OFFICE OF
JUDGE ADVOCATE
GENERAL
OF THE ARMY

BOARD OF REVIEW
AND
JUDICIAL COUNCIL

HOLDINGS
OPINIONS
REVIEWS

VOL. 11

1951

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v.11

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JUDGE ADVOCATE GENERAL'S CORPS

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

Board of Review

CM 345027

UNITED STATES v. Corporal MELVIN HAMPTON (RA 38634241), Company B, 66th Medium Tank Battalion, Fort Hood, Texas.	2D ARMORED DIVISION Trial by GCM, convened at Fort Hood, Texas, 18 January 1951. Dishonorable discharge, total forfeitures after promulgation, and confinement for one (1) year. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
LUDINGTON, WOLF and BYRNE
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.
Dissent -, J.A.G.C.
_____, J.A.G.C.

JAGE CM 345027 1st Ind

JAGO, SS USA, Washington 25, D. C. APR [illegible]

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

In the foregoing case of Corporal Melvin Hampton (RA 38634241), Company B, 66th Medium Tank Battalion, Fort Hood, Texas, The Judge Advocate General has not concurred in the holding by the Board of Review

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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.

Franklin P. Shaw

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

3 Incls
1. Supporting Memorandum to B/R holding
2. Dissent by member B/R
3. Record of trial

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

JAGZ CM 345027

UNITED STATES	)	2D ARMORED DIVISION
	)	
v.	)	Trial by GCM, convened at Fort Hood, Texas, 18 January 1951. Dishonorable discharge, total forfeitures after promulgation and confinement for one (1) year. Disciplinary Barracks.
	)	
Corporal MELVIN HAMPTON (RA 38634241), Company B, 66th Medium Tank Battalion, Fort Hood, Texas.	)	

DISSENTING OPINION BY
WOLF
Officer of the Judge Advocate General's Corps

1. I am unable to concur with the Board of Review which has held the record of trial in this case to be legally sufficient to support the findings of guilty and the sentence.

2. My dissent is based primarily on the belief that conduct of members of the court, specifically the president and the law member, in directing improper questions and remarks to and at a key witness, injuriously affected the substantial rights of the accused.

3. The accused, Hampton, was charged with a violation of the 94th Article of War in that he "did, at Fort Hood, Texas, on or about 14 November 1950, feloniously steal three and one-fourth (3¼) cases of canned milk, of the value of about $17.16, and twenty-five (25) pounds of ground coffee of the value of about $15.00, all of the total value of $32.16, property of the United States furnished and intended for the military service thereof." He was found guilty as charged and 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 one year. The sentence was approved by the reviewing authority.

4. Evidence presented at the trial showed that 3 cases and 12 cans of Carnation milk and a 50 pound paper sack about half full of ground coffee were found in a cabin at the Cottage Courts tourist cabins, Waco, Texas, on 16 November 1950, and that the accused had rented the same cabin early

on the morning of 16 November. The accused refused to make a written pre-trial statement. He stated to a CID agent that he had purchased the items in question from an unknown colored man in East Waco, Texas, and had later left them in the cabin where they were found. While the prosecution devoted much time and effort (R 9-20) in attempting to show that the milk and coffee were government property, it succeeded only in showing that the cartons and the bag had once belonged to the Governemt. There was no showing that the cartons and bag had ever been in government stocks at Fort Hood. It was shown that government-purchased coffee was sold to individuals at the Fort Hood Commissary in two pound bags and that cases of milk bearing government inspection numbers were some times sold at the commissary.

5. With the evidence in this not overly convincing state Recruit Gale R. Cook was called as a witness for the prosecution. In a pre-trial statement not as yet before the court, Cook had told of driving the accused to Waco, from Fort Hood, on the evening of 14 November 1950. He had further stated that before leaving the post he had stopped at a mess hall at the request of the accused (a cook) who had come out of the mess hall with two "boxes" and placed them in the trunk of the car, that on stopping at another building on the post at the request of the accused the latter had placed two cartons in the trunk of the car and that on arriving at the tourist court in Waco the accused had removed the "cartons" from the car and taken them to his room. At the trial, however, Cook testified only that he had seen the accused come out of a mess hall at Fort Hood with a bag that he presumed to be laundry and consistently denied that he had seen the accused put any cartons in the trunk of the car. At R 55 the prosecution questioned the witness as follows:

> "Q. Now, you said it was laundry?
> A. I took it for granted it was laundry. I didn't know what it was.
>
> Q. Was it in cartons, packages, bags or sacks?
> A. All I seen was one bag that looked like a barracks bag.
>
> Q. You didn't see any cartons?
> A. No, sir.
>
> PROSECUTION: I will have to ask the court to bear with me for a few minutes here.
>
> Q. You made a statement about this?
> A. Yes, sir.
>
> Q. Didn't you use the word "cartons" in that case?
> A. The man asked what it could have been. I said it could have been boxes, could have been cartons. All I can

testify definitely he put in there was one sack and it looked like a barracks bag. The rest of the material, I don't know what it was."

In all of his testimony from R 51 to R 59 the witness Cook denied that he knew the nature of the articles placed in the trunk by the accused other than that one looked like a laundry bag. The witness was excused.

The prosecution next offered into evidence a deposition from a cab driver of Waco, Texas (Pros Ex 21). The driver stated that in the early morning of 16 November 1950 he had transported the accused, a female companion, and some bags and boxes from one tourist cabin (Magnolia Court) to another (Cottage Courts) in Waco, that accused had asked him if he "could use some milk" and that one of the bags smelled like coffee. He stated that he did not know what was in the boxes or bag.

After some additional witnesses were heard the defense counsel presented a motion for an acquittal on account of insufficient evidence (R 70). The law member stated that before ruling on the motion he wanted to recall the witness Cook (R 72). The previous testimony of Cook was the only evidence before the court tending to show that the accused had removed any articles from Fort Hood. After some preliminary questions by members of the court a line of questioning began which developed into a barrage of highly improper questions and comments by members of the court as I feel to the injury of the substantial rights of the accused.

"Q. Are you familiar with the penalties for perjury, Cook?

A. No. I am not sir. (R 73)

Q. Well, perjury is false testimony upon a material matter in a judicial proceeding. This is a judicial proceeding. The matters about which you are testifying are material. The maximum penalty for perjury is dishonorable discharge, total forfeiture of all pay and allowances to become due after the date of the order promulgating the sentence, and confinement at hard labor for not to exceed five years. Now, you have just testified to a fact, Cook, which can be definitely disproved. Suppose you think it over and tell us the truth here. (R 73)

A. Well, one night I brought him home, and one night I didn't.

Q. We are talking about the night he took these items up there and no other night. You are under oath, and for your own benefit you had better start telling the truth. (R 73)

LAW MEMBER: I want to tell you about a case that happened here about a year ago. A soldier named committed an aggravated assault in Temple. He was tried

and convicted and got a dishonorable discharge and two years. At his trial, a soldier named testified for and perjured himself, testified to a lie. Was tried for that, got a dishonorable discharge and five years. Now, think about that, Cook. Do you want to be sitting over there on trial for perjury?

A. No sir, but I make that previous statement, one night I took him in and brought him back, and one night I didn't bring him back." (R 73)

* * * *

"Q. How could anyone so absent minded as you have anything to do with a tank? Have you been taking care of your tank for the last few days? Did you work on it last week?

A. I was over the hill, sir. (R 74)

* * * *

"Q. At the time you went over the hill you knew Hampton's trial was coming up, didn't you?

A. I knew he was going to be tried, but I wasn't subpoenaed to come to it. (R 74)

Q. You knew he was going to be tried when you went over the hill, didn't you?

A. I knew it was coming off, sir. (R 74)

* * * *

"Q. You heard the trial was dropped and came back, didn't you?

A. No. I didn't. When I came back, Hampton was in the billet and I asked what he got. (R 75)

Q. You thought the trial was all over and you came back, didn't you?

A. No, I didn't, sir. (R 75)

Q. You thought it would all be over when you got back?

A. No, I didn't. (R 75)

Q. You did come back. You are sitting here now. You asked him what he got? (R 75)

A. Everybody is curious when somebody has been tried in a small company of 100 men.

Q. You thought he had already been tried, didn't you? Were you surprised when they called you up. (R 75)

A. No, sir.

Q. Were you surprised when you found Hampton hadn't been tried?

A. Well, yes and no. I knew he was supposed to be and knew several other witnesses. (R 75)

Q. That is why you left, wasn't it?

A. No, sir, I knew I was supposed to be there. (R 75)

Q. If you knew you were supposed to be at the trial, why did you leave? Why didn't you stay and help Hampton, if you testified as you have today? Why didn't you be here for the trial and help him?

A. I went to see about a transfer. I got drunk after payday and just stayed drunk. That ain't the reason I went AWOL. (R 75)

* * * *

"Q. You testified before she came out to the car and you had never seen her before. Do you want to make a clean slate of it, or I am going to do something about it. Do you want to make a clean slate of the whole thing?

A. I am telling you as clean as I know right now, sir. (R 77)

Q. You have sat there and lied and lied, and I have caught you in five of your lies up to now. You have told numerous lies about the girl Martha, about what you did and where you went. Suppose you come out and tell the truth.

A. I have told you the truth. (R 77)

Q. You better start thinking, Cook. I have caught you in several lies and the law member has caught you in several. You had better tell the truth now.

A. As far as I know, I have to the best of my ability spoken the truth. (R 77)

* * * *

"PRESIDENT: Yes, you did. You said she came and drank beer with you. You further testified the first time you laid eyes on her was when she came out to the car. You just sit there and lie, lie, lie, You know a lot more than you have told. I don't know who you are defending but if I were you, I would start thinking about Pvt Cook. You are defending somebody, Cook. You are covering up for somebody. If I were you, I would start taking care of Private Cook.

LAW MEMBER: Mr. TJA, do you have a signed pretrial statement? (R 78)

TRIAL JUDGE ADVOCATE: (Reading) The night of the 14th of November 1950. He stated on the stand also that it was on the 14th of November. May I ask the witness a question?"

* * * *

Questions by the prosecution.

"Q. Now, Cook, I am going to tell you something. I am going to be here until tomorrow night if I have to get the truth out of you. Didn't you make a statement to the CID on this?

A. Yes, he asked me questions and I gave him answers. (R 78)

* * * *

"Q. In that statement didn't you say "Yes, I agreed and at approximately 1830 hours I drove Hampton down Central Avenue where he directed me to go and stopped beside mess hall on south side of Central Avenue where Hampton got out of the car and went into the mess hall and came out carrying two boxes which he put in the trunk of the car." Didn't you say that?

A. No, I didn't. I don't know what he put in. (R 78)

* * * *

"LAW MEMBER: Do you want to be tried for false swearing? You are lying and lying under oath. There is no offense which I consider more despicable and more rotten then lying under oath, and if I myself have to prefer charges and put you in the stockade, I will do it.

MEMBER: He is already in it. (R 79)

LAW MEMBER: I know. I will keep him in it.

Q. Didn't you say that in your statement?

A. I didn't say boxes. (R 79)

* * * *

"Q. What did you tell Mr. Schunks about those boxes is what I want to know?

A. I don't recall talking to him about two boxes. (R 79)

Q. (Law Member) Did you sign that statement?

A. Yes, I signed the statement. (R 79)

Q. Did you read it before you signed it?

A. Just glanced over it. (R 79)

PRESIDENT: I want charges preferred against this man.

* * * *

PRESIDENT: You have told so many lies you have confused yourself. You are confused about your lying. You don't know which lie to tell next, do you?

WITNESS: I ain't confused about my lying. It has been almost three months since the statement. I don't know what is on the statement. (R 83)

PRESIDENT: I don't want to hear any more."

After being subjected to the foregoing tirades by members of the court the witness eventually, as might have been expected, acquiesced in the accuracy of the remarks contained in his pre-trial statement and it was admitted as prosecution exhibit #24. The accused elected to remain silent and the trial drew to a rapid conclusion with the accused being found guilty as previously stated.

6. Article of War 19 provides in pertinent part as follows:

"The trial judge advocate of a general * * * court martial shall administer to the members of the court, before they proceed upon any trial, the following oath or affirmation: 'You * * * do swear ****** that you will duly administer justice, without partiality, favor, or affection, * * *." (Underscoring supplied).

It has been a long cherished human belief that he who judges must be unbiased. Carved on the tomb of Rekhmire, Chief Justice of Egypt about 1500 BC are the instructions he received from King Thutmose III on taking office. Among these are the words: "It is an abomination of the god to show partiality."

Winthrop says:

"It is quaintly announced in Art. 87 that 'All members of a court martial are to behave with decency and calmness', a directory provision dating back in our law to the Articles of 1775 which derived it, in substance from Art. 48 of the code of James II. It will be of course for the president, 'the organ of the court to keep order' to require an observance of this Article in the first instance." Winthrop Military Law and Precedents (2d Ed., 1920 Reprint) 177

In the United States the right of a judge to question a witness has been universally recognized, Wigmore on Evidence (Third Edition) 153. However, such questions must remain within reasonable bounds. Judge Shelby in Adler v. U. S., 182 Fed 464, 472, (CCA 5th) said:

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"The impartiality of the judge - his avoidance of the appearance of becoming the advocate of either one side or the other of the pending controversy which is required by the conflict of the evidence to be finally submitted to the jury - is a fundamental and essential rule of special importance in criminal cases. * * * While we are of the opinion that the judge is permitted to take part impartially in the examination or cross-examination of witnesses we can readily see that, if he takes upon himself the burden of the cross-examination of defendant's witnesses * * * and conducts the examination in a manner hostile to the defendant and the witnesses, the impression would probably be produced on the minds of the jury that the judge was of the fixed opinion that the defendant was guilty and should be convicted. This would not be fair to the defendant, for he is entitled to the benefit of the presumption of innocence by both judge and jury till his guilt is proved.

* * * *

"The evidence, taken as a whole, might be so conclusive of the defendant's guilt that an appellate court would not be justified, in interfering with the judgment on this account alone. But in a case where there is substantial conflict in the evidence as to the essential points that were required to be submitted to the jury, the course of the judge in unnecessarily assuming to perform the duties incumbent primarily upon others might make it the duty of the appellate court, on this ground alone, to grant a new trial."

In Hunter v. U. S. 62 Fed. 2d, 217, 220 (CCA 5th, 1932) in reversing judgment of the U. S. District Court, the Court of Appeals said:

"The assignments of error based on the district judge's cross-examination of appellant are in our opinion well taken. While that method of cross-examination, if it had been conducted by the district attorney, might have been proper, a district judge ought never to assume the role of a prosecuting attorney and lend the weight of his great influence to the side of the government. It is the judge's duty to maintain an attitude of unswerving impartiality between the government and the accused, and he ought never in any questions he asks go beyond the point of seeing to it, in the interests of justice, that the case is fairly tried."

To the same effect is the decision in Frantz v. United States 62 Fed. 2d 737 (CCA 6th, 1933).

In Williams v. U. S. 93 Fed. 2d, 685, 692 (CCA 9th, 1937) after citing with approval the three cases referred to above the court concluded as follows:

"As we read the record—particularly the 200 pages comprising the District Judge's interrogation of witnesses—we are compelled to the conclusion that, in such questioning, the learned trial court passed beyond the immemorial limits set down for Anglo-American tribunals. Applying the language of the foregoing decisions, we believe that he took 'upon himself the burden of the cross-examination of the defendant's witnesses, when the government /was/ represented by competent attorneys.' The District Judge furthermore repeatedly took the appellants out of the hands of their own 'counsel, who, as the record before us shows, /were/ apparently competent, conscientious and expeditious in /their/ conduct of the case, and proceed/ed/ along an independent and extensive line of examination and cross-examination.' We believe that the District Judge did not 'seduloúsly avoid all appearance of advocacy as to those questions which /were/ ultimately to be submitted to the jury,' but on the contrary, probably produced on the minds of the jury the impression 'that the judge was of the fixed opinion that the defendant/s/ /were/ guilty and should be convicted.' This being 'a case where there is substantial conflict in the evidence as to the essential points that were required to be submitted to the jury, the course of the judge is unnecessarily assuming to perform the duties incumbent primarily upon others,' makes it our duty to grant a new trial."

