact, witness didn't know about any such trouble (R 181-183).

Master Sergeant Oliver Keyes, M P Detachment, Section Two, testified that on the evening of the 15th of August, he was parked across the street when the accused drove up and entered the parking lot in the rear of Nat's grocery. Witness then entered the store, came out and passed within six to ten paces of accused's car in the parking lot (R 183-185).

4. Discussion.

The accused was charged with and found guilty of two offenses of knowingly making false official statements at the time and place alleged to Colonel Leland B. Shaw with intent to deceive him in violation of Article of War 96.

To support a conviction of this offense, the evidence must show that the accused made the alleged statement, that it was official, that it was false, that he knew it to be false and that the statement was made with the intent to deceive the person to whom it was made (CM 339494, Clifford, 5 BR-JC 131, 138; CM 343385, Allen, BR-JC, 12 Dec. 1950; CM 344523, Johnson, BR-JC, 2 Feb. 1951; CM 344374, Hansen, BR-JC, 22 Mar. 1951).

It is noted that in the instant case the specifications alleging the offense are not couched in the language of the model specification in the Manual for Courts-Martial (MCM, 1949, App. 4, spec. no. 147, p. 329) and do not contain the customary allegation of the evidentiary facts indicating wherein the statements complained of were false. However, the Board of Review is of the opinion that the specifications under discussion adequately allege the elements of the offense. At most, the failure to allege the evidentiary facts would have made the specifications subject to a motion for appropriate relief by the defense had it elected to make such a motion (MCM, 1949, par. 70b). Not having done so, the defense is taken to have waived any objection it may have had to the sufficiency of the specifications in this respect (MCM, 1949, par. 64a). It manifestly appears from the record of trial that the accused was not misled in his defense by omission of such evidentiary facts from the specifications with the result that the Board of Review finds no prejudice to the accused to have resulted therefrom (AW 37; MCM, 1949, p. 283).

The contention of the defense that the use of the accused's statements to Colonel Shaw on 10 July 1950 as the bases for Specification 3 of the Charge and the Specification of the Additional Charge constitutes a multiplicity of charges is without merit. The accused's allegedly false answers, although made during the course of a single interrogation, relate to two separate and distinct transactions into which an officer conducting an official investigation was making inquiry; namely, the accused's dealings with Private First Class Harris and his dealings with Corporal Williams.

As to Specification 3 of the Charge, the evidence is clear and undisputed that on 10 July 1950, during an official investigation conducted by Colonel Shaw as Assistant Inspector General of The Infantry Center, the accused stated in substance and effect that he had never loaned money to Private First Class Harris or to any other military personnel and that he had never received interest or remuneration upon such loans to military personnel. The falsity of such statements was established by the testimony of Private Harris, Sergeant Williams and Corporal Manning that each of them had borrowed money from the accused on several occasions and that they were required to repay the loans with interest. The testimony of Private Harris was corroborated in part by Lieutenant Meinerding who testified that upon receiving $13.00 for accused from Harris, he gave Harris a receipt therefor and that at the time the money was turned over to the accused, he seemed to know what it was for. Additional credence may be given to the Harris account of the transaction from the fact that he showed the CID agents the ash of burned paper which he stated was the remains of the check and receipt. Moreover, the testimony of the defense witness, Sergeant Ashe, who had occupied the same office with the accused for twenty-two months, established that colored mess personnel sought loans from the accused who would arrange for them to get the money, sometimes by co-signing a note. By its finding of guilty as to Specification 3 of the Charge, it is apparent that the court determined that the accused, in fact, had loaned money to Private Harris and other military personnel and had received interest or other remuneration therefor and that accused's answers to the contrary made to the Inspector General during his official investigation were knowingly false. The intent to deceive Colonel Shaw may be inferred from such knowledge (CM 275353, Garris, 48 BR 39, 42; CM 336558, Armstrong, 3 BR-JC 133, 140; CM 339004, Shea, 5 BR-JC 1, 17; CM 344374, Hansen, BR-JC, 22 Mar. 1951).

The findings of guilty as to Additional Charge I and its Specification are equally justifiable. The evidence is undisputed that in the course of the official investigation conducted by Colonel Shaw 10 July 1950, the accused denied that he had been to the bank with Corporal Williams on 30 June 1950 and that Corporal Williams had made him a payment of $75.00 that evening. The falsity of accused's statements was established by the testimony of Williams and the receipt for $75.00, dated 30 June 1950 and signed by the accused (Pros Ex 4). Despite its indefiniteness, the testimony of Mr. Brown, cashier at the bank, corroborates to some extent Williams' testimony of a discussion in the bank between accused, Williams and Mr. Brown concerning the check (Pros Ex 2) and the note (Pros Ex 3). The court was warranted in finding that the accused's statements concerning his relations with Williams were false and made with the intent to deceive Colonel Shaw during the course of his official investigation.

It was the function and duty of the trial court to weigh the evidence, judge the credibility of witnesses and determine controverted issues of fact prior to arriving at its findings of guilty as to these two specifications (MCM, 1949, par 139a; CM 325457, McKinster, 74 BR 233, 241) and the court's findings are entitled to considerable weight by reason of the superior position it enjoyed in seeing the witnesses and hearing them testify (CM 323161, Lacewell, et al., 72 BR 105, 109). The Board of Review in exercising a similar function upon appellate review pursuant to the provisions of Article of War 50g concludes that the competent evidence in the record of trial justifies the court's findings of guilty and that they should not be disturbed (CM 335526, Tooze, 3 BR-JC 313, 340-341; CM 338993, Pelkey, 6 BR-JC 289, 308-309; CM 343793, Cruikshank, BR-JC, 8 Mar. 1951).

The accused was also charged with and found guilty of wrongfully and unlawfully extorting $75.00 from Corporal Williams by threatening him with criminal action concerning a check given by Corporal Williams to accused in violation of Article of War 96.

The offense alleged is extortion. In the discussion of the substantive offense of robbery in the Manual for Courts-Martial it is stated that "Extortion by means of threats of prosecution for * * * types of purported offenses /other than for an unnatural crime/ * * * should be charged under Article 96" (MCM, 1949, par. 180f). Extortion is the wrongful taking or obtaining of another's property by threats or other conduct of a character likely to produce fear in the mind of a reasonable man and it is not material that the person against whom the extortion is exercised is guilty of the act threatened to be exposed or of the offense charged (CM 293768, Dobbelaere, 4 BR (A-P) 75, 79 and cases there cited; CM 318380, Yabusaki, 67 BR 265, 277). It is true that at common law and in the United States Code (18 USC (Supp III) 872) extortion is limited to offenses committed by de facto or de jure officers acting under color of their office, but in United States v. Dunkley (D.C., N.D., Calif., 1916) 235 Fed 1000, 1002, the court stated:

> "* * * at common law extortion was the unlawful taking by an officer, by color of his office, from any man any money or thing of value that is not due to him, or more than is due, or before it is due, and so the offense is defined by Blackstone. But the word 'extort' has come to have a much wider meaning than this, and, as generally understood, it means the wrongful exaction of money or property; the taking or obtaining of anything from another by compulsion or oppressive exaction, whether by an officer or otherwise."

The broader concept of the term extortion would encompass blackmail which "in common parlance, * * * is equivalent to, and synonymous with, 'extortion', -- the exaction of money, either for the performance of a duty, the prevention of an injury, or the exercise of influence. It

supposes the service to be unlawful, and the payment involuntary. Not infrequently it is extorted by threats, or by operating upon the fears or the credulity, or by promises to conceal, or offers to expose, the weaknesses, the follies, or the crimes of the victim" (Black's Law Dictionary, 3 Ed., p. 225 and cases there cited). In the opinion of the Board of Review the term "extortion" is used in the broader sense in military law and such an offense is conduct to the prejudice of good order and military discipline and of a nature to bring discredit upon the military service in violation of Article of War 96 (CM P-44 Roush, Kinard, 3 BR (A-P) 257, 261; CM 293768, Dobbelaere, supra; CM 264680, Thomas, 4 BR (NATO-MTO) 389, 392; CM 318380 Yabusaki, supra).

In the instant case we believe that the specification alleges the necessary elements of extortion and states an offense under the 96th Article of War. Therefore, the only question to be determined is whether the competent evidence proved the offense. The uncontroverted evidence established that on 30 June 1950, Corporal Williams sought out the accused to make arrangements for the payment of a note for $125.00 upon which he and the accused were co-signers and which had been overdue since 1 June 1950 (Pros Ex 3). Corporal Williams learned from the accused that he, believing that Williams had proceeded to his new station, Fort Dix, without paying the note, had turned over to the CID a "bad check", executed by Williams 2 June 1950 in favor of the accused as security for the payment of the note. When Mr. Brown, cashier at the bank, informed them that the note had to be paid off in a day or two, Williams took steps to raise some money to meet the obligation. To that end he paid the accused $75.00 on the evening of the 30th. Although this payment was not sufficient to satisfy the note, accused agreed to pay off the bank and secure the return of the check from the CID. There is no evidence that the accused instigated Williams' efforts to obtain the money or threatened him with criminal action or court-martial in order to obtain payment. In fact, Williams expressly testified that "Major Perry never threatened me with criminal action" although he also said, "I thought I might get a court-martial for writing a bad check if he gave the check to the CID. He told me he was going to hold it until I paid him." Such evidence indicates that Williams' efforts were voluntary and not the result of illegal compulsion by the accused. Williams knew that the accused had turned the "bad check" over to the CID and he knew that the accused would be required to pay off the note at the bank since he, Williams, did not have the money. It is apparent that he considered himself obligated to the accused at least for the amount of the note. His acts were those of a delinquent debtor who knew the time for reckoning had arrived. Considering Williams' testimony as entirely credible, his payment of $75.00, together with the previous payments of $25.00 and $15.00, do not total the amount of his obligation. Since the gist of extortion is the illegal compulsion or oppression (CM 318380, Yabusaki, supra, at 279), we believe the proof fails to sustain the allegation; and, although the accused may have committed some other offense in his dealings with Williams, it is not extortion. Under the circumstances, in our opinion, the court erred in finding the accused guilty of Specification 2 of the Charge.

There remains for consideration Specification 2 of Additional Charge II in which the accused was charged with and found guilty of wrongfully soliciting Private First Class Freddie Marshall to prevent

the attendance of Private First Class Elton Harris as witness against him in a trial by general court-martial.

The object of the solicitation was the prevention of the attendance of a witness at a court-martial. Such conduct constitutes obstruction of the due administration of justice and is a substantive offense under federal statute (18 USC (Supp III) 1503 , 1505) which makes punishable as a felony influencing or injuring an officer, juror or witness. The offense, if committed by a person subject to military law, is also cognizable under the 96th Article of War (AW 96; MCM, 1949, par. 183c, pp. 256-257). Moreover, it has been held that interference with the orderly administration of military justice even during the investigation is conduct to the prejudice of good order and military discipline in violation of Article of War 96 (CM 276298, McNeil, 48 BR 287, 302; CM 302962, Deeg, 59 BR 215, 226). Since the object of the solicitation was a crime, it is clear that the specification alleges that the accused, an army officer, solicited the soldier to commit a crime. Such solicitation is in itself an offense prejudicial to good order and military discipline or of a nature to bring discredit upon the military service (CM 344868, Weller, BR-JC, 19 Mar. 1951). We, therefore, conclude that the specification states an offense violative of Article of War 96.

The evidence is uncontradicted that about 1800 hours on 14 August 1950, the accused, while driving along Glade Road, picked up Private Marshall who at accused's request showed him where Harris lived and that they then drove to Nat's Grocery where they parked in the rear and discussed Harris. Nor is there any controversy about the fact that the accused returned to the grocery store the next evening to meet Marshall and that he gave Marshall $60.00. As to the other details of these meetings there is a direct conflict between the testimony of Marshall and the accused.

Marshall testified that he did not know the accused before the evening of the 14th of August and that accused offered him $100.00 to get rid of Harris so that he would not appear against the accused at a general court-martial. In reply to Marshall's question, "What do you want me to do?", accused said, "I want you to get rid of him some way, just anyway." Marshall then asked, "What do you mean, sir?" and the accused said, "Well, like you get in a fight with him, or stab him, that would be self-defense, or have an automobile run over him, that's an accident." Marshall told accused he would give him a definite answer the next day. According to Marshall's testimony, they met the following evening as planned and, after some discussion relative to Marshall's complaint that $100.00 was too little to kill a man for, accused raised his offer to $200.00. At that time, he paid Marshall $60.00 and said, "I'll be here on Monday, and if you haven't did the job I want my $60.00 back. If you have did the job, I'll give you the other $140."

According to the accused, Marshall knew who he was when he picked him up and it was Marshall who brought up accused's trouble with Harris. When accused learned that Marshall was a good friend of Harris, he mentioned that Harris had been "lying on him" and said, "if I could get some good friend of his to talk to him maybe I could get the whole thing straightened out. That every time I tried to say anything to him he refused to talk to me." Accused admitted giving Marshall $5.00 on the evening of the 14th so that Marshall could see Harris that evening and find out how Harris "felt about the whole thing". Concerning their meeting the following evening, accused testified that when he learned that it would take more than $10.00 to take care of everything, he wanted to drop the matter but, upon Marshall's insistence that he could straighten the whole matter out if accused would put up the money, he gave Marshall $60.00. Marshall told him not to worry, that he would take care of everything. Accused testified, "The only thing I wanted him to do was to get him to agree to stop trying to frame me, and to tell the truth about the whole affair."

By its findings of guilty, it is apparent that the court resolved these controverted issues of fact against the accused. In the exercise of our right and duty upon appellate review to weigh the evidence, judge the credibility of witnesses and resolve controverted questions of fact (AW 50g; MCM, 1949, p. 290), we find no reason to disturb these findings. At the time the accused contacted Marshall on 14 August 1950, he was under charges of court-martial and the principal witness against him was Private First Class Elton Harris. The conversation between accused and Marshall as recounted by Marshall suggests ways in which a witness might be prevented from testifying that appear to be the ideas of a man better educated and more experienced than Marshall, such as the accused who would know the legal ramifications of his suggestions. There is no question but that the object thereof was to implant in the mind of the hearer the means whereby the attendance of Harris as a witness at a court-martial could be effectively impeded without the true purpose thereof being patently apparent. And this be true even though the accused never used the word "kill". Further credence is afforded the testimony of Marshall that the accused solicited his services to accomplish this unlawful act by the undisputed payment of $60.00 to him by the accused. In view of all the circumstances we conclude that the evidence establishes beyond a reasonable doubt that the accused is guilty of Specification 2 of Additional Charge II and Additional Charge II.

5. Records of the Department of the Army indicate that the accused was born 10 April 1917 in Watauga County, North Carolina. He is married and has three children. Accused was graduated from North Carolina State College with a Bachelor of Science degree in 1938, at which time he was also commissioned a second lieutenant, Infantry-Reserve, as a result of successful completion of the ROTC course. Subsequent to his graduation, accused worked for the Federal Security Agency as assistant supervisor at a monthly salary of $135.00 and also managed his own farm.

Accused was ordered to extended active duty as a second lieutenant 25 January 1942. He was promoted to first lieutenant 15 July 1942, major 2 June 1945, and lieutenant colonel 28 December 1950, subsequent to his conviction in the present case. Because of an eye condition, he was reclassified limited service 13 July 1943 and performed staff duties at training centers in the zone of interior until August 1946 when he was ordered to Japan. From 19 August 1946 until 5 April 1948 he served as Administrative Officer of the Agriculture Division, Natural Resources Section, Far East Command, receiving a commendation for his service. From 12 May 1948 to 20 October 1948 he was a patient in the Valley Forge General Hospital, Phoenixville, Pennsylvania, for treatment of his eyes. Thereafter, he has served at The Infantry School, Fort Benning, Georgia. Accused was awarded the Army Commendation Ribbon for the period 14 January 1946 to 25 April 1946. His efficiency ratings from 29 April 1942 to 30 June 1947 were superior or excellent. Subsequent overall numerical ratings to 30 April 1950 are 095, 118, 117, 121, 117, the last four characterizing his service at The Infantry School. There is no record of civilian delinquencies or previous conviction by courts-martial.

6. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Specification 3 of the Charge and the Charge, the Specification of Additional Charge I and Charge I, and Specification 2 of Additional Charge II and Charge II, and legally insufficient to support the findings of guilty of Specification 2 of the Charge. The Board of Review is also of the opinion that the record of trial is legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon a conviction of violations of Article of War 96.

Reginald C. Miller, J.A.G.C.

William C. Fitzhugh, J.A.G.C.

Arthur P. Ireland, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGU CM 344670

UNITED STATES

v.

Major EDGAR R. PERRY, 0-366068, Headquarters and Headquarters Company, Student Training Regiment, The Infantry School, Fort Benning, Georgia

THE INFANTRY CENTER

Trial by G.C.M., convened at Fort Benning, Georgia, 8 & 11 Dec 1950. Dismissal, total forfeitures after promulgation and confinement for one year.

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Opinion of the Judicial Council
Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

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1. Pursuant to Article of War 50d(2) the record of trial in the case of the officer named above and the opinion of the Board of Review have been submitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon trial by general court-martial the accused pleaded not guilty to extorting $125 on or about 2 June 1950 from Corporal Robert L. Williams by threatening him with criminal action concerning a check given by him to the accused and was found guilty of extorting $75 from Williams by such threat on or about the last week of June 1950 (Specification 2 of the Charge). He also pleaded not guilty to and, with certain exceptions, was found guilty of making false official statements with intent to deceive on or about 10 July 1950 during the course of an official investigation (Specification 3 of the Charge). He stood mute, the court entered a plea of not guilty and he was found guilty, with certain exceptions, of making additional false official statements with intent to deceive on or about 10 July 1950 during the course of an official investigation (Specification, Additional Charge I). He pleaded not guilty to and was found guilty of knowingly, willfully and wrongfully soliciting on or about 14 August 1950 an enlisted man to prevent the attendance of another enlisted man as a witness against the accused should he be tried by general court-martial (Specification 2, Additional Charge II). All offenses were charged and found to be in violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence and to be confined at hard labor for three years. The reviewing authority approved

the sentence, but reduced the period of confinement to one year, and forwarded the record of trial for action under Article of War 48. The Board of Review is of the opinion that the record of trial is legally insufficient to support the finding of guilty of extortion (Specification 2 of the Charge), and legally sufficient to support the other findings of guilty and the sentence, as modified by the reviewing authority, and to warrant confirmation thereof.

3. We concur with the Board of Review that the record of trial is legally sufficient to support the findings and sentence but we do not agree that the record is legally insufficient to support the finding of guilty of extortion. Since our disagreement with the Board stems entirely from our belief that it has taken a too restricted view of the evidence and the inferences that may be drawn therefrom, it is deemed appropriate to restate in some detail the testimony introduced on this specification.

Evidence for the prosecution.

On 1 May, the day after pay day, Sergeant Robert L. Williams as a result of gambling losses approached the accused in the mess hall at Fort Benning, Georgia, and asked him for a loan of $125. The accused suggested that Williams get a note from a local bank and that if he paid the accused $40 the latter would sign as a co-maker of the note. Williams complied with this suggestion and procured a loan of $125 from The Columbus Bank & Trust Company, of Columbus, Georgia (R 60, 61). The note was a negotiable instrument, dated 3 May 1950, payable to the bank in the amount of $125 and was due 1 June 1950. Both the accused and Williams signed it as joint and several obligors (R 59, 61; Pros Ex 3). On receiving $125 from the bank Williams paid the accused $25, the first installment on his obligation to pay $40 "interest" (R 61, 62).

When Williams was paid on 31 May the accused was present and collected the balance of $15 "interest." At that time Williams told him that he would pay off the note the next morning. Williams, however, again lost money gambling and was forced to tell the accused that he could not pay the note (R 62). After "ducking" the accused for three or four days, Williams finally met him and at the accused's suggestion signed a check (R 63). This check, which the accused had filled out except for the signature of the drawer, was dated 2 June 1950 and was payable to the accused's order in the sum of $125. It was drawn on the "Columbus Bank and Trust Company" (R 58, 63; Pros Ex 2). At the time he signed the check Williams told the accused that he had no account in the bank and the accused said that he was simply going to hold the check and was "not going to put it through any bank" (R 63).

Shortly thereafter the accused went on leave and Williams was given a delay en route to his new station, Fort Dix. The accused on returning to duty and finding Williams absent endorsed the check and presented it for payment on 26 June 1950 at the bank, which refused to honor it and marked it "No account" (R 57, 58, 64; Pros Ex 2). The accused then turned the check over to the Criminal Investigation Division (R 64).

Williams returned to Fort Benning to get paid for the month of June and was informed that the Criminal Investigation Division was "looking" for him because of the check. He "got kind of worried" and sought out the accused (R 64). When he found him, the following conversation ensued:

> "* * * He [the accused] said, 'I thought you were in Washington.' I said, 'No, sir, you know I wasn't leaving until I got straight with you.' He said, 'I couldn't take no chances. I turned the check over to the CID. The CID is probably waiting to pick you up in Fort Dix.' He said, 'They probably wouldn't try to pick you up in Washington, because it's too big.' I said, 'Major, you mean you would really do that?' He said, 'Yes.' I said, 'You really would do that?' He said, 'I have done it.' I said, 'That was a bad check.' He said, 'Williams, what I want is the money.' I said, 'I guess I have to suffer the consequences; I don't have the money.' I said, 'There's no way we can map out anything?' He said, 'I don't know. Wait a minute.' He went in the mess hall and came out and said, 'Let's go to the bank.' * * *" (R 65)

At the bank Williams offered to allot part of his pay to take care of the note, but the bank refused to accept this method of payment because the allotment was cancelable and informed the accused that the note must be paid within a day or two (R 65). Both the accused and Williams returned to the mess hall at Fort Benning. As they entered the hall a sheriff from one of the nearby towns was there and the accused said "This is the boy I was trying to get you to pick up about that check" (R 66). The accused and Williams then ate together and during the meal Williams stated that he was "going up to the company" to try to raise some money with which to pay the accused. Williams indicated, however, that he was apprehensive about being arrested by the Criminal Investigation Division and the accused said, "If the CID picks you up, just call me and I'll take care of it" (R 66).

Williams was successful in his gambling on this occasion and telephoned the accused about 2300 hours that night that he was bringing some money up to him. He again, however, expressed fear of being apprehended

and the accused said, "If anything happens, just call me. I'll leave the porch light on" (R 67). Williams gave the accused $75 for which he was given a receipt dated 30 June 1950 stating that the $75 was "for payment on check" (R 67, 68; Pros Ex 4). After the payment was made, the accused told Williams that he intended to get the check back from the Criminal Investigation Division because he did not want anything done to Williams because of it, an intention which he carried out (R 68, 69). The accused paid the bank the amount of the note on 1 July (R 58, 59; Pros Ex 3).

With respect to the factors which motivated Williams in paying the accused, the former testified as follows:

"CROSS EXAMINATION

* * *

"Q Now, Major Perry never threatened you with any criminal action, did he, if you didn't pay this note?
A Threaten me with any criminal action?

Q Yes
A No, sir, Major Perry never threatened me with criminal action.

Q So it wasn't the threat of criminal action that induced you to pay him $115? You just wanted to get square?
A Wanted to get square?

Q Yes
A Yes, sir. Correct.

Q You weren't afraid Major Perry would put you in jail?
A No, sir.

Q You felt you owed a debt and you wanted to pay it?
A Yes, sir.

Q And you did the best you could to pay it?
A Yes, sir.

Q In fact, you have paid it all except $10, right?
A That's right, sir

"REDIRECT EXAMINATION

* *

"Q Did Major Perry tell you he turned the check over to the CID?
A Yes, sir, he did.

Q You had been informed that the CID was looking for you?
A Yes, sir, everybody in the mess hall told me the CID had the check and was looking for me.

Q Did the fact that the CID had the check cause you to be apprehensive?