See also Martucci et al v. Brooklyn Children's Aid Society 140 Fed. 2d, 732, 734 (CCA 2nd 1944) and Gomila et al v. United States, 146 Fed. 2d, 372, 376 (CCA 5th 1944).

7. In CM 316558, Summers, 65 BR 355, the Board of Review after extensive consideration of previous holdings as to the effect of improper remarks by members of the court said:

"It follows from the foregoing authorities that the prejudicial effect of improper remarks by members of a court-martial is to be measured by consideration whether the legal evidence of guilt is relatively conclusive or inconclusive, and the extent to which evidence for the prosecution is contradicted or explained consistently with innocence by evidence on behalf of the accused. A conviction should not be set aside where the evidence is of compelling effect and the errors committed could not reasonably have affected the result. A similar rule is followed by the Federal courts, (Williams v. United States, 93 Fed (2nd) 685 (CCA Cal. 935); Pasqua v. United States, 146 Fed (2nd) 522)."

In CM 187894, Washak, 1 BR 105, quoted in the Summers case the Board of Review stated:

"The court member's positive and emphatic statement that the room was 'dark as hell' in contradiction of the accused on this material point amounted to a declaration

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unwarranted by the evidence before the court, that the accused's testimony explanatory of his possession and as to how he came into possession of the stolen property was false. In effect the member made himself an unsworn witness for the prosecution on a material point of which the court could not take judicial notice, and the court failed to reject his statement or indicate in any manner that it was not accepted as evidence of the fact in issue. No witness was called to testify to the fact stated by the member. The member's conduct and his subsequent participation in the findings and sentence was * * * unmistakably erroneous."

Considering the circumstances under which the improper questions and remarks were made by members of the court to the key witness in the present case I consider them to have been highly prejudicial to the substantial rights of the accused. Had these improprieties been committed by the judge or the foreman of the jury in a Federal court I entertain not the slightest doubt that they would be considered reversible error. The right of every accused to be tried by an impartial court is so basic that I can perceive no justification or excuse for its infringement merely because the tribunal in question happens to be a general court martial operating under military law.

8. Inasmuch as the improper remarks by members of the court were, in my view, overwhelmingly fatal, it is not necessary to dwell at length on other possible defects disclosed by the record of trial. It should be noted however that the prosecution failed to prove beyond a reasonable doubt that the milk and coffee allegedly stolen by the accused were in fact "property of the United States." In an opinion concurred in by the Judge Advocate General, CM 319591, Pogue, 68 BR 385, 399, the Board of Review said:

"Proof that accused had applied to his own use or to another apparently unauthorized purpose certain property of a type and kind generally furnished and intended for the military service, even though such property might bear manufacturer's markings indicating that it had been made under Government contract for ultimate use in the military service, is insufficient to support a conviction of misappropriation in violation of the 94th Article of War unless such proof is accompanied by further evidence that the property in question had been unlawfully obtained from military custody or that items similar to such property were not sold on a legitimate open market in the locality where the offense was alleged to have been committed or by other showing, by fair inference or accused's own admission, that such property was in fact military property."

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For all that appears in the record Carnation milk and coffee of the type here involved might have been purchased at any grocery store.

9. I am of the opinion that findings and sentence in this case should be disapproved.

John F. Wolf JAGC

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

JAGU CM 345027

UNITED STATES v. Corporal MELVIN HAMPTON, RA 38634241, Company B, 66th Medium Tank Battalion, Fort Hood, Texas	2D ARMORED DIVISION Trial by G.C.M., convened at Fort Hood, Texas, 18 January 1951. Dishonorable discharge, total forfeitures after promulgation, and confinement for one year.

- - - - - - - - - -

Opinion of the Judicial Council
Harbaugh, Brown and Mickelwait
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 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 stealing three and one-fourth cases of canned milk of the value of about $17.16 and twenty-five pounds of ground coffee of the value of about $15.00 of the total value of $32.16, property of the United States furnished and intended for the military service thereof, at Fort Hood, Texas, on or about 14 November 1950, in violation of Article of War 94. Evidence of one previous conviction by summary court-martial 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 at such place as proper authority may direct for one year. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, 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, one member dissenting, has held the record of trial legally sufficient to support the findings of guilty and the sentence. The dissent was based primarily on the grounds that the substantial rights of the accused were prejudiced by improper questions and remarks directed to a key witness for the prosecution. The dissenting member also expressed the opinion that the prosecution failed to prove beyond a reasonable doubt that the property alleged to have been stolen was "property of the United States." The Judge Advocate General has not concurred in the Board's holding.

3. We will summarize only so much of the evidence as we deem appropriate to illustrate the action of the court in interrogating the key prosecution witness.

On 16 November 1950 at about 9:00 a.m., three cases and twelve cans of Carnation milk and a fifty-pound paper sack about one-half full of ground coffee were found in a cabin at Cottage Courts, Waco, Texas. The cases of milk and the sack containing the coffee bore markings suggestive of Government ownership (R 60; Pros Ex 22, 23).

On the same date, prior to the discovery of these items, the accused had been driven in a taxicab to New Highway Courts where, after a girl entered the cab, they proceeded to Magnolia Courts. There items similar to those previously mentioned were placed in the cab and transported to Cottage Courts. After unloading the items the accused and his female companion were driven away in the cab. In the course of their travel the accused inquired of the cab driver if he, the driver, could "use" some milk (R 59; Pros Ex 21).

The cabin at Cottage Courts had been rented by a soldier named "Hampton" (R 60; Pros Ex 22) and, in oral pre-trial statements received in evidence, the accused admitted possession of and placing the milk and coffee where they were found. The accused further stated that he had purchased the items from an unknown colored man in East Waco, Texas, for approximately $8.50 and that they were "to have been used to trade for items to be used to fix up the company mess halls." He also stated "this was not the first time he had traded Government items or materials * * * for materials he needed in the company messes." He explained that the "transfer of these items was not made because he failed to contact the purchaser for those items" (R 66).

Recruit Gale R. Cook was called as a witness by the prosecution (R 51-59) and later recalled as a witness by the court (R 72-84). The substance of his testimony in brief on the first occasion was as follows.

On 14 November 1950, he drove the accused in an automobile from Fort Hood, Texas, into Waco, Texas. Prior to leaving the reservation he stopped the car while the accused went into a mess hall. When the accused returned to the car Cook, at his request, handed him the keys to the trunk of the car. Cook "took it for granted" that the accused put something in the trunk but disclaimed knowledge of the nature of the articles. A second stop was made at which time the accused entered "an orderly room or supply room." He returned with a bag of some kind which he also placed in the trunk. They later drove into Waco, finally arriving at New Highway Courts where they had a "few more beers." Subsequently, Cook drove the accused to another court about a block and one-half away and remained in the car while the accused removed the articles from the trunk. Cook again stated he did not know what was in the trunk but "took it for

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granted it was laundry." When questioned whether he had used the word "carton" in a pre-trial statement, Cook replied that he stated "it could have been boxes, could have been cartons" but that all he could testify to "definitely" was that it "was one sack and it looked like a barracks bag. The rest of the material I don't know what it was."

After some additional witnesses were heard, the defense counsel presented a motion for acquittal on "account of insufficient evidence" (R 70). The law member stated that before ruling on the motion he wanted to recall the witness Cook (R 71).

Upon his recall as a witness by the court Recruit Cook was subjected to a severe cross-examination by the law member and other members of the court. He was accused of lying and threatened more than once with prosecution for perjury. Portions of the record of trial showing the questions and answers are set forth at length in the dissenting opinion by the minority member of the Board of Review and will not be recapitulated. After the threats and accusations referred to above the witness changed his previous testimony in certain respects and admitted that the facts contained in his pre-trial statement, which was admitted in evidence (R 84; Pros Ex 24), were true. In his pre-trial statement Cook had stated substantially as follows. On 14 November 1950 the accused directed him to stop beside a mess hall where the accused "got out of the car and went into the mess hall and came out carrying two boxes which he put in the trunk of the car"(R 84; Pros Ex 24). At the direction of the accused he made another stop on the reservation. On this occasion the accused left the car and returned about ten minutes later accompanied by another soldier. Each was carrying a carton which he placed in the trunk of the car. Immediately after this testimony the law member overruled the defense motion for findings of not guilty (R 85).

The accused after being advised of his rights as a witness elected to remain silent (R 85).

4. The question is whether or not the repeated accusations of lying and threats of prosecution for perjury in the interrogation of the witness Cook constituted error which injuriously affected the substantial rights of the accused within the contemplation of Article of War 37.

Cook was called as a witness by the prosecution and questioned about the activities of the accused on the date of the offense alleged in the specification. In the course of his testimony it became apparent that he was a reluctant witness and was seeking to avoid frank answers that would incriminate the accused. His evasive manner of testifying made it clear that he was attempting to color his testimony for the benefit of the accused. In view of these circumstances, including his

unexpected hostility, he was clearly subject to impeachment by the prosecution. It was also quite proper for the members of the court to interrogate Cook since they might ask a witness any question that either side might properly ask (MCM 1949, par 135b, p 178). Full latitude should be allowed the cross-examiner and the extent of the cross-examination is within the sound discretion of the court (MCM 1949, par 135b, p 177).

It is apparent however that in this case the court abused its discretion. The evil is manifest where members of a court-martial, all officers, repeatedly accuse a witness, an enlisted man, of lying and threaten him with prosecution for perjury unless and until he changes his testimony. The possibility that such procedure might result in a witness being coerced into giving false testimony immediately condemns such practice. Such conduct is clearly improper and constitutes error.

In CM 130286 (1919), Miller (Dig Op JAG, 1912-40, sec 56, p 236), one of the specifications charged the accused with injecting a narcotic drug into his arm in violation of Article of War 96. The only witness for the prosecution testified that the accused had a needle and some "dope" but he had never seen the accused use the drug. After the prosecution had rested, the court requested the witness to be recalled at which time the witness confirmed his testimony on this point. Upon the suggestion of the court, however, of the probability of the witness' trial for perjury in case the falsity of his statement should be established, the witness then stated that he had seen the accused use the drug. The Judge Advocate General's Office disapproved the finding of guilty of this specification on the grounds that it was not alleged that the act was wrongful or unlawful. The opinion stated further that the record did not disclose such evidence of bias, fear, or duress as would ordinarily coerce one into making a false statement under oath but condemned the practice by adding "Yet, when the consideration is limited to the case as made by the prosecution, matters so vitally affecting the credibility of the witness upon whose statement the whole case substantially rests, cannot be properly ignored in a safe administration of justice."

In CM 316558, Summers, 65 BR 341, the president, who was also the law member, commented on the evidence and credibility of the accused. The Board of Review in its opinion stated:

> "But in his misdirected zeal he injected into the presentation of the case comments on the evidence and on the credibility of the accused which would be deemed improper had they been made by the trial judge advocate. These remarks, on the part of the member charged with the dual responsibility of maintaining the court's dignity, as its president, and its legality as law member, constitute irregularities of the most serious nature. The harm done is not cured by the inadvertence

of the irregularities or the laudable motives which prompted them." (p 351)

After considering a number of decided court-martial cases, the Board of Review further stated with reference to the improper remarks that

> "It follows from the foregoing authorities that the prejudicial effect of improper remarks by members of a court-martial is to be measured by consideration whether the legal evidence of guilt is relatively conclusive or inconclusive, and the extent to which evidence for the prosecution is contradicted or explained consistently with innocence by evidence on behalf of the accused. A conviction should not be set aside where the evidence is of compelling effect and the errors committed could not reasonably have affected the result. A similar rule is followed by the Federal Courts (Williams v. United States, 93 Fed (2nd) 685 (CCA Cal 935); Pasqua v. United States, 146 Fed (2nd) 522)." (p 355)

In applying the above enunciated rule to the facts in the Summers case the Board of Review in its opinion stated:

> "In the light of all the evidence introduced in this case it would be inconceivable that the inexcusable and irresponsible remarks made by the president and law member could affect the findings of the court. Since the evidence of guilt of the offenses alleged seems to us to be compelling, the improper conduct of the President and law member did not prejudice the substantial rights of the accused." (p 356)

In the case presently under review Cook was a key prosecution witness. It was sought to be established by his testimony that the accused brought "cartons" and "boxes" from a mess hall similar to those found in the tourist court, which were admitted to have been placed there by the accused. Cook refused to state on direct or cross-examination that he had knowledge of the nature of the items placed in the trunk of his vehicle. The evidence was in this unsettled state when the prosecution rested and the defense made a motion for an acquittal. The court, however, refused to rule on this motion until the witness Cook was recalled. Upon recall and after being subjected to the improper pressure by the court, Cook changed his testimony and admitted the truth of a pre-trial statement wherein he stated that he had observed the accused bringing "boxes" and "cartons" from the mess hall. The court then closed and the accused was found guilty of the offense as alleged.

Article of War 37 in pertinent part provides:

"The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved in any case on the ground of improper admission or rejection of evidence * * * unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused; * * *"

In Kotteakos v. United States ((1946) 328 U.S. 750, 757), followed in CM 335123, Green, 2 BR-JC 53, 58, 64-65, the Supreme Court, in considering the Federal harmless error statute then in effect, the provisions of which are substantially similar to those of Article of War 37, summarized its conclusions as follows:

"If, when all is said and done the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment shall stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. Bruno v. United States, supra (308 U.S. at 294, 84 L ed 260, 60 S Ct 198). But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."(p 757)

It was clearly erroneous for the court to conduct an examination of a witness in the manner shown in this case. The danger of inducing false testimony by this method is too great to condone its use in this instance. In addition, the repeated accusation of lying, especially where directed towards a witness testifying favorably for an accused and related to a vital element of proof, indicates possible foreknowledge of the facts in the case and evidences premature judgment against the accused. The degree of improper influence thus brought to bear upon other members of the court was unconscionable. It is clear that the error had "substantial influence" on the findings by the court in this case. It was only after the witness had been coerced into changing his testimony to the detriment of the accused that the court ruled upon the motion for acquittal, thus emphasizing the inconclusive state of the testimony and the reliance placed upon the coerced testimony. The Judicial Council is of the opinion that the erroneous conduct of the members of the court injuriously affected the substantial rights of the accused.

5. 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, 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

THE JUDICIAL COUNCIL

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

In the foregoing case of Corporal Melvin Hampton, RA 38634241, Company B, 66th Medium Tank Battalion, Fort Hood, Texas, upon the concurrence of The Judge Advocate General the findings of guilty and the sentence are disapproved and a rehearing is authorized.

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

14 May, 1951

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

JAGN-CM 345045

MAR 8 1951

UNITED STATES	)	1ST INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Furth, Germany, 12 and 13 January 1951. Dishonorable discharge, total forfeitures after promulgation and confinement for three and one-half (3½) years. Disciplinary Barracks.
Private THEODORE U. LANE (RA 19339992), Company E, 16th Infantry Regiment.	)	

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 Charges and Specifications:

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

Specifications 1 through 5: (Nolle prosequi).

Specification 6: In that Recruit Theodore U Lane, Company "E", 16th Infantry Regiment, did, at Stein Castle, Stein, Germany, on or about 23 September 1950, feloniously steal one (1) trench coat, value about $37.50, the Property of Second Lieutenant Charles E Cheatham, Headquarters Company, Third Battalion, 2nd Armored Cavalry Regiment.

Specification 7: (Nolle prosequi).

Specification 8: In that Recruit Theodore U Lane, Company "E", 16th Infantry Regiment, did, at Nurnberg, Germany, on or about 1 October 1950, feloniously steal one (1) Belgian

automatic pistol, with holster, magazine, value about $20.00, the property of Second Lieutenant Irvin D Slauson, Company "F", 16th Infantry Regiment.

Specifications 9 through 12: (Nolle prosequi).

Specification 13: In that Recruit Theodore U Lane, Company "E", 16th Infantry Regiment, did, at Stein Castle, Stein, Germany, on or about 8 October 1950, feloniously steal one (1) Argus camera, value about $65.00, and one (1) trench coat, value about $37.50, of a total value of about $102.50, the property of Second Lieutenant Hunter W Passmore, Company "E", 16th Infantry Regiment.