"Defense: Objected to as immaterial.

"A Cause me to be . . .

"Prosecution: Just a minute.

"Law Member: I'll overrule that. The question is, 'Were you apprehensive by the fact that the CID had the check?' You may answer that.
A Well, I knowed that the CID had the check and the check wasn't no good; that I would do my best to pay Major Perry so I could get straight. I know it might get me in trouble by him giving the check to the CID.

"Q What sort of trouble did you anticipate?

"Defense: Objected to as immaterial unless it is connected with Major Perry.

"Prosecution: I believe it has been connected with Major Perry.

"Law Member: Objection overruled.

"Q Would you answer that.
A I thought I might get a court-martial for writing a bad check if he gave the check to the CID. He told me he was going to hold it until I paid him.

"RECROSS EXAMINATION

"Questions by defense:

"Q It wasn't anything Major Perry said that made you think you could get a court-martial, was it?
A Wasn't anything he said?

Q He didn't threaten you with a court-martial, did he?
A He didn't threaten me of a court-martial? I don't remember.

Q You don't remember whether he threatend you or not?
A Threatened me in what manner? What do you call a threat, sir?

Q Did he say if you didn't pay him $125 he was going to court-martial you?
A He couldn't court-martial me if I didn't pay that $125. No, sir, he didn't say that.

Q He didn't threaten to court-martial you?
A No, sir." (R 74, 75, 76)

In connection with another transaction involving an alleged usurious loan it was testified that when the accused made the loan he required the borrower to sign a check on a bank where to the accused's knowledge the borrower had no account and, thereafter, when the debtor was delinquent in paying, the accused threatened to give the check to the Criminal Investigation Division, saying to his debtor, "it would cost * * * [him] $10,000" (R 11, 12, 34).

b. Evidence for the Defense.

The accused elected to remain silent with respect to the specification under discussion (R 162).

Four pretrial statements were introduced in evidence (R 140-142; Def Exs A, B, C, D) for the purpose of impeaching two of the prosecution's witnesses by prior contradictory statements which are collateral to the present inquiry.

4. Extortion at common law is the exaction of money or other thing of value by an officer, by virtue of his office, either where none is due or none is yet due (United States v. Laudani, 134 F 2d 847 (CCA 3d - 1943, rev'd 320 U.S. 543; United States v. Sutter, 160 F 2d 754 (CCA 7th - 1947); 2 Wharton's Criminal Law (12th ed.), sec. 1904). Statutes have generally been enacted extending this crime so as to prohibit obtaining or attempting to obtain anything of value by anybody by means of threats (Wharton, supra, sec 1905). See for example section 2305, Title 22, District of Columbia Code; section 1801, Title 26, Georgia Code.

It has been held that extortion is an offense against military law without regard to Federal or state statutes. For this purpose extortion is considered to be the wrongful taking or obtaining of another's property by threats or other conduct likely to produce fear in the mind of a reasonable man (CM P-44 Roush et al, 3 BR (A-P) 257; CM 293768 Dobbelaere, 4 BR (A-P) 75; CM 318380, Yabusaki, 67 BR 265, 277. Cf. MCM 1949, par 180f, p 239).

We think the court was fully warranted in finding that the accused deliberately employed the threat of criminal prosecution as a means of

compelling Williams to pay him the amount of the note. The accused solicited a check from Williams drawn on a bank where he knew the latter had no account. Indeed, it was drawn on the very bank to which Williams was indebted. As an obligation of Williams it was worthless. Its only value was as an instrument whereby Williams could be coerced into payment by the threat of criminal prosecution. Notwithstanding that he knew Williams had no account, the accused presented this check at the bank where it was dishonored. Thereafter he turned it over to the Criminal Investigation Division and advised the civilian authorities of Williams' alleged offense.

Once Williams learned that the authorities were interested in his activities and made efforts to come to terms with the accused, the latter showed every disposition not to press criminal charges. As soon as he met Williams he said, "What I want is the money." When Williams indicated that he was apprehensive lest he be arrested while trying to raise money, the accused made it clear that he would intercede with the Criminal Investigation Division. Finally when Williams paid him $75 the accused went to the Criminal Investigation Division and retrieved the check, an action which for all practical purposes terminated any threat of immediate prosecution.

In this connection, the fact that the accused had used a similar technique on another occasion had a material bearing on the issues to be resolved by the court. While ordinarily evidence of other acts of misconduct is incompetent to establish the accused's guilt of a crime, such evidence is unobjectionable where it tends to show the motive, plan of action or intent of the accused (MCM 1949, par 125b, p 154). In prosecutions for extortion this evidence is generally received (Comm. v. Corcoran, 252 Mass. 465, 148 N.E. 123 (1925); 2 Wigmore, Evidence (3d ed), sec 352). It is not material that the accused was found not guilty of the specification which this evidence was introduced to prove (Dunn v. United States, 284 U.S. 390 (1932); Pilgreen v. United States, 157 F 2d 427 (CCA 8th - 1946); CM 335123, Green, 2 BR-JC 58, and cases cited).

It seems to us plain, therefore, that the accused was not interested in vindicating the criminal law but in using its machinery to collect obligations owing to him.

In these circumstances we do not regard it as controlling that the threat to prosecute was not articulated. The accused's actions spoke louder and in this case more persuasively than words. He went far beyond oral threats and took the first step toward prosecuting Williams. There existed a real threat that Williams would be prosecuted and the accused was entirely responsible for it. In these circumstances Williams' testimony that the accused did not threaten him simply means that the accused did not

verbalize what was implicit in the situation. As was said in Bush v. State, 19 Ariz. 195, 168 P 508 (1917):

> "No precise words are necessary to convey a threat. Conduct takes its legal color and quality more or less from the circumstances surrounding it."

Equally applicable are the court's remarks in State v. Keiffer, 112 W. Va. 74, 163 S.E. 841 (1932).

> "It is true that no specific threat was proven. But the conduct and the representations of the Keiffers constituted a threat just as effectively as if the threat had been actually spoken."

The Board, however, is of the opinion that the prosecution did not prove the extortion charge because the record shows that Williams was motivated by a desire to clear up his indebtedness and was not induced by a desire to avoid threatened prosecution. We think that this is an unrealistic view of the evidence. Williams, so far as the record shows, did little or nothing toward raising money to pay the note until after he learned that the civilian and military law enforcing agencies were seeking him. When he discovered that, he became "worried" and in an attempt to settle the matter quickly sought out the accused, who gave him every reason to believe that he (the accused) was able to prevent prosecution if he desired. It is true that in response to leading questions posed on cross examination, which, although perfectly proper, had a tendency to suggest the desired answer, Williams gave evidence indicating that in paying the accused $75 he was motivated by a desire to liquidate his obligations. However, on redirect examination he categorically stated that he thought he might get court-martialed for writing a bad check. We think that the court was warranted in inferring from all the evidence that while Williams may have been motivated by a desire to see that the note was paid, this desire was impelled by the threat of criminal prosecution for which the accused was responsible. As the court said in State v. Coleman, 96 Minn. 487; 110 N.W. 5, 116 Am. St. Rep. 441 (1906),

> "Appellant seeks to defend himself upon the plea that the money was not paid pursuant to a threat made by him, but that Pencille made the advances and voluntarily paid it to avoid exposure. The position is untenable as a defense. Appellant, having created the situation, and knowing the effect it might have on the mind of Pencille, took advantage of the fear thus created the moment he took the money knowing it was paid for the purpose of purchasing silence."

It is, of course, no defense that Williams owed the accused the

money he paid (see annotation 135 A.L.R. 728), although strictly speaking Williams owed the accused nothing until the latter had actually paid the note.

One point remains which the Board in the view it took of the evidence found unnecessary to consider. The accused was charged with extortion of $125 on or about 2 June 1950 and was found guilty of extortion of $75 on or about the last week of June 1950. The question is whether the finding changed the nature or identity of the offense charged (MCM 1949, par 78c, p 77). We believe that this was an immaterial variance rather than the finding of a new offense with which the accused was not charged. It was alleged that the accused extorted "the sum of" $125 by threatening criminal action concerning a check. The pleader could hardly have intended charging extortion of the check. A check and particularly a worthless one, known to the accused to be such, is not aptly described by the phrase "the sum of," and it was impossible for the accused to extort the check by threatening Williams with criminal prosecution for making and delivering it before Williams actually made and delivered it.

Nor do we believe that the accused could have been misled by the variance. He was fully advised of the transaction for which he was on trial. He was made aware of the name of the person from whom and of the means by which he was alleged to have extorted the money. The erroneous date and sum were not unrelated to the offense of which he was ultimately found guilty. The actual extortion which occurred in the last week of June was the result of a threat which hung over Williams from the time he gave the check on 2 June. We are therefore of the opinion that the substitutions by the court in its finding did not change the nature or identity of the offense and that the variance between the specification and the proof was immaterial and did not prejudice the accused (2 Wharton, Criminal Evidence (11th Ed) 1802; CM 249613, Kallish, 32 BR 137; CM 276435, Meyer, 48 BR 331; CM 324927, Bowen, 74 BR 1; CM 332879, Boughman, 81 BR 223).

6. Consideration has been given to oral representation and material submitted to the Judicial Council on behalf of the accused by the office of Congressman Robert L. Doughton.

7. For the foregoing reasons the Judicial Council is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, as modified by the reviewing authority, and to warrant confirmation of the sentence.

(Dissent)
Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr.
J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

DISSENTING OPINION
by
BROWN
Member of the Judicial Council

For reasons stated in the opinion of the Board of Review herein, I am unable to concur with the majority of the Judicial Council that the record of trial is legally sufficient to support the finding of guilty of extortion as modified by the reviewing authority (Specification 2 of the Charge). I do concur, however, that the record supports the other findings of guilty as modified by the reviewing authority and the sentence as so modified.

Robert W. Brown
Robert W. Brown, Brig Gen, JAGC

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Major Edgar R. Perry, 0-366068, Headquarters and Headquarters Company, Student Training Regiment, The Infantry School, Fort Benning, Georgia, upon the concurrence of The Judge Advocate General the sentence as modified by the reviewing authority is confirmed and will be carried into execution. The United States Disciplinary Barracks or one of its branches is designated as the place of confinement.

Robert W. Brown, Brig Gen, JAGC
(Does not imply approval of modified finding as to Specification 2 of the Charge)

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action of the majority of the Judicial Council.

FRANKLIN P. SHAW
Major General, USA
Acting The Judge Advocate General

9 May 1951

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

(309)

JAGK - CM 344684

FEB 1 3 1951

UNITED STATES	2D ARMORED DIVISION
v.	Trial by G.C.M., convened at Fort Hood, Texas, 1 December 1950. Dismissal, total forfeitures after promulgation, and confinement for one (1) year.
Second Lieutenant MILTON RAY MOSIER (O-1688518), Headquarters, Headquarters and Service Company, 17th Armored Engineer Battalion, Fort Hood, Texas.	

OPINION of the BOARD OF REVIEW
BARKIN, WOLF and LYNCH
Officers of The Judge Advocate General's Corps

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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 Judicial Council and The Judge Advocate General.

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Second Lieutenant Milton R. Mosier, Headquarters and Service Company, 17th Armored Engineer Battalion, did at Temple, Texas on or about 27 October 1950, feloniously and unlawfully kill First Lieutenant Ralph K. Cox, by operating an automobile in which said First Lieutenant Ralph K. Cox was a passenger, in a grossly negligent and reckless manner, thereby causing said automobile to be wrecked, resulting in the death of said First Lieutenant Ralph K. Cox.

He pleaded not guilty to and was found guilty of the charge and specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct for eighteen months. The reviewing authority approved only so much of the sentence as provides for dismissal, forfeiture of all pay and allowances to become due after the date of the order directing

execution of the sentence and confinement at hard labor for one (1) year, and forwarded the record of trial for action under Article of War 48.

3. Evidence

a. For the Prosecution

On the evening of 26 October 1950 the accused together with First Lieutenant Lawrence O. Ballard, Warrant Officer Junior Grade Marvin Coats and First Lieutenant Ralph K. Cox, all of whom were assigned to the 17th Armored Engineer Battalion, Fort Hood, Texas, met at a night club in Temple, Texas. They arrived thereat in two automobiles. The accused drove to Temple with Coats and Ballard was accompanied by Cox (R 18,19,32). During the course of the evening they visited several clubs in Temple. At the last club Cox announced to the others that he was sleepy and that he would wait for them in "the car." As the door to Ballard's car was locked, Cox got in the back seat of the accused's car and lay down. At approximately 2315 or 2330 hours, Ballard, Coats and the accused left the club to return to Fort Hood. Coats, upon approaching the accused's car observed Cox in the back seat and Cox, within hearing of the accused, remarked, "Coats, you ride with Lt. Ballard, and I won't have to move" (R 18,19,27,33,34). The accused, who had consumed about "five beers" during the course of the evening, drove off with Cox as a passenger. They were followed immediately by Ballard and Coats in Ballard's automobile (R 20,27,29,31,34,38,44). The accused and Cox were seen soon thereafter at the site of an accident in the vicinity of a gasoline station on H Avenue, Temple, Texas (R 20,35; Pros Ex 8, Court Ex 1). Cox "was lying with his body on the ground, on his back, and he was about midway--he would be about even with the intersection of the doors on Lt. Mosier's car, and he was lying some 3-4 feet out from the car with his head toward the car and his feet toward the road. *** it was evident that he was injured, because he wasn't moving, and it seemed he was seriously hurt." He was bleeding from his nose and his eyes. The accused was outside the car "on his knees holding his head" and he "looked like he was groggy" (R 22,23,36,37). The accused's car was a "total wreck" (R 36, Pros Ex 6). The police arrived within a few minutes and Cox was taken to the hospital. It was stipulated that at approximately 0016 hours 27 October 1950 Cox was a passenger in an automobile which was at that time owned and being driven by the accused; that this vehicle with accused driving was involved in a wreck on West Avenue H, Temple, Texas, and that Cox "died as a result thereof and no other cause at about 12:30 a.m. on 27 October 1950." The cause of death was "multiple fractures of the left frontal, temporal and parietal areas of the skull with lacerations and contusions of the left side of the brain, cerebral hemorrhage and shock" (R 14,22,37; Pros Exs 2,3,5).

A. C. Berry, a patrolman of Temple, Texas, testified that on the night of 26-27 October he and another patrolman were making their "nightly rounds, headed north on 25th Street, just at the intersection of Avenue 'H', which runs approximately west off 25th" (R 49, Pros Ex 8, Court Ex 1). They observed two automobiles, a Nash and an Oldsmobile, turn "off 25th on to Avenue 'H'" at the same time. The cars were traveling with such speed that they gave chase. Patrolman Berry and his partner proceeding between 25th Street and 47th Street drove between 70 and 75 miles an hour but were unable to catch up with the cars because "they were gaining on us." The "dust rose up" on their faces to the extent that they lost sight of these automobiles until they approached the Gulf gasoline station, which is contiguous to Avenue H. Here they saw a Nash automobile that had been completely wrecked, and an Oldsmobile parked "some 10-15 feet" beyond the Nash. Cox, who had been lying beside the Nash was taken to the hospital immediately. The accused, owner of the Nash, was apparently not badly hurt (R 48-51,56,61,70, Pros Ex 8, Court Ex 1). Patrolman Berry made an inspection forthwith of the area where the accident had occurred. He described what he had observed at that time, and indicated the following on Court Exhibit 1: "*** post 'C' had been pushed over to *** the north, and post 'D' and 'E', one was broke off and the other was uprooted, *** and post 'G'," a metal post "showed markings of blue paint," similar in color to that of the automobile owned by the accused. "Over at Post 'H' at this small island directly in front of the Gulf filling station *** were tire marks. Apparently the car had straddled this small island some two or three and a half foot wide." The witness determined that the accused's automobile came to rest several hundred feet from the point of impact (Pros Exs 7, 8; Court Ex 1). Patrolman Berry identified Prosecution Exhibit 6 as a picture of the wrecked automobile he found when he arrived at the scene of the collision (R 51-53).

Mr. Robert B. Dodge, Criminal Investigator, identified a pretrial statement made by the accused on 7 November 1950. He testified that prior to the interrogation the accused was advised of his rights under Article of War 24 and without the use of force, duress, or undue influence the accused made a voluntary statement which he signed. This pretrial statement was received in evidence without objection as Prosecution Exhibit 9 (R 77,78). In his statement the accused related that "just prior to the accident an estimate pertaining to /his/ speed was about 75 MPH." He "drove through town and was driving out Ave. H and at the junction of 47th St lost control, hitting a guard post, at this time /he/ struck /his/ head on some object and was unconscious until after the accident" (R 78, Pros Ex 9, Court Ex 1).

Joseph E. Chapman, Investigator, 43d Criminal Investigation Detachment, stated that on 7 November he interviewed the accused. After apprising him of his rights under Article of War 24 the accused voluntarily

told Chapman that he (accused) was not asleep at the time of the accident and that he had not "been drinking too much." The accused said he "had one or two beers." Chapman asked the accused "if it was the speed of the vehicle itself which caused it to leave the road and the answer was no as well. I asked him if he had been forced off the road by another vehicle and the answer to that was no." The accused was asked "if there was a vehicle anywhere near his vehicle, either beside, in back of it or in front of it, and to the best of his memory there was no vehicle around him at that particular time" (R 82-83).

The court took judicial notice that "within the corporate limits of the cities of /Texas/ the speed limit /is/ 30 miles an hour except where posted" (R 81).

b. For the Defense

Daisy Bradshaw testified that shortly after midnight on the night of 26-27 October 1950 she was riding home to Belton from Temple, traveling on Avenue H.

> "I had come from 25th Street across and turned down the avenue, and about 33rd, approximately, two cars passed me at an exceeding great speed for town driving. Shortly thereafter, they seemed to me to become practically parallel to each other, and *** the police car passed me right after that."

She estimated the speed of the two cars as between 60 and 65 miles an hour. After she passed a curve in the road she observed a "wrecked car" and a car beside the wrecked car. There was no doubt in her mind that the wrecked car was "one of the two cars that passed /her/" (R 85-89; Pros Ex 8, Court Ex 1).

Charlene Middleton testified that at 12:15 on the morning of 27 October she was driving home with Daisy Bradshaw.

> "At about 33rd Street, two cars passed me. I was riding about forty miles an hour. They passed me as though I was standing still practically. They were going at a very rapid rate of speed, one right behind the other. One, I believe, it was light green or gray; the other was a *** two-tone Nash, and they passed me about 33rd Street and came on down the avenue. The green car was about in the middle of the road. The Nash was on the left, and seemed to be trying to pass. *** he finally passed there about 45th Street."

"I thought they were going around 60 or 65 when they passed me." After she "got around the curve in the center of 47th," she saw the "wrecked"

Nash (R 89-92; Pros Ex 8, Court Ex 1).

The accused, having been apprised of his rights as a witness, elected to testify under oath substantially as follows (R 95): At approximately 1700, 26 October, the accused in company with Coats left their battalion area and went to the Fort Hood Officers Mess, where they both drank a can of beer. Thereafter Coats and the accused were joined by Ballard and Cox and "came to the mutual agreement /they/ would all proceed to Temple, Texas." Coats rode in the accused's car and Cox was a passenger in Ballard's car. Subsequently all four met at a club in Temple and visited several other clubs. At the last amusement place Cox remarked that he was sleepy and thereupon left this place, got into the back seat of the accused's car and went to sleep. Coats decided he would ride with Ballard on the trip back to the post. The accused stated:

> "I was driving up Avenue 'G' in a westerly direction. At the intersection of 'G' and 25th, there is *** a stop light. I made a left turn there and proceeded south to Avenue 'H'. There was also a signal light there. Not being too familiar with the city laws and ordinances of Temple, I didn't know whether it was permissible or not to turn right on a right (sic) light at this particular intersection. Therefore, I pulled up and stopped. While I was stopped there was another car directly on my right, a light gray, green, or tan color. As the light changed I turned right, heading west on Avenue 'H'. The other car being on my right, making a short arc, made the curve a little faster than I did. I followed this car on up the highway and *** just over the crest of the hill *** between 37th and 39th Street, I saw I had a clear vision to *** pass. I did pass the car and proceeded on west on Avenue 'H', and after passing the car, drew back to the right hand side of the road."

The accused continued:

> "As I rounded the corner, I could see the lights from this *** car shining through the left hand side of my car, and I knew or was reasonably sure that this car was close there. At that particular point, it was up to me to *** make a snap decision. It was either for me to give way to the right of the road allowing the other car a little more room in order that he could manipulate the curve, or for me to stay over there, possibly causing an accident, of two cars. I did give way to the right and got over onto the shoulder there. At the time I tried to bring the car back onto the highway - it was completely off on the shoulder - and struck, I believe it was point 'D', and at the time I struck that post I was thrown forward and my head

hit the windshield or wheel or an object in the front of the car and I was knocked unconscious from the time I struck that particular object until after the accident was over, and I was told to get into the police car, I have no knowledge of anything that happened."

Following this event, the accused was taken by the police to the Temple Police Station and there he pleaded guilty to a charge of reckless driving. He was fined $109.00. Concerning his plea of guilty, the accused explained:

"*** They asked whether I wanted to plead guilty or not guilty. Again it was a matter of making a snap decision. I figured if I pleaded not guilty, I will be held, be absent from my duty station and my duties, also there will be lawyers and defense involved which would amount to a sum total amount, and again, if I am found guilty, there will be the find (sic) again. So, I figured taking all those things into consideration, it would be the wisest move for me to plead guilty, which I did."

At the time the accused approached the intersection of 25th Street and Avenue "H" the other car referred to by the accused was believed by him to be Ballard's. The accused admitted that he did not "have to stop on the left" of the other car to make a right turn.

The accused did not recall saying to Chapman that "after rounding that curve there was no car near" him. He drank a total of four beers that night. He "possibly" told Agent Chapman that he had only one or two beers because Chapman asked him if he was intoxicated and he replied that he was not.

Asked how fast he was going when he passed that other car between 39th and 47th Street the accused replied, "I can't truthfully say because I was keeping my eyes on the road and on the other car during passing." The accused acknowledged that he told Agent Dodge that an estimate of his speed as he entered 49th Street was about 75 miles an hour, but he added, "Since I have given it more thought I don't see how I possibly could have been going that fast" (R 95-106).

The testimony of Lieutenant Colonel William D. Eister, Captain Kenneth H. Sullivan and Captain James L. Stillwell pertained to the accused's good reputation and the excellent manner in which he performed his duties (R 108-112).

4. Discussion

The Specification of the Charge alleges that on or about 27

October 1950 at Temple, Texas, the accused did "feloniously and unlawfully kill First Lieutenant Ralph K. Cox, by operating an automobile in which said First Lieutenant Ralph K. Cox was a passenger, in a grossly negligent and reckless manner, thereby causing said automobile to be wrecked, resulting in the death of said First Lieutenant Ralph K. Cox."

By the wording of this specification, the accused is charged with involuntary manslaughter. This offense is defined by the Manual for Courts-Martial, 1949 (par 180a) as:

> "*** homicide unintentionally caused in the commission of an unlawful act not inherently dangerous to human life, or by culpable negligence in performing a lawful act or an act required by law."

Culpable negligence is described as:

> "*** a degree of carelessness greater than simple negligence and may be described as a negligent act or omission accompanied by a disregard for the foreseeable consequences to others of such act or omission. Thus, a negligent act or omission which, when viewed in the light of human experience, might foreseeably result in the death of another, even though the act or omission would not, necessarily, be likely to have fatal consequences, may be the basis for a charge of involuntary manslaughter ***" (MCM, 1949, supra).

The evidence shows that at about midnight, 26-27 October 1950, at Temple, Texas, the accused and another officer, Ballard, who had spent the preceding four or five hours in night clubs in Temple, raced their cars over the public streets of the municipality of Temple at a speed of about 75 miles per hour, that accused negotiated a curve with his car abreast and to the left of Ballard at an excessive rate of speed, and, finally, unable to control his wildly careening vehicle smashed into a sign post at a gasoline station, his vehicle coming to a halt some few hundred yards beyond the point of collision. As a result of the collision, the accused's passenger, Lieutenant Cox, sustained injuries from which he died shortly thereafter. The conduct of the accused during the drive through Temple, at such an accelerated speed, plainly reveals gross and culpable negligence and a reckless and wanton disregard of the rights and safety of others. The Board of Review, therefore, concludes that the evidence is legally sufficient to sustain the charge and its specification alleging involuntary manslaughter in violation of Article of War 93 (CM 292563, Andersen, 57 BR 241,245).

5. Records of the Department of the Army show that the accused is 23 years of age, married, and has one child. He was graduated from high school in 1945. In civilian life he was employed as a laborer, truck driver, mechanic and clerk. He was commissioned a second lieutenant in the Officers Reserve Corps on 4 March 1949 and entered on his present tour of extended active duty on 25 September 1950. He had prior service as an enlisted man from 29 June 1945 to 3 March 1949. His only overall efficiency report of record is 63.

6. The court was legally constituted and had jurisdiction over the accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. 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 and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 93.

_____, J.A.G.C.

_____, J.A.G.C.

_____, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

344684

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Second Lieutenant Milton Ray Mosier, 0-1688518, Headquarters, Headquarters and Service Company, 17th Armored Engineer Battalion, Fort Hood, Texas, upon the concurrence of The Judge Advocate General the sentence as modified by the reviewing authority is confirmed and will be carried into execution. The United States Disciplinary Barracks or one of its branches is designated as the place of confinement.

Robert W. Brown
Robert W. Brown, Brig Gen, JAGC

(Absent on Temporary Duty)
C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr.
J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

19 Feb 1951

I concur in the foregoing action.

E. M. Brannon
E. M. BRANNON
Major General, USA
The Judge Advocate General

(GCMO 22, Mar 1, 1951).

14009

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGK - CM 344743

FEB 1 9 1951

UNITED STATES v. Corporal IRA BROWN (RA 19300029), 27th Ordnance Maintenance Company, 1st Cavalry Division, APO 201.	1ST CAVALRY DIVISION Trial by G.C.M., convened at 1st Cavalry Division (Rear), APO 201, 29 and 30 November 1950. Dishonorable discharge, total forfeitures after promulgation, and confinement for thirty (30) years. A Federal Institution.

REVIEW by the BOARD OF REVIEW
BARKIN, WOLF and LYNCH
Officers of The Judge Advocate General's Corps

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1. The Board of Review has examined the record of trial in the case of the soldier named above.

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Corporal Ira Brown, 27th Ordnance Maintenance Company, 1st Cavalry Division, APO 201, did at or near Man Kyong Dai (also known as So-ri) Korea, on or about 11 November 1950, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill a human being known as Che Yon Bon by shooting him with a U.S. Army rifle, M-1, Caliber 30.

He pleaded not guilty to the charge and its specification. He was found guilty of the specification except the words "and with premeditation," not guilty of the excepted words, and guilty of the charge. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor, at such place as proper authority may direct for thirty years. The reviewing authority approved the sentence, designated a United States penitentiary, reformatory, or other such institution as the place of confinement and directed that the prisoner be committed to the custody of the Attorney General, or his designated representative, for classification, treatment, and service of sentence of

confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50(e).

3. Evidence

a. For the Prosecution

The evidence pertinent to the findings of guilty is summarized as follows:

At about 1700 hours, 11 November 1950, accused, a member of the 27th Ordnance Maintenance Company, and Kim Nam Soo, an employee of the company, left the company compound and went to the village across the hill. When they left the compound, accused, who was armed with an "M-1" rifle,was a "little drunk." Kim Nam Soo was carrying two bottles of liquor and a bandoleer of ammunition around his shoulder. En route to the village, accused test-fired his rifle. After firing, accused climbed a tree and showed his companion where he had shot. At this juncture, Kim Nam Soo was of the opinion accused was not drunk. Subsequently, however, accused consumed additional liquor. Upon their arrival at the village which was located between the "crest of the hill and the river," they visited a house where they found an old woman. A Korean came up who could talk English and talked to accused (R 33-35, 39-40,42).

At about 1830 hours, 11 November 1950, Song Ia Hown, an employee of the Fifteenth Medical Battalion, First Cavalry Division, was in the village of Man Kyong Dai, also known as So-ri, purchasing some chickens. After purchasing the chickens, he went to a house where there were said to be two soldiers. Inside the gate, he found accused, to whom he was introduced, and another soldier who seemed to be a Korean. Accused was armed with an "M-1" rifle and the Korean was carrying a bandoleer of ammunition. Both appeared to be intoxicated. Song Ia Hown told accused that the woman who owned the house had sought his help so that she would not have any trouble because of the sudden visit of the two soldiers. Accused, in turn, inquired where he could find some girls. Song Ia Hown confessed his ignorance in such matters and after some further conversation left. The conversation between Song Ia Hown and accused was carried on in English (R 23-26,28).

In his narrative, Kim Nam Soo related that after the departure of the Korean, who came to the house at which he and accused were visiting, he and accused also left. They, then, met another Korean man to whom accused called "Irri-wa," Korean for "Come here." As the man approached accused, the latter said, "sexy-sexy," which in Korean means "something like a young girl." The Korean responded, "No sexy" and repeated the

same response to accused's importunities for "Sexy, sexy." Accused took his weapon from his shoulder and aimed it at the Korean. While Kim Nam Soo attempted to prevent accused from pointing the gun at the man, the latter turned and ran. When he reached a point about 15 meters from accused, accused fired and the man fell to the ground. At the time, Kim Nam Soo observed that the victim was wearing cotton-lined pants and that "the parts of his belly was torn out." No blood, however, was seen by Kim Nam Soo. Kim Nam Soo ran to the nearest house and told a man of the incident. He then returned to the scene where he found accused lying beside his victim and saying to him, "Kumin-asai, Kumin-asai." According to Kim Nam Soo, "Kumin-asai" means "I am sorry." Accused then arose from the ground, told Kim Nam Soo to accompany him, and left the scene. Kim Nam Soo did not see the victim's face for more than a second and would not be able to identify him. Kim Nam Soo and accused spent the night on an island in the river, and returned to the company the following morning (R 36-38,41).

In the meantime, Song Ia Hown, after leaving accused and his Korean companion at the house in the village of Man Kyong Dai, was returning to the Fifteenth Medical Battalion,which is located on the other side of a hill from the village. After leaving the village,Song Ia Hown heard three shots. About 45 minutes later he had returned to the village and in the general vicinity of the house where he met accused he saw a Korean corpse. He identified Prosecution Exhibits 1, 2 and 3 as pictures of the corpse (R 28-32).

At about 1600 or 1630 hours, 11 November 1950, Che Yon Bon, married for 18 years to Kim Yong Joo, who identified Prosecution Exhibits 1, 2 and 3 as pictures of her husband, took leave of his house and wife on some business "with a boat." When Kim Yong Joo saw her husband the next day he was dead. In his 18 years of marriage, Che Yon Bon had no illness and was a very active man (R 11-13).

Kim Bon Jap was in the village of Man Kyong Dai on 11 November 1950 taking care of the interment of his wife's uncle, Park Tong Chan. At about 1930 hours, while getting ready for the burial, Kim Bon Jap heard a shot and ran out of the house. He found Che Yon Bon lying on the ground and at his request carried him to Son Ok's house. While loading Che Yon Bon on his back, Kim Bon Jap "felt his belly. It had a bulge and when /he/ finished carrying him, /he/ felt his belly getting bigger." There was not much blood, only "a little bit *** on the outside of the coat." Che Yon Bon asked for water. Kim Bon Jap secured some water but Che Yon Bon "seemed to pass away" as he was taking a third spoonful of water (R 14-17,44).

Captain Carl E. Cummings, M.S.C., testified that he had been in the Army since 29 February 1936, during which time he had served exclusively in the Medical Department, having been commissioned in the

Medical Administrative Corps on 18 September 1942. In 1949 he graduated from a "30-day Assistant Battalion Surgeon's course, given in the FEC." During World War II he had in Europe observed approximately 250 deceased persons. He had made superficial examinations of deceased persons "relative to identification," and had assisted pathologists in performing autopsies, and had made examinations prior to burial (R 19-20).

On 12 November 1950, he was on duty in the Medical Section, Headquarters First Cavalry Division Rear, at which time there were no medical officers on duty. Captain Cummings was asked to accompany a party investigating the death of a Korean national. At 1400 hours, 12 November, in a village in the vicinity of the court, Captain Cummings viewed the remains of the Korean national depicted in Prosecution Exhibits 1, 2 and 3, and examined the body (R 20,22). Concerning his examination, he testified as follows:

> "***I first checked the body to determine presence of life and I accomplished that by: one, looking at the body; two, checking the condition of the eyes; three, checking the status of rigor mortis by attempting to bend the right leg and right wrist. I then uncoupled the belt of the remains and uncovered a large wound in the lower right belly in the vicinity or just below the navel or umbellicum, ***. A large, jagged wound was uncovered, ill-defined because of the presence of numerous intestines. ***" (R 20-21).

The wound was about 4-1/2 inches in diameter and was typical of "a gunshot type" and Cummings concluded it was a gunshot wound. Since the belly was quite distended Cummings was of the opinion that there had been considerable hemorrhage within the abdominal cavity which made it obvious that the wound was sustained prior to death. Other than the belly wound, there was no apparent cause of death. Cummings estimated that death occurred 18 hours earlier (R 21-22).

On 19 November 1950, accused was interviewed by Captain Milton T. Quinton, Jr., who advised accused of his rights under Article of War 24 and who received assurances from accused that he understood those rights. Accused made an oral statement which Captain Quinton reduced to writing. This statement was reproduced on a typewriter, read, and signed by accused and signed by Captain Quinton. Captain Quinton did not induce the statement by promise of reward or by threats of violence. Captain Quinton identified Prosecution Exhibit 4 as the typewritten statement and it was admitted in evidence (R 53-56).

In his statement accused recounted his movements subsequent to 1715 hours 11 November 1950 when he left his company area accompanied by a Korean named Junior, who was carrying his ammunition and a bottle of Korean brandy. Accused's movements were substantially as related by Kim Nam Soo except that accused had no memory of shooting anyone. Prior to arriving at the Korean village accused fired two shots at a tree, and

then had a drink. When he arrived at the Korean village he "was drunk like hell," and did not recall how long he remained in the village or what took place there. They subsequently left the village and crossed the river to another village where they spent the night, returning to the company area at about 0630 hours 12 November. With reference to his appearance on his return accused stated as follows:

> "Upon being interviewed I first noticed what appeared to be blood on my left hand. I do not, nor can I account for the crimson colored substance appearing thereon. I was not in a fight nor did I strike anyone because that is not my nature. My combat boots are covered with dried mud and they are the same boots I was wearing on the night and morning 11-12 November 1950. Dried mud appears to be on the knee of my trousers and possibly could have been caused by falling when I was running." (Pros Ex 4)

b. For the Defense

Accused, after being apprised of his rights as a witness, elected to remain silent (R 63-64).

Master Sergeant Ralph R. Eberling, First Sergeant, 27th Ordnance Company, testified that it was "SOP" in the 27th Ordnance during the hours of darkness to shoot Korean civilians approaching the company compound. He also testified no report against accused had been brought to him as first sergeant (R 58-61).

Corporal Hugh E. Kline testified that on the afternoon of 11 November 1950 accused was riding with him in his truck, and that accused stopped in a town to pick up a bottle of Korean whiskey. Both Kline and accused drank from the bottle. Kline was unable to state if accused was intoxicated (R 61-62).

Sergeant Marvin R. Kohler testified that he had known accused for a year and a half, that accused worked under his immediate supervision and performed his duties well, and never gave him any trouble (R 62-63).

4. Discussion

Accused has been found guilty of murder unpremeditated, which is defined as "the unlawful killing of a human being with malice aforethought" (MCM, 1949, par 179a, p 230). The evidence shows that, on 11 November 1950, at a village in Korea near his company area, accused was unsuccessful in securing from a Korean male directions as to how to secure the companionship of a young Korean female. Upon

thus being rebuffed, accused shot the Korean male, whose belly was torn out. At or about the same time in the village of Man Kyong Dai, also known as So-ri, which the facts and circumstances of record indicate as the locus of the shooting above described, the mortally wounded Che Yon Bon was discovered in his last throes by a fellow Korean. Che Yon Bon expired moments later. The observations of those who viewed Che Yon Bon's corpse of a gaping belly wound with the intestines protruding, identical in appearance with the wound sustained by accused's victim, together with the evidence of Song Ia Hown placing accused in the vicinity of the murder alleged in fair proximity to a time when accused shot an unidentified Korean lead inexorably to the conclusion that Che Yon Bon was accused's victim as alleged.

The unrebutted evidence which shows that Che Yon Bon was a healthy and active individual until shot by accused and that shortly thereafter he died is sufficient to establish conclusively in the absence of contrary evidence that the wound inflicted by accused was the cause of death (U.S. v. Wiltberger, Fed. Case No. 16,738, 3 Wash. C.C. 515, 28 Fed. Cas. 727, reversed on other grounds in 5 Wheat. (18 U.S.) 76).

All the facts and circumstances contained in the record of trial show that the shooting was without legal excuse or justification, and, hence, unlawful, that malice requisite to murder may be presumed from accused's use of a deadly weapon in a deadly manner, and that the malice thus presumed was not excused by provocation. All the elements of murder as hereinbefore defined are conclusively shown by the record of trial (CM 329321, Marinez, 78 BR 11,23). Voluntary intoxication of the accused suggested by the evidence does not excuse murder unpremeditated of which he was found guilty (Bishop v. United States, 107 F. 2d 297, 301).

An officer of the Medical Service Corps was allowed to testify, over objection, that the wound sustained by Che Yon Bon was typical of gunshot and hence he was of the opinion that the wound was inflicted by gunshot, that the distention of deceased's belly revealed the presence of hemorrhage within the stomach cavity thus showing that the wound preceded death, that from the rigidity of the body and other factors it was his opinion that death preceded his examination by 18 hours, and that there was no apparent cause of death other than the belly wound. We find it unnecessary to decide the competency of this testimony in view of the circumstances hereinbefore described which in our opinion conclusively show that a gunshot wound was inflicted upon Che Yon Bon by accused and that the gunshot wound so inflicted was the cause of death.

5. Accused is 21 years of age and single. He attended grade school and in civilian life was employed as a laborer. His current

enlistment extends from 27 October 1949, prior to which time he had approximately two years and nine months of enlisted service. His character and efficiency are rated as "Good," and he has no record of previous convictions by courts-martial.

6. The court was legally constituted and had jurisdiction of the person and of the offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence. A sentence to imprisonment for 30 years is authorized upon conviction of unpremeditated murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder not premeditated, recognized as an offense of a civil nature and so punishable by penitentiary confinement by Section 275, Criminal Code of the United States (18 USC 454).

_____, J.A.G.C.

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(326)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

Board of Review

CM 344743

FEB 1 9 1951

UNITED STATES v. Corporal IRA BROWN (RA 19300029), 27th Ordnance Maintenance Company, 1st Cavalry Division, APO 201	1ST CAVALRY DIVISION Trial by GCM, convened at Pyongyang, Korea, 29 and 30 November 1950. Dishonorable discharge, total forfeitures after promulgation, and confinement for thirty (30) years. A Federal Institution.

HOLDING by the BOARD OF REVIEW
BARKIN, WOLF and LYNCH
Officers of the Judge Advocate General's Corps

The record of trial in the case of the soldier named above has been examined and is held by the Board of Review to be legally sufficient to support the findings of guilty and the sentence.

_____, J.A.G.C.
_____, J.A.G.C.
_____, J.A.G.C.

1st Indorsement

Dept. of Army, J.A.G.O. FEB 2 0 1951 To the Commanding General, 1st Cavalry Division, APO 201, c/o Postmaster, San Francisco, California.

1. In the case of Corporal Ira Brown (RA 19300029), 27th Ordnance Maintenance Company, 1st Cavalry Division, APO 201,

attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence . Confirming action is not by The Judge Advocate General or the Board of Review deemed necessary. Under the provisions of Article of War 50 you now have authority to order the execution of the sentence .

2. A radiogram is being sent advising you of the foregoing holding. Please return the said holding and this indorsement and, if you have not already done so, forward therewith six copies of the published order in this case.

(CM 344743).

FOR THE JUDGE ADVOCATE GENERAL:

WILLIAM P. CONNALLY, JR.
Colonel, JAGC
Assistant Judge Advocate General

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

(329)

JAGN-CM 344787

MAR 19 1951

UNITED STATES v. Private ROBERT J. SWAN (RA 19315898), Recruits EARL H. SIELOFF (RA 16247568) and ROBERT E. SMITH (RA 18319708), all of Headquarters Detachment, Special Troops, Yokohama Command, APO 503.	YOKOHAMA COMMAND Trial by G.C.M., convened at Yokohama, Honshu, Japan, 4 January 1951. As to each accused: Dishonorable discharge, total forfeitures after promulgation and confinement for five (5) years. Federal Institution.

HOLDING by the BOARD OF REVIEW
YOUNG, MICKEL and MOBERLEY
Officers of the Judge Advocate General's Corps

1. The Board of Review has examined the record of trial in the case of the soldiers named above and submits this, its holding, to The Judge Advocate General under the provisions of Article of War 50e.

2. The accused were tried by general court-martial upon the following Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that, Recruit Robert E. Smith and Private Robert J. Swan, both of Headquarters Detachment, Special Troops, Yokohama Command, APO 503, then both of Company A, 17th Infantry Regiment, 7th Infantry Division, APO 7, and Recruit Earl H. Sieloff, Headquarters Detachment, Special Troops, Yokohama Command, APO 503, then of Company C, 17th Infantry Regiment, 7th Infantry Division, APO 7, acting jointly, and in pursuance of a common intent, did, at or in the vicinity of Gotemba, Honshu, Japan, on or about 12 September 1950, feloniously steal from the presence of Sui Furuya, approximately thirty thousand yen (¥ 30,000.00) to forty thousand yen (¥ 40,000.00) the property of Sui Furuya, value of approximately one hundred ($100.00) dollars.

Each accused pleaded guilty to the Charge and Specification, except as to the amounts above mentioned, for which were substituted ¥ 15,000 and $41.64, respectively, to which each also pleaded guilty. Each accused was found guilty of the Specification and Charge, except as to the amounts set forth in the Specification, for which the court substituted the words and figures "twenty-two thousand one hundred yen (¥ 22,100)" and "more than fifty ($50.00) dollars," respectively, of which each also was found guilty; each was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct for five years. Evidence of two previous convictions for Swan, three for Sieloff, and five for Smith was introduced. As to each accused the reviewing authority approved the sentence, designated a United States penitentiary, reformatory, or other such institution, as the place of confinement, the prisoners to be committed to the custody of the Attorney General, or his designated representative, for classification, treatment, and service of sentences of confinement, and forwarded the record of trial for action pursuant to Article of War 50e.

3. Evidence.

a. For the Prosecution.

The record of trial shows that at about 11:30 P.M. on 12 September 1950 Sui Furuya, a Japanese housewife, was in her home in Honshu, Japan; the building also was used in part as a laundry (R 11, 12). Present at the time were Mrs. Ogawa, Yoshisuke Otsuka and a maid (R 11. 15). In response to a knock at the gate the maid admitted the accused Smith and Sieloff (R 11, 13, 14, 16), who entered the house without removing their shoes (R 11, 16). A Japanese boy, a colleague of the accused, accompanied them and acted as their interpreter (R 11, 16). Smith indicated that he wanted to have some money changed, but Sui Furuya shook her "hand" and said, "'No, no.'" She told them that her father was not home and "asked them again and again to go home" (R 11). One of the chests was locked, so they demanded the key and required Sui Furuya to unlock the chest (R 12, 16). Just as Smith "was about to take the money there was somebody outside whistling so he left the money and went outside, but he came back soon after and took the money and went outside again" (R 12, 16). As Sieloff left, he "threw the ten yen bills" at Sui Furuya (R 12). The two accused were in the house for 30 minutes to an hour (R 12, 16).

Sui Furuya's testimony, on direct examination, pertinent to the money taken, was as follows (R 12):

"A In the chest were thousand yen bills, hundred yen bills, and ten yen bills stacked in different stacks * * *.

* * * *

"Q Sui, do you know how much money the soldier took out of the drawer and went away with?
"A I believe it was approximately 40,000 yen.

* * * *

"Q What kind of notes was the money in?
"A I do not recall exactly, but I believe he took thousand yen notes and hundred yen notes."

The following reflects the pertinent cross-examination of this witness, with the objection of Defense Counsel and ruling of the Law Member thereon (R 14, 15):

"Q How many yen did you say was in the drawer on direct examination?
"A I believe around 40,000 yen.

"Q Why do you say 40,000 yen?
"A We later figured out the cash we had on hand and the receipts of that day, and we arrived at the conclusion that we had about that much.

"Q Did you count the money at any time that was in that drawer?
"A It was the day previous to that that grandfather counted the money.

"Q Grandfather counted the money. Did you ever count the money?
"A Grandfather, who, incidentally, is my father, counted the money on the previous day and he told me how much was there.

"DEFENSE: I ask that that part of the witness' testimony be stricken from the record and the court disregard it because she said 'My grandfather told me.'

"LAW MEMBER: The testimony of this witness as to the approximately amount of yen in the chest will be stricken from the record and the members of the court amonished [sic] not to consider that as evidence in this case."

With respect to the money Yoshisuke Otsuka testified in substance as follows: "When the drawer was opened there was some money in /it/ so the soldier took the money and left. My guess, as I saw it, would be that there was about 40,000 yen in the drawer" (R 16). The accused Smith held the money in one hand with some of the bills fanned out, and for a few moments gesticulated, shaking them in the face of Sui Furuya (R 16, 17). While the money was thus held up, Yoshisuke Otsuka saw that the hundred yen bills were on the bottom in a bundle, and the thousand yen notes were on the top; there were more thousand yen notes than hundreds (R 17, 21). He described the notes as "not too old and yet they were not new," and demonstrated to the court that the stack of bills he saw in the hand of the accused was from three-quarters to one inch thick (R 17). The witness was asked (R 18):

> "Q In your opinion what is the least amount of money among those bills?
>
> "DEFENSE: The defense objects to that. This is not an expert witness."

Continuing, Otsuka testified that while the money was so "fanned out" he could not see each piece of paper, but noted the bulk (R 18); that his estimate of the amount of yen was not based on anything any one had told him (R 19); that he had experience in handling sums of money in paying employees of "the company" over a period of three years; and that the highest amount paid by him to any one employee was about ¥ 7,000, which in fresh 100 yen notes would make a bundle half an inch thick (R 20). The Law Member then announced (R 20):

> "LAW MEMBER: The defense has an objection to a previous question of the prosecution as to the witness' opinion as to the amount of yen held in the soldier's hand. The objection of the defense to that question is sustained."

The Defense Counsel did not cross-examine the witness (R 21).

The court took judicial notice of the fact that on or about 12 September 1950 the legal rate of exchange as between yen and dollars was ¥ 360 to $1.00 (R 30).

Two days subsequent to the incident above described Smith and Sieloff made to an agent of the Criminal Investigation Detachment voluntary verbal statements admitting their complicity in the larceny (R 23-25). The agent found on the person of Smith ¥ 11,100 in thousand and hundred yen notes, and on the person of Sieloff ¥ 4,000 in thousand yen notes, which each admitted to be a part of the proceeds of the theft (R 25). The agent testified that the notes which came out of Smith's pocket were crumpled, but that Sieloff's were folded, and that the bills were not brand new, although none of them were torn (R 26).