Specification 14: (Nolle prosequi).

Specification 15: In that Recruit Theodore U Lane, Company "E", 16th Infantry Regiment, did, at Nurnberg, Germany, on or about 15 October 1950, feloniously steal one (1) flashlight, value about $1.50, one (1) blanket, value about $4.00, one (1) pair sun-glasses, value about $6.50, one (1) air Pistol, value about $12.00, and one (1) hunting knife with case, value about $5.00, of a total value of about $29.00, the property of Master Sergeant William F Cohlman, Headquarters Company, 16th Infantry Regiment.

Specification 16: (Nolle prosequi).

Specification 17: In that Recruit Theodore U Lane, Company "E", 16th Infantry Regiment, did, at Nurnberg, Germany, on or about 15 October 1950, feloniously steal two (2) Gasoline Coupon Books, of some value, and one (1) flashlight, value about $1.50, of a total value of about $1.50, the property of Sergeant William P Kallbrier, 556th Ordnance Company.

Specifications 18 and 19: (Nolle prosequi).

Specification 20: In that Recruit Theodore U Lane, Company E, 16th Infantry Regiment, did, at Nurnberg, Germany, on or about 7 October 1950, feloniously steal one (1) Gasoline Coupon Book, of some value, the property of Lt Colonel Sam F Muffie, 793d Military Police Service Battalion.

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

Specification: In that Recruit Theodore U Lane, Company E, 16th Infantry Regiment, did, at Stein, Germany, on or about 28 September 1950, feloniously steal one (1) pistol, calibre .45, M1911A1, value of about $38.00 property of the United States, then in the custody of 2d Lt Charles E. Cheatham, Headquarters Company 3d Battalion, 2d Armored Cavalry Regiment, furnished for the military service thereof.

He pleaded not guilty to and was found guilty of the Charges and Specifications thereunder with exceptions as follows:

Of Specification 6, Charge I: Except the words, "value about $37.50," substituting therefor respectively the words, "of some value."

Of Specification 8, Charge I: Except the words, "value about $20.00," substituting therefor respectively the words, "of some value."

Of Specification 13, Charge I: Except the words, "value about $65.00," and "value about $37.50," substituting therefor respectively the words, "of some value," and "of some value," and except the words, "of a total value of about $102.50."

Of Specification 15, Charge I: Except the words, "value about $1.50," and "value about $4.00," and "value about $6.50," and "value about $12.00," and "value about $5.00," substituting therefor respectively the words, "of some value," and "of some value," and "of some value," and "of some value," and "of some value," and except the words, "of a total value of about $29.00."

Of Specification 17, Charge I: Except the words, "value about $1.50," substituting therefor respectively the words "of some value," and except the words, "of a total value about $1.50."

The reviewing authority disapproved Specification 15 of Charge I; and approved only so much of the finding of guilty of Specification 17 of Charge I, as finds that the accused did, at the place and time alleged, feloniously steal one gasoline book, of some value, the property of Sergeant William P. Kallbrier. 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 four years. Evidence of two previous convictions was introduced. The reviewing authority approved only so much of the sentence as provides for 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 three and one-half years, 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. The evidence is legally sufficient to sustain the findings. The only question presented is the legality of the sentence imposed.

4. Specification 6 of Charge I and the Specification of Charge II, allege the larceny of one trench coat, the property of Second Lieutenant Charles E. Cheatham, on or about 23 September 1950, and the larceny of a pistol, the property of the United States, on or about 28 September 1950. The proof conforms to the allegations of the offenses charged except as to the date of the taking of the trench coat. The coat and pistol were stolen, according to the evidence adduced, on 28 September 1950 from the automobile of Lt. Cheatham. There is nothing contained in the record of trial that indicates anything other than a single larceny, which should have been alleged in but one specification. The rule in such cases is stated in subparagraph 180g of the Manual for Courts-Martial, U. S. Army, 1949:

> "When a larceny of several articles is committed at substantially the same time and place it is a single larceny even though the articles belong to different persons. Thus, if a thief steals a suitcase containing the property of several individuals, or goes into a room and takes property belonging to various persons, there is but one larceny, which should be alleged in but one specification."

In the instant case, the election to charge the single larceny as two offenses is clearly violative of the principle quoted above (CM 333014, Brooks, 81 BR 273 at page 277). It remains to be determined whether this error in pleading injuriously affected the substantial rights of the accused.

Had the larceny been properly charged under a single specification the values of the articles stolen would have been aggregated to a total value of more than $38.00 but less than $50.00, and the maximum period of confinement therefor would have been one year (subpara 117c, MCM, 1949).

JAGN-CM 345045

It follows that the total confinement imposable is three years, comprising four six months periods for the larcenies alleged in Specifications 8, 13, 17 and 20 of Charge I, and one year for Specification 6 of Charge I and the Specification of Charge II, as one transaction. By alleging the larceny as two offenses, the accused was sentenced to be confined for one year for the theft of the pistol of a value of about $38.00, and to be confined for six months for the theft of the trench coat "of some value," and a total of three and one-half years for all of the offenses. The error in pleading, therefore, injuriously affected the substantial rights of the accused to the extent indicated.

5. For the reasons stated, the Board of Review holds the record of trial legally sufficient to sustain the findings of guilty as approved by the reviewing authority and legally sufficient to support only so much of the sentence as provides for 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 three years.

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

George B. Weckel, J.A.G.C.

Lieb B. McKelley, J.A.G.C.

MAR 1 6 1951

JAGN-CM 345045 1st Ind
JAGO, Department of the Army, Washington 25, D. C.

TO: Commanding General, 1st Infantry Division, APO 1, c/o Postmaster, New York City, New York.

1. In the case of Private Theodore U. Lane (RA 19339992), Company E, 16th Infantry Regiment, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority and legally sufficient to support only so much of the sentence as provides for 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 three years. Under Article of War 50e(3) this holding and my concurrence therein vacate so much of the sentence as is in excess of 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 three years. Under the provisions of Article of War 50 you now have authority to order the execution of the sentence as modified in accordance with the foregoing holding.

2. When copies of the published order in this 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 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 345045).

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.

JAGK - CM 345053

APR 4 1951

UNITED STATES	3D INFANTRY DIVISION
v.	Trial by G.C.M., convened at 3d Infantry Division, APO 468, c/o Postmaster, San Francisco, California, 7 and 8 January 1951. Dishonorable discharge, total forfeitures after promulgation, and confinement for life.
Corporal JOHN RIDDICK (RA 37371700), Battery "A", 999th Armored Field Artillery Battalion (Motorized), 3d Infantry Division.	

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 soldier named above and 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 92d Article of War.

Specification: In that Corporal John Riddick, Battery A, 999th Armored Field Artillery Battalion (Motorized), did, at or near, Hamhung, Korea, on or about 5 December 1950, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill Master Sergeant Charles J. Hemphill, a human being, by shooting him with a carbine, M-2.

He pleaded not guilty to the charge and specification. He was found guilty of the Specification except the words "And with premeditation," of the excepted words, not guilty, 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 the term of his natural life. The reviewing authority approved the sentence but stated that "pursuant to Article of War 50 e the order directing the execution of the sentence is withheld."

3. <u>Evidence</u>

a. For the Prosecution

At about 1600 hours, 5 December 1950, Master Sergeant Charles J. Hemphill, First Sergeant of Battery "A", 999th Armored Field Artillery Battalion, located near Hamhung, Korea, requested Master Sergeant Grover C. Lowery, communications sergeant of that unit, to furnish him an enlisted man with a shovel for a detail (R 18,24,28,32). Hemphill was a big man weighing between 200 and 250 pounds (R 33,43). The battery had just moved to a new position and was then "digging in" (R 18,28). Lowery communicated the order to accused, Corporal John Riddick, a member of his section, who was then digging his foxhole (R 32). Accused said "OK" but failed to comply with the order (R 18,28). Shortly afterward, Hemphill asked Lowery where the man was, adding that two men were needed for the detail instead of one (R 28,32). Lowery returned to accused who was still digging his foxhole and asked him why he had not reported to Hemphill as ordered (R 28). Accused replied, "I'll go but you'll have to take me to him" (R 28). Lowery took accused to Hemphill. Lowery related that accused said to Hemphill, "it's not right for /me/ to dig someone else's foxhole before /I/ dug /my/ own. *** 'After all I am an NCO, the same as you are'" (R 22,28,32). Hemphill replied, "Yes, you are an NCO, the same as I am, but I receive orders and you receive orders" (R 28). A heated argument followed and accused told Hemphill that "he would rather fight" (R 28). Accused said that if the foxhole to be dug was for an officer he would not dig it (R 18). Hemphill shook his finger at accused and said, "Go on the detail soldier" (R 18,21) Accused told Hemphill not to shake his finger at him, to which Hemphill replied, "You no-toothed bastard, if I had time I'd kick your ass" (R 19,22). Accused thereupon took off his glasses, threw them on the ground, and said, "You can take time, Sergeant" (R 19). Hemphill said, "I'm not going to fight you" (R 28). A scuffle followed and they fell to the ground. Hemphill struck accused several times with his fists, and each time asked if accused "had enough" (R 19,20). Accused did not answer and Hemphill continued hitting him (R 19). Accused then said, "You win," and Hemphill got up. Accused either got up by himself or Hemphill pulled accused to his feet and accused said, "You won that argument, Sergeant" (R 10,13,21,35,37). Hemphill then said to accused, "Now will you go and get the shovel?" to which accused replied, "Yes" (R 29,32). Hemphill gave accused a push toward his foxhole and accused went to his foxhole about 10 or 15 yards away, picked up his carbine and pointed it at Hemphill who had followed about six paces behind him (R 10,13,19,21,35). Hemphill walked over to accused and said, "Put that carbine down soldier." Hemphill made a movement to push the muzzle of the carbine away from himself (R 10,13,15). Accused said, "I told you about messing with me," and fired a burst of the carbine at Hemphill (R 10,19). Hemphill fell to the ground "in a knee-bend," unbuttoned his parka, and pulled his .45 automatic revolver from his pistol holster, which was attached

to the belt of his trousers (R 20). He attempted to load the revolver, but let it fall to the ground. He held his arms around his stomach, and called for the "medics" (R 15,20,29,32). Hemphill had made no move toward his revolver before he was shot (R 20,24,25). First aid was administered by Corporal James H. Fetherson, first aid man of the unit, who cut through Hemphill's clothing and observed three "puncture wounds" in Hemphill's body (R 36,38-39). A medical tag was made out and Hemphill was taken to the hospital (R 39-40). Accused was disarmed and taken into custody (R 20). Accused and Hemphill had had no trouble prior to this incident (R 24). Hemphill had never been known to start a fight or to personally curse a man prior to this incident and accused was a quiet type of man who never was known to have started a fight or quarrel (R 25.30,31,33).

Later that afternoon, Hemphill was admitted to the 121st Evacuation Hospital at Hamhung, Korea, where the examining officer, Captain Richard I. Walsh, stated that the following occurred:

> "On the Fifth of December, he was admitted late in the afternoon with multiple gun shot wounds. The patient was in a state of shock on admission for which he was treated and taken to the operating room at 10:00 o'clock that night. He had a perforating wound through his left lower humeral region; he had multiple gun wounds through the left anterior lower chest near the costal margin with wounds of exit in his right lower flank region. At operation it was found the patient had multiple perforations of his large bowel; large sections of the small bowel had to be resected and half of his large bowel was removed. The patient was in fairly good condition on leaving the operating room. He was given support treatment of blood the following day. The patient was alert for a short time and spoke to various people -- only the doctors saw him at that time but he was never able to maintain a satisfactory blood pressure or put out adequate urine. The patient expired that evening about 10:00 o'clock, and I was the one that pronounced him dead that evening." (R 41)

As to the cause of death, Captain Walsh stated, "Death was the direct result of gun shot wounds" (R 41).

On 12 December 1950, accused, after being advised of his rights under the 24th Article of War, by John J. McEachern, Agent, 19th Criminal Investigation Division, voluntarily dictated a statement to McEachern and signed it. The statement was admitted in evidence without defense objection (R 44-45). In his statement, accused stated he first met Sergeant Hemphill in October 1950, and discussed a previous

tour of duty in the Philippines. A friendly conversation followed in which they "kidded" each other. As to the incident in issue, accused stated that on 5 December 1950 he and another soldier named Nolan were digging a foxhole for their joint use when Sergeant Lowery, accused's section sergeant, approached accused and told him to report to the first sergeant with his shovel. Accused asked Sergeant Lowery "to give /him/ a break and let /him/ finish /his/ own foxhole first which is customary before digging a hole for someone else." Sergeant Lowery left and returned in five minutes. Accused left his shovel with Nolan and proceeded with Sergeant Lowery to Sergeant Hemphill. When they arrived there, Sergeant Hemphill said, "God-damn it, bring two men now." Sergeant Lowery left and Sergeant Hemphill told accused to get his shovel, to which accused replied that Nolan needed it to dig their foxhole. Sergeant Hemphill pushed accused backward and accused asked him to stop. Sergeant Hemphill persisted and accused removed his glasses and again asked Sergeant Hemphill to stop pushing him. Sergeant Hemphill said, "You old toothless bastard, I'll knock your brains out." Accused said, "No you won't," and Sergeant Hemphill hit accused about the head. Accused attempted to strike back but missed, and tried to get a "head hold" on Sergeant Hemphill but was knocked loose. Sergeant Hemphill knocked accused down, put accused's right arm behind his back, put his knee on accused's arm, and, holding accused's head with one hand, beat him with the other. After administering several blows, Sergeant Hemphill asked accused if he had enough and accused said, "Yes." Sergeant Hemphill then "let /accused/ up on /his/ feet," and told him to get his shovel. Accused went to the dugout with Sergeant Hemphill at his back pushing him. At the dugout accused saw Sergeant Hemphill lift the flap of his pistol holster which was in the upper right pocket of his parka. Believing that Sergeant Hemphill was going to shoot him, accused pulled his carbine from under his bedroll, "pushed the safety off and in the same motion put the carbine to /his/ hip" and fired a "burst of rounds." Sergeant Hemphill pulled the holster from his pocket, sank to his knees, saying, "You win--you win," and fell over backwards (R 45-47).

b. For the Defense

Two witnesses testified that accused was a quiet type of person who did not bother anyone (R 58,70). Sergeant Hemphill was described as a moody person who cursed his men and threatened them with physical violence to enforce discipline. On one occasion he struck an enlisted man without provocation (R 53,60-61,64-65).

Accused, after being informed of his rights as a witness, elected to testify under oath (R 71-73).

He testified that he had been in the Army for eight years and

seven months, had never been court-martialed or punished under Article of War 104, and had never had trouble with either commissioned or non-commissioned officers under whom he served prior to this incident. During World War II he served in "the South and Southwest Pacific and Philippine Islands." He had dengue fever twice, and a mouth and throat infection which resulted in having all his teeth pulled. He received five Good Conduct ribbons (R 73).

Relative to the incident in issue, accused testified that at about 1700 hours, on 5 December 1950, he and Private Nolan were digging a foxhole for themselves when Sergeant Lowery informed him that he was to go on a detail. Several other members of the battery had previously been requested to perform the detail but managed to evade it. Private Nolan left and then Sergeant Lowery left. Accused remained and continued digging. Both Nolan and Sergeant Lowery returned in about 10 minutes and accused and Sergeant Lowery proceeded to Sergeant Hemphill who upon seeing them shouted, "Now, make it two God-damned men." Sergeant Lowery left and accused asked Sergeant Hemphill what he was supposed to do. Sergeant Hemphill ordered him to get his shovel, towering over him, cursing him, and shaking his finger in accused's face. Hemphill said, "Why you old toothless bastard *** I ought to knock your God-damned brains out." Accused protested and Sergeant Hemphill shoved him backwards. Accused braced himself and Hemphill began to beat him about the head. The blows stunned him and he tried to defend himself. Accused fell to the ground and Sergeant Hemphill continued to beat accused on his head and face for about ten minutes. Sergeant Hemphill then pulled accused to his feet and shoved him toward his dugout. Accused entered the dugout and, glancing upward, saw Sergeant Hemphill standing over him pulling his pistol holster flap open. Accused picked up his carbine, put it off safety, and being too frightened and weak to retreat warned Sergeant Hemphill not to approach. As Sergeant Hemphill advanced toward him, accused pulled the trigger. As Sergeant Hemphill fell he tried to use his revolver and said, "You win." Accused was not given any medical treatment and attended to his injuries himself. Accused showed the court an injury to his eye (R 74-77).