The Criminal Investigation Detachment agent also obtained a voluntary written confession from the accused Swan (R 26-29). Upon receiving the confession in evidence the Law Member admonished the court to consider it only in so far as it concerned the accused Swan and to not consider any matter contained therein as against the other two accused (R 30). Swan's confession in pertinent part was that (Pros Ex 1):

"A. On 12 September 1950 * * * We left the hotel at about 2330 hours and went up to the laundry place. After we got there * * * went into the house. * * * About 15 minutes later * * * came out and said 'Let's take off.' We went straight up the road towards camp * * * and went to another Mama-san's house in the town and we split the money taken at the laundry.

"Q. How much money had been taken at the Laundry Shop?

"A. I don't know how much was taken.

"Q. How much did you receive for your part in the robbery?

"A. About ¥ 7,000 yen."

b. For the Defense.

After they were advised of their rights in the matter of testifying, each accused elected to remain silent (R 31).

No evidence was offered for the Defense (R 31).

4. Discussion.

All three accused pleaded guilty to the offense of stealing a sum of yen of a value of about $41.64. The record affirmatively shows that the pleas were made voluntarily. There is nothing to indicate that the pleas were entered improvidently or through lack of understanding of their meaning and effect (MCM, 1949, para 71). Therefore, the accuseds' guilt of feloniously stealing yen of a value of $50 or less and more than $20, at the time and place and in the manner alleged, is fully and completely established. In the light of the court's findings, the sole question presented by the case is -- How many yen were taken? It is our view that the competent evidence of record shows that the amount taken was as much or more than that found by the court, viz., ¥ 22,100, of a value of more than $50.00, and that the sentence embracing five years confinement at hard labor is legal.

There would have been no problem had the Law Member restrained himself. Over zealous, he did not limit his ruling to the scope of Defense Counsel's motion to strike certain of the testimony of Sui Furuya. He apparently endeavored to eliminate from the record all her testimony concerning the amount of yen, although it probably was competent in part. We do not, in this opinion, undertake to decide the correctness or extent of the Law Member's ruling. We need not consider Sui Furuya's testimony in this respect.

The testimony of the other Japanese, Yoshisuke Otsuka, is in the record and was before the court. That testimony is of probative value and stands uncontroverted. It is competent evidence of the fact that the amount of yen purloined by Smith and Sieloff was at least ¥ 22,100 and probably ¥ 40,000 or more.

Japanese paper money generally is of various sizes with distinctive coloration and typographical characteristics. Unlike American currency, different denominations of that used in Japan can readily be distinguished by the initiated. Otsuka was experienced with Japanese currency and definitely knew that a pile of ¥ 100 notes comprising ¥ 7,000 was half an inch thick. He observed in the hand of Smith a stack of Japanese bills at least three-quarters of an inch in thickness; hundred yen notes were in a separate bundle on the bottom, and thousand yen notes were on top. There were more thousand yen notes than hundreds. He asserted that he was not basing his statements as to the amount on anything some one else told him. The interpreter's translation of the witness' testimony that he "guessed" there was ¥ 40,000 in the drawer can only be taken to mean, in the light of all the circumstances, that such was his considered judgment in the matter rather than a precise count of the yen. We, therefore, are of the opinion that the testimony of this witness amply established beyond any reasonable doubt that the yen taken by the accused was ¥ 22,100 or more.

We advert to the possibility that the court erred in considering the statements of Smith, Sieloff and Swan in arriving at the amount of yen set out in its findings, to wit, ¥ 22,100. It is obvious that the court computed the ¥ 22,100 by simply totalling the sums of yen found in the possession of Smith and Sieloff and mentioned in the confession of Swan, thus:

Smith	¥ 11,100
Sieloff	4,000
Swan	7,000
TOTAL	¥ 22,100

(¥ 22,100 converts to $61.40.)

When Swan's confession was received in evidence, the Law Member instructed the court that Swan's statement should be considered only as against him. This instruction was correct, and accepting the statement as evidence on the general issue of Swan's guilt was proper (CM 230070, Henry, et al, 17 BR 291; CM 239239, Mitchell, et al, 25 BR 93, 112; CM 252439, Peros, et al, 34 BR 55; CM 337951, Lawrence, et al, 5 BR-JC 395, 419).

Smith and Sieloff each stated individually to the Criminal Investigation Detachment agent that the yen found in their possession came from the proceeds of the larceny. Other than these admissions there was no proof whatsoever that the money in the possession of Smith and Sieloff was the fruit of the larceny. In his written confession Swan stated that his share was "about ¥ 7,000." Accordingly, identical legal reasoning controls the determination of whether these respective statements are competent evidence of the total amount involved in the theft committed by the three accused.

It is a general rule of law that statements of a conspirator or co-actor made after the common design is accomplished or abandoned are not admissible against the others (E.g., Logan v. U.S., 144 U.S. 263, 36 L. Ed. 429; Brown v. U.S., 150 U.S. 93, 37 L. Ed. 1010; Anderson v. U.S., 318 U.S. 350, 87 L. Ed. 829; Fiswick v. U.S., 329 U.S. 211, 91 L. Ed. 196; Gambino v. U.S., 108 F 2d 140 (3d Cir. Pa.); CM 214637, Bullington, et al, 10 BR 371; CM 252439, Peros, et al, supra; CM 275792, Blair, et al, 48 BR 151; CM 277983, Robinson, et al, 51 BR 281; CM 337951, Lawrence, et al, supra; MCM, 1949, subpara 127b). Did the court unjustifiably contravene this rule? We think not! In reaching the conclusion that Smith was guilty of stealing ¥ 22,100 the court did not err in considering the statements of Sieloff and Swan, nor did it err similarly in its conviction of Sieloff and Swan.

In the civil courts two exceptions to the general principle mentioned above are as well established as the rule itself. The first, as stated by Wigmore, is (IV Wigmore, Evidence (3d Ed.), sec. 1079 (c), p. 133, and cases cited in ftnte 5):

> "That the confession of a principal is admissible, on the trial of the accessory, to evidence the commission of the crime by the principal, seems clear on the present principle, supposing some evidence of the defendant's co-operation to be first furnished."

The second is where, in a prosecution for receiving stolen property, the confession of the thief, made out of court, that he had stolen the property and had sold it to the accused, in whose possession it was found,

is admissible to prove that the property was stolen, although not admissible to prove that the accused was the receiver of the stolen property (Hoyt v. State, 88 Tex. Cr. R. 612, 228 S.W. 936; Donegan v. State, 89 Tex. Cr. R. 105, 229 S.W. 857; Pine v. State, 134 Tex. Cr. R. 396, 115 S.W. 2d 918)..

Boards of Review have expressed themselves as not inclined to permit the application of these exceptions as indicated by their holdings in CM 325056, Balucanag, 74 BR 67 and CM 266734, Murphy, et al, 43 BR 301. In the Balucanag case, supra, however, the inculpatory statement of the alleged principal was shown to be untrustworthy, and the Board there relied principally upon Kirby v. United States, 174 U.S. 47, 43 L. Ed. 890, which in our view is authority only for the limited proposition that a statute, making the judgment of conviction of a principal in embezzlement or larceny conclusive evidence of the fact of embezzlement or larceny of such goods, is unconstitutional. The Board in the Murphy case, supra, announced its holding without citation of authority.

We believe that the reasons for any legal principle must be examined in order to apply with discrimination and in proper perspective the resulting principle, and when the reason is not present in a given case the rule should permit of exception (ETO 2297, Johnson, 6 BR ETO 291, 307).

The reason for the general rule alluded to above may be seen by scrutinizing some of the decided cases in which it has been applied.

In Fiswick v. United States, supra, three defendants were convicted for violating the alien registration act in that they conspired to conceal their membership in the Nazi party. In statements made after their arrest each said that he had concealed his membership at the instance of the others. The court held that the admissions of each were improperly received in evidence as against the others.

Anderson v. United States, supra, involved a conspiracy to injure property of a corporation in which the United States was a stockholder. Confessions of six defendants were received, without complete limiting instructions by the trial court. Each confession was inculpatory of one or more co-defendants. The Supreme Court reversed.

In Brown v. United States, supra, the defendant was convicted of murder. The trial court admitted testimony of a witness that the morning after the homicide a Mrs. Hitchcock had made statements indicating the prior existence between herself and the defendant of a conspiracy to kill her husband (the deceased). This was held to be error.

Logan v. United States, supra, was a trial on an indictment for conspiracy to injure and suppress citizens and to murder. The Supreme Court held that it was error to receive evidence of third person's statements made after the affray to the effect that Logan had been present thereat.

In CM 210985, Bonner, et al, 10 BR 383, Bonner, Judd and Riley were convicted of larceny of a suit of clothes. A witness testified as to oral statements made by each accused after the theft. Bonner admitted that he sold the suit; that he divided the proceeds three ways; that he had given Judd $1.50; and that he was not stating who the third party was. The Board of Review held that receiving this evidence as against Judd and Riley was error, fatal as to Riley because of the lack of other compelling evidence against him, but not fatal as to Judd.

CM 214637, Bullington, et al, 10 BR 371, involved the joint larceny and sale of a ham. The confessions of Bullington and Yates made after the theft and sale included statements that Marschall participated therein. The Board held that the receipt in evidence of the confessions, so far as they implicated Marschall, was fatal error, since the other evidence against him was not compelling.

In CM 267878, Lumpkins, et al, 44 BR 149, several accused were found guilty of the offenses of joining in a mutiny and of rioting. Confessions of some accused inculpating others were received in evidence without appropriate instructions. The Board held this to be error, but not fatal because of the ample and compelling independent evidence.

In CM 275792, Blair, et al, supra, four accused were found guilty of wrongfully taking and using an automobile. The only evidence implicating the accused McConnell consisted of inculpatory remarks as to him in the confessions of the other three accused. His sentence was disapproved.

In CM 277983, Robinson, et al, supra, the Board held the finding of guilty of one specification as to accused Pompili not supported by the evidence. The specification involved the taking of a jeep, and the only thing connecting Pompili therewith was a remark inculpating Pompili in the confessions of two co-accused.

On the facts of the foregoing cases, and of innumerable others in the State and Federal Courts and before the Boards of Review, it is apparent that the reason underlying the general principle under discussion is that where the evidence is untrustworthy and not entitled to belief it is excluded. A statement of a co-actor made after termination of the

common design implicating another is not binding on the other since the relationship of an agent to his principal (or co-conspirator to fellow conspirator) has then ended. A statement made at that time is one out of court, not under oath, and the person from whom it emanated was not subject to cross-examination. Moreover, a statement of an individual casting blame upon another is not regarded as reliable. It is expected that an individual might lie to exculpate himself and show another guilty. In the absence of the classic safeguards, such a statement is not credible evidence, unless other conditions convincing of verity and truth are present.

On the contrary, as epitomized by the mentioned exceptions, the confession of one inculpatory of himself has been accepted as competent evidence, even though not in court, not under oath, and not subject to cross-examination, because it is against his own self interest, and the necessity is dictated by the fact that he cannot be forced to testify as a witness (Hines v. Commonwealth, 136 Va. 728, 117 S.E. 843). This premise is based on the manifest tendency of human nature to place one's own life and freedom above that of others (Accord, CM 267651, Boswell, 44 BR 35, 43). A sufficient assurance of truthfulness is found in the statement's harmful effect against the one making it. It is entitled to belief on the common judgment of mankind that an individual will not implicate himself unless he speaks the truth.

In discussing the principles of the exceptions to the hearsay rule Wigmore says (V Wigmore, Evidence (3d Ed.), sec. 1422, p. 204):

> "* * * under certain circumstances the probability of accuracy and trustworthiness of statement is practically sufficient, if not quite equivalent to that of statements tested in the conventional manner. This circumstantial probability of trustworthiness is found in a variety of circumstances sanctioned by judicial practice; * * *. There is no comprehensive attempt to secure uniformity in the degree of trustworthiness which these circumstances presuppose. It is merely that common sense and experience have from time to time pointed them out as practically adequate substitutes for the ordinary test, at least, in view of the necessity of the situation."

It is noteworthy that evidence of the kind here considered generally has been accorded probative value where it bears on a collateral matter and does not relate directly to the general issue

of guilt or innocence. The court in Mulligan v. People, 68 Colo. 17, 189 P. 5, 9, exemplifying the admissibility of such evidence on an ancillary question, said:

> "* * * whatever evidence is competent to determine the guilt of the principal is competent upon the trial of the accessory."

So, in the case at bar there is not the slightest doubt as to the general issue. The possibility that the accused were innocent is precluded by their pleas of guilty. The record presents a situation where the accused are jointly charged with stealing. In a joint and common venture they perpetrated the larceny of the currency of Sui Furuya. It is fully established that a substantial sum of Japanese money was taken. It is uncontradicted that of the proceeds of the theft, ¥ 11,100 finally lodged in the possession of Smith, ¥ 4,000 in the possession of Sieloff, and ¥ 7,000 in the possession of Swan. It is clear beyond peradventure that these three amounts of yen were all separate portions of the whole amount stolen. Fully competent, trustworthy, and entitled to belief is the evidence that of the whole amount stolen each accused received a part. In their respective statements as placed before the court each accused inculpates only himself in respect of how much he received. That each one's admission was against his individual self interest is adequate guarantee of its truth.

The Board feels impelled to consider the evidence in all its separate components, each of which is inextricably bound up with, and a part of, the whole. Pieced together, the increments inescapably show that combined action culminated in a single joint crime. The cumulative and total effect of all the evidence compels the conclusion that the three accused together committed one theft of property having a value of more than $50.00.

6. For the foregoing reasons the Board of Review holds the record of trial to be legally sufficient to support the findings of guilty and the sentence.

Chas. L. Young, J.A.G.C.

[illegible], J.A.G.C.

[illegible], J.A.G.C.

(340)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

Board of Review

CM 344787

MAR 19 1951

UNITED STATES v. Private ROBERT J. SWAN (RA 19315898), Recruits EARL H. SIELOFF (RA 16247568) and ROBERT E. SMITH (RA 18319708), all of Headquarters Detachment, Special Troops, Yokohama Command, APO 503	YOKOHAMA COMMAND Trial by GCM, convened at Yokohama, Honshu, Japan, 4 January 1951. As to each accused: Dishonorable discharge, total forfeitures after promulgation and confinement for five (5) years. Federal Institution.

HOLDING by the BOARD OF REVIEW
YOUNG, MICKEL and MOBERLEY
Officers of the Judge Advocate General's Corps

The record of trial in the case of the soldiers named above has been examined and is held by the Board of Review to be legally sufficient to support the findings of guilty and the sentences.

, J.A.G.C.

, J.A.G.C.

, J.A.G.C.

JAGE CM 344787 1st Indorsement

JAGO, SS USA, Washington 25, D. C. APR 5 1951

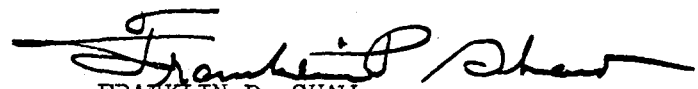
TO: Chairman, the Judicial Council, Office of The Judge Advocate General

In the case of Private Robert J. Swan (RA 19315898), Recruits Earl H. Sieloff (RA 16247568) and Robert E. Smith (RA 18319708), all of Headquarters Detachment, Special Troops, Yokohama Command, APO 503, The Judge

JAGE CM 344787

Advocate General has not concurred in the holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentences. Pursuant to Article of War 50e(2) the holding and record of trial are accordingly transmitted to the Judicial Council for appropriate action. Participation by The Judge Advocate General in the confirming action is required.

FOR THE JUDGE ADVOCATE GENERAL:



FRANKLIN P. SHAW
Major General, USA
The Assistant Judge Advocate General

2 Incls
1. Record of trial
2. LH by B/R of legal sufficiency

(342)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGU CM 344787

UNITED STATES v. Private ROBERT J. SWAN, RA 19315898, and Recruits EARL H. SIELOFF, RA 16247568, and ROBERT E. SMITH, RA 18319708, all of Headquarters Detachment, Special Troops, Yokohama Command, APO 503	YOKOHAMA COMMAND Trial by G.C.M., convened at Yokohama, Honshu, Japan, 4 January 1951. EACH: Dishonorable discharge, total forfeitures after promulgation and confinement for five years. Federal Institution.

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Opinion of the Judicial Council
Harbaugh, Brown and Schindler
Officers of The Judge Advocate General's Corps

- - - - - - - - - - -

1. Pursuant to Article of War 50e(2) the record of trial and the holding by the Board of Review in the case of the soldiers named above have been submitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon joint trial by general court-martial the accused were charged with the joint larceny of approximately 30,000 to 40,000 yen, property of Sui Furuya, value of approximately $100.00, at or in the vicinity of Gotemba, Honshu, Japan, on or about 12 September 1950, in violation of Article of War 93. Each accused pleaded guilty, substituting 15,000 yen and $41.64, respectively, for the amounts of yen and dollars alleged. Each was found guilty of the joint larceny of 22,100 yen, value of more than $50.00, under the circumstances alleged. Evidence was introduced of previous convictions as follows: two as to Swan, three as to Sieloff, and five as to Smith. The reviewing authority, as to each accused, approved the sentence, designated a United States penitentiary, reformatory or other such institution as the place of confinement, and forwarded the record of trial for action under Article of War 50e. The Board of Review has held the record of trial legally sufficient to support the findings of guilty and the sentences. The Judge Advocate General has not concurred in the Board's holding. There have been transmitted with the record of trial and allied papers a supplemental holding and a memorandum by the Board of Review in support of its conclusions.

3. The record of trial, including the pleas of guilty with exceptions and substitutions, establishes the commission by the three accused of the joint larceny of at least approximately 15,000 yen, of the exchange value of approximately $41.64, under the circumstances alleged. The only question is whether the evidence is sufficient to establish the larceny of 22,100 yen, of the exchange value of over $50.00, as found by the court. In our view, the three accused's pretrial statements, considering each only against its maker, and the testimony of the Japanese witness Yoshisuke Otsuka constitute a sufficient basis for the court's findings as to value.

The evidence shows that on 14 September 1950, two days after the night of the larceny, during the interrogation of the accused Sieloff and Smith by an agent of the 44th Criminal Investigation Detachment, 4,000 yen were discovered on Sieloff's person and 11,100 yen on Smith's person (R 22-25). Each "admitted the robbery" (R 24), Sieloff stating "that the yen came from the incident that took place the night of the 12th" and Smith stating "that the yen had come from the proceeds of" that incident (R 25). In his written pretrial statement of 14 September (R 29-30; Pros Ex 1) the accused Swan stated in effect that after he acted as a lookout at "the laundry place," he and others "split the money taken at the laundry," Swan receiving about 7,000 yen for his part in the "robbery."

Yoshisuke Otsuka, a "newspaperman," testified substantially as follows. His "guess" would be that at the time of the larceny there was about 40,000 yen in the owner's drawer. The "thinner soldier" (Smith (R 14)) removed this money and held it in his hand (R 16). The witness indicated that the bundle of bills, neither "too old" nor new, was between three-quarters of an inch and an inch in thickness, although since they were "fanned out" he could not give "the true thickness." On the bottom were hundred-yen bills and on the top were thousand-yen bills (R 17). The witness believed at the time that there were more thousand-yen bills than hundred-yen bills in the bundle (R 21). His estimate of the number of yen could not be based upon anything anyone told him (R 19). For the past three years he had handled money when paying about eight employees monthly. The highest amount he paid to any employee was about 7,000 yen. The witness indicated that a bundle of 7,000 yen in "fresh" hundred-yen bills would be about a half-inch in thickness, but testified that "it differs with fresh bills and old bills" (R 18, 20).

4. It appears from the accused's statements that each admitted his participation in the larceny of an amount substantially greater than his own share thereof. Although Otsuka initially characterized his estimate of "about 40,000 yen" as a "guess," his subsequent testimony demonstrates that the estimate was based upon his observation of the bills in question and his experience in handling such currency and was therefore competent evidence (MCM 1949, par 125b, p 153). If, as he in effect testified, seventy new one-hundred-yen bills would make a bundle a half-inch thick,

the court, in our opinion, was warranted in concluding that a bundle of bills, over half of which were of thousand-yen denomination, of the total thickness of at least three-quarters of an inch, would contain substantially in excess of 22,100 yen. This conclusion would be justified even allowing for slight variations in thickness due to the age and denomination of the bills in question. In our opinion, the accused's admissions considered only as against each individually, together with Otsuka's testimony considered in the light of the court's judicial knowledge of the physical characteristics of Japanese currency, furnished an adequate basis for the findings as to value.

In view of our conclusion, it is unnecessary to consider the other points adverted to by the Board of Review in its supplemental holding and its memorandum; particularly the question whether the pretrial statement of each accused as to his own share of the proceeds might properly be considered against the other two accused in determining the aggregate value of the yen jointly stolen by all.

5. In view of the foregoing, the Judicial Council is of the opinion that the record of trial is legally sufficient as to each accused to support the findings of guilty and the sentence and to warrant confirmation thereof. A sentence to dishonorable discharge, total forfeitures after promulgation and confinement at hard labor for five years in a United States penitentiary is authorized upon conviction of larceny of property more than $50.00 in value (D.C. Code, sec 22-2201; MCM 1949, par 117c, p 137).

Robert W. Brown
Robert W. Brown, Brig Gen, JAGC

Irvin Schindler
Irvin Schindler, Colonel, JAGC

J. L. Harbaugh, Jr.
J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

Harbaugh, Brown and Schindler
Officers of The Judge Advocate General's Corps

In the foregoing case of Private Robert J. Swan, RA 19315898, Recruits Earl H. Sieloff, RA 16247568, and Robert E. Smith, RA 18319708, all of Headquarters Detachment, Special Troops, Yokohama Command, APO 503, upon the concurrence of The Judge Advocate General the sentence as to each accused is confirmed and will be carried into execution. A United States Penitentiary is designated as the place of confinement of each accused.

Robert W. Brown
Robert W. Brown, Brig Gen, JAGC

Irvin Schindler
Irvin Schindler, Colonel, JAGC

J. L. Harbaugh, Jr.
J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action.

Franklin P. Shaw
FRANKLIN P. SHAW
Major General, USA
Acting The Judge Advocate General

23 April, 1951

(GCMO 47, 3 May 1951).

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

(317)

JAGK - CM 344821

MAR 2 3 1951

UNITED STATES	)	YOKOHAMA COMMAND
	)	
v.	)	Trial by G.C.M., convened at Yokohama, Honshu, Japan, 18,21 and 22 December 1950. Dishonorable discharge, total forfeitures after promulgation, and confinement for life.
	)	
Corporal GEORGE E. WERKOWSKI (RA 16246454), 604th Ordnance Base Small Arms Maintenance Company, APO 712	)	

OPINION of the BOARD OF REVIEW
BARKIN, WOLF and LYNCH
Officers of The Judge Advocate General's Corps

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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 Judicial Council and The Judge Advocate General.

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Corporal George E. Werkowski, 604th Ordnance Base Small Arms Maintenance Company, did, at Tokyo, Honshu, Japan, on or about 17 August 1950, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill Toyono Hashimoto, alias Michiko Takagi, a human being, by shooting her with a pistol.

He pleaded not guilty to and was found guilty of the charge and specification. Evidence of one previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence

a. For the Prosecution

Sergeant Warren H. Singleton, Headquarters and Service Company, 610th Ordnance Base Armament Depot, had known accused since March 1949. From February 1950 to the end of July 1950, Singleton had known a girl named Toyono Hashimoto, also known as Michiko Takagi. During the first three months Singleton was keeping company with the girl, accused was also keeping company with her. Singleton and accused had words about the girl and accused told Singleton "if he ever saw /Singleton/ near the house again he would knock /Singleton's/ block off." After their first encounter, Singleton stayed away for three weeks. He saw her several times and she urged him to come back. On the first of August Singleton talked with accused and it was agreed that accused would have a "clear field." The last time Singleton saw the girl was in August (R 155-158).