On cross-examination accused stated he knew that if he were wronged he could report it to proper authorities and receive redress. When he saw Sergeant Hemphill reach for his revolver, accused was groggy and nauseated. He denied, saying, "I told you not to mess with me sergeant." Prior to this incident, he had no trouble with Sergeant Hemphill (R 78-80).

c. Rebuttal

Captain Ernest T. Jones, executive officer of accused's battery, testified that Sergeant Hemphill was a superior field first sergeant, that Sergeant Hemphill used no more profanity than the average American

soldier, and that he never heard him curse his men. Captain Jones saw accused immediately after the shooting and his face bore no marks of a fight. He saw deceased holding his hands to his stomach and observed no revolver in the immediate area. (R 82-86)

It was duly stipulated that if two noncommissioned officers were present in court they would testify that Sergeant Hemphill's character was good and that he took care of the interests of his men. (R 87-88)

d. For the Court

Corporal Pasley on recall stated that Sergeant Hemphill carried his pistol in his pants pocket beneath his parka and did not attempt to draw it out prior to his being shot. (R 88-89)

4. Discussion

Accused was charged with premeditated murder, and, by exceptions, was found guilty of murder without premeditation, of Master Sergeant Charles J. Hemphill, in violation of Article of War 92.

Murder is defined as "*** the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse" (MCM, 1949, par 179a, p 230).

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 not the less malice aforethought, within the meaning of the law, because the act is done suddenly after the intention to commit the homicide is formed: it is sufficient that the malicious intention precedes and accompanies the act of homicide. It is manifest, therefore, that the words 'malice aforethought,' in the description of murder, do not imply deliberation, or the lapse of considerable time between the malicious intent to take life and the actual execution of that intent, but rather denote 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 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, ***; *** 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).

The elements of proof of the offense of murder without premeditation are as follows:

"(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; ***" (MCM, 1949, par 179a, p 232).

The evidence shows that accused, having been given a lawful order by Sergeant Hemphill, his first sergeant, to dig a foxhole for another before he had finished digging his own, became angry and engaged in an argument with Sergeant Hemphill. The argument became heated terminating in a fight in which, at the outset, Hemphill told accused he did not want to participate. Accused was soundly beaten, and his anger and resentment toward Hemphill apparently increased.

When the mutual affray between accused and Hemphill terminated, accused acknowledged his defeat and indicated that he would comply with Hemphill's orders. Hemphill followed accused to his foxhole where instead of securing his digging implements, accused seized his carbine and shot and killed Hemphill. Although accused claims that his shooting of Hemphill was a reaction to Hemphill's act of drawing his pistol, there is substantial credible evidence that Hemphill did not attempt to draw his pistol until after he was shot. The court could and apparently did find,

on all the evidence, that the excuse of self defense was fictional and not real.

Did the beating given by Hemphill to accused in their mutual affray constitute adequate provocation in law? In United States v. Armstrong, Fed. Cas. 14,467, 24 Fed. Cas 864, accused, who had done deceased to death with a blow of a hatchet, contended that a kick delivered by deceased had provoked the fatal assault. The court instructed the jury as follows:

> "If deceased did kick accused, still it does not necessarily follow that the killing was not malicious. Because there must be some reasonable proportion between the provocation given and the act of resentment. It is not every blow given which will account for the use of a deadly weapon. *** We can, therefore, only say, that if a blow of considerable violence, excites the passions of the one assailed, and so causes him, in the heat of blood to kill his assailant, the killing is not, in general, malicious; but that if a deadly weapon is used, the provocation should be very great to be sufficient to extenuate the offense."

As to adequate 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 a case punish him as severely as if the killing were 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 exists." (MCM 1949, par 180a, p 233)

A homicide caused by an act likely to result in death, intentionally committed in the heat of sudden passion brought about by provocation is voluntary manslaughter (MCM, par 180a, supra).

That accused killed Hemphill with malice aforethought may be presumed from the fact that, after the altercation, he confronted Hemphill with a dangerous weapon and intentionally fired a burst of rounds into his body at close range (MCM, 1949, par 125, p 151, supra). That

accused's killing of deceased was the result of reflection and deliberation is shown not only by the abovestated incident, but also by the fact that Hemphill at no time was the physical aggressor and attempted to dissuade accused from violence in settling their differences.

It is evident that accused was angry at Hemphill at the time of the shooting. However anger in and of itself aroused by inadequate provocation, is not sufficient to excuse murder, nor may violent resentment, bearing no proportion to the provocation excuse murder (CM 322487, Dinkins, 71 BR 185, 198).

The evidence showing that accused's act was induced with malice aforethought without legal justification or excuse, the Board of Review is of the opinion that accused is guilty of murder as found.

5. Although the reviewing authority forwarded the record of trial for action under Article of War 50e, the record is before the Board of Review pursuant to the terms of Article of War 48c(2) and 50d(2). In the instant case, pursuant to the provisions of Article of War 48(c)(2), the confirming authority is the Judicial Council, acting with the concurrence of The Judge Advocate General.

6. Accused is 28 years of age and is single. He reenlisted 23 May 1950 for a period of six years and has had nearly eight years of prior military service.

7. The court was legally constituted and had jurisdiction over 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 thereof. 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 unpremeditated murder in violation of Article of War 92.

Acuna Bonin, J.A.G.C.

Samuel S. Cowles, J.A.G.C.

J. W. Lynch, 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 Corporal John Riddick, RA 37371700, Battery "A", 999th Armored Field Artillery Battalion (Motorized), 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. Under the direction of the Secretary of the Army and upon the recommendation of the Judicial Council the term of confinement is reduced to twenty-five years.

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.

JAGK - CM 345116

APR 3 1951

UNITED STATES v. Captain FRANK P. BOUTWELL (O-1115878), Corps of Engineers, Headquarters and Headquarters Company, 599th Engineer Base Depot.	FRANKFURT MILITARY POST Trial by G.C.M., convened at Frankfurt-am-Main, Germany, 9 February 1951. Dismissal, total forfeitures after promulgation, confinement for three (3) years, and to pay to the United States a fine of $820, and to be further confined until said fine is so paid but for not more than six (6) months.

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 93rd Article of War.

Specification 1: In that Captain Frank P Boutwell, Headquarters and Headquarters Company, 599 Engineer Base Depot, did, at Wolfgang, Germany on or about 2 March 1950 feloniously steal one hundred fifty dollars ($150.00) in Military Payment Certificates, the property of Master Sergeant Robert E Thomas, 517 Labor Supervision Company.

Specification 2: In that Captain Frank P Boutwell, ***, did, at Wolfgang, Germany on or about 4 April 1950 feloniously steal one hundred dollars ($100.00) in Military Payment Certificates, the property of Master Sergeant Robert E Thomas, 517 Labor Supervision Company.

Specification 3: In that Captain Frank P Boutwell, ***, did, at Wolfgang, Germany on or about 3 May 1950 feloniously steal one hundred dollars ($100.00) in Military Payment Certificates, the property of Master Sergeant

Robert E. Thomas, 517 Labor Supervision Company.

Specification 4: In that Captain Frank P Boutwell, ***, did, at Wolfgang, Germany on or about 3 August 1950 feloniously steal two hundred dollars ($200.00) in Military Payment Certificates, the property of Master Sergeant Robert E Thomas, 517 Labor Supervision Company.

Specification 5: In that Captain Frank P Boutwell, ***, did, at Wolfgang, Germany on or about 3 May 1950 feloniously steal seventy dollars ($70.00) in Military Payment Certificates, the property of Corporal Elliott D Hodges, 7743 Engineer Supply Control Office Detachment.

Specification 6: In that Captain Frank P Boutwell, ***, did, at Wolfgang, Germany on or about 2 June 1950 feloniously steal one hundred dollars ($100.00) in Military Payment Certificates, the property of Corporal Elliott D Hodges, 7743 Engineer Supply Control Office Detachment.

Specification 7: In that Captain Frank P Boutwell, ***, did, at Wolfgang, Germany on or about 2 July 1950 feloniously steal one hundred dollars ($100.00) in Military Payment Certificates, the property of Corporal Elliott D Hodges, 7743 Engineer Supply Control Office Detachment.

He pleaded not guilty to, and was found guilty of, the charge and all 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 be confined at hard labor at such place as proper authority may direct for three years, and to pay to the United States a fine of $820.00 and to be further confined at hard labor until said fine is so paid, but for not more than six months in addition to the three years hereinbefore adjudged. 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 under Article of War 48.

3. Evidence

a. For the Prosecution

The accused, Captain Frank P. Boutwell, was the personnel officer of the 7742nd Engineer Base Depot, Gp Headquarters Hanau Engineer Base Depot,

European Command, during all times in issue (R 9, Pros Ex 2).

The customary method of handling "Soldiers' Deposits" at the depot was for the enlisted man to turn in his money and Deposit Book (WD AGO 14-38), if he had one, to his unit commander or the personnel officer and a receipt would be given to the enlisted man. If the unit commander received the money, he would turn it and the Soldier's Deposit Book over to the personnel officer, who would give his receipt for it. The personnel officer would then prepare a "Soldier's Deposit Schedule of Collections, WD AGO 14-155" and deliver that as well as the Deposit Book to the Finance Officer, who would receipt the Deposit Book of the enlisted man concerned against receipt of the money. The book would then be returned to the enlisted man (R 11).

Master Sergeant Robert E. Thomas, 517 Labor Supervision Company, Hanau, Germany, testified that he had known the accused since 1939 and that they were "very good friends." He and the accused served together at various times in the past as enlisted men. In February 1950, Thomas established a "Soldier's Deposit" account by depositing with the accused, in his capacity of personnel officer, the sum of $300.00. The accused gave Thomas a signed receipt for the amount received (R 19,24; Pros Ex 4). Thereafter Thomas made additional deposits. On 1 March 1950 he gave the accused $150.00 to be deposited to his "Soldier's Deposit" account, and the accused gave Thomas a signed receipt (R 20, Pros Ex 5). On 3 April 1950, Thomas gave the accused $100.00 to deposit to his "Soldier's Deposit" account and received a signed receipt from the accused (R 21, Pros Ex 6). On 2 May, Thomas gave the accused $100 for deposit to his account and the accused gave him a signed receipt (R 22, Pros Ex 7). On 2 August 1950, Thomas gave Chief Warrant Officer Orville A. Moore, Assistant Adjutant, Headquarters and Headquarters Company, 599 Engineer Base Depot, Hanau, Germany, $200.00 for deposit to his "Soldier's Deposit" account and received from Moore a signed receipt (R 14,17,18; Pros Ex 8). On 7 August, Moore, on behalf of Thomas, turned this money over to the accused and obtained from the accused a signed receipt (R 14,17,18,22; Pros Exs 8,9).

Thomas identified Prosecution Exhibit 13 as his "Soldier's Deposits" Book which contains one entry of $300.00 representing the amount he gave to the accused as his initial deposit in February 1950. At the time Thomas made this deposit, the accused retained Thomas' Deposit Book and it was not until the first week in September 1950 when Thomas asked the accused for his book that accused stated that he had it at home and would bring it to him, which he did "about two days later" (R 23). When Thomas discovered that the book did not contain entries covering deposits made by him on 1 March 1950, 3 April 1950, 2 May 1950 and 2 August 1950, totaling $550.00, he inquired of the accused as to the reason. The accused replied that he (accused) "was some money short" and had "used some of [Thomas'] money to square up his [accused's] accounts." The accused added that "he would take care of it, get it fixed up." He asked Thomas if he wanted the "cash,"

or to have the money deposited to his "book when it is repaid." Thomas responded that accused could "pay him back in cash, that he /accused/ could use the money to purchase an automobile." The accused, however, has never repaid any part of this money (R 23,27,28,29).

Corporal Elliott D. Hodges, 7743rd E.S. Company Detachment, Hanau Engineer Sub-Post, stated that on 2 May 1950 he gave to the accused his Soldier's Deposit Book and $70 to be deposited to his "Soldier's Deposit" account. The accused gave Hodges a signed receipt for the amount received and retained the book that Hodges had given to him (R 33,35; Pros Ex 10). On 1 June 1950, Hodges gave the accused $100 to be deposited to his "Soldier's Deposit" account and received from the accused a signed receipt (R 34, Pros Ex 11). On 1 July 1950, Hodges again gave the accused $100 to be deposited to his "Soldier's Deposit" account and received a receipt signed by the accused (R 34, Pros Ex 12).

The latter part of October 1950, Hodges received a duplicate "Soldier's Deposit Book" from the Finance Accounting Officer, St. Louis, Missouri, and found that the $270 he had given to the accused for deposit to his "Soldier's Deposit" account had not been deposited, and that Hodges' account was short that amount (R 33,37). Thereafter he spoke to the accused concerning this shortage and the accused told him "not to worry about this money; that something had turned up; it was short and he would take care of it and see that /Hodges/ would not lose anything" (R 37). On or about 11 December 1950, Hodges received an honorable discharge from the Army and at that time he also received the money he had on deposit in his "Soldier's Deposit" account less the amounts of $70, $100 and $100 which he had given the accused for deposit on 2 May, 1 June and 1 July 1950, respectively, totaling $270 (R 35,37,39,42).

Prosecution Exhibit 17, a photostatic copy of "Public VOUCHER FOR REFUNDS" pertaining to "Cpl Elliott D. Hodges," was identified by Lieutenant Colonel Richard E. Burch, Finance Corps, Disbursing Officer, Frankfurt Military Post, as an identical copy of the original which had been made by him and transmitted to St. Louis. The voucher purports to set forth the total deposits made to Hodges' account during his then subsisting enlistment. It fails to reflect deposits evidenced by Prosecution Exhibits 10, 11 and 12 (R 39,40).

b. For the Defense

Captain Howard McCann and Sergeant Willard D. Fry testified as to the efficiency and good reputation of the accused (R 46,52).

Accused, after being apprised of his rights as a witness, elected to testify under oath. He was born in Camillia, Georgia, in 1914, and lived there until he entered the service as an enlisted man in 1936. He subsequently attained the rank of master sergeant, and received his commission in 1943 upon successfully completing the Engineer Officer Candidate School. He attended high school one year, is married, and has

three step-children (R 55,56).

He met Thomas at Fort Benning, Georgia, in 1939. They were both enlisted men and frequently "went out" together. In the month of January 1950, the accused borrowed $100 from Thomas. No specific time for the repayment of this money was agreed upon. In March of 1950, Thomas brought into the Personnel Office $50 for Soldiers' Deposits and at that time the accused remarked, "Thomas, let me give you a receipt for $150.00 and I will just put this in Soldier's Deposits when I get it." Thomas replied that it was all right with him. Thereupon the accused executed a receipt for the $150.00 and gave it to Thomas. The accused put the money, together with a Soldier's Deposit Book Thomas had given him, in the company safe. On the outside of the book (Pros Ex 13) the accused made a notation that $150 should be added. Also noted on the outside of the book is the figure $100 which Thomas had given the accused in April 1950. This money was likewise placed in the company safe. Neither of these amounts had been deposited to Thomas' account by the accused (R 57). In the company safe, the accused kept all the "Soldiers' Deposits," bond money, and his own personal money. The accused handled approximately $11,000 in "Soldiers' Deposits" a month. At his convenience, usually three or four times a month, the accused took the money to the Finance Officer. During the month of March 1950, the accused's duties necessitated his being away from his office most of the time. He served as a recorder on a "368" board which usually convened once a week, but the work, such as notifying witnesses, "writing up the stuff," usually took him two afternoons to prepare for one session. He also spent a "good deal" of his time as an assistant adjutant. The accused was also the insurance and savings officer and served as chairman of the Red Cross and March of Dimes drive for funds (R 58,59). The first time Thomas deposited money with the accused, in February 1950, he asked the accused to keep his Soldier's Deposit Book. The accused put Thomas' book in the safe where he also had about $2,300 consisting in part of "Soldiers' Deposits." The accused was subsequently reassigned. He did not turn this money over to his successor, Captain McCann, but had deposited "everybody's /money/ with the exception of Thomas's." Asked why he did not deposit the money Thomas had given him, the accused replied, "I was being relieved and as I have indicated I had not deposited his original money before then and I went to Thomas and told Thomas, 'I am relieved, as you know. Do you want me to deposit all of your money in Soldiers' Deposits, or do you want it in cash?'" Thomas told accused that if he "had not already deposited the money he /Thomas/ would sooner have it in cash" (R 60-61).