In August 1950, accused was working on the firing range helping to do the functional firing for small arms. Accused had access to such arms. He had been working on the range for about a month and a half and in the ten days prior to the sixteenth of August the men were working a 12-hour day and the work was very tiring. At about 0035 hours, 17 August 1950, accused was relieved at the range by Sergeant Robert C. Blazer. At the time, the two had a conversation which accused seemed to understand. Blazer did not observe anything unusual in accused's demeanor. He was close enough to smell accused's breath and did not smell anything unusual (R 25-26).

On cross-examination Blazer testified that in off duty hours he played baseball with accused and at times in a game would observe accused "just get mad" and throw his glove down (R 27).

At about 0100 hours, 17 August 1950, Haruo Deguchi, a driver for the Tokyo Ordnance Depot, delivered a load of rifles to the range. Accused directed him to pick up another load of rifles. En route back to "the small arms" accused rode with Deguchi a short distance from the range (R 123-125).

At about 0330 hours, 17 August 1950, Sergeant Rudolph P. Mott, 604th Ordnance Base Small Arms Maintenance Company, who was on duty as "CQ" at the Post Security Office received a telephone call from accused whose voice he recognized. Accused told Sergeant Mott that he thought he had killed a Japanese girl in the Jujo area. Upon learning from accused where he was, Mott picked him up and was directed by accused to the scene of the shooting. The body was found near a high board fence on the side of a small narrow road in the Jujo area. Mott examined the body, saw that it was bloody and "couldn't see any breathing." Accused was nervous and upset and was talking. Mott, however, could not quite understand what was being said by accused as he was "pretty nervous" at the time. Mott returned to the Security Office with accused, called the 23rd Criminal Investigation Division in Tokyo, and reported the incident to

Captain Mooney, the officer of the day. Accompanied by Captain Mooney and a guard, Mott returned to the scene (R 13-16). In the meantime, accused remained at the Security Office guarded by Corporal Leslie Kloosterman. Accused was nervous, kept moving around in his chair and putting his face in his hands, and got up frequently to get a drink. During the half hour that Kloosterman was guarding accused in the Security Office he did not question him, and all that accused said was, "I don't see why I didn't shoot myself, I had enough bullets left" (R 21-22).

Mott returned to the Security Office, where later Robert J. Patterson, CID agent, appeared. Patterson identified himself to Mott and asked Mott what had happened. Accused interrupted and stated that at approximately "one o'clock in the morning *** he *** concealed a .45 caliber pistol in his fatigue clothing, gone to his girl's house, asked her to go for a walk with him, talked to her for some time and asked her to back up against the fence and shot her" (R 30). Mott, Kloosterman, Patterson and accused went to the scene (R 15-16,31). Here, Kloosterman heard accused say that "While he was working he thought of what she might be doing at that time" (R 21). Near the body were found "four pieces of brass, .45 caliber cartridge cases." At this juncture, accused volunteered the information that as he was running from the scene he accidentally discharged the pistol a fifth time and threw the pistol down. According to accused, there was a round left in the pistol, and he expressed concern lest somebody should pick it up, discharge it accidentally, and hurt himself (R 127). Accused led Patterson approximately 100 yards from the body where was found a magazine with one round lying beside it, and a short distance further was found the ".45" (R 16,32). At this time, Patterson had accused returned to the company for breakfast. At 0930 hours, accused was brought to the "23d CID" office where he was interviewed by Patterson. Patterson prefaced the interview by reading the 24th Article of War to accused, after which accused read the Article and then assured Patterson that he understood his rights thereunder. Accused then wrote out a statement and signed it in Patterson's presence. The statement was not induced by promise of reward or of immunity, or threats of the infliction of bodily harm (R 33-34). Prosecution Exhibit 4 was identified as the statement made by accused and was admitted in evidence over objection by the defense (R 146).

In the statement, accused related that on the evening of 16 August while at the firing range at Kanto he was thinking "of home, this girl Michiko, and so forth." He lay on a cot until about midnight when he got up and "sort of looked around as if [he] was daydreaming or something of the sort." He smoked a few cigarettes, went to get a drink of water, and obtained a pistol. His mind was all "messed up" when he took the pistol. He would pick the pistol up and lay it down. After some equivocation he loaded the pistol with seven rounds of ammunition,

and put three extra rounds in his pocket. At the time, accused was shaking like a leaf and was "sort of shivering and sweating a lot." Finally, he put the "fully loaded pistol inside /his/ fatigue belt," went to the sergeant and was relieved from duty. He was given a ride to "this girl's house," and waited outside. It was about 0115 hours. She knew he was there and asked him what he wanted. She could not understand why he wanted to go walking at that hour in the morning. His narrative continues as follows:

> "*** I told her I wanted to talk to her, I was lonesome, and so forth. At this time the thought of doing anything harmful sort of eased away from my mind. We walked slowly. Then I showed her the pistol. She couldn't figure it out; she thought I was going to get somebody else. I told her not to worry about it. It was bothering me both inside and in my mind. I would say we walked for about forty-five minutes, 0200 AM. Of course, we would stop and talk awhile or sit down; we were walking arm in arm, talking about everything. She was crying a couple of times because she knew whatever I was up to was no good for either of us. After awhile of this walking and talking she showed me a spot where we could relax for awhile. So we relaxed there, and this is when a million things started running through my mind, just like it did earlier in the evening. You see, I had a lot of trust in this girl, too much, in fact, that it hurt my heart. I was crazy about her, but I wasn't jealous of her. I told her if she ever didn't want to see me anymore all she had to do was to let me know and we'd call it quits; but she always said she wouldn't leave me unless I went home or something of the sort. I just didn't or couldn't believe her. I always felt she was keeping something from me, but I couldn't get it out of her, because she always said she just cared for me. Somehow I must have thought that down deep in her heart she was laughing at me by telling me how faithful she was to me. I don't know, but that is the conclusion I came across. Even then, sitting there, I couldn't force myself into thinking of committing a harmful act. We sat there until about 0300. Of course, she kept asking me who I was after and so forth. She asked me once to go to her room until morning. Then we could or should run away together. She didn't want me to go back to camp. Instead she wanted us both to take a powder. I told her I wasn't running away from anything, so she didn't say any more, but she was crying occasionally.
>
> "Well, we got to this scene of the incident. I just stood there with my arms around her, and she layed her head on my chest. I guess our brains were doing a lot of thinking then. I would say it was about 0325 when she was standing there against the

fence when all of a sudden I pulled out the pistol and in a nightmare action like pulled the slide back. I heard her say, 'No, George', but my mind or something went blank because before I knew it I shot her while she was falling. Then I ran like a madman. I didn't know what to do. I didn't know how many shots I fired either. About half a block or so I got rid of the weapon and magazine. Then I headed for the company. I was shaking and sweating very much. I got my clothes off and tried to sleep, but it wasn't any use. My conscience was working on me, so about 0400 I went down to the CQ room and called up Security and told Corporal Mott what happened." (R 51-52)

4. Sanity

a. For the Defense

The defense objected to the admission of a pretrial written statement of accused in evidence on the ground that accused was insane at the time of its making. The evidence adduced by both sides, however, in fact, pertained to the issue of accused's sanity at the time of the offense alleged.

The defense testimony pertaining to the issue of sanity is summarized as follows:

Corporal George A. Morgan had known accused since January 1949 and had "ran around with him quite a bit." Morgan had seen accused walk out of a ball game in which he was pitching because the batter got a hit off him. On another occasion when accused was playing the outfield he made no attempt to field a ball hit to his territory, but threw his glove down, watched the ball go over his head, and then walked off the field (R 109).

Other activities of accused observed by Morgan involved accused's purchase of chickens, walking along the street with them under his arm, and his giving them away to some Japanese personnel; his taking of watermelons from a fruit stand and then throwing them on the ground, putting grapes with the melons and then mixing them with his feet; his putting his fist through the wall of a Japanese home where he and Morgan were visiting two Japanese girls, and when food in the mess hall was not to accused's liking his mixing it with his hands, piling it on his tray and walking out of the mess hall. Based upon the foregoing incidents, and the incident giving rise to trial, Morgan was of the opinion that accused was "subnormal" (R 110-112,116).

Private First Class Eugene Wigranowski, Jr., who had been acquainted

with accused for 15 to 18 months observed the same baseball and dining hall behavior of accused as that related by Morgan. Wigranowski, on one occasion at the Enlisted Men's Club, saw accused fall over backwards in a chair, get up and reseat himself, say nothing for five or ten minutes, and then ask what time it was. Wigranowski also related that one night when accused came in from work he threw a soap box on the floor breaking it up, then walked to the window and threw it out; he started laughing and laughed "so hard he laid down on his bunk and *** laughed till he laughed himself out." When Wigranowski asked, "What did you do that for?" accused merely laughed and walked off. From his association with accused, Wigranowski formed the opinion he was "off-balance sometimes" (R 118-120).

Although the defense objected to the admission of accused's pre-trial statement in evidence on the issue of guilt or innocence, it insisted that the members of the court read the statement in its determination of the issue of sanity (R 101-102).

Doctor Shichikuro Uematsu, professor of psychiatry at Keio University Medical School, testified that he graduated from the Medical Department of the Tokyo Imperial University and pursued the fields of psychiatry and neurology at Harvard University from 1918 to 1922. Upon his return in the latter year to Japan he engaged in the practice and continued his study of psychiatry, and presently is the superintendent of an institution for the insane (R 45-47).

Accused was examined by Doctor Uematsu for approximately an hour and a half on 20 December 1950. Accused's history as obtained by Doctor Uematsu shows that accused's sister, presently 21 years of age, had fits of convulsion when she was 8 to 10 years of age. Accused, at the age of 12 or 13, was struck a heavy blow on his head with a baseball bat. Although there are no visible scars from the blow, accused "suffers from severe headache paroxysmally." His bizarre conduct is characteristic of "epileptic patients" (R 48).

With reference to accused's mental state on 16 August, Doctor Uematsu testified that accused -

> "*** was very much tired and restless, having headaches mentioned above, and when he layed down in his army cot, many things went through his mind: his home, his girl, etc. When he got up at about 2400 he felt himself 'as if he was day-dreaming,' staring in the dark for awhile. This statement made by Werkowski corresponds to the emotional disturbances and dreamy state or twilight state of epileptics. In the former, patient tends to become morose, suspicious, irritable, and querulous; while in the latter he passes into a peculiar dream-like state which persists for several hours or days,

during which crimes of violence are often committed. He tells me he has had attacks above-mentioned two to three or more times a month." (R 48-49)

Accused's weaving and shivering when he was taking the pistol is technically known as "epileptic furore." Accused's "nightmare action like" when "he pulled out the pistol" followed by his mind going "blank" when "he shot her" was symptomatic of "the dreamy state and emotional disturbances of epileptic nature continuing from the earlier evening." Based upon his examination of accused, accused's history, his bizarre conduct substantially as related by Morgan and Wigranowski, his pretrial written statement, and the assumption that accused shot his "sweetheart" with whom he had not previously quarrelled, who had denied him nothing, whose relations at the time were as they had been for several weeks prior, and who was shot under the circumstances outlined by accused in his pretrial statement, Doctor Uematsu found that at "the time of the incident" accused's mental condition was not normal (R 49-52). His diagnosis of accused's mental condition and basis therefor follow:

"Looking at his family history, it is quite clear that this patient, the accused, has tendencies or shows signs of being troubled with epileptic fits. That can be said considering the various facts of my statement and also the fact that on several occasions he broke, for no apparent reason, several panes of window glass; and also from the point of him picking up or bringing back live chickens and for, again, no apparent reason, pass it on to some stranger. And, also, I would like to add something to my statement which was not included in it at the time that it was read. He showed another very strange trait of being bothered with epileptic fits because I understand that for a few seconds' intervals daily he has fits that cause him to become absent-minded and loses his senses altogether. And another point I would like to stress is that when he drinks various types of liquor he becomes very quarrelsome and does not remember or has no memory of his actions during those stages at a later time. Those facts tend to make me believe that he is not suffering from epileptic seizures physically but that he is under some mental-psycho epilepsy or psycho-motor." (R 52)

Doctor Uematsu expressed substantial accord with an excerpt from "Insanity and Law" by Doctors Singer and Krohn, wherein the phenomena of "epileptic furor" is described as "a sudden - apparently unmotived - outburst of emotion, often of great violence and short duration, in which the patient may react with blind fury, striking and smashing anyone or anything that gets in his way." The excerpt further prescribes

the points to be stressed in making a diagnosis of epileptic furor as follows:

> "*** the points to be stressed are: a definite history of epileptic seizures; abrupt onset; lack of plan and usually lack of motive, though the latter may sometimes appear to be present when the victim happens to be someone against whom the epileptic had a grudge; absolute lack of consideration for self or consequences and complete amnesia afterward. In this last point, which may of course be simulated, it is important that the subsequent acts are in accord with a real absence of memory; there is no effort to avoid or escape the consequences and the man goes about his business as if nothing had happened. Frequently there is a prolonged sleep and severe headache immediately after the attack."(R 59-60)

Doctor Uematsu added that to get the true diagnosis of an epileptic patient the past history of the patient must be thoroughly looked into (R 61).

From the evening prior to the incident until "the time of the incident or a little thereafter" in Doctor Uematsu's opinion, accused was so mentally disturbed as to be experiencing "a periodic state of insanity," and that at the time of the shooting accused was not so far free from mental defect, disease or derangement as to be able concerning the shooting to distinguish right from wrong (R 53,64).

Upon cross-examination, Doctor Uematsu admitted that his opinion was based upon what he was told by accused (R 54).

b. For the Prosecution

Lieutenant Colonel Oswald M. Weaver, neuropsychiatrist at the 361st Station Hospital, received his medical training at the University of Virginia, graduating in 1936. He interned for two years at the Duvall County Hospital, Jacksonville, Florida. For two and a half years he was on the staff of the Lynchburg State Hospital, a mental hospital for epileptics and feeble minded persons, following which he came into the Army. In the Army, he has served as neuropsychiatrist at various installations and completed three years of formal residency training in neuropsychiatry in December 1949. Subsequently he served as Chief of the Out-Patient and Consultation Service at Fitzsimmons General Hospital for a six months period and then joined the staff of the 361st Station Hospital (R 66-67).

Colonel Weaver related that accused had two admissions to the 361st

Station Hospital, the first on 22 August 1950, and the second on 31 October 1950. The latter admission terminated on 9 December 1950. Both admissions were for the purpose of examination and observation for possible mental disease. During the two periods of hospitalization accused was examined for mental disease by at least three doctors and Colonel Weaver studied the report submitted by those doctors. Colonel Weaver examined accused on at least two occasions and also studied the reports submitted on accused. Colonel Weaver identified Prosecution Exhibit 3 as the hospitalization records on accused forhis two periods of hospitalization at the 361st Station Hospital and testified that the entries therein comprising the clinical records are made in the regular course of business. Colonel Weaver was also a member of a board appointed to determine the sanity of accused, and took part in the board proceedings. Based upon "[his] examination, [on] examinations done during the period of hospitalization, and also from information obtained both from [accused] and from other sources," Colonel Weaver was of the opinion that accused "is sane, that he was sane at the time of the alleged act, that [at the time of the incident] he [was] so far free from mental disease, defect, or derangement as to be able to distinguish right from wrong and to adhere to the right." In attaining this conclusion, Colonel Weaver considered a written statement of accused made several hours after the incident, that as "a youngster" accused was struck on the head while playing baseball, and that accused's sister was an epileptic. There was nothing in accused's statement which led Colonel Weaver to conclude that accused was an epileptic or in an epileptic state at the time the act was committed. That a person prior to an act of violence breaks out in a state of nervousness and sweat would not indicate to Colonel Weaver that the person was suffering from epilepsy (R 67-73).

Upon cross-examination, Colonel Weaver admitted that incidents of bizarre conduct on the part of accused as related by Morgan and Wigranowski were not brought out before the board, but the board was aware that accused experienced bursts of temper, and that these merely indicated emotional outbursts. Upon interview with accused, Colonel Weaver became aware that accused did not remember many of the details related in his statement. Such a memory lapse is always of significance in the diagnosis of mental conditions. In this instance Colonel Weaver discounted the memory lapse because the amnesia connected with an epileptic attack is a complete amnesia, and the memory lapse appeared to Colonel Weaver to be simulated, the simulated amnesia being what a layman would feel would be acceptable to a court. Colonel Weaver saw an interpretation of brain waves of accused. Ordinarily brain waves will indicate the existence of an epileptic condition. However, experience shows that 15% of the population will have brain waves symptomatic of epilepsy and yet not be epileptic (R 73-79).

Colonel Weaver indicated his agreement with the excerpt from "Insanity and Law" set forth at page 8 of this opinion (R 77).

Upon examination by the court, Colonel Weaver stated that knowledge of accused's bizarre conduct as otherwise established would not have resulted in a change in his opinion that at the time of the shooting accused was not suffering from psychomotor seizures, was not in a psychotic state, was not under some mental psycho-epilepsy or some psychomotor epilepsy, did not evidence any traits of epileptic fits, and did not have daily intervals when he had fits that caused him to lose his senses and be absent minded. Colonel Weaver's conclusion that accused was not subject to epileptic attacks was not premised upon accused having a partial amnesia following the incident, but upon accused having no amnesia immediately following it (R 79-80).

Lieutenant Colonel Arthur L. Hessin, Chief of the Neuropsychiatric Service at the 361st Station Hospital, testified that he graduated from the University of Toronto Medical School in 1938, and since that time, with the exception of one year of internship, has engaged in the practice of psychiatry. He served on the staffs of the Universities of Toronto and Iowa, had one year fellowships at the Mandy Institute, Toronto, and at Hartford, Connecticut; and has been in the Army eight years, during which time he has been a ward officer in psychiatry, division neuropsychiatrist, chief of the psychiatric service of Letterman General Hospital, chief of the "NP Hospital" at Valley Forge General Hospital, and has been serving in his present assignment since 16 July 1950 (R 84-85).

Colonel Hessin was a member of a board of medical officers composed of three psychiatrists, which convened on 6 September 1950, to determine the sanity of accused. Prior to the board's determination, accused was examined and studied by one of the doctors in the neuropsychiatric service and the clinical data collected by him was studied by the board. The study of the clinical data and an interview of the accused by each member of the board was the basis of the board's determination. Colonel Hessin, who interviewed the accused personally, concluded that at the time of the offense charged accused could distinguish right from wrong and could adhere to the right. According to Colonel Hessin a person suffering from psychomotor epilepsy would have no memory of anything occurring while in a psychomotor epileptic state. Assuming a medical history of accused substantially as related to Doctor Uematsu, bizarre conduct of the accused substantially as related by Morgan and Wigranowski, and considering the written pretrial statement of accused (Pros Ex 4), Colonel Hessin was of the opinion that accused was at the time of and pertaining to the shooting able to distinguish right from wrong and to adhere to the right, and that he was sane at the time he made the statement (R 85-92, 98-99).

Colonel Hessin also participated in the examination of accused at a subsequent hospitalization and personally interviewed the accused. He identified Prosecution Exhibit 3 as the clinical records of accused and the exhibit was admitted in evidence over objection by the defense (R 88,91). Included therein are a final summary dated 7 December 1950 signed by "D.A.P. Smith Capt. M.C."; an evaluation of an electroencephelogram performed upon accused; a report of neurological examination; two radiographic reports; a report of psychological testing; and an additional report signed by "DAP Smith Capt. M.C."

The final summary reflects that accused was readmitted to the hospital on 31 October despite a previous decision of a previous sanity board on 6 September 1950 that accused was sane. The summary further reflects that accused's mother died in 1936, and that until his father remarried four years later accused was in an orphanage. He served honorably in the Navy from 1943 to 1946, and enlisted in the Army in 1947. He has been serving in Japan since 1948. The report further reflects that accused admitted that on 17 August 1950 he shot and killed a Japanese girl, although he disclaimed memory of the actual shooting. The summary also states as follows:

> "*** EEG, psychological profiles, complete physical, Neurological and laboratory examinations, as well as X-rays are all negative, for any significant disease. On 1 December 1950 a sanity board met and after reviewing the whole case and interviewing the patient again decided that there was no evidence of psychiatric desease."

According to the evaluation of the electroencephelogram, the possibility of epilepsy or some type of organic brain damage was suggested by the record, although the record also suggested "a clinically assymmystomatic dysrhythmia."

The report of neurological examination reflects that accused was found to be normal neurologically, and the X-rays of the skull and lumbo-sacral spine were negative.

The report of psychological testing records the following impression:

> "Character disorder suggested by Wechsler results. Rorschach results further suggest a character disorder with schizoid traits, however, clinical observation necessary to rule out chronic schizophrenia on this test."

The additional report signed by Captain Smith is purely cumulative to the final summary.

Colonel Hessin explained that because of the equivocal electro-encephalographic record resort was had to a neurological examination in which accused was found to be normal (R 90-91). Colonel Hessin expressed his concurrence with the excerpt from "Insanity and Law" set forth at page 8 of this opinion (R 96).

5. Discussion

The evidence shows that accused was enamored with a Japanese girl, Toyono Hashimoto, also known as Michiko Takagi, to the extent that he by threat of physical force fended off at least one possible rival suitor. In the early morning hours of 17 August 1950, accused, by telephone, notified the CQ of his organization that he believed he had killed a Japanese girl and subsequently led military personnel to the dead body of a Japanese girl, who was not otherwise identified, in the Jujo area of Tokyo. At the scene four pieces of brass, residue of caliber .45 ammunition, were picked up. At 1400 hours 17 August 1950, an autopsy performed upon Toyono Hashimoto, alias Michiko Takagi, by the medical examiner of the Tokyo Medical Examiners Office showed that the deceased had sustained four bullet wounds, and that death was the result of internal hemorrhage caused by one of the lungs being punctured by a bullet. The accused's pretrial statement indicates that the female killed by him was one with whom he was intimately acquainted and that he called her Michiko. The evidence other than accused's statement shows that the offense alleged, the murder of Toyono Hashimoto, was probably committed, and from all the evidence the court could and did conclude that accused was the criminal agency.

Murder is defined as "the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse" (MCM 1949, par 179). It is apparent in the instant case that there is no legal justification or excuse for the killing. Premeditated murder is defined as "murder committed after the formation of a specific intention to kill someone and consideration of the act intended. Premeditation imports substantial, although brief, deliberation or design" (MCM 1949, supra). Such intention to kill is evidenced by accused's written pretrial statement, wherein he voices his suspicions of his victim's fidelity and thus betrays his motive for his criminal act. Otherwise, his act of firing a caliber .45 pistol at his victim at close range, sufficiently evidences his intent to kill. That the accused believed that the victim may have been sharing her affections with others than accused does not constitute legal provocation excusing malice aforethought (CM 329321, Marinez, 78 BR 11, 23-24).

If the evidence otherwise shows that accused was mentally responsible at the time of the offense, the finding of guilty of premeditated murder is sustained by the evidence.

On the issue of mental responsibility, the defense introduced in evidence the testimony of lay witnesses who gave examples of bizarre conduct of accused over a period of time and expressed the opinion that accused was not normal. The defense also presented the testimony of a qualified Japanese psychiatrist who, in the main relying upon what he was told by accused, expressed the opinion that accused suffered from psychomotor epilepsy, and that accused was in a psychomotor epileptic state at the time of the incident giving rise to the trial. By reason of his being in a psychomotor epileptic state, accused was not, concerning the homicide, able to distinguish right from wrong and to adhere to the right, but was presently sane.

Contrary conclusions were expressed by Army psychiatrists, each of whom had sat upon a board to determine the mental responsibility of accused. In attaining their conclusions the Army psychiatrists, although not cognizant at the time of their study of accused of accused's bizarre conduct as related by defense witnesses, were familiar with the clinical records of accused, had examined and interviewed him and were familiar with his written pretrial statement.

In adddition, on the issue of mental responsibility, the court had for its consideration the testimony of Sergeant Blazer, who relieved accused from duty a few hours prior to the homicide, to the effect that accused's demeanor at the time of his relief was normal. The conduct of accused in voluntarily relating to Mott his belief that he had killed a Japanese girl, his leading Mott to the scene, his return to the scene with Mott, Patterson and others, and then locating the lethal weapon some 100 yards from where his victim lay, and finally, his spontaneous utterances to Kloosterman only too clearly showed an awareness by accused of the enormity of his crime. The demeanor and conduct of accused immediately prior and subsequent to the main event under consideration as narrated by prosecution witnesses were not considered by any of the psychiatrists, but must have been most persuasive to the court in concluding that accused, at all times in issue, was sane. There was, therefore, for the court's consideration substantial competent evidence of a compelling nature justifying the finding by the court that accused was sane.

The prosecution also introduced in evidence on the issue of sanity, as records kept in the regular course of business, the clinical records pertaining to accused made during his periods of hospitalization at the 361st Station Hospital. Hospital records as such are not without the scope of the shop book rule as set forth in paragraph 130c, Manual for Courts-Martial, U.S. Army, 1949. Entries of opinion therein are not, however, within the scope of the rule and constitute hearsay (CM 329968, Mowell and Otwell, 78 BR 205, 207-208). We find it unnecessary, however, to discuss the competency of the various entries in the hospital records

under the business entry or official records exceptions to the hearsay rule, since we find that the hospital records are otherwise competent. The context of the testimony of the two Army psychiatrists indicates that their opinions that accused was sane at the times in issue were predicated in part upon the hospital records which included expert opinions of the mental status of the accused. Formerly, an opinion of an expert based upon the opinions of other experts was held to be incompetent (Laughlin v. Christenson, 1 F. 2d 215; Corrigan v. U.S., 82 F. 2d 106). A contrary rule has been enunciated in United States v. Cannon, 116 F. 2d 567, wherein it appears that the expert opinions relied upon by the testimonial expert were expert opinions relating to mental status contained in reports of examinations by physicians of the Veterans' Bureau. It may be seen that the facts in the Cannon case, supra, are peculiarly apposite to those in the instant case. The court stated, at page 569:

> "*** A qualified physician, on the basis of his own examination of the patient, disclosing a present mental or physical disability, and on the basis of the exhibits properly in evidence, consisting of the detailed medical and psychiatric history set forth in the official records of the War Department and of the Veterans' Bureau, is competent to give an expert opinion as to the cause of the present disability, its past period of development, its probable duration for the future, and its effect, at various stages, upon the patient's capacity to work. The weight to be given such testimony depends on the circumstances and is for the jury to decide. The basis of the Government's objection, as stated at the trial, was that an expert should not be permitted to base an opinion upon the opinion of other experts. While such a rule of evidence has sometimes been stated (Corrigan v. United States, 9 Cir., 82 F. 2d 106), it is of questionable soundness (see Wigmore on Evidence, 3d Ed., sec 682 (d)) and in any event we think it has no application to the case at bar."

There being no other basis for concluding that the entries of psychiatric opinion appearing in the Veterans' Bureau records were competent, it is apparent that their competency is based upon their serving as a predicate for the testimonial expert opinion.

We find that the rule in the Cannon case, supra, has been adopted in the Manual for Courts-Martial, U.S. Army, 1949, in preference to the contrary rule. Thus, it is stated:

> "*** An expert witness may be asked to state his relevant opinion, when based on his personal observation or on an examination or study conducted by him, without first specifying hypothetically in the question the data on which the

opinion is to be based. He may be required on direct or cross-examination to specify the data upon which his opinion is based, but if in the course of relating the data he gives testimony which would be inadmissible on the issue of guilt or innocence, such testimony is not to be considered upon that issue. ***" (par 125b, p 153).

Data is defined as "*** material serving as a basis for discussion or inference" (Webster's New International Dictionary, 2d Ed., unabridged). Expert opinion would appear to be included within the general term "data." In the instant case, the Army psychiatrists effectually specified the opinions upon which they relied, and, the reception in evidence of those opinions in the form of entries in hospital records, under the circumstances, is not deemed to be error.

We are of the opinion that the competent evidence of record warrants the conclusion of the court implicit in its findings of guilty that accused at all times in issue was mentally responsible, and that the record of trial in every detail sustains the findings of guilty.

6. Accused is 25 years of age and single. He attended high school for approximately four years and in civilian life was employed as a laborer. He had service in the Navy from October 1943 until April 1946 and has been serving in the Army from 7 May 1947. His character has been rated as "Excellent" (1947, 1948) and his efficiency has been rated as "Excellent" (1947) and "Very Satisfactory" (1948). Accused's present commanding officer rates his character as "Excellent" and his efficiency as "Very Good." His prior conviction by summary court-martial was for the offense of breach of restriction.

7. The court was legally constituted and had jurisdiction of the person and of the offense. No errors injuriously affecting the substantial rights of accused were committed during trial. The Board of Review is of the opinion that the record of trial is legally sufficient to sustain the findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence to death or confinement at hard labor for life is mandatory upon conviction of murder premeditated in violation of Article of War 92.

Lucas Bankhead, J.A.G.C.

Samuel S. Troop, J.A.G.C.

M. Lynch, J.A.G.C.

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DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGU CM 344821

UNITED STATES	)	YOKOHAMA COMMAND
v.	)	Trial by G.C.M., convened at Yokohama, Honshu, Japan, 18, 21, and 22 December 1950. Dishonorable discharge, total forfeitures after promulgation, and confinement for life.
Corporal GEORGE E. WERKOWSKI, RA 16246454, 604th Ordnance Base Small Arms Maintenance Company, APO 712	)	

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Opinion of the Judicial Council
Harbaugh, Brown and Schindler
Officers of The Judge Advocate General's Corps

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1. Pursuant to Article of War 50d(2) the record of trial in the case of the soldier named above and the opinion of the Board of Review have been submitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon trial by general court-martial the accused pleaded not guilty to and was found guilty of the premeditated murder of Toyono Hashimoto, alias Michiko Takagi, by shooting her with a pistol, at Tokyo, Japan, on or about 17 August 1950, in violation of Article of War 92. Evidence of one previous conviction by summary court-martial was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The Board of Review is of the opinion that the record of trial is legally sufficient to sustain the findings of guilty and the sentence and to warrant confirmation of the sentence.

3. The evidence is fully stated in the opinion of the Board of Review and we limit ourselves to reciting such of it as will enable us to dispose of the question of the admissibility of certain medical records.

The defense contended at the trial that the accused was insane at the time he shot the deceased and, in an attempt to establish this, introduced in evidence the testimony of two enlisted men as to certain eccentricities of the accused (R 108-117, 117-123) and the testimony of a Japanese psychiatrist to the effect that at the time of the shooting the

accused was afflicted with an "epileptic furore" (sic), was experiencing "a periodic state of insanity," and was not so far free from mental defect, disease, or derangement as to be able to distinguish right from wrong (R 45-66).

In rebuttal the prosecution introduced into evidence the testimony of two psychiatrists, Lieutenant Colonel Oswald M. Weaver and Lieutenant Colonel Arthur L. Hessin. Each of these officers had separately served as a member of two Sanity Boards which had examined the accused. Colonel Weaver examined the accused in November 1950 and Colonel Hessin examined him on 6 September 1950. Both officers testified that on the basis of their personal examination of the accused, the results of certain clinical tests and a consideration of an extra-judicial statement made by the accused, he was legally sane. Both of them were of the opinion that the accused was not the victim of an epileptic seizure on the night in question (R 66-84, 84-104, 104-107). Over the objection of the defense, the prosecution then introduced into evidence, as entries made in the regular course of business, the clinical records of the accused which the two psychiatrists had considered in reaching their conclusions (R 88; Pros Ex 3). These records consisted of (a) "Doctor's Progress Notes" which briefly summarized the history of the accused's case; (b) "Clinical Records Brief" which in effect stated that no psychiatric disease had been detected; (c) "Consultation Sheet" containing the results of an electroencephalographic test which because of the presence of abnormal brain waves suggested the possibility of epilepsy; (d) "Consultation Sheet" stating that the accused was not suffering from any organic disease of the cerebral nervous system; (e) "Nursing Notes and Treatment Record" containing notations about the treatment and examination undergone by the accused; (f) "Consultation Sheet" relating to the diagnosis and treatment of a scalp condition; (g) "Radiographic Report" stating that the X-ray of the skull was negative; (h) urinalysis; (i) dental survey; (j) "Report of Psychological Testing" which indicated a character disorder but stated that clinical observation was necessary to rule out chronic schizophrenia; and (k) "Abbreviated Clinical Record" more or less summarizing the other records and stating that a Sanity Board found the accused free from disease. All of these records have dates of late October, November and December 1950.

In addition, as bearing on the accused's sanity, the prosecution introduced an extra-judicial statement of the accused, made within hours of the shooting, which showed he had a clear recollection of the event (R 146; Pros Ex 4), and the testimony of an agent of the Criminal Investigation Division, who took the accused's statement, to the effect that he spoke clearly and coherently and that he had a vivid recollection of what had happened (R 126).

4. We put aside any question of the admissibility of the "Nursing Notes," the "Consultation Sheet" dealing with the condition of accused's scalp, the urinalysis and the dental survey since they have little or no relevance on the issue of the accused's sanity and their admission, even

if erroneous, could not have resulted in any prejudice to the accused. A different question is presented by the other records, particularly those expressing an opinion as to the accused's mental responsibility.

Paragraph 130, page 168, of the Manual for Courts-Martial, 1949, provides that both with respect to official records and entries in the regular course of business, statements of opinion are not admissible. However, some assertions based on trained observation which, strictly speaking, might be considered statements of opinion so closely approximate statements of fact that they may properly be put in the latter category. Examples of these may be found in CM 320307, Robinson, 69 BR 309 (report of a blood alcohol test), and in CM 323197, Abney, 72 BR 149 (report of an autopsy). On the other hand in CM 329968, Mowell and Ottwell, 78 BR 205, the Board held that the admission of the report of a neuropsychiatric examination was error.

The Federal courts are in conflict as to the extent to which so-called statements of opinion are admissible under the "business entry" exception to the hearsay rule. Some circuits have been liberal in admitting such evidence under this exception (Hunter v. Derby Foods, 110 F 2d 970 (CCA 2d - 1940) - coroner's certificate showing cause of death as enteritis with acute nephritis admissible in an action for wrongful death; Reed v. Order of United Commercial Traveller's of America, 123 F 2d 252 (CCA 2d - 1941) - hospital records stating person to be under influence of alcohol admissible to prove defense of drunkenness in an action on an insurance policy; Norwood v. Great American Indemnity Co, 146 F 2d 797 (CCA 3d - 1944) - undisclosed autopsy report admissible in an action on an insurance policy to prove accidental death; Pritchett v. Etheridge, 172 F 2d 822 (CCA 5th - 1949) - hospital records showing deceased irrational and disoriented admissible in an action to determine whether he was competent to change beneficiary of an insurance policy; Bartoski v. Pittsburgh & Lake Erie Co, 172 F 2d 1007 (CCA 3d - 1949) - undisclosed contents of hospital records admissible in an action under Federal Employers' Liability Act to show deceased's injury caused a cancer and subsequent death).

On the other hand, in New York Life Insurance Co. v. Taylor, 147 F 2d 297 (CADC - 1945), the court, one judge dissenting, excluded certain records of Walter Reed Hospital which contained a psychiatric diagnosis. The case involved an action on an insurance policy for double indemnity for accidental death and the records were offered by the defendant to establish that the insured had committed suicide. The court stated that while hospital records containing more or less routine observations were admissible, a record showing a psychiatric diagnosis stood on a different footing and the party against whom such a record was offered should have the right of confrontation. See also England v. United States, 174 F 2d 466 (CCA 5th - 1949). The Manual for Courts-Martial, United States, 1951 (par 144d, pages 266, 267), to be effective 31 May 1951 (EO 10214, 8 Feb 1951), has adopted the rule in New York Life Insurance Co. v. Taylor, supra.

We need not choose between these competing views, for assuming, without deciding, that the admission of the records in question was error, we fail to find that any prejudice to the substantial rights of the accused resulted. Two psychiatrists, who examined the accused on two separate occasions, pronounced him sane. They based their opinion not only on the records in question but on their personal observation of the accused, his history, and his actions, as related in his own extra-judicial statement, both before and after the killing. Moreover, it appears that Colonel Hessin in the first instance had reached his conclusion as to the accused's sanity without recourse to these records since they all bear a date subsequent to 6 September 1950 when, as a member of the first Sanity Board, he examined the accused.

In addition to the expert opinion of the two psychiatrists who testified for the Government, the court was entitled to draw on its own experience and judgment, and in this connection consider that the accused within hours of the killing was able to give a coherent recital of the events surrounding it. We, accordingly, concur with the opinion of the Board of Review that the record is legally sufficient to support the court's implicit conclusion that the accused at all times in issue was mentally responsible.

5. For the reasons stated, the Judicial Council is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence.

Robert W. Brown
Robert W. Brown, Brig Gen, JAGC

Irvin Schindler
Irvin Schindler, Colonel, JAGC

J. L. Harbaugh, Jr.
J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

(366)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

Harbaugh, Brown and Schindler
Officers of The Judge Advocate General's Corps

In the foregoing case of Corporal George E. Werkowski, RA 16246454, 604th Ordnance Base Small Arms Maintenance Company, APO 712, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution. A United States Penitentiary is designated as the place of confinement.

Robert W. Brown, Brig Gen, JAGC

Irvin Schindler, Colonel, JAGC

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action.

FRANKLIN P. SHAW
Major General, USA
Acting The Judge Advocate General

23 April 1951

(GCMO 46, May 2, 1951).

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D.C.

JAGH CM 344837

15 February 1951

UNITED STATES v. First Lieutenant WILLIAM GORDON ROUNDY (0-1551099), Headquarters, Motor Battalion, Headquarters and Service Command, General Headquarters, Far East Command.	HEADQUARTERS AND SERVICE COMMAND GENERAL HEADQUARTERS, FAR EAST COMMAND Trial by G.C.M., convened at Tokyo, Japan, 16 January 1951. Dismissal.

OPINION of the BOARD OF REVIEW
MILLER, FITZHUGH and IRELAND
Officers of The Judge Advocate General's Corps

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 and the Judicial Council.

2. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that First Lieutenant William G. Roundy, Ordnance Corps, Headquarters, Motor Battalion, Headquarters and Service Command, General Headquarters, Far East Command, did, at Tokyo, Japan, on or about 5 December 1950, feloniously steal one (1) Military Payment Certificate, value of ten dollars ($10.00), the property of Captain Linton J. Buttrey.

Specification 2: In that First Lieutenant William G. Roundy, Ordnance Corps, Headquarters, Motor Battalion, Headquarters and Service Command, General Headquarters, Far East Command, did, at Tokyo, Japan, on or about 9 December 1950, feloniously steal one (1) Military Payment Certificate, value of ten dollars ($10.00), the property of Captain Linton J. Buttrey.

He pleaded guilty to, and was found guilty of, the Charge and its Specifications. No evidence of previous convictions was introduced. He was

sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence.

a. For the prosecution.

A written stipulation, entered into between accused, defense counsel and trial judge advocate and signed by each of them, was received in evidence as Prosecution Exhibit No. 1 (R 9). The stipulation read as follows:

"It is hereby stipulated and agreed by and between the prosecution and defense, with the consent of the accused, that:

"The accused is and was at all times hereinafter mentioned a member of Headquarters, Motor Battalion, Headquarters and Service Command, General Headquarters, Far East Command.

"On or about 5 December 1950 at Tokyo, Japan, the accused feloniously stole from the wallet of his roommate, Captain Linton J. Buttrey, one (1) military payment certificate, value of $10.00. This money has not been repaid to Captain Buttrey.

"On or about 9 December 1950 at Tokyo, Japan, the accused feloniously stole from the wallet of his roommate, Captain Linton. J. Buttrey, one (1) military payment certificate, value of $10.00. This military payment certificate was recovered from the accused by CID agents and will be returned to Captain Buttrey." (Pros Ex 1)

b. For the defense.

Colonel Edward G. Hellier, Commanding Officer of the Motor Battalion, Headquarters and Service Command, to which accused was assigned, testified that he was the accuser in this case, that he had known the accused since June 1950, and that prior to this incident he had always considered accused's character "of very high standing" and his efficiency "somewhat above average." In November, accused had done a very outstanding job in establishing and operating the drivers' training school (R 9-10).

Major Wayne G. Mann, executive officer of the Motor Battalion, testified that he had known the accused since June 1950, that accused was the battalion motor officer and that he, as rating officer on official efficiency reports pertaining to accused, would classify his character as "excellent" and his efficiency "above average" (R 11-12).

First Lieutenant James W. Sidney testified that he had known and served with the accused for approximately three months. He thought the accused to be a "loyal, hard-working, interested officer" (R 13). On several occasions witness had observed the accused during off-duty hours when he had been drinking. During these times accused "did not act as a normal individual might--some rough and some a little different--but he seemed to be different; he seemed to be in a far-away sort of existence while we were drinking. I doubt seriously on some of these occasions that he knew I was there drinking with him." Witness has not seen accused take a drink of intoxicating liquor since 9 December 1950 although he has had the opportunity (R 14).

Captain Linton J. Buttrey, MSC, 406th Medical General Laboratory, testified that since the latter part of September 1950 he had been and still is accused's roommate and that he had observed accused to be different when he had been drinking. He has no personal animosity against the accused. Witness has not seen accused drunk or drinking since 9 December 1950 (R 15).

Master Sergeant Robert K. Seed testified that he has known the accused about seven months during which time he was the noncommissioned officer in charge of drivers' training under accused's supervision. He believes the accused well qualified for his duties and would be willing to continue to serve under him regardless of the outcome of the trial. The enlisted men of the organization consider accused a very good officer (R 16-17).

Sergeant Haskell M. Stillman testified that he has known the accused about eight months and for the past seven months has been Operations Sergeant in accused's section under his direct control. He considers accused qualified to handle the job of motor officer and would very much desire to serve under accused again regardless of the outcome of the trial. Witness believes the other men in the organization would all work for accused again if they could (R 17-18).

The accused, having been advised of his rights as a witness by the law member, elected to take the stand and testify under oath (R 19). He stated that he is 32 years of age. He was born in Baker, Oregon, and raised in a farm district around Enterprise, Oregon, where he was graduated from high school in 1936. His father was a master machinist and accused had had a normal home life, experiencing no difficulty with law enforcement agencies until the present offense. After finishing high school, he worked for J. C. Penney Company, Inland Transit Stage and Cadillac. He enlisted in the Army in March 1939 (R 19).

Accused has been in the Army continuously since his original enlistment except for 12 days in 1945. He attained the grade of technical sergeant and was regimental sergeant, 18th Coast Artillery, at Fort

Stevens, Oregon, prior to going to Officers' Candidate School at the Ordnance Proving Ground, Aberdeen, Maryland, in 1942. Accused was commissioned a second lieutenant 14 November 1942. In December 1943, he went overseas where he served 22 months in command of colored units. He participated in the Normandy, Northern France and Rhineland Campaigns. On 27 December 1945, he was separated from the Army for the purpose of reenlisting in the Regular Army. He reenlisted 12 January 1946 as a master sergeant and served in that grade until 24 October 1948 when he was ordered to extended active duty as an officer (R 20-21).

The accused was married in June 1942 at Fort Stevens, Oregon. He has three children; one boy, seven years old and two girls, three and two years old. His family was with him at his last station in the United States, Mount Rainier Ordnance Depot, Tacoma, Washington, but returned to Oregon when he came to Japan in May 1950 (R 21-22).

Although he drank intoxicating liquors "moderately" before coming to Japan, accused had been drinking to excess since his arrival. He believes nothing but whiskey is responsible for the predicament in which he is today. Despite the fact that he has admitted taking money which did not belong to him, accused believes that he has some future value to the military service because of his 12 years' experience, both enlisted and commissioned. He states that he has drunk nothing of an intoxicating nature since 9 December 1950 and can continue to control his desire for whiskey (R 22-23).

Upon examination by the court, accused stated that the drinking of whiskey caused him to commit the offenses upon which he is charged and that he did not know what he was doing to the degree that he could not control himself. In answer to questions by the law member, he replied that he realized when he pleaded guilty to the specifications and the Charges, he was also pleading guilty to the elements thereof, including the intention of depriving the owner permanently of his property. He further stated that at the time he took the money on the 5th and 9th of December, he was intoxicated, having been drinking for three or four hours prior thereto (R 23). On each of the dates mentioned, at about 0100 hours he took the pocketbook from Captain Buttrey's pants and removed $10.00 therefrom. On both occasions there was more money in the pocketbook but accused did not know how much. Accused declared that he did not need the money and had no financial responsibilities which were not being taken care of (R 23-25).

Upon cross-examination, accused stated that he was unable to control his actions on the dates mentioned but admitted that he knew what he was doing on each occasion when he took the $10.00 from Captain Buttrey (R 25).

In answer to further questioning by the court accused stated that he had no family trouble and that he had no motive for taking the money

(R 26). He added that he knew what a stipulation was when he signed Prosecution Exhibit 1 and that he agreed with everything contained therein. He did not wish to change anything in the stipulation or plea (R 27). He stated that he had thoroughly discussed every angle of the case with his defense counsel and that he was satisfied with the advice given and the representation received (R 28).

4. Discussion.

The accused was charged with and found guilty of two specifications of larceny in violation of Article of War 93.

> "Larceny, or stealing, is the unlawful appropriation of personal property which the thief knows to belong either generally or specially to another, with the intent to deprive the owner permanently of his property therein" (MCM, 1949, par. 180g, p.239).

The uncontradicted prosecution evidence, together with accused's pleas of guilty, established conclusively that accused took one Military Payment Certificate, value of $10.00, from Captain Buttrey on 5 December 1950 and another on 9 December 1950 with intent to deprive the owner permanently of his property therein. Such an unauthorized taking was larceny.

The accused as a witness in his own behalf on direct examination testified only to matters pertaining to his civilian background and military service prior to the commission of the present offenses. Upon examination by the court, he was interrogated with respect to the offenses themselves. While this was error, it being well-settled that an accused is subject to cross-examination only as to an offense or offenses concerning which he has testified to on direct examination and as to facts relevant to his credibility as a witness (MCM, 1949, par. 135b, p.178), the error was not prejudicial to accused's substantial rights in view of his pleas of guilty (CM 310076, Peterson, 61 BR 177,178; SP CM 1144, Kelly, 5 BR-JC 455,458).

During interrogation of the accused, his disclosure that he had no motive for the theft caused the trial court some concern. However, intent may exist where motive is lacking and accused reaffirmed under oath that he understood the effect of the stipulation, the meaning and effect of his pleas of guilty and that he knew what he was doing when he took the money. From such evidence it does not appear that the pleas of guilty were improvidently entered. In fact, such pleas were not only consistent with the evidence but also were confirmed by accused's admissions of guilt on the witness stand. The stipulation of fact introduced by the prosecution was in effect a stipulation of guilt but in view of the nature of the pleas,

accused's testimony in the case, and the fact that the matters stipulated were susceptible of proof, the stipulation was properly received in evidence (CM 338562, Warrington, 4 BR-JC 297,299).

5. Consideration has been given to a copy of a letter from Mr. John E. Forney, the accused's father-in-law, addressed to Mr. Walter Norblad, Representative from Oregon.

6. The accused was born 9 June 1918 in Baker, Oregon. His parents are living and he has eight brothers and sisters. Accused was graduated from high school at Enterprise, Oregon, in 1936, and, thereafter, worked for various employers, including J. C. Penney Company and Inland Transit Stage Lines, until he enlisted in the Army 18 March 1939. There is no evidence of civil offenses. He was married in 1942 and has three children, a boy, seven years old, and two girls, three and two years old.