The shortage in Hodges' account came to the accused's attention sometime in October when Captain McCann called and informed him that Hodges' duplicate "Soldier's Deposit" book revealed a shortage of $270 in Hodges' account. The accused responded "that he /Hodges/ certainly

wouldn't lost anything if I had signed for his money and it didn't show up in Soldiers' Deposits." The accused did not, however, specifically remember signing a receipt for Hodges. He admitted that it was his duty to sign receipts for Soldiers' Deposits, and acknowledged that his signature is inscribed on Prosecution Exhibits 10, 11 and 12. The accused did not know why the $270 was not entered in Hodges' Soldier's Deposit Book. He stated that he could have overlooked it, but added that he at no time used the money belonging to Hodges or ever stole any money that belonged to Thomas. He has not repaid Thomas because the "Investigating Board had been appointed and no one would accept the money and I would not contact Thomas." If he went to Thomas and tried to pay him off he (accused) would be accused of tampering with a witness. "I am sure Thomas would have accepted the money, but I wanted it to be official" (R 61-65).

c. For the Court

Master Sergeant Robert E. Thomas was recalled as a witness for the court and stated that he received the receipt marked Prosecution Exhibit 5 from the accused. Although there is a discrepancy between the figures shown thereon as $150 and the writing as "one Hundred," he had on 1 March given the accused for deposit $150.00 and not $100.00 as asserted by the accused (R 68,69).

4. Discussion

The accused was found guilty of feloniously stealing money in the form of military payment certificates of an aggregate value of $820, the property of two named enlisted men, in violation of Article of War 93.

The evidence shows that on seven occasions accused received money of two enlisted men totaling $820 for deposit to their Soldiers' Deposit accounts. The evidence including the accused's judicial and extrajudicial statements conclusively shows that the money so received was not deposited. As to money received from Thomas (Specs 1-4, incl, Chg), accused seeks to defend on the ground that Thomas after being apprised that the accused had not made the deposits did not protest and agreed to the return of the money to him at some uncertain future date. It is evident that at the time accused did not have funds either to repay Thomas or to make the deposits.

As to the money received from Hodges (Specs 5-7, incl, Chg), accused seeks to defend on the ground that, although he had not deposited Hodges' money, the money had not been converted, that he had it at all times, and was ready, willing and able to fulfill the terms of the bailment. His testimony in this respect is at issue with his pretrial statements to Hodges that he was short of money.

The evidence as it pertains to the money received by accused from

Thomas and Hodges shows conclusively the creation of a trust relation between accused and the two enlisted men whereby it "became accused's duty to deposit or cause to be deposited, with the Finance Officer, the money [the enlisted men had turned in for that purpose] on the [seven] separate occasions" (CM 335586, Wilkins, 2 BR-JC 153, 162-163). The accused's failure so to deposit the money is unquestioned. Otherwise, it appears that when accused was confronted by the enlisted men he admitted that he was without funds to fulfill the terms of the trust. Such evidence warrants the findings of guilty of larceny in violation of Article of War 93 (CM 323764, Mangum, 72 BR 397, 403; CM 335586, Wilkins, supra; CM 339494, Clifford, 5 BR-JC 131,141; CM 340473, Morton, 6 BR-JC 49).

5. The reviewing authority 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. Paragraph 87b, Manual for Courts-Martial U.S. Army, 1949, provides, inter alia,

> "If the sentence of a general court-martial as ordered executed provides for confinement, the place of confinement will be designated. In cases involving imprisonment for life, dismissal and confinement of officers, and the dismissal and confinement of cadets, 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 336706, Pomada, 3 BR-JC 209).

6. Department of the Army records show that the accused is 36 years of age, married, and has three children. He completed one year of high school work. In civilian life he was employed as a filling station attendant. He had enlisted service from 1936 until he was commissioned a second lieutenant in 1943 after successfully completing Officers Candidate School. He was subsequently promoted successively to first lieutenant and captain. He served overseas for 35 months during World War II and is entitled to wear the European Theater ribbon, American Defense medal, American Theater ribbon, World War II Victory medal and Presidential citation. His overall efficiency ratings of record are 103, 079, 114 and 133.

7. 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. Dismissal is authorized upon conviction of a violation of Article of War 93.

Albert Baker, J.A.G.C.

Samuel S. Cowles, J.A.G.C.

John W. Lynch, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

BROWN, MICKELWAIT AND YOUNG
Officers of The Judge Advocate General's Corps

In the foregoing case of Captain Frank P. Boutwell, 0-1115878, Corps of Engineers, Headquarters and Headquarters Company, 599th Engineer Base Depot, 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.

C. B. Mickelwait, Brig Gen, JAGC

Edward H. Young, Colonel, JAGC

APR 2 6 1951

Robert W. Brown, Brig Gen, JAGC
Chairman

I concur in the foregoing action.

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

23 April 1951

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

JAGH CM 345129

MAR 2 0 1951

UNITED STATES	)	FORT LEONARD WOOD
	)	
v.	)	Trial by G.C.M., convened at Fort Leonard Wood, Missouri, 21 February 1951. Dismissal and total forfeitures after promulgation.
	)	
First Lieutenant FORREST M. BLANFORD (O-1015089), Co. C., 6th Quartermaster Battalion, 6th Armored Division, Fort Leonard Wood, Missouri.	)	

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 61st Article of War

Specification: In that First Lieutenant Forrest M Blanford of Company C, 6th Quartermaster Battalion, Combat Command Reserve, 6th Armored Division, Fort Leonard Wood, Missouri, did without proper leave absent himself from his station at Fort Leonard Wood, Missouri from 0730 12 February 1951 to 1300 16 February 1951.

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 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 pursuant to Article of War 48.

3. Evidence.

a. For the prosecution.

A duly authenticated extract copy of the morning report of the accused's organization, received into evidence as Prosecution Exhibit 1, showed that the accused was absent without leave from his organization at Fort Leonard Wood, Missouri, from 0730 hours, 12 February 1951, until 1300 hours, 16 February 1951 (R 9).

b. For the defense.

Major Merle F. Finley, Commanding Officer of the 6th Quartermaster Battalion, Fort Leonard Wood, Missouri, testified that on Monday, 12 February 1951, he received a telegram from the accused which read as follows: "Child seriously ill. Will return tonight. Blanford." (R 10-11).

Upon cross-examination, Major Finley stated that he did not grant accused any additional leave as a result of the telegram and that no one else in the Battalion had authority to grant the accused leave. He further testified that the accused was not present for duty on 12 February 1951 and did not return to duty until 16 February 1951 (R 11-12). At the time accused reported to his organization on 9 February 1951, the major had authorized the accused a VOCO until Monday morning, 12 February 1951 (R 13).

After having been advised of his rights as a witness by the law member, accused elected to be sworn and testify in his own behalf (R 14). He stated that he left Fort Leonard Wood at approximately 1530 hours Friday afternoon on the VOCO of Major Finley. He went to Tell City, Indiana, to visit his wife and three children. Upon his arrival, he found one child ill with intestinal flu. Another child became ill the day he arrived and both required a doctor's care. On Monday he sent the aforementioned telegram to Major Finley, and when one child became worse that evening, he tried to telephone the Fort without success. On Tuesday he made several additional attempts to telephone. At that time because of ice on the roads, the busses had stopped running. On Wednesday he left home and reached Evansville where he had to spend the night because no busses were running due to the weather. He also had to stop again in St. Louis. He stated that he was able to travel by bus only, because he had no money for train fare. Upon his return to the Fort, he went to the BOQ to change clothes, had lunch and reported to the Battalion (R 14-16).

Upon cross-examination, accused admitted that his VOCO extended only until 0600 hours, Monday, 12 February 1951, and that he neither requested nor was granted additional leave from that hour until the time of his arrival. He added that Fort Leonard Wood is 350 miles from his home and that he had arrived there at nine o'clock on Saturday morning at which time the road conditions were good. At the time of his departure from the Fort he had no knowledge of any sickness in his family and that was not the reason for taking a VOCO (R 16-17).

4. Discussion.

The accused was charged with and found guilty of absence without proper leave from his station at Fort Leonard Wood, Missouri, from 0730, 12 February 1951, to 1300, 16 February 1951, in violation of Article of War 61.

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 station as alleged and that such absence was without authority (MCM, 1949, Par. 149). Both of these facts may be proved prima facie by duly authenticated extract copies of the morning reports of accused's organization (MCM, 1949, par. 146a, p. 199).

In the instant case, the competent evidence sustains beyond a reasonable doubt the court's findings of guilty of the Charge and its Specification. A duly authenticated extract copy of the morning report of the accused's organization shows the accused absent without leave from 0730, 12 February 1951, until 1300, 16 February 1951. Moreover, by his own testimony accused admits his absence without authority for the period alleged, but attempts to explain such absence with testimony of family illness and inclement weather. Such explanation may be considered only in extenuation of, and not as excuse for, violation of Article of War 61.

5. The accused was born 4 April 1920 at Mount Pulaski, Illinois. He is married and his wife and three daughters, the oldest of whom is three years of age, are living in Tell City, Indiana. He completed 11-1/3 years of schooling in 1935. The accused was inducted into the Army 6 March 1942 and served as an enlisted man until 9 January 1943 when he was commissioned a second lieutenant in the Infantry after attending The Armored Force School at Fort Knox, Kentucky. He served overseas in the European Theater from 17 June 1943 until 16 September 1945, participating in the Rome-Arno, Southern France, Rhineland and Central European campaigns. He was awarded the Silver Star, the Bronze Star Medal, and the Purple Heart with Oak Leaf Cluster, and is entitled to wear the Croix de Guerre with Palm and the Distinguished Unit Badge. He was relieved from active duty 12 February 1946. During this period of his commissioned service his performance of duty was rated generally "very satisfactory", but his weakness for liquor was commented upon by two rating officers and on 10 May 1945 he received punishment under Article of War 104 for drunkenness administered by the Commanding General of the Third Infantry Division. Prior to his recall to active duty 6 October 1950, he worked for two years as a cabinet maker at a salary of $55 per week. No efficiency reports pertaining to the accused are available since his return to active duty but the opinion of the Staff Judge Advocate reveals that the accused has received punishment twice under Article of War 104 for absence without leave from 6 January 1951 to 15 January 1951 and again on 2 February 1951. In each instance a reprimand and a forfeiture of $150 of his pay for one month were administered.

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 and the sentence 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.

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 Mickelwait
Officers of The Judge Advocate General's Corps

In the foregoing case of First Lieutenant Forrest M. Blanford, O-1015089, Company C, 6th Quartermaster Battalion, 6th Armored Division, Fort Leonard Wood, Missouri, 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

27 March 1951

(GCMO 38, 3 April 1951).

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

JAGH CM 345196

APR 17 1951

UNITED STATES	EUROPEAN COMMAND
v.	Trial by G.C.M., convened at Heidelberg, Germany, 3 January 1951. Dishonorable discharge, total forfeitures after promulgation and confinement for thirty (30) years. Federal Institution.
Corporal PANAGIOTIS TJACAS (RA-33287346), Detachment "A" 7809 Station Complement Unit, APO 403	

REVIEW 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 soldier named above.

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

CHARGE: Violation of the 92nd Article of War

Specification: In that Corporal Panagiotis Tjacas, Detachment "A" 7809 Station Complement Unit, did, at Heidelberg, Germany on or about 6 October 1950, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill Anthony Cami, a human being, by stabbing him in the chest with a knife.

The accused pleaded not guilty to the charge and its specification. He was found guilty of the specification except the words "deliberately" and "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 (30) 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. The accused has been found guilty of the unpremeditated murder of Anthony Cami at Heidelberg, Germany, on 6 October 1950. It was admitted by the accused that he opened his knife and stabbed the deceased in the body (R 111, 172, 178, 293; Pros Ex 7). The evidence is uncontradicted that deceased's death was caused by a stab wound in the left chest which penetrated the left ventricle of the heart, the diaphragm and liver and resulted in a massive hemorrhage, left hemothorax (R 19; Pros Ex 1, 2; Def Ex A).

The defense contended (1) that the accused was "abnormal emotionally", and (2) that he stabbed the deceased in self-defense (R 187-188). A large part of the record of trial is devoted to defense efforts to prove that a young German girl, Sigrid Willigmann, had entered into an intimate relationship with the accused, yet had toyed with his affections to such an extent that he had become "insanely jealous" and was, at the time of the fatal encounter, "abnormal emotionally". The evidence adduced by the prosecution and defense is accurately reflected in the Staff Judge Advocate's review and need not be repeated except as it relates to matters herein discussed.

The accused, fifty-three years of age, is a corporal in the Regular Army and, at the time of the alleged offense, was assigned as a cook in Detachment A, 7809 Station Complement Unit, Karlsruhe Military Sub-Post, Germany. Since September 1946, he has been acquainted with a German family consisting of Rose Willigmann, a widow, and her daughters, Heidi and Sigrid. A very close relationship developed initially between the accused and Rose Willigmann, but later he became very much interested in Sigrid Willigmann; and, from about December 1948 until shortly before Anthony Cami's death, accused maintained an intimate relationship with Sigrid who was about thirty years his junior in age. The deceased was a civilian employee of the Eucom Exchange Service and resided in Room 1, Green Leaves Hotel, Heidelberg, Germany. For three or four months prior to his death, Sigrid Willigmann had been keeping company with Cami and often visited him at his hotel room. On 6 October 1950, at approximately 2250 hours, Cami and Sigrid Willigmann were in his room, having just finished consuming some sandwiches and beer, when accused sought admittance to the room. Cami, then dressed in pajama trousers and T-shirt, unlocked the door. Accused entered the room, and in a brief ensuing scuffle with Cami, fatally stabbed him with a pocket knife.

4. We first consider accused's mental responsibility for the offense charged. In support of the contention that accused was "abnormal

emotionally", the defense offered the expert testimony of Professor Doctor Hans Johann Rauch, professor of psychiatry and neurology and chief doctor of the psychiatric and neurological clinics at Heidelberg University (R 252-254). Based upon his examination of the accused on five occasions of approximately two hours each during the period 16 December 1950 to 30 December 1950, the witness was of the opinion that on the night of 6 October 1950 the accused's capacity to distinguish right from wrong was "considerably diminished" and his ability to adhere to the right was "also considerably reduced" (R 255-256). In his view, the accused was in a "state of excitement" at the time of the fatal encounter, the condition stemming from the abnormal personality traits of irritability and excitability, which are "psychopathic traits of character." He described the accused as being "unsure of himself" and hiding this with "an emphasized self-assured attitude"; as being "ego-centric", "very mistrusting" and "very jealous", the jealousy arising from "his inner insecurity"; and, as having an intelligence which is "not particularly developed." The witness further testified that the accused "was looking, as it is customary with jealous people, for some confirmation of his jealousy"; that accused had been "for days previously in a state of excitement" which was "especially increased in the moment when he came to know by the desk clerk that his girl friend is in the hotel"; that accused's excitement was increased by the sight of "his girl friend, lightly clothed" in the presence of a lightly clothed man, by her shouting and by his fright arising from his impression that deceased "wanted to take out a pistol from a drawer"; in short, that accused "got so excited that he lost the control over himself" (R 257-259). Upon cross-examination, the witness testified as follows:

"Q. At the time in question, on the 6th of October 1950, at the time you have testified the accused's ability to differentiate between right and wrong was considerably reduced and his ability to adhere to the right was considerably diminished, in your professional opinion, was this diminution of ability the direct result of any mental defect, disease or derangement?