Subsequent to his original enlistment, he attained the grade of technical sergeant and, after attending the Officers' Candidate School at Ordnance Proving Ground, Aberdeen, Maryland, was commissioned a second lieutenant 14 November 1942. He was promoted to first lieutenant 26 October 1943 and went overseas in December of that year where he served for 22 months in command of colored units. He participated in the Normandy, Northern France, and Rhineland Campaigns. Accused was relieved from active duty 27 December 1945 and reenlisted in the Regular Army as a master sergeant 12 January 1946 in which grade he served until he was recalled to extended active duty as a first lieutenant 24 August 1948. Accused was reassigned to the Far East Command and has been serving in Japan since May 1950. He was not accompanied by his family. There is no evidence of previous convictions. His efficiency ratings indicate one adjectival rating of satisfactory, one of very satisfactory, nine of excellent, and five of superior for the period from 29 November 1942 to 12 September 1945. Since his recall to extended active duty his ratings have been 104, 089, 079, and 097.

7. The court was legally constituted and had jurisdiction of the person and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed at the trial. 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, and to warrant confirmation of the sentence. A sentence to dismissal is authorized upon conviction of an officer of violations of Article of War 93.

Lawrence C. [illegible], J.A.G.C.

William C. Tillinghast, J.A.G.C.

Arthur P. Ireland, J.A.G.C.

14009

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 344837

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of First Lieutenant William Gordon Roundy, O-1551099, Headquarters, Motor Battalion, Headquarters and Service Command, General Headquarters, Far East Command, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution.

Robert W. Brown
Robert W. Brown, Brig Gen, JAGC

(Absent on Temporary Duty)
C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr.
J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

19 Feb 1951

I concur in the foregoing action.

E. M. Brannon
E. M. BRANNON
Major General, USA
The Judge Advocate General

20 February 1951

(GCMO 23, Marl, 1951).

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGK - CM 344852

FEB 1 9 1951

UNITED STATES v. First Lieutenant WOODROW WILSON CAMPBELL (0-1304857), Company B, 13th Infantry, Fort Jackson, South Carolina	8TH INFANTRY DIVISION Trial by G.C.M., convened at Fort Jackson, South Carolina, 25 January 1951. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
BARKIN, WOLF and LYNCH
Officers of The Judge Advocate General's Corps

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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 Judicial Council and The Judge Advocate General.

2. Accused was tried upon the following charges and specifications:

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

Specification 1: In that First Lieutenant Woodrow Wilson Campbell, Company B, 13th Infantry did, without proper leave, absent himself from his organization at Fort Jackson, South Carolina, from about 26 December 1950 to about 27 December 1950.

Specification 2: In that First Lieutenant Woodrow Wilson Campbell, Company B, 13th Infantry did, without proper leave, absent himself from his organization at Fort Jackson, South Carolina, from about 2 January 1951 to about 7 January 1951.

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

Specification: In that First Lieutenant Woodrow Wilson Campbell, Company B, 13th Infantry was, at Fort Jackson, South Carolina, on or about 28 December 1950, drunk in camp.

He pleaded not guilty to and was found guilty of the charges and specifications. Evidence of one previous conviction for absence without leave for a period of ten days was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence

a. For the Prosecution

Accused is a member of Company B, 13th Infantry.

Two duly authenticated extract copies of morning reports of accused's organization were admitted in evidence without objection as Prosecution Exhibits 1 and 2 (R 9). Entered thereon are the following entries pertaining to accused:

"M/R 26 December 1950

Campbell Woodrow W 01304857 1st Lt
Dy to AWOL 0800 hrs

/s/ William T Johnson 1st Lt Inf
/t/ WILLIAM T. JOHNSON 1st Lt Inf

M/R 27 December 1950

Campbell Woodrow W 01304857 1st Lt
AWOL to dy 0800 hrs

/s/ William T. Johnson 1st Lt Inf
/t/ WILLIAM T JOHNSON 1st Lt Inf" (Pros Ex 1)

"M/R 2 January 1951

Campbell Woodrow W 01304857 1st Lt
Dy to AWOL 0800 hrs

/s/ William T. Johnson 1st Lt Inf
/t/ WILLIAM T JOHNSON 1st Lt Inf

M/R 8 January 1951

Campbell Woodrow W 01304857 1st Lt
AWOL to dy hrs unk Eff 7 Jan 51

/s/ William T. Johnson 1st Lt Inf
/t/ WILLIAM T JOHNSON 1st Lt Inf" (Pros Ex 2).

On 28 December 1950, accused was not present in his office at 1st Battalion Headquarters, Fort Jackson, South Carolina. Major Gene R. Welch, Commanding Officer of the 1st Battalion, 13th Infantry, sent First Lieutenant John H. Vaughn to locate accused. Lieutenant Vaughn found accused in his quarters across the street from battalion headquarters. Accused, who was "highly intoxicated" was sitting on the side of a bed drinking from a "tall brown bottle" which resembled a whiskey bottle. Lieutenant Vaughn reported to Major Welch and at the latter's direction brought accused to Headquarters. When accused was brought to Major Welch "he /accused/ could hardly support himself on his feet. Lieutenant Vaughn was helping him. He was trembling; his face was flushed; his eyes were blurry." On leaving Major Welch to take accused to the hospital, Lieutenant Vaughn asked for and received assistance from Second Lieutenant Lyman W. Vassey in carrying accused to the jeep. Major Welch and Lieutenants Vaughn and Vassey were of the opinion that accused was drunk. Upon his arrival at the station hospital, Fort Jackson, accused was observed by First Lieutenant Donald I. Abbott, a patient, who likewise was of the opinion that accused was drunk (R 9-15).

b. For the Defense

The defense offered no evidence. After being advised of his rights as a witness, accused elected to remain silent (R 15).

4. Discussion

Accused has been found guilty of two absences without leave covering the periods 26-27 December 1950, and 2-7 January 1951 in violation of Article of War 61 (Chg I, Specs 1 and 2). The uncontradicted evidence of record consisting of two duly authenticated extract copies of morning reports of accused's organization, admitted in evidence without objection, constituted prima facie evidence of accused's guilt of absence without leave for each of the periods alleged in the two specifications of Charge I and warrants the findings of guilty thereof (CM 341216, Cherwak, 1950).

Accused was also found guilty of being drunk in camp in violation of Article of War 96 (Chg II, Spec). The uncontradicted testimony of four fellow officers establishes conclusively that, at the time and place alleged, accused was in camp so drunk that he bordered on insensibility. The offense of being drunk in camp is violative of Article of War 96 (CM 241642, Thompson, 26 BR 327,330).

5. Accused is 32 years of age, married, and the father of a 15 month old child. He is a high school graduate and completed one year of junior college. In civilian life he was employed as a meter reader and furniture salesman. He had enlisted service from 13 April 1941 until he was commissioned as second lieutenant on 21 December 1942. He was promoted to first lieutenant on 27 March 1945. He was separated from the service on 6 January 1946 and was recalled to active duty effective 27 September 1950. He served in the Mediterranean Theater of Operations from 25 April 1944 to 22 October 1945 and served in combat with the 34th Infantry Division as a platoon leader. His efficiency ratings of record are "Very Satisfactory" (1), "Excellent" (7), and "Superior" (2).

On 23 October 1950, accused was punished under Article of War 104 for absence without leave from 27 September 1950 to 10 October 1950.

General Court-Martial Orders Number 47, Headquarters Fort Jackson, South Carolina, 28 December 1950, show that on 8 December 1950 accused was found guilty of absence without leave from 9 to 19 November 1950 and was sentenced to be reprimanded and to forfeit $100.00 of his pay per month for five months. The reviewing authority directed execution of the sentence.

6. The court was legally constituted and had jurisdiction of the person and of the offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. 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 and to warrant confirmation of the sentence. A sentence to be dismissed the service is authorized upon conviction of violations of Articles of War 61 and 96.

Eleanor Bacon, J.A.G.C.

Samuel S. Cowles, J.A.G.C.

J. W. Lyric, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 344852

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of First Lieutenant Woodrow Wilson Campbell, O-1304857, Company B, 13th Infantry, Fort Jackson, South Carolina, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution.

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action.

E.M. BRANNON
Major General, USA
The Judge Advocate General

26 February 1951

(GCMO 25, Mar2, 1951).

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C

JAGH CM 344868

UNITED STATES	)	25TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	APO 25, 11 December 1950.
Captain CHARLES D. WELLER	)	Dismissal, total forfeitures
(0-1016061), Company A, 79th	)	after promulgation, and con-
Heavy Tank Battalion, APO	)	finement for one (1) year.
25	)	

OPINION of the BOARD OF REVIEW
MILLER, FITZHUGH and IRELAND
Officers of The Judge Advocate General's Corps

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 and the Judicial Council.

2. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 95th Article of War. (Finding of not guilty).

Specifications 1, 2 and 4: (Findings of not guilty on motion of defense).

Specifications 3 and 5: (Findings of not guilty).

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

Specification 1: In that Captain Charles D. Weller, Company "A", 79th Heavy Tank Battalion, did, on or about 25 September 1950, attempt to induce Master Sergeant Arley E. Thompson, Company "A", 79th Heavy Tank Battalion, to enter into a conspiracy to defraud the United States, in that, he, Captain Charles D. Weller, did, make a certain writing addressed to the said Master Sergeant Arley E. Thompson, to wit: "I sent a certificate to Division Headquarters about that payroll and I stated that no one had been paid so don't cross me up."

"Don't forget - I told Division that I did not pay anyone before the payroll burned," then knowing full well that he, Captain Charles D. Weller, had paid Master Sergeant Arley E. Thompson two hundred forty-eight ($248.00) dollars on or about 31 August 1950.

Specification 2: In that Captain Charles D. Weller, Company "A", 79th Heavy Tank Battalion, did, at Fuji, Japan, during the month of June 1950, wrongfully gamble with Enlisted Men of Company "A", 79th Heavy Tank Battalion, to wit: Master Sergeant James P. Leach, Sergeant First Class Melvin E.Strople, Sergeant William E. Stanton, and Sergeant E. Garcia, then under his command.

Specification 3: In that Captain Charles D. Weller, Company "A", 79th Heavy Tank Battalion, did, on an LST enroute to Korea during the month of July 1950, wrongfully gamble with Enlisted Men of Company "A", 79th Heavy Tank Battalion, then under his command.

Specification 4: In that Captain Charles D. Weller, Company "A", 79th Heavy Tank Battalion, did, at Haman, Korea, during the month of August 1950, wrongfully gamble with Enlisted Men of Company "A", 79th Heavy Tank Battalion, to wit: Master Sergeant James P. Leach, Sergeant First Class Melvin E. Strople, Sergeant William E. Stanton, and Sergeant E. Garcia, then under his command.

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Charge I and its Specifications; and guilty of Charge II and its Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. Evidence.

The evidence pertinent to the findings of guilty is summarized as follows:

a. For the prosecution.

Master Sergeant Arley E. Thompson testified that on 31 August 1950, Company A, 79th Heavy Tank Battalion, was located near Haman, Korea. The accused and the witness were, respectively, the company commander and first sergeant of the company. During the morning of that day, the accused and first sergeant went to Kumhae, the "Division Rear,""to pick up the pay for the company." After eating lunch, the accused, accompanied by the

first sergeant, "picked up the pay," amounting to about $11,800.00 for the month of August. The accused paid Master Sergeant Thompson $248.00, as pay for the month of August, and the latter "signed the pay roll slip." They then went to the APO where the first sergeant purchased a money order for $250.00 (R 18-19).

After picking up some mail for the company, the accused and first sergeant returned to their command post near Haman, arriving about five o'clock in the afternoon. At about twelve o'clock that night, orders were received "to move out." The first sergeant "took the money and placed it in the jeep -- not in the jeep, but in the trailer underneath some bed rolls and equipment. That was when we got ready to leave that night" (R 19, 22). They moved out of the old command post and, after turning left on "the dike road," stopped for an hour or two. When they started to move forward again, the jeep was hit by a shell and the jeep and trailer burned (R 19-20, 22). The sergeant "figured" that the pay roll burned also since "there was fire all over the jeep and trailer" (R 22).

Having served as first sergeant with the accused since the latter part of November 1949, the witness testified that he was positive that he knew accused's handwriting when he saw it. He identified a letter (Pros Ex 1), received by him, as being in the handwriting of the accused (R 20). Upon further examination by the law member, the witness stated that he received the letter sometime in October at Company A, 79th Heavy Tank Battalion, then at Ire, Korea; that it came in an envelope addressed to him; that the return address was "Dependent Mail Section, Headquarters Camp Otsu, APO 9;" and that he did not have the envelope, having previously turned it over to the Inspector General (R 21). Prosecution Exhibit 1 was received in evidence, without objection by the defense, and reads in part as follows:

"25 September 1950

"Dear Top:

"Just a few lines to ask how everything is with the Company. * * *.

"By the way Top I sent a certificate to Division Headquarters about that payroll and I stated that no one had been paid so don't cross me up. I don't know whether or not they have contacted any one in the Company about the payroll.

"* * Don't forget -- I told Division that I did not pay anyone before the payroll burned. Take it easy Top.

Capt Weller." (Pros Ex 1, R 20-22)

Prior to the receipt of the letter, the accused had not given the first sergeant, either officially or personally, any information concerning his report to higher headquarters (R 22). The defense did not cross-examine the witness.

Lieutenant Colonel Edwin W. Grenelle, Assistant Chief of Staff, G-1, 25th Infantry Division, on 1 September 1950, at the Division Command Post at Masan, received a telephone call from a person identifying himself as "Captain Weller." In the telephone conversation, "Captain Weller" stated in substance that he was at the Division Clearing Station, located in the vicinity of Masan; that the jeep in which he had been riding had been caught in small arms fire near Haman; that the gas tank had been punctured, setting the jeep afire; that he had been burned badly and was being evacuated to a hospital at Pusan; and that a pay roll of about $11,800.00, which he was carrying to his company, had been burned (R 40, 42). Upon defense motion to strike this testimony on the ground that there was no evidence showing that the accused was the person who made the telephone call, the law member ruled that the court would not "presume that the voice involved in this conversation * * was the voice of the accused," but that the court would take into consideration "the content of the conversation itself" (R 42-43).

One of the noncommissioned officers of accused's command, Sergeant First Class Melvin E. Strople, testified that he was not paid on pay day for August 1950. Asked if he had any knowledge of the fact that the pay roll for the month of August was lost, the witness replied "Yes, sir; I know it was lost" (R 23, 26).

Sergeant First Class Melvin E. Strople, Sergeant First Class William E. Stanton, Sergeant Leach and Sergeant Garcia were noncommissioned officers assigned to Company A, 79th Heavy Tank Battalion, and under the command of accused (R 23, 25, 32). While on maneuvers in Fuji during the month of June (1950), the sergeants initiated games of poker. They did not invite the accused to participate, but "he would come up to where we were playing and he would say either 'deal me in' or 'I want to sit in'" (R 28). Some of the games were "jaw-bone" poker, "where you don't gamble with money. The money you owe, or the debt that you have against you during the month would be settled on pay day. It was pay day stakes" (R 25).

Sometime during the month of June 1950, at Mount Fuji, Japan (R 33), Sergeant Stanton played cards with the accused. The game was poker, played for money; bets were made; and money was won and lost (R 32, 37). Sergeants Strople, Leach, Thompson and Garcia also participated in the game with the accused (R 28, 34, 37; but with reference to Sergeant Strople's participation, note the discrepancy in his testimony concerning the months of June and July R 24, 25, 28). Since the accused did not have any cash, the noncommissioned officers "let him play without money" and "then he would pay us back pay day" (R 39). Accused incurred an indebtedness of $125.00 to Sergeant Stanton as the result of this gambling (R 32-33, 39).

In July 1950, on an LST enroute from Japan to Korea, the accused gambled with Sergeant Stanton and other noncommissioned officers of Company A, 79th Heavy Tank Battalion (R 33, 37-38). During the card game in which accused participated, he won and lost money (R 38).

During August 1950, at the company command post at Haman, Korea R 25-26), the accused participated in a poker game with Sergeant First Class Strople, Sergeant First Class Stanton, Sergeant Leach and Sergeant Garcia (R 25-26, 28-29, 34-35, 37). In the course of the game Sergeant Leach loaned the accused a total of $15.00, in increments of $5.00 each, which the accused used in gambling (R 34-37). Money was won and lost while the accused participated in the game (R 28-29).

b. For the defense.

Master Sergeant Arley E. Thompson, who had testified for the prosecution, was called as a defense witness. The first sergeant testified that he went with the accused to the Division Finance Office to collect the pay roll for July 1950. Some of the names of the officers of the company were not on the pay roll because the pay records had not come forward from Japan. The name of the accused did not appear on the pay roll. The witness did not know whether the officers' pay cards were missing at the time he accompanied the accused to Kumhae on 31 August and the accused did not mention whether the officers' names were on that pay roll (R 47-48).

It was orally stipulated, with the consent of the accused, that accused has had approximately eight years and nine months service; that he served in enlisted status from March 1942 to February 1943; that he served as a commissioned officer from February 1943 to April 1946 and from August 1946 to the date of trial; that, during World War II service, he earned the Purple Heart with Oak Leaf Cluster, ETO Ribbon with two battle stars, American Theater Victory Medal, and ribbons for the occupation of Germany and Japan; that, during the campaign in Korea, he had been awarded a second Oak Leaf Cluster to the Purple Heart; and that he is married (R 49-50).

It was further orally stipulated, with the consent of the accused, that in early 1949, while acting as executive officer of the 25th Reconnaissance Company, accused was commended by the company commander, Captain Robert Dudley, and the commendation was accompanied by favorable indorsements from Division Headquarters; and that if Major Hiram Merritt, G-4 Section, 25th Infantry Division, were present, he would testify to the excellent character and efficiency of the accused, based on his contact with the accused in the 35th Infantry Regiment (R 50).

After explanation of his right to testify as a witness, to make an unsworn statement, or to remain silent, accused elected to remain silent (R 51).

c. Rebuttal for the prosecution.

Captain Ralph A. Schilling, AGC, Headquarters, 25th Infantry Division, testified that on 31 August 1950 he was the Division Postal Officer and, as such, the official custodian of the records of APO 25. In connection with postal money orders, the office retains a duplicate

copy of an application for a money order with each day's receipts of business (R 53). Over objections by the defense as to the materality and competency of the Exhibit, there was received as new evidence in the case a certificate by the witness, setting out a true copy of the duplicate application for Money Order No. 228404, on file at APO 25, stamped 31 August 1950, in the amount of $100.00, naming the National City Bank of New York, Osaka, Japan, as payee, and showing Captain C. D. Weller, Company A, 79th Heavy Tank Battalion, APO 25, as purchaser (Pros Ex 2, R 54-55). With reference to this application for money order, the witness testified that he sent the original copy to the Base Post Office at San Francisco; that the printed duplicate copy was first retained in the office in his custody, but later sent with other records to Yokohama for safekeeping; and that he prepared the Exhibit as an exact copy of the duplicate copy on file in his office. The witness did not see the accused in the post office on 31 August 1950 (R 53-56).

4. Discussion.

a. Specification 1, Charge II.

Accused has been found guilty of attempting to induce Master Sergeant Arley E. Thompson "to enter into a conspiracy to defraud the United States," by writing to him, on or about 25 September 1950:

> "I sent a certificate to Division Headquarters about that payroll and I stated that no one had been paid so don't cross me up." "Don't forget - I told Division that I did not pay anyone before the payroll burned",

then knowing that he, the accused, had paid Master Sergeant Thompson $248.00 on or about 31 August 1950.

We consider first the sufficiency of the specification to allege an offense. The specification alleges, in effect, that the accused, an Army officer, in the manner and by the means alleged, solicited a noncommissioned officer of his command to commit a crime. The words "attempt to induce" may be construed to mean "try to lead into," or more simply, as the equivalent of "did - solicit". The quoted phrase from the specification is used in the sense of endeavoring to persuade or influence Master Sergeant Thompson to enter into a conspiracy; it involves soliciting him to enter into an illegal agreement. "Soliciting another to commit a crime is not an attempt. ***" (MCM, 1949, subpar. 183c, p. 258), but this principle has reference only to an ineffectual attempt to commit a crime and not to an act of solicitation, considered by itself as a separate offense. "The word 'solicit' has been used in the same connection with words like 'incite', 'endeavor', and 'attempt' when the purpose in view has been to show that solicitation itself embodies the elements of an independent crime ***" (14 Am. Jur., Criminal Law, sec. 117; State v. Bowles, 79 Pac. 726, 70 Kan. 821 (1905)). Thus, in common law jurisdictions, a solicitation to commit a felony has been distinguished from an attempt to commit the

felony (State v. Bowers, 14 S. E. 488, 35 S.C. 262 (1892); State v. Schleifer, 121 A. 805, 99 Conn. 432 (1923)). As will hereinafter be demonstrated, under military law various acts of solicitation have been treated as separate offenses, prejudicial of good order and military discipline or of a nature to bring discredit upon the military service, thus indicating that an act of soliciting may be considered as distinct from an attempt. This specification, in our opinion, is not faulty because it alleges the act of soliciting in the terms of an "attempt to induce" the assent of the enlisted man concerned.

The object of the solicitation is alleged to be "to enter into a conspiracy to defraud the United States." A "conspiracy is the corrupt agreeing together of two or more persons to do by concerted action something unlawful either as a means or an end" (MCM, 1949, subpar. 181j). With reference to fraud and false statements, it is a federal criminal offense, knowingly and willfully, to falsify, conceal or cover up by any trick, scheme, or device a material fact, or to make any false, fictitious or fraudulent statements or representations, in connection with any matter within the jurisdiction of any department or agency of the United States (18 USC (Supp III) 1001). With reference to conspiracy, if two or more persons conspire to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each has committed a federal criminal offense (18 USC (Supp III) 371). The substantive offenses of fraud and conspiracy, mentioned above, are punishable as felonies in the federal civil courts (18 USC (Supp III) 1, 371, 1001; United States v. Bowman, 260 U. S. 94, 98-101 (1922)); and such offenses, if committed by persons subject to military law, are also cognizable under the 96th Article of War (AW 96; MCM, 1949, subpar. 183c, pp. 256-7, 260). Any person subject to military law who enters into any agreement or comspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim, or who enters into any agreement or conspires to commit any of the other offenses delineated in the article, violates the 94th Article of War (AW 94; MCM, 1949, subpar. 181j); and, any person subject to military law who enters into a conspiracy to commit an unlawful act, not violative of the 94th Article of War and not involving an overt act to effect the object of the conspiracy (as required by 18 USC (Supp III) 371, supra), violates the 96th Article of War (CM 313830, Friedman, 63 BR 299, 303; CM 320455, Gaillard, 69 BR 345, 377; CM 320681, Watcke, 70 BR 125, 133; CM 328248, Richardson, 77 BR 1, 18-19; CM 336639, Cole, 3 BR - JC 159, 168 - 169; CM 342763, Fish, BR - JC, 6 December 1950). As a mere entry into a conspiracy violates Article of War 96, the specification, therefore, alleges a solicitation of the enlisted man concerned to commit an offense.

It is noted that the object of the solicitation is here alleged as a conclusion of law. In United States v. Simmons, 96 U.S. 360, 363 (1877), in considering the sufficiency of an indictment charging that the defendant had unlawfully caused and procured a still to be used for distilling, within the intent and meaning of the internal revenue laws of the United States, Mr. Justice Harlan said:

> "It is laid down as a general rule, that 'in an indictment for soliciting or inciting to the commission of a crime, or for aiding or assisting in the commission of it, it is not necessary to state the particulars of the incitement or the solicitation, or of the aid or assistance.' 2 Wharton, sect. 1281; United States v. Gooding, 12 Wheat. 460."

With reference to an indictment charging a conspiracy to commit an offense, Mr. Justice Sanford, in Wong Tai v. United States, 273 U.S. 77, 81 (1927), said:

> "*** it is not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy, *** or to state such object with the detail which would be required in an indictment for committing the substantive offense ***"

And, the Circuit Court of Appeals for the Eighth Circuit has held:

> "*** when the conspiracy charged is one to commit an offense, and that offense *** is clearly defined by statute, no high degree of particularity is required in describing it. ***
>
> Wharton says (2 Wharton's Crim. Law, sec. 1343):
>
> 'It is enough to set out the offense aimed at by such apt words as will describe it as a conclusion of law.'" (Thomas v. United States, 156 F. 897, 906 (CCA 8, 1907)).

By a parity of reasoning, inasmuch as the object of the solicitation here alleged is defined by statute, we conclude that it may, properly, be alleged as a conclusion of law. In our opinion, the specification, both in respect to the act of solicitation and the object of the solicitation, sufficiently advised the accused of the nature and cause of the accusation against him, to the end that he could prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense.

Solicitation by one person to induce another to enter into a conspiracy (the agreement not having been consummated) is not a substantive offense, defined by federal statute. However, under military law, a solicitation by one person of another to commit a crime has been recognized as constituting an offense. For example, convictions have been

sustained as violations of Article of War 96 where the accused; proposed and suggested a course of conduct to another with intent to induce him to unite with the accused in defrauding the United States (G.C.M.O. 602, Briscoe, 1865 (charged under the 62nd Article)); solicited another to commit statutory perjury (CM 301840, Clarke, 24 BR (ETO) 203, 211); CM 321309, Tisdall, 70 BR 301, 310); attempted to induce a soldier to give false testimony before an investigating officer (CM 230829, Mayers, 18 BR 65, 91-92); solicited another to commit sodomy (CM 192609, Huime, 2 BR 19, 24; CM 227629, Smith, 15 BR 321; CM 236725, Hyre, 23 BR 115, 127), and solicited a female to commit acts of prostitution (CM 233717, Neff and Portella, 20 BR 71, 75). Also, as conduct unbecoming an officer and a gentleman, Winthrop cites as example, "Abuse of authority over soldiers *** by requiring or influencing them to do illegal acts" (Winthrop, Military Law and Precedents, Second Edition (Reprint 1920), p. 716). The prejudicial effect of such a solicitation to commit crime is recognized not only under military law but also by most common law jurisdictions. By the great weight of authority, at common law it is an indictable offense for one to counsel and solicit another to commit a felony or other aggravated offense, even though the solicitation is of no effect and the crime counseled is not in fact committed (United States v. Gallianni, 245 Fed. 977, 978 (D.C., Mass, 1917); United States v. DeBolt, 253 Fed. 78, 81 (D.C., S.D. Ohio, 1918); and see CM 301840, Clarke, 24 BR (ETO) 203, 211, supra.). The common law concept, as applied in the highly instructive and much cited early case of Rex v. Higgins, 2 East 5, is predicated upon the view that an attempt to incite another to commit a crime is prejudicial to the community (United States v. DeBolt, supra, p. 83). As heretofore noted, the object of the solicitation alleged in the instant case is "to enter into a conspiracy to defraud the United States." Thus, it is alleged that the accused solicited the first sergeant to commit a serious offense, the commission of which would be violative of the federal criminal statutes or the Articles of War. We conclude that the act of solicitation with this object, as alleged in the specification, is violative of Article of War 96 and is in itself contrary to the custom of the service. Having reached this conclusion, we deem it immaterial that the specification omits words importing criminality, such as "wrongfully", "illegally" or "dishonorably" (MCM, 1949, subpar. 29a, p. 22).

The evidence is uncontradicted that about noon on 31 August 1950, the accused and Master Sergeant Thompson, the commanding officer and first sergeant, respectively, of Company A, 79th Heavy Tank Battalion, arrived at "Division Rear" near Kumhae, Korea, "to pick up the pay for the company". After accused "picked up the pay" for the month of August 1950, amounting to about $11,800, he paid $248.00 to the first sergeant who signed the pay roll slip acknowledging receipt of his August pay. It was also established that while at Division Rear, accused purchased a money order in the amount of $100.00. While this evidence was not relevant to prove that tho accused received his pay for August also, it was material and relevant to the issue of dishonorable failure to pay a debt of $52.00 as alleged in Specification 3 of Charge I. The accused and first sergeant then returned to their

command post near Haman, Korea, where they remained from about 1700 hours to 2400 hours at which time they received orders "to move out". There is no evidence that any member of Company A, other than Master Sergeant Thompson, received his August pay from the accused; moreover, there is evidence that one other noncommissioned officer of the company was not paid. It was further established that the pay roll was burned when the vehicle in which it was being conveyed to the new position was destroyed by shell fire. It appears that the accused, as a result of burns received in this fire, was evacuated through medical channels to the rear and ultimately to Japan. There is no evidence that the accused, at any time subsequent to the fire, contacted Master Sergeant Thompson in any manner or for any purpose, except through the letter signed "Capt Weller", dated 25 September 1950, containing the language set out in the specification, which the first sergeant received sometime in October while Company A was located at Ire, Korea.

Accused knew that he had paid $248.00 to the first sergeant on 31 August 1950, as the sergeant's pay for the month of August. While not proved specifically, the evidence warrants the inference that the money used for this payment was the property of the United States and furnished for this purpose. Having reported to division headquarters that the pay roll had burned before anyone in the company had been paid, accused could anticipate that an official investigation would be made concerning the loss (AR 35-320, 5 February 1945, pars. 1, 2; AR 35-180, 23 December 1946, par. 11); and that such investigation might reveal the falsity of his statement. No response of the enlisted man to accused's demand, "don't cross me up," could possibly be protective of the accused, other than one which inevitably involved a fraud on the United States, It should be observed that if the first sergeant merely remained silent concerning the prior payment to him, ultimately he would have received a duplicate payment of $248.00 from the United States Army to which he was not entitled. Such conduct would involve concealing and covering up a material fact by some scheme or device in a matter within the jurisdiction of the Department of the Army, as prescribed by Title 18, United States Code, Section 1001, supra. If, on the other hand, he made a claim for the duplicate payment or made a false statement concerning the prior payment to him, the first sergeant would commit one or more offenses involving fraud on the United States (AW 94; 18 USC (Supp III), 1001, supra). We can conceive of no course of conduct, consistent with accused's solicitation, which would not require the first sergeant to commit a crime. The evidence compels the conclusion that the accused sought the consent of the first sergeant to participate in a scheme whereby the falsity of accused's statement would not be revealed and the first sergeant would receive a duplicate payment of pay for the month of August 1950. The fact that the accused would not appear to benefit financially from the scheme which he proposed is not material (See CM 200025, Johnston, 4 BR 211, 228); the gravamen of the offense here charged and proved is the solicitation by an officer of an enlisted man to commit a serious offense. Such conduct is highly degrading to the officer concerned, inherently destructive of good order and directly prejudicial of military discipline.

The evidence supports, beyond a reasonable doubt, the court's findings of guilty of this specification and the charge.

b. Specifications 2, 3 and 4, Charge II.

Accused has been found guilty of gambling with enlisted men, then under his command, at Fuji, Japan, during June 1950 (Spec. 2), on an LST enroute to Korea during July 1950 (Spec. 3), and at Haman, Korea, during August 1950 (Spec. 4).

The evidence is uncontradicted that the accused gambled with enlisted men of Company A, 79th Heavy Tank Battalion, then under his command, during the times and at the places as alleged, respectively, in the three specifications. With reference to Specifications 2 and 4, the enlisted men with whom the accused is alleged to have gambled are identified in each specification as: "Master Sergeant James P. Leach, Sergeant First Class Melvin E. Strople, Sergeant William E. Stanton, and Sergeant E. Garcia." The evidence adduced in support of each specification shows that "Sergeant Leach", "Sergeant First Class Melvin E. Strople", "Sergeant First Class William E. Stanton," and "Sergeant Garcia" were the enlisted men with whom the accused gambled. Thus, there is a variance between the proof and findings in connection with the enlisted grades of Leach and Stanton and the full names of Leach and Garcia. As the identity of the enlisted men concerned was not a contested issue in the case, and it was uncontroverted that all were enlisted men under the command of the accused, the noted variance is immaterial. (CM 331601, Brill and Brown, 80 BR 75, 82).

It is a well-established rule of law that gambling by an officer with enlisted men constitutes conduct prejudicial to good order and military discipline in violation of Article of War 96 (CM 336350, Hoover, 3 BR-JC 39, 49-50; CM 339658, Anthony, 5 BR-JC, 205, 217-218; and cases cited therein). The court properly found the accused guilty of Specifications 2, 3, and 4 and of a violation of Article of War 96.

c. Procedural matters.

At the time of arraignment, the defense moved for a continuance of the case on the ground that "certain administrative rights which the accused has in this case are yet to be determined." The nature of the administrative matter was not revealed by the defense "for fear that the disclosure of the context of this regulation alluded to, would prejudice the minds of the whole court." Following consideration of the motion in closed session, the court denied the motion for continuance (R. 8-9). Thereupon, the defense counsel renewed the motion for continuance on the ground that paragraph 4, Army Regulations 605-275, authorizes a resignation for the good of the service; and stated that the accused had, on the preceding day, tendered his resignation from the service in lieu of trial by court-martial. The defense counsel contended that the tendered resignation must be submitted to The Adjutant General, Washington, D. C., for final action and that, until final action had been taken relative to the

resignation, such administrative procedure should serve as a bar to accused's trial. The motion was again considered by the court in closed session and denied (R. 10-11). The defense then challenged three members of the court for cause and examined them individually to determine whether any unfavorable inference or opinion had been formed as a result of revealing that the accused had tendered his resignation under these circumstances. Each challenged member of the court denied under oath having adopted any inference unfavorable to the accused or of forming any opinion as to his guilt or his innocence. The court voted by secret written ballot upon each challenge and none was sustained. The defense did not desire to challenge the remaining four members of the court (R. 12-17).

While the regulations cited by the defense counsel authorize an officer to tender his resignation for the good of the service in lieu of trial by court-martial, nothing in the regulations purports to require that an appointing authority, upon receipt of such tendered resignation, shall withdraw charges already referred to a general court-martial for trial or otherwise suspend the court-martial proceedings, pending final action on the resignation by the Department of Army (AR 605-275, 27 June 1949, pars. 4, 6, 7, 10, 12). An officer may be tried by court-martial prior to final action being taken by the Department of the Army upon his resignation for the good of the service and the tender of such resignation does not divest the court-martial of jurisdiction to hear and determine the case (JAGJ 1946/6243, 11 July 1946).

A court-martial may, for reasonable cause, grant a continuance to an accused for such time as may appear to be just (AW 20). Among the grounds that may be considered as reasonable are the absence of a material witness; sickness of the accused, his counsel, or a witness; insufficient time to prepare for trial; and a pending prosecution in a civil court based on the same act or omission (MCM, 1949, subpar. 52b). The reason urged by the defense counsel for requesting the continuance did not relate to a requirement for additional time to prepare for trial or otherwise perfect accused's defense. Under these circumstances, it is clear that the court did not abuse its discretion in denying either of the two motions for continuance (MCM, 1949, subpar. 52b, supra).

Upon examination under oath of the challenged members of the court, it appeared affirmatively that the revelation by the defense of the fact that accused had tendered his resignation for the good of the service had no adverse effect upon the impartiality of such members. The burden of maintaining a challenge rests upon the challenging party and a court need not sustain a challenge upon the mere assertion of the challenger (MCM, 1949, subpar. 58f, p. 56). In the instant case, there was no evidence submitted indicating any disqualification of any member of the court-martial. The challenges for cause were, therefore, properly not sustained.

5. The accused was born 18 September 1918, in Ludlow, Kentucky. He was graduated from high school at Cincinnati, Ohio, in 1938, and, thereafter, attended evening courses in accounting at Xavier University for

approximately two years. From 1936 to 1941 he was employed at the Cincinnati Public Library, after which he was employed for one year by the Eagle-Picher Lead Company, Cincinnati, Ohio, in the capacity of clerk. There is no record of civil offenses. He is married and his mother is living.

Accused is commissioned in the Cavalry, Organized Reserve Corps. He enlisted 5 March 1942, attained the grade of corporal, and was honorably discharged in February 1943 to accept a commission as second lieutenant, Army of the United States, for which he had qualified at the Officers' Candidate School, Armored Force, Fort Knox, Kentucky. His commissioned service covers the periods 13 February 1943 to 24 April 1946 and 14 August 1946 to date. He was promoted to first lieutenant 23 June 1945 and to captain on 20 August 1950. Accused served in the European Theater of Operations from 11 September 1944 to 1 April 1945, participating as a tank platoon leader in the Rhineland and Ardennes-Alsace campaigns. He received injuries to his hands on 13 and 16 December 1944 and was thereafter hospitalized in Europe and the United States for approximately ten months. After recall to active duty, accused was assigned in October 1946 to the United States Forces Pacific, serving in Korea until July 1947, at which time he returned to the United States because of the death of his father. In June 1948, accused was assigned to the Far East Command and since then has served continuously in Japan or Korea. He is authorized to wear the Purple Heart Medal with two Oak Leaf Clusters, EAME ribbon with two battle stars, American Theater Service ribbon, World War II Victory ribbon and ribbons for the occupation of Germany and Japan.

During accused's first period of commissioned service, February 1943 to April 1946, he was rated on periods of duty totalling slightly less than eighteen months and received one adjectival rating of satisfactory, five of very satisfactory, one of excellent and one of superior. Since reentry on active duty in August 1946, he has received one efficiency rating of excellent; and numerical ratings, from 16 June 1948 to 23 February 1950, of 098, 054, 054, 112, 070, 105 and 108. He has completed the Officers' Advanced (Armored Infantry) Course at The Armored School (1944), and the Officers' Intelligence Course at The Ground General School (1948), receiving, respectively, academic ratings of satisfactory and very satisfactory. There is no evidence of previous convictions. As stipulated, early in 1949, while acting as executive officer of the 25th Reconnaisance Company, accused was commended by the company commander and the commendation was accompanied by favorable indorsements from the headquarters of the division.

6. The court was legally constituted and had jurisdiction of the person and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed at the trial. 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, and to warrant

confirmation of the sentence. A sentence to dismissal, total forfeitures after promulgation, and confinement at hard labor for one year is authorized upon conviction of an officer of violations of Article of War 96.

Reginald C. Miller, J.A.G.C.

William C. Fitzhugh, J.A.G.C.

Arthur P. Ireland, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

CM 344868

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Captain Charles D. Weller, O-1016061, Company A, 79th Heavy Tank Battalion, APO 25, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution. The United States Disciplinary Barracks or one of its branches is designated as the place of confinement.

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action.

E. M. BRANNON
Major General, USA
The Judge Advocate General

19 March 1951

(GCMO 33, 22 March 1951).

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

Board of Review

SP CM 2932 9 JAN 1951

UNITED STATES v. Corporal JAMES JOSEPH McGill (RA 15243930), Battery "D", 73rd Anti-aircraft Artillery, Automatic Weapons Battalion (Self-Propelled), Fort Bliss, Texas	ANTIAIRCRAFT ARTILLERY AND GUIDED MISSILE CENTER Trial by SP CM convened at Fort Bliss, Texas, 4 October 1950 Bad conduct discharge (suspended), forfeiture of $50 pay per month for six (6) months and confinement for six (6) months. Post Stockade.

HOLDING by the BOARD OF REVIEW
BISANT, CROOK and OEDING
Officers of the Judge Advocate General's Corps

The record of trial in the case of the soldier named above has been examined and is held by the Board of Review to be legally sufficient to support the findings of guilty and the sentence.

/s/ Oscar M. Bisant, Jr, J.A.G.C

/s/ Gerard B. Crook, J.A.G.C

/s/ Ernst C. Oeding, J.A.G.C

JAGE SP CM 2932 1st Indorsement

Dept of Army, JAGO, Washington 25, D. C., 16 January 1951

TO: Chairman, the Judicial Council, Office of The Judge Advocate General, Washington 25, D. C.

In the foregoing case of Corporal James Joseph McGill (RA 15243930), Battery "D", 73rd Antiaircraft Artillery, Automatic Weapons Battalion (Self-Propelled), Fort Bliss, Texas, The Judge Advocate General has not

concurred in the holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence. Pursuant to Article of War 50e(2) the holding and record of trial are accordingly transmitted to the Judicial Council for appropriate action. Participation by The Judge Advocate General in the confirming action is required.

FOR THE JUDGE ADVOCATE GENERAL:

Franklin P. Shaw

1 Incl
Record of trial

FRANKLIN P. SHAW
Major General, USA
The Assistant Judge Advocate General

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

JAGU Sp CM 2932

U N I T E D S T A T E S	ANTIAIRCRAFT ARTILLERY AND GUIDED MISSILE CENTER
v.	Trial by SP CM, convened at Fort Bliss, Texas, 4 October 1950. Bad conduct discharge (suspended), forfeiture of $50 pay per month for six months and confinement for six months. Post Stockade.
Corporal JAMES JOSEPH McGILL, RA 15243930, Battery D, 73d Antiaircraft Artillery Automatic Weapons Battalion (Self-Propelled), Fort Bliss, Texas	

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Opinion of the Judicial Council
Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

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1. Pursuant to Article of War 50e(2) the record of trial and the holding by the Board of Review in the case of the soldier named above have been transmitted to the Judicial Council which submits this its opinion to The Judge Advocate General.

2. Upon trial by special court-martial the accused pleaded not guilty to and was found guilty of absenting himself without proper leave from his station at Fort Bliss, Texas, from about 20 May 1950 to about 8 August 1950, in violation of Article of War 61. No evidence of previous convictions was introduced. He was sentenced to be discharged from the service with a bad conduct discharge, to forfeit fifty dollars pay per month for six months and to be confined at hard labor for six months. The convening authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 47d. The general court-martial authority approved the sentence and ordered it executed, but suspended the execution of the bad conduct discharge until the soldier's release from confinement, and designated the Post Stockade, Fort Bliss, Texas, as the place of confinement. The proceedings were duly published (SpCMO 130 Hq AAA and GM Cen. Ft. Bliss, Tex, 28 Nov 1950). The Board of Review has held the record of trial legally sufficient to support the findings of guilty and the sentence. The Judge Advocate General has not concurred in the Board's holding.

3. The only question we deem necessary to consider is the legal effect of the fact that Captain Henry T. Johnson sat as a member of the court after having represented the accused as his counsel at the pretrial investigation held pursuant to Article of War 46h. The Investigating Officer's Report, dated 21 September 1950 and a letter dated 27 December 1950 from the Acting Staff Judge Advocate, accompanying the record of trial, disclose that the accused exercised his right to

have counsel represent him at the investigation (MCM 1949, par 35a, p 29) and that pursuant to his request Captain Henry T. Johnson was designated as defense counsel and was present throughout the investigation. In the subsequent trial of the accused by special court-martial upon the charge and specification under investigation, Captain Johnson was appointed and sat as a member of the court (par 1, SO 40, Hq 73d AAA AW Bn, Ft Bliss, Tex, 3 Oct 1950; R 4). Captain Johnson made no disclosure in open court in response to the prosecution's general request. Neither the prosecution nor the accused challenged him for cause or peremptorily (R 8).

There is no express provision in the Articles of War or Manual for Courts-Martial directly in point respecting the question with which we are concerned. Article of War 11, however, provides that no person who has acted as member, defense counsel, assistant defense counsel, or investigating officer in any case shall subsequently act in the same case as a member of the prosecution. This provision was obviously placed in the law to protect accused persons from being prosecuted by a person who, prior to his appointment as a member of the prosecution, had been in a position in which he well may have formed an opinion as to the guilt or innocence of the accused and become biased, prejudiced or hostile to him. In our opinion, the spirit of the foregoing provision applies with even more force against placing on the court a person who had previously acted as defense counsel for the accused in the same case.

The absence of a clear statutory or regulatory prohibition against a defense counsel subsequently sitting as a member of a court in the same case probably resulted from the fact that a member of the court is subject to challenge for cause whereas a member of the prosecution is not. In the instant case no effort was made to challenge Captain Johnson and he failed to respond when inquiry was made by the prosecution as to the awareness of any member of any facts believed to be grounds for challenge by either side. Obviously the accused was aware of Captain Johnson's dual status and had Captain Johnson been the investigating officer rather than a former defense counsel, failure to object with such knowledge would probably have constituted a waiver (CM 210612, Maddox, 9 BR 277, 279-280).

In our opinion, there is a clear distinction between a case where an investigating officer sits as a member of a court and one where a former defense counsel sits as a member. This distinction arises from the inviolate privilege attaching to communications between attorney and client. This privileged relationship, which according to Wigmore, "goes back to the reign of Elizabeth, where it already appears as unquestioned," has been zealously guarded by the courts since the 16th century (see CM 331574, Lloren, 80 BR 61, 65; CM 333433 Alvaro-Rodriguez, 81 BR 359, 363).

From the following excerpt from the Manual for Courts-Martial 1949, it is clear that this privileged relationship is an integral part of our system of military jurisprudence:

"He [the defense counsel] will guard the interests of the accused by all honorable and legitimate means known to the law. It is his duty to undertake the defense regardless of his personal opinion as to the guilt of the accused; * * * to represent the accused with undivided fidelity, and not to divulge his secrets or confidence." (MCM 1949, par 45b, p 42) (Underscoring supplied)

It is well settled that a violation of this confidential relationship by defense counsel, or by an officer to whom the law imputes the relationship of attorney, advisor, or counsel, is sufficient in itself to constitute such error as to be "incapable of being remedied by the curative provisions of Article of War 37" (CM 331574, Lloren, supra). In the Lloren case an officer to whom there had been imputed the status of defense counsel to the accused subsequently testified with respect to a complete confession by the accused to him as defense counsel. Although an objection was made that the evidence was remote, no objection was made on the grounds that he was divulging a privileged communication. The Board of Review held that the receipt of the evidence was erroneous and prejudiced the substantial rights of the accused to such an extent as to be incapable of being remedied by the curative provision of Article of War 37.

We must believe that Captain Johnson, in his function as defense counsel, discussed the charges with accused, considered the accused's explanation of the circumstances surrounding the commission of the alleged offense and undoubtedly became aware of facts and acquired information from the accused which were in the nature of privileged communications. If he had testified in court as to these facts for the prosecution, clearly prejudicial error would have resulted, within the rule announced in the Lloren case. There is no real distinction between taking the testimony of a former defense counsel and placing him on the court as a member, so far as prejudice is concerned.

We, of course, do not know the extent, if any, to which Captain Johnson participated in the discussion during the closed session of the court. Suffice it to say that it is contrary to our concepts of justice to permit the accused's former defense counsel, who must have acquired privileged knowledge of the facts of the case from the accused, to sit in judgment on him in the same case. Although the accused may have knowingly failed to challenge his former defense counsel, such failure can not be permitted to operate as a waiver, inasmuch as the error here involved strikes at the very foundation of a fair trial. For the same reason the conviction must be set aside regardless of the compelling nature of the evidence of guilt.

4. For the foregoing reasons the Judicial Council is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

Robert W. Brown

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr.

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

Sp CM 2932

THE JUDICIAL COUNCIL

Harbaugh, Brown and Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of Corporal James Joseph McGill, RA 15243930, Battery D, 73d Antiaircraft Artillery Automatic Weapons Battalion (Self-Propelled), Fort Bliss, Texas, upon the concurrence of The Judge Advocate General, the findings of guilty and the sentence are disapproved and vacated. All rights, privileges and property of which Corporal McGill has been deprived by virtue of the findings of guilty and the sentence so vacated will be restored.

Robert W. Brown, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

J. L. Harbaugh, Jr., Brig Gen, JAGC
Chairman

I concur in the foregoing action.

FRANKLIN P. SHAW
Major General, USA
Acting The Judge Advocate General

1 February, 1951

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