*** *** ***

"A. In my opinion, the accused had no mental disease in the medical sense of the word. Of mental derangement one can say that insofar as that by his excitement, he was in such a state caused by what affected him that his consciousness was troubled.

*** *** ***

"Q. Then, if I understand you correctly, this condition that existed in the accused at that time was not the result of any mental defect?

"A. No; I do not think that there was a mental disease or a mental defect based on a brain injury." (R 262-263)

The prosecution called Lieutenant Colonel Hans Lowenbach, Medical Corps, Neuropsychiatric Consultant for the European Command and Acting Chief of the Neuropsychiatric Service of the 98th General Hospital, whose qualifications as a doctor of medicine and as a psychiatrist were conceded by the defense. The witness served as president of a board of three medical officers appointed to inquire into, examine and report upon the mental condition of the accused. He observed and evaluated the accused's mental condition during the period 19 October 1950 to 17 November 1950 and concluded that on 6 October 1950 "no psychiatric disorder was existing, in Corporal Tjacas"; that there was no evidence that accused was suffering from mental disease, defect or derangement; and that there was no reason to think that accused was unable, at the time of the alleged offense, to distinguish right from wrong or to adhere to the right (R 337-338, 345). The report of proceedings of the board of medical officers expressing similar conclusions was received in evidence without objection by the defense (Pros Ex 13). On cross-examination, the witness described the accused as "frustrated" at times in his feelings and as being a "simple-minded person, but by that I do not mean feeble-minded by any means - very simple and straight-forward, not devious" (R 341). In his opinion a sudden scream incident to the fight agitated accused's frustration and, from what the accused told the board of his scuffle with the deceased, the board was of the opinion that accused acted in self-defense (R 344-345). Having testified that the accused was capable of deliberation and premeditation, the witness referred to a prior conversation with the special defense counsel and said, "You asked me whether I thought he did deliberate premeditation and I said 'No'" (R 346-347).

The standard of mental responsiblity to be applied in military law is prescribed in the Manual for Courts-Martial as follows:

> "*** A person is not mentally responsible in a criminal sense for an offense unless he was, at the time, so far free from mental defect, disease, or derangement as to be able concerning the particular act charged both to distinguish right from wrong and to adhere to the right. The phrase 'mental defect, disease, or derangement' comprehends those irrational states of mind which are the result of deterioration, destruction, or malfunction of the mental, as distinguished from moral, faculties. Thus a mere defect of character, will power, or behavior, as manifested by one or more offenses or otherwise does not necessarily indicate insanity, even though it may demonstrate a diminution or impairment in ability to adhere to the right in respect to the act charged."[1]

The Department of the Army technical manual, "Psychiatry in Military Law", amplifies the foregoing standard and provides in pertinent part:

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1 Manual for Courts-Martial, U. S. Army, 1949, par. 110b

"Character and behavior disorders, under whatever name designated, do not impair the accused's criminal accountability. These disorders are known variously as a pathologic personality, constitutional psychopathy, psychopathic personality and by several other names under numerous subtypes. However, this is precisely the kind of condition which is considered a 'defect of character, will power, or behavior' by paragraph 110b, MCM, 1949./par 13a/ *** 'Moral insanity', 'emotional insanity', and 'morbid propensity', so-called, constitute no defense before a court martial and do not affect the criminal accountability of the accused /par 13b/ *** Inability to adhere to the right (because of mental disease) is grounds for finding the accused 'not guilty'; but diminution or impairment of that ability is only a ground for consideration in fixing the sentence /par 13d/"[2]

In this case the evidence is uncontradicted that the accused was not psychotic at the time of the alleged offense. The testimony of Lieutenant Colonel Lowenbach is persuasive that accused possessed sufficient mental capacity to distinguish right from wrong and to adhere to the right, and Professor Doctor Rauch's testimony is not in real opposition to these conclusions. His view that accused's capacity with respect to these attributes was considerably diminished and reduced implies implicitly that accused possessed some ability to distinguish right from wrong and to adhere to the right.[3] Moreover, his opinion is based upon certain personality traits, described as "psychopathic traits of character," which are classified, under military law, as character and behavior disorders which do not affect accused's criminal accountability.[4] The defense did not contend that accused was insane in the usual legal sense, but characterized him as being "abnormal emotionally". "The theory of emotional insanity is untenable under any circumstances",[5] and an alleged

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2 Department of the Army Technical Manual, TM 8-240, Psychiatry in Military Law, 20 September 1950, pars 13a, 13b, 13d; underscoring supplied additional to italics.

3 Department of the Army Technical Manual, TM 8-240, par 13d, note 2, supra.

4 Manual for Courts-Martial, U.S. Army, 1949, note 1, supra; Department of the Army Technical Manual, TM 8-240, pars 13a, 13b, note 2, supra; CM 319168, Poe, 68 BR 141, 168-169; CM 338934, Jones, 6 BR-JC 269, 285-286; and see Fisher v. United States, 328 U.S. 463, 467 (1946)

5 Taylor v. United States, 7 App. D.C. 27, 44 (1895); and see Fisher v. United States, 149 F.2d 28, 29 (C.A., D.C., 1945).

emotional abnormality does not constitute a defense of insanity before a court-martial.[6] We have given full consideration to the evidence concerning accused's mental capacity and conclude that the record of trial supports the conclusion inherent in the court's findings that the accused was mentally responsible both at the time of the alleged offense and at the time of trial.[7]

5. We next consider whether the homicide was excusable because done in self-defense and, if not, whether it was committed with malice aforethought.

Miss Willigmann testified that following a knock on the door, Cami asked who was outside and a person whose voice she identified as that of the accused, said "let me in" (R 31). She requested that Cami not open the door, but the knocking continued, whereupon Cami unlocked the door and the accused entered the room (R 31, 82). When accused entered, Cami was near the door in the center of an open floor space between a dresser and radiator and Miss Willigmann was to his left, about opposite him, in the open wall-space near the radiator (R 31; Pros Ex 4). She did not then see anything in accused's hands (R 82). Accused asked Cami what he was doing and the latter replied that they had just finished supper. Accused then asked what Cami was going to do now, to which Cami replied "That is my business." "At that moment", she related, "I heard Mr. Cami scream. I saw him stagger back and I saw blood on his 'T' shirt." "Tjacas tried a second time to push against Cami." "I saw that Tjacas pushed Cami a third time and at that moment I got a hold of his [accused's] hand"; "I wanted to stop him from pushing Cami a third time." "At the time I was holding Tjacas' hand he turned towards me and pointed the knife at my breast *** it had a very long blade, approximately fifteen centimeters long." "At the time Tjacas was pointing the knife at me, Mr. Cami pushed him outside of the room. Tjacas had a hold of me and dragged me out of the room too. I then heard Mr. Cami close the door and lock the door" (R 32, 82). Outside the room, accused and Miss Willigmann struggled and fell down the stairs, during which time accused had the knife open. When they reached the bottom of the stairs, accused got up and "rapidly left the hotel." Miss Willigmann called for help, returned to the room and found that the door was still locked (R 33). Approximately three and one-half minutes had elapsed between accused's entry and departure from the hotel (R 103).

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6 Department of the Army Technical Manual, TM 3-240, par 13b, note 2, supra.

7 See also Holloway v. United States, 148 F.2d 665, 667 (C.A., D.C., 1945). cert. den. 334 U.S. 852.

Military policemen were summoned and upon arrival one of them forced open the door to Cami's room (R 92, 93, 99, 107). Cami was lying in a "half-reclining and half-sitting position between a central heating pipe and the door" (R 107, 167, 168, 178; Pros Exs 3, 5). There was blood on the left side of the body and on the left arm, the head was thrown back, the mouth and eyes were open and the face was as "pale as cotton" (R 108). Shortly thereafter, a medical officer arrived at the room and pronounced Cami dead (R 11, 15; Pros Ex 3). The body was later identified at the morgue as that of Anthony Cami (R 22-23; Pros Ex 2).

The accused, having been properly advised of his rights, elected to testify under oath (R 272-273). Much of his testimony relates to prior relations with Miss Willigmann. Relative to the fatal encounter, he testified that at about 2240 hours;--

> "I stopped on the right side to the Green Leava Hotel. Something come on my head to go see if my girl friend is there. I walked in to aska only two words, 'no' or 'yes' if you see my girl friend. I said to the desk, 'Guten Abend', and I aska him, 'You see my girl friend here to-night?' He said to me, justa like he wanted to make me troubles, 'Yes, she is upstairs with Mr. Cami's room, number one.' That time I hear that word, I got just something bad feeling on my heart. But I am go to his room. I see that the woman, she work in the kitchen, and I wave to her, just hello.
>
> "Now, I go upstairs to the room number one. I knock at the door. No answer. I shake the door, if the door is open. I hear a voice from the girl, 'snell, snell'. I knock at the door again. I wait couple seconds and I hear answer.'Who is?' I answer, 'You know who is'. So, he opened the door. I hold the door with my right hand. I said,'What you people do here?' I saw his body with 'T' shirt on. I saw his body with 'T' shirt on and short pants, that time I saw him with 'T' shirt and short pants or pajamas, -- I don't know what you call them. My blood go through over my head. He said to me, 'Get out of here'. I said, 'Listen, young fellow, let the girl go'. He stand in front of me. He try to hide the girl from my face, but I see the girl, she pull on her coat. So I told him, 'Let the girl to go'. He looked to me, justa like he was ready to grab something. He said to me,'No, that girl is to stay here', so he tried to push me, and he is move, he go across to the desk, he put arm on me, he tried to grab me."
>
> *** *** ***
>
> "So, I was so afraid and at the same time, I hear the girl, she scream so bad 'aaaahhhh', she made me so excite. I think the man, he grab a pistol. He carry a pistol all the time. I

was so afraid. And I put hand on my pocket, my left hand I push him and he grab me again. Same time, I pull the knife out and open with the left hand. And, I stabbed him." (R 292-293).

Accused further testified that he did not intend any harm to Cami when he went to the Green Leaves Hotel; that he went there to look for Sigrid whom he regarded as "my wife" (R 295-296, 300).

Attacking Sigrid Willigmann's credibility, the defense called two German girls who were employed in the Post Exchange where Sigrid was employed. They testified that she was known as the girl friend of the accused and that her reputation for truth and veracity was not good (R 190, 192, 200, 203). A German woman, for whose child the accused had been godfather, testified that in March 1950 Sigrid Willigmann had told of falsely charging the accused with stealing 100 Deutsche marks from her in order to "get rid of" the accused (R 238) and, on an occasion when they met on the street subsequent to the fatal incident, Sigrid had said she would bring such accusations against the accused that "he won't come out any more" (R 235, 240). The husband of this woman testified that he had heard Sigrid Willigmann make a similar remark, that he was present when Sigrid told her mother that she intended to testify that the accused had threatened several people with a knife and that the mother had exclaimed, "Sigrid you are a liar, stick to the truth" (R 244, 248, 249).

We are not convinced that accused's testimony concerning his encounter with the deceased accurately reflects the facts, particularly with reference to the alleged act of the deceased in pulling accused toward the dresser and at the same time reaching behind himself with his left hand in an effort to reach the dresser drawer. Comparing accused's testimony at the trial with a voluntary statement which he gave on the morning of 7 October 1950, it is significant, we think, that his earlier statement contains no reference to such action on the part of the deceased, although he was quite articulate in describing in detail many other less material matters. In that statement, he related that deceased "grabbed me and said come on, let's go out of my room. At the same time he tried to make a hook with his arm around my neck. I pushed him with my left arm up, put my right hand in my pocket, opened my knife, stabbed him in the body and pushed him back with my left hand" (Pros Ex 7; R 168-172, 301-302). This statement agrees essentially with the testimony of Sigrid Willigmann relative to the encounter. Moreover, when accused demonstrated to the court the alleged movements which he and the deceased made during the scuffle, the defense counsel, in describing it, said that "Cami was against a portion of the dresser" (R 310), yet a photograph of the portion of the room containing the dresser, taken before Cami's body was removed, shows several bottles and a glass resting upright on a narrow shelf attached to the dresser (Pros Ex 5). It is reasonable to expect that in a struggle, such as accused described in his testimony, one or more of the objects on the shelf of the dresser would have been upset by some movement of the dresser when deceased backed into it. We conclude that deceased

was stabbed by the accused without any attempt on the part of the deceased to secure some object from the dresser drawer.

But even if accused's testimony in this regard were accepted as entirely creditable, it fails to establish that he had 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. Accused was the jealous intruder, bent on entering deceased's room. When told to "Get out of here," accused refused and attempted to force his way past the deceased in order to reach Miss Willigmann who was behind the deceased. Under these circumstances, deceased was under no obligation to retreat;[8] and was entitled to use such force as might be reasonably required in the defense of his person and habitation.[9] Thus, if the deceased had, in fact, reached for some object with which to defend himself, such act in this setting could not be transposed into an assault which would justify the accused in killing him, for no overt act on deceased's part provoked the evil intent with which accused sought him out on this occasion.[10] The door to the room was open and accused could have avoided the conflict by departing from the room as requested. No necessity for killing an assailant can exist, so long as there is a safe way open to escape the conflict.[11] Under military law, since accused was not in his own house, it was his duty to retreat as far as he safely could.[12] Accused's entry into the room and insistence upon remaining there compels the conclusion that he was the agressor and intentionally provoked the altercation. When an accused challenges the fight in any way, and goes to it armed, he cannot afterward maintain that in taking his assailant's life he acted in self defense.[13]

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8 Manual for Courts-Martial, U.S. Army, 1949, par 179a, p. 230.

9 Beard v. United States, 158 U.S. 550, 563-564 (1895); Alberty v. United States, 162 U.S. 499, 508 (1895); Laney v. United States, 294 Fed 412, 415 (CA, DC, 1923).

10 Acers v. United States, 164 U.S. 388, 392 (1896); Andersen v. United States, 170 U.S. 481, 509 (1898).

11 Allen v. United States, 164 U.S. 492, 498 (1896); Laney v. United States, note 9, supra, at p. 414.

12 Manual for Courts-Martial, U.S. Army, 1949, par 179a; CM 339357, Wright, 5 BR-JC 49, 68; CM 344372, Davis, BR-JC, April 1951, and cases therein cited.

13 1 Wharton, Criminal Law (12th Ed., 1932), sec. 614.

The record clearly fails to show that the homicide is excusable on the ground of self defense.[14]

Murder is the unlawful killing of a human being with malice aforethought.[15] Malice may consist of an intention to cause death or grievous bodily harm,[16] and may be presumed when a homicide is caused by the use of a deadly weapon in a manner likely to result in death.[17] A deadly weapon is anything with which death may be easily and readily produced.[18]

The evidence establishes that accused was jealous of the attentions paid Sigrid Willigmann by the deceased. Resentful over the possible loss of her companionship, his ill-will toward deceased ripened into threats expressed to Sigrid Willigmann and her mother that he would "kill" Cami (R 27-28, 134, 159-160). Two days before the fatal incident he told Cami, "something is going to happen" (R 28, 84). On the day of the killing, he told a master sergeant that "Someone is messing around with my girl, but I will get him" (R 122-123). And, within three-quarters of an hour prior to the fatal attack, accused admittedly told Mrs. Willigmann that if he found "Sigrid with that civilian it is going to be bad" (Pros Ex 7). Armed with a knife, he proceeded uninvited to Cami's room, gained entry and stabbed the deceased while the latter was unarmed. In our opinion, the accused's savage use of the knife in an unprovoked attack and his prior threats against Cami's life clearly show malice.[19]

The record is devoid of any evidence indicating provocation adequate to reduce the crime from murder to manslaughter. Accused had no legal right to object to Miss Willigmann's associations with the deceased. He was playing the role of the jealous suitor, not the outraged husband. Under the circumstances of this case, his discovery of the girl in deceased's company provides no basis for a contention that the homicide was committed in the heat of a sudden passion brought about by provocation.[20]

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[14] Manual for Courts-Martial, U.S. Army, 1949, par. 179a, pp. 230-231; CM 344372, Davis, note 12, supra; and see Hopkins v. United States, 4 App. D.C. 430, 442-443 (CA, DC, 1894); Laney v. United States, note 9, supra at p. 415.

[15] Manual for Courts-Martial, U.S. Army, 1949, par 179a, p 230.

[16] Ibid, par 179a, p 231.

[17] Ibid, par 125a, p 151.

[18] Acers v. United States, 164 U.S. 388, 391 (1896); CM 344372, Davis, note 12, supra.

[19] CM 330963, Armistead, 79 BR 201, 231.

[20] Manual for Courts-Martial, U.S. Army, 1949, par 180a, p 233.

We conclude that the evidence establishes beyond a reasonable doubt that the accused is guilty of the unpremeditated murder of Anthony Cami.

6. Accused, who is unmarried, was born 15 September 1897 at Sampanaga, Greece. He completed nine years of schooling and, from 1918 to 1920, served in the Greek Army. Shortly thereafter he emigrated to the United States and became a naturalized citizen. He was employed for several years as a cook and baker. Entering military service in 1942, he served as a cook and baker on troop trains in the United States until 1945. His total service is slightly in excess of eight years, including an enlistment on 4 October 1945 and reenlistment on 24 August 1948 for three years. The Staff Judge Advocate reports that accused's current tour of duty in the European Command began in February 1946 where he has been assigned as cook and baker; that the highest rating attained is that of corporal; that his AGCT score is 76; and that the character of his service prior to the present offense has been rated as excellent. There is no evidence of previous convictions.

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. 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 for more than one year by Title 18, United States Code (Supp. III), Sections 1111 and 4083.

Lennard C. Pullen, 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.

JAGK CM 345217

UNITED STATES v. Captain ABIHUE J. BATSON, SR. (0-1635552), Headquarters and Headquarters Company, 317th Signal Construction Battalion, Camp Gordon, Georgia	CAMP GORDON, GEORGIA Trial by G.C.M., convened at Camp Gordon, Georgia, 20 December 1950, 3, 4 and 17 January 1951. Dismissal, total forfeitures after promulgation, and confinement for five (5) years, one (1) month, and twenty-seven (27) days.

OPINION OF THE BOARD OF REVIEW
BARKIN, WOLF and BROWN
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 61st Article of War.

Specification: In that Captain Abihue J. Batson, Senior, Headquarters and Headquarters Company, 317th Signal Construction Battalion, Signal Corps Training Center, formerly of the 403rd Signal Construction Company, did, without proper leave, absent himself from his command at Camp Gordon, Georgia, from about 3 November 1950 to about 22 November 1950.

CHARGE II: Violation of the 93rd Article of War

Specification: In that Captain Abihue J. Batson, Senior, Headquarters and Headquarters Company, 317th Signal Construction Battalion, Signal Corps Training Center, formerly of the 403rd Signal Construction Company, did, at Camp Gordon, Georgia, on or about 31 October 1950, feloniously steal five thousand, five hundred and eighty-two dollars ($5582.00) lawful money of the United States, value of about five thousand, five hundred and eighty-two dollars ($5582.00)

the aggregate property of the following named enlisted personnel together with the amounts of said sums belonging to said enlisted personnel as indicated hereinafter, to wit: Recruit Webb Perry - sixty dollars ($60.00) lawful money of the United States, value of about sixty dollars ($60.00); Recruit Sonny Jackson - one hundred and sixty dollars ($160.00) lawful money of the United States, value of about one hundred and sixty dollars ($160.00); Private Roosevelt Perry - one hundred and forty dollars ($140.00) lawful money of the United States, value of about one hundred and forty dollars ($140.00); Recruit Herman Edwards - one hundred and thirty dollars ($130.00) lawful money of the United States, value of about one hundred and thirty dollars ($130.00); Recruit James Witherspoon - one hundred and forty dollars ($140.00) lawful money of the United States, value of about one hundred and forty dollars ($140.00); Recruit John Fultz - one hundred and twenty dollars ($120.00) lawful money of the United States, value of about one hundred and twenty dollars ($120.00); Recruit James Presswood - one hundred dollars ($100.00) lawful money of the United States, value of about one hundred dollars ($100.00); Recruit James L. Cook - sixty dollars ($60.00) lawful money of the United States, value of about sixty dollars ($60.00); Recruit Flanders Clemmons - fifty-five dollars ($55.00) lawful money of the United States, value of about fifty-five dollars ($55.00); Recruit Tommie Meacham - one hundred and fifty dollars ($150.00) lawful money of the United States, value of about one hundred and fifty dollars ($150.00); Recruit Robert Brown - sixty-five dollars ($65.00) lawful money of the United States, value of about sixty-five dollars ($65.00); Recruit Gus Williams - two hundred dollars ($200.00) lawful money of the United States, value of about two hundred dollars ($200.00); Sergeant Elgin Carmichal - one hundred dollars ($100.00) lawful money of the United States, value of about one hundred dollars ($100.00); Private First Class Ernest Bell - one hundred dollars ($100.00) lawful money of the United States, value of about one hundred dollars ($100.00); Recruit Gloster Atkins - sixty-two dollars ($62.00) lawful money of the United States, value of about sixty-two dollars ($62.00); Recruit James Spencer - forty dollars ($40.00) lawful money of the United States, value of about forty dollars ($40.00); Recruit Arthur Washington - one hundred and sixty dollars ($160.00) lawful money of the United States, value of about one hundred and sixty dollars ($160.00); Recruit Ruben Gore - one hundred dollars ($100.00) lawful money of the United States, value of about one hundred dollars ($100.00); Private First Class Warren G. Patton - four hundred dollars ($400.00) lawful money of the United States, value of about four hundred dollars ($400.00);

Recruit Floyd Goodson - one hundred dollars ($100.00) lawful money of the United States, value of about one hundred dollars ($100.00); Recruit Tollie Dunn - sixty dollars ($60.00) lawful money of the United States, value of about sixty dollars ($60.00); Recruit Willie B. Latham - two hundred and sixty dollars ($260.00) lawful money of the United States, value of about two hundred and sixty dollars ($260.00); Recruit Billie C. Hamilton - one hundred and ninety-five dollars ($195.00) lawful money of the United States, value of about one hundred and ninety-five dollars ($195.00); Private First Class Rufus Gamble - one hundred dollars ($100.00) lawful money of the United States, value of about one hundred dollars ($100.00); Recruit Otis Colvin - one hundred and twenty dollars ($120.00) lawful money of the United States, value of about one hundred and twenty dollars ($120.00); Recruit Willie Latham - one hundred and sixty dollars ($160.00) lawful money of the United States, value of about one hundred and sixty dollars ($160.00); Recruit Franklin Latham - sixty dollars ($60.00) lawful money of the United States, value of about sixty dollars ($60.00); Recruit Lonzie Kelly - one hundred and sixty dollars ($160.00) lawful money of the United States, value of about one hundred and sixty dollars ($160.00); Recruit Franklin Robinson - eighty dollars ($80.00) lawful money of the United States, value of about eighty dollars ($80.00); Recruit President L. Hodo - forty dollars ($40.00) lawful money of the United States, value of about forty dollars ($40.00); Recruit John Mitchell - forty dollars ($40.00) lawful money of the United States, value of about forty dollars ($40.00); Recruit Joe Mainard - sixty dollars ($60.00) lawful money of the United States, value of about sixty dollars ($60.00); Recruit Jimmie L. Hughes - sixty dollars ($60.00) lawful money of the United States, value of about sixty dollars ($60.00); Private James Cain - one hundred and forty dollars ($140.00) lawful money of the United States, value of about one hundred and forty dollars ($140.00); Private Tommie Dixon - one hundred and forty dollars ($140.00) lawful money of the United States, value of about one hundred and forty dollars ($140.00); Recruit Richard Carlisle - eighty dollars ($80.00) lawful money of the United States, value of about eighty dollars ($80.00); Recruit Robert Jackson - forty dollars ($40.00) lawful money of the United States, value of about forty dollars ($40.00); Recruit Joe Rufus Brown - one hundred dollars ($100.00) lawful money of the United States, value of about one hundred dollars ($100.00); Recruit Edward J. Jones - one hundred and twenty dollars ($120.00) lawful money of the United States, value of about one hundred and twenty dollars ($120.00); Recruit Judge Glover - one hundred dollars ($100.00) lawful money of the United States,

value of about one hundred dollars ($100.00); Recruit Ernest Kilpatrick - one hundred dollars ($100.00) lawful money of the United States, value of about one hundred dollars ($100.00); Recruit Albert Latham - sixty dollars ($60.00) lawful money of the United States, value of about sixty dollars ($60.00); Recruit Floyd D. Blount - seventy dollars ($70.00) lawful money of the United States, value of about seventy dollars ($70.00); Private Samuel Kent - seventy dollars ($70.00) lawful money of the United States, value of about seventy dollars ($70.00); Recruit David Allen, Junior - two hundred and twenty-five dollars ($225.00) lawful money of the United States, value of about two hundred and twenty-five dollars ($225.00); Recruit Willie G. Thomas - one hundred and forty dollars ($140.00) lawful money of the United States, value of about one hundred and forty dollars ($140.00); Recruit Sidney Tarvis - twenty dollars ($20.00) lawful money of the United States, value of about twenty dollars ($20.00); Recruit Robert L. Richardson - one hundred and seventy dollars ($170.00) lawful money of the United States, value of about one hundred and seventy dollars ($170.00); Recruit Louis Noble - thirty dollars ($30.00) lawful money of the United States, value of about thirty dollars ($30.00); Recruit Harvey McCoy - one hundred and forty dollars ($140.00) lawful money of the United States, value of about one hundred and forty dollars ($140.00).

He pleaded not guilty to, and was found guilty of, 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 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 (5) years, one (1) month, and twenty-seven (27) days. 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 19 August to 3 November 1950, accused was commanding officer and Master Sergeant Oliver Jones was first sergeant of the 403rd Signal Construction Company, Camp Gordon, Georgia (R 17).

On 31 October 1950, accused informed Sergeant Jones and Lieutenant Young to "go out on Bivouac * * * to pay off the men [and] to tell them [that] if they desired to turn money over to [accused] * * * for safekeeping

until they returned from Bivouac, they could." Sergeant Jones "went on Bivouac" and, at a company formation, informed the enlisted men of the company of Captain Batson's offer. Sergeant Jones thereafter collected a total of $5582, "lawful money of the United States," from the enlisted men listed in the Specification of Charge II in the amounts shown opposite their names. Later that day, at the company orderly room, Sergeant Jones gave accused the $5582 thus collected, in exchange for which accused gave Sergeant Jones a signed receipt, dated 31 October 1950, admitted in evidence without objection, which listed the names of each enlisted man, the amount each had given Sergeant Jones, the total amount collected, and accused's acknowledgment that he had received $5582 in cash from Jones (R 18-20, Pros Exs 3 and 4).

On 3 November 1950, the company "came off Bivouac" and the enlisted men asked Sergeant Jones for the return of their money. Sergeant Jones in turn requested accused to return the money, and accused stated "he did not have the money, but he would pay the men as soon as he could. He was kidnapped and robbed by two men" (R 20). The money has not been returned to date (Pros Ex 4).

Two duly authenticated extract copies of morning reports were admitted into evidence without objection as Prosecution Exhibits 1 and 2 (R 16, 17). Entered thereon are the following pertinent entries:

"4 Nov 50

Batson, Abihue J 01635552 Capt

Dy to AWOL EFF 3 Nov 50

/s/ Salvatore J. Messina

1st Lt. Sig-C" (Pros Ex 1)

"27 November 1950

* * *

"Batson Abihue J Sr 0-1635552 Capt

AWOL to conf Post Stockade this sta

eff 1800 hours 22 Nov 50

s/ John J Eckerle t/ JOHN J ECKERLE
t/ Capt t/ Sig C" (Pros Ex 2).

b. For the Defense

After being apprised of his rights as a witness, accused elected to testify (R 23-24).

Accused stated that he enlisted in the United States Army in 1938. In 1942, he was commissioned a Second Lieutenant. In 1944, he participated in an act of heroism and was awarded a Soldier's Medal. In October 1947, he "went on inactive duty" and reenlisted as a Master Sergeant. His service in that status was terminated by discharge pursuant to the provisions of Army Regulations 615-369. However, he retained his reserve commission as an officer. In October 1949, accused became Commanding Officer of the 403d Signal Construction Company, an inactivated reserve unit. On 19 August 1950, when the unit was activated, accused was recalled to active duty as its Commanding Officer. On 31 August 1950, he and the unit were ordered to Camp Gordon, Georgia, where, because of a shortage of officers and the inexperience of his enlisted men, accused "had an awful lot of difficulty" (R 24-25, 27-31, 46).

On 31 October 1950, Sergeant Jones turned over to accused "a certain sum of money" for safekeeping, for which accused gave Sergeant Jones a receipt which "is in evidence." As there was no safe in the company area, accused put the money in a small canvas bag and took it to his quarters. The next day, he brought it back to his office and that night again returned it to his quarters where it remained until 3 November. That morning, a safe was placed in the orderly room and accused was given its combination (R 32, 51, 70).

At about 1300 hours of that day, accused drove to town with the bag of money. He parked his car and was putting a nickel in the parking meter when he was approached by a man who introduced himself as Johnny Owens. Owens asked accused if his car was for sale. When accused indicated that he might be interested, Owens and another person named Chicken Hart offered to direct accused to Hart's uncle, a prospective purchaser. Owens and accused drove in accused's car and Hart led the way in another. On the way they stopped and Owens gave accused a drink of whiskey and water. They proceeded further and "got on a deserted road in a lonely place." At that time accused "was feeling hazy and * * * suspected there had been something in the drink they gave [him]." They stopped and Owens and Hart attacked and bound accused. They opened the bag and some of the money fell out and scattered on the front seat. They took the bag and some personal papers from accused's billfold and left. Accused untied himself and counted approximately $840 on the seat. In addition, $70 in accused's wallet was undisturbed. Accused drove back to Camp Gordon, changed into civilian clothes, and left the camp (R 33-36).

From then until 22 November, he travelled to and visited a number of cities in South Carolina, Virginia, Georgia, Alabama and Florida. His first stop was Columbia, South Carolina, where he purchased a small hand bag and abandoned his car. At Pensacola and Panama City, Florida, he registered in hotels under assumed names. At Pensacola, he purchased an automobile for $300 under an assumed name. He "thought of changing [his] identity and

and maybe [his wife] might come down there and that [he] might start a new life." To finance his trip and to purchase the car, he used the money which he knew was part of the money "entrusted in [his] care" (R 37-42, 54, 55, 65).

On 22 November, he returned to Camp Gordon. As he was approaching the camp, he stopped and hid the car, some clothing, a gun, and an Army blanket in some bushes off the road. He walked to the nearest house and met a Sergeant who brought him to Camp Gordon. Finding his quarters locked, he went to the quarters of a neighbor where he telephoned his commanding officer and announced his return. He was taken into custody and proceeded to the Criminal Investigation Division Office. Attempts were made to verify accused's story that he had been robbed by Owens and Hart without success (R 42-45).

c. Rebuttal

Second Lieutenant John B. Shearer, Supply Officer of the 403rd Signal Construction Battalion, testified that, at accused's request, he requisitioned and obtained a safe from "The Quartermaster" and sometime between 23 October and 1 November 1950 he placed the safe in the orderly room next to accused's office. After Lieutenant Shearer supervised its placement, he informed accused that the safe had been delivered to the orderly room, and gave accused an envelope containing its combination. He remembered that the safe was still there on 3 November (R 114-118).

Sergeant Orvil W. Hubler testified that on or about 22 November, as he was at home working on his car, accused emerged from the woods and identified himself. Accused told Hubler that he had been kidnapped, robbed, and held captive for two weeks. His captors were driving accused in the vicinity when accused, whom his captors believed was asleep from "knockout drops" they had given him but which he had not taken, jumped from the car and escaped through the woods to Sergeant Hubler's house (R 120).

4. Discussion

a. As to the Merits

Accused has been found guilty of absence without leave from 3 to 22 November 1950 in violation of Article of War 61 (Spec of Chg I and Chg I). The uncontradicted evidence of record consisting of two duly authenticated extract copies of morning reports of accused's organizations, admitted in evidence without objection, constituted prima facie evidence of accused's guilt of absence without leave of the period alleged in the Specification of Charge I and Charge I and warrants the findings of guilty thereof (CM 344852, Campbell, 19 Feb 1951). Accused's admissions as a witness in his behalf conclusively prove the charge of absence without leave as alleged.

Accused was also found guilty of feloniously stealing money in the aggregate amount of $5582, the property of 50 named enlisted men, in violation of Article of War 93.

"Larceny is defined in the Manual for Courts-Martial, 1949, paragraph 180g, as follows:

> 'Larceny, or stealing, is the unlawful appropriation of personal property which the thief knows to belong either generally or specially to another, with intent to deprive the owner permanently of his property therein. Unlawful appropriation may be by trespass or by conversion through breach of trust or bailment. In military law former distinctions between larceny and embezzlement do not exist.'

"The elements of proof necessary to sustain a conviction of larceny under Article of War 93 are as follows:

> 'Proof.- (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)" (CM 341018, Melton, 7 BR-JC 1, 11-12)

The undisputed evidence shows that, at accused's request, 50 enlisted men of the company of which accused was Commanding Officer gave accused a total of $5582 for safekeeping, which accused failed to return on demand. This failure to deliver the fund as required created an inference that accused converted the money to his own use with the requisite felonious intent (CM 339494, Clifford, 5 BR-JC 131, 141). His defense that he was robbed of all but about $840 was properly rejected by the court. Even if true, his admission that he spent the remainder to pay the expenses incurred by an unauthorized absence of 19 days is an acknowlegment of guilt of larceny in that amount.

There is a well established legal presumption that one who has assumed the stewardship of another's property has unlawfully appropriated such property by conversion through breach of trust if he does not or cannot account for and deliver it at the time an accounting or delivery is required of him. A person in charge of funds to whom they have been

entrusted, who fails to respond with or account for them when called upon, 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 as in the instant case (CM 341018, Melton, 7 BR-JC 1, 15; CM 323764, Mangum, 72 BR 397, 403).

The failure of accused to report the purported robbery promptly, his unauthorized absence, his flight in civilian clothes, his abandonment of his car and concealment of his personal property, his traveling under assumed names, are obviously inconsistent with the actions of an innocent person.

The credible evidence proves beyond a reasonable doubt that accused appropriated to his own use and dissipated the entire amount of money entrusted to his care, and justifies the finding of guilty as alleged.

b. Accused's Pretrial Statements

Relative to the voluntary nature of a pretrial statement made by accused on 23 November 1950, accused testified that, on the night of 22 November and the morning of 23 November, he was interrogated by agents of the Federal Bureau of Investigation and the Criminal Investigation Division. Asked if he was warned of his rights, accused said, "I am sure I was warned of my rights throughout the entire thing" (R 137-138).

During the interrogation on the night of 22 November, which was twice interrupted when he was taken to the hospital for medical examinations, accused stated that Major Smith and Agent Sligh told him he would not be permitted to eat, sleep or telephone his wife until he made a satisfactory statement. Accused also charged that while he was eating a sandwich and drinking a bottle of "Coca Cola," the bottle was knocked from his hand by a person who was searching him. He further stated that Major Smith and Agent Sligh, two of the interrogators, "handled [him] very roughly, swore at him, and pushed him into a chair when he stood up," and that Major Smith struck him in the face (R 44, 56, 60-62).

The next morning, accused stated that Agent Polonski took accused to his quarters and furnished him with a razor, towel, shirt and necktie. Accused ate heartily and rested frequently. Thereafter accused made a statement (Pros Ex 8) to Agent Polonski after he was told "it would be much better if [he] made a statement, that things would go easier on him." However, he admitted that his purpose in making the statement to Agent Polonski was to "relieve [himself] of the responsibility" of returning the money he had spent and of "the absence without leave for the time [he] had gone" (R 51, 139, 141).

On 5 December, accused stated he made a voluntary statement to Major Manning (R 54, Pros Ex 7). He gave as his reason for making the latter statement:

"I gave my new statement and proceeded to cooperate with the CID in every manner to substantiate the facts that exist and in an effort to accept the responsibility that may have been placed on my shoulders, for the portion of this money for which I was responsible. I might even add that in making the statement that it was pointed out to me that larceny was inferred and that whether it was fifty dollars or eight hundred dollars, it made no difference; but I could only tell them the truth and then stand by that" (R 141).

To rebut accused's testimony of coercion and undue influence, Major Albert C. Smith, Provost Marshal, Camp Gordon, Georgia, testified that during his interrogation of accused, he did not at any time strike accused but admitted that he "pushed him back into the chair" after telling him three times to be seated (R 122-123).

Major John J. Perry, Jr., Chief, Criminal Investigation Division Section, Provost Marshal's Office, testified that at about 1800, 22 November, he and his sergeant searched accused, who appeared very indignant. Accused was drinking from a bottle of "Coca Cola" at the time and Major Perry took the bottle from his hand but denied striking it from accused's hand (R 125-126).

At the conclusion of Major Perry's testimony, defense counsel stated:

"For the record, at the specific request of the accused, I have been asked to state that if the impression was given that Major Perry did not use the highest type of investigating conduct as far as his personal behavior is concerned, that it is a misinterpretation and the accused has asked me to state that Major Perry at all times conducted himself with the highest standard of conduct, except for the fact that the coca cola bottle was removed rapidly. He might have been under the impression that it was struck out but Major Perry himself did not do anything of the nature to show any injustice to the accused in any manner" (R 126).

Mr. William L. Sligh, Criminal Investigation Division Agent, testified that as he was interrogating accused, accused became excited and "sprang" from his chair. Sligh "grabbed" accused and "sat him back in the chair" (R 127-129). He denied striking accused.

At the conclusion of Mr. Sligh's testimony, defense counsel stated:

"At this time, let me on behalf of the accused, also state that Agent Sligh did not strike him. That the accused testified to the fact merely that Mr. Sligh was one of the persons who did keep him seated at a time when he wanted to arise and insisted that he be seated in order to answer the questions that they may have been projecting to him. I say this not for the truth of what I say, but to indicate the state of mind; and not wanting to accuse another falsely or leave a false impression with the court." (R 129)

Criminal Investigation Division Agent Joseph Polonski testified that at 2300 hours, 22 November, he asked accused if he wanted to make a statement. Accused said he did not. Agent Polonski did not see accused again until about 1000 hours, 23 November, when accused was brought into the "CID" office. Accused was not questioned between 1100 and 1700 hours. At 1700 hours, prior to talking to him, Polonski warned accused of his rights under Article of War 24 and accused indicated that he understoodthem. Polonski asked accused if he wanted to make a statement and accused said that he did. No threats or promises of leniency or immunity were made and no force or coercion were used. Thereafter accused answered questions which were recorded by a stenographer, reduced to writing and sworn to and signed by accused in Polonski's presence (R 131-136).

Both statements were admitted in evidence, defense objecting only to the statement dated 23 November on the grounds that it was obtained by coercion and undue influence (R 121, 140; Pros Exs 7 and 8).

A brief summary of the contents of the statement dated 23 November (Pros Ex 8) is that on 31 October 1950 accused received over $5,000 from enlisted men of his company for safekeeping while they were in the field. On 3 November 1950 he went to his quarters and obtained the money. As he was leaving, he was struck from behind by two men in uniform who robbed him and held him captive until 22 November. On that date, he escaped, came to the home of Sergeant Hubler, and was taken into custody by the Provost Marshal.

The contents of the statement dated 5 December (Pros Ex 7) are substantially the same as was told by accused on the witness stand.

In discussing the general principles governing the admissibility of pretrial statements, the Manual for Courts-Martial provides, in part:

"No statement, admission, or confession of an accused person obtained by the use of coercion or unlawful influence shall be received in evidence by any court-martial. * * *

"A confession or admission may not be received in evidence if it was not voluntarily made. If the confession

or admission was obtained from the accused in the course of an investigation, by informal interrogation or by any similar means, it may not be received in evidence unless it appears that the accused, through preliminary warning or otherwise, was aware of his right not to make any statement regarding an offense of which he was accused or concerning which he was being interrogated and understood that any statement made by him might be used as evidence against him in a trial by court-martial. The fact that a confession or admission otherwise admissible was made to an investigator during an investigation of a charge does not make the confession or admission inadmissible. * * *

"A confession is not admissible in evidence unless it is affirmatively shown that it was voluntary. An admission of the accused, however, may be introduced without such preliminary proof except when it is indicated that the admission was involuntary. No hard and fast rules for determining whether a confession or admission was voluntary are here prescribed. Some instances of coercion or unlawful influence in obtaining a confession or admission are:

(1) Infliction of bodily harm, including prolonged questioning accompanied by deprivation of the necessities of life (food, sleep, adequate clothing, etc.).

(2) Threats of bodily harm.

(3) Imposition of confinement or deprivation of privileges or necessities because a statement is not made by the accused, or threats of the same if a statement is not made.

(4) Promises of immunity or clemency with respect to an offense allegedly committed by the accused.

(5) Promises of reward or benefit, of a substantial nature, likely to induce a confession or admission from the particular accused.

* * *

"The ruling of the law member (or of the special court-martial) that a particular confession or admission may be received in evidence is not conclusive of the voluntary nature of the confession or admission. Such a ruling merely places the confession or admission before the court. The ruling is final only on the question of admissibility. Each member of the court, in his deliberation upon the findings of guilt or innocence, may come to his own conclusion as to the voluntary nature of the confession or admission and accept or reject it accordingly. He may also consider any evidence adduced as to the voluntary or involuntary nature of the confession or admission as affecting the weight to be given thereto." (par 127a, MCM 1949)

Accused charged that Major Smith struck him in the face, that Major Perry struck a bottle from his hand, that Agent Polonski told him it would go easier with him if he made a statement and that he was denied food and treated roughly by Major Smith and Agent Sligh. These charges were denied by the persons thus accused. After Major Perry and Agent Sligh testified in denial of accused's charges, accused repudiated his testimony as to them. However, Major Smith and Agent Sligh admitted that, while questioning accused, each had pushed accused into a chair. It was also evident that accused had been subjected to prolonged questioning late at night. Although this treatment of accused was improper, it is clear that his statement made to Agent Polonski the following day was not induced thereby, or that it was the procuring cause of accused's statement. As the accused admitted, his statement was a fabrication to avoid responsibility for the larceny and unauthorized absence. Under all the facts and circumstances, it was a question of fact for the court to determine whether the treatment accorded accused was prejudicial to his substantial rights. By its findings, the court found on substantial evidence that it was not and the Board of Review is of the opinion that such a conclusion was justified (CM 334745, Higgs, 4 BR-JC 377, 396).

c. Mental Responsibility of Accused

The defense put the mental responsibility of accused in issue and presented the testimony of accused, a psychiatrist and two lay witnesses as well as two exhibits.

Accused testified that he had been in Panama from 1938 to 1941 and from 1943 to 1946 and, although not hospitalized, believed he might have been "in the Tropics too long." After leaving Panama, he had headaches, "passed out during normal sleeping hours" and "would wake up wet." During 1947 and 1948, he was a patient at five Army and Air Force Hospitals, in two of which he was in the neuropsychiatric ward (R 27-28, 45-48, 60).

Dr. Harvey Cleckley, Professor of Psychiatry and Neurology, Georgia Medical School, Augusta, Georgia, testified as a defense witness, that he examined accused and his medical records at Oliver, Walter Reed and Percy Jones General Hospitals. Dr. Cleckley was of the opinion that accused had a "psychopathic personality," and a "personality disorder, ordinarily called character behavior or perhaps situational adjustment." In Dr. Cleckley's opinion, accused was sane "in the ordinary sense," but had a "considerable impairment of ability to behave judiciously and correctly as one should under the circumstances." Accused impressed Dr. Cleckley as having "unimpaired reasoning powers" and a "very fertile imagination." He stated that accused has no history of a "schizoid disorder" and in his opinion accused is not "schizophrenic" (R 74-77).

Second Lieutenant Fred B. Stevenson testified that he had known accused for 14 months. On one occasion accused asked Lieutenant Stevenson to drive him to a certain location. When they arrived there accused was uncertain that it was his destination. They drove around the neighborhood and Lieutenant Stevenson finally let accused out of the car to find the place himself (R 79, 82). On another occasion, accused told him that while going to college he also worked for a lawyer in the afternoon and as a bookkeeper at night. Lieutenant Stevenson also stated that accused did not delegate duties to other officers but "seemed to try to take care of all the work himself," and concluded that accused was a "little abnormal" and "mentally unbalanced" (R 80).

Second Lieutenant Grover C. Smith testified that he was a member of the same organization as accused and had known him since 8 May 1950. In August 1950, prior to the organization being activated, accused called a meeting of his noncommissioned officers, at which time, accused "would start talking, he would get off on a side issue, then off on another side issue until what we came there for and what he was talking about wouldn't be remotely connected." Lieutenant Smith described accused as a person who "had to be doing something all the time. He had to go somewhere at night and he liked to have as many people with him as possible. He had something in his background he was trying to get away from. Trying to impress people all the time." Lieutenant Smith was of the opinion that accused "was in need of psychiatric attention" (R 84).

The defense introduced the following exhibits:

A report of proceedings rendered prior to his discharge pursuant to Army Regulations 615-369, dated 1 November 1948, stated that accused had "transient personality reactions to acute situational maladjustment" (R 26; Def Ex A). A "Rating Sheet" of the Veterans Administration Office, Montgomery, Alabama, dated 15 March 1949, stated that accused had a ten per cent disability rating from 9 November 1948 for "Psycheneurosis, anxiety, mod." (R 29; Def Ex D).

In rebuttal, First Lieutenant S. J. Messina testified for the prosecution that he knew accused for over a year, and that he was accused's executive officer in the 403d Signal Construction Company. During the entire time he knew accused, accused's behavior was normal (R 110-111).

As a witness for the court, Lieutenant Junior Grade Myron G. Sandifer, Medical Corps, United States Navy, psychiatrist for the United States Army Hospital, Camp Gordon, Georgia, testified that, pursuant to orders of the Commanding General, Camp Gordon, Georgia, he examined accused on 13 January 1951, and studied accused's military records and "the court-martial proceedings." On 16 January 1951, he prepared a written psychiatric report on accused, which was admitted in evidence without objection (R 90; Pros Ex 6). Lieutenant Sanifer found:

"a. That the clinical diagnosis is psychopathic personality.

"b. The accused at the time of the alleged offense was so far free from mental defect, disease, and derangement as to be able concerning the particular acts charged to distinguish right from wrong.

"c. The accused at the time of the alleged offense was so far free from mental defect, disease, and derangement as to be able concerning the particular acts charged to adhere to the right.

"d. The accused possesses sufficient mental capacity to understand the nature of the proceedings against him and intelligently to conduct or cooperate in his defense."

The two psychiatrists who testified agreed that accused was a psychopathic personality. Dr. Cleckley, who testified for the defense, stated that accused was sane "in the ordinary sense," but that his condition is known as a personality disorder or character behavior. This condition is described in Psychiatry in Military Law, TM 8-240, at paragraph 13c as follows:

"* * * There is ample evidence that individuals with character and behavior disorders know that their actions are wrong. Typically they seek to explain, neutralize, or escape from their offenses by evasive explanations, flight, or the piling up of one prevarication on another. These actions indicate that they know they have done something wrong.**It should be pointed out that while character and behavior disorders are diseases of the 'mind' for the purposes of technical medical classification, military law views them as defects of moral character, not mental disorders."

The condition of accused thus represents a lack of moral rather than mental faculties, a defect of character or lack of will power, which did not affect his ability to distinguish between right and wrong or to adhere to the right. Admitting for the sake of argument that his condition resulted in an impaired ability to adhere to the right, or a partial irresponsibility, this would have been no defense (CM 338934, Jones, 6 BR-JC 269, 281).

The court heard all the evidence and observed the witnesses and accused and found that accused was not affected by any mental disease or derangement as to be able concerning the particular acts charged to distinguish between right and wrong and to adhere to the right. From a careful examination of the evidence, the Board of Review concludes that there is no reason to disturb the court's findings (CM 339794, LeCleire, 5 BR-JC 233, 254).

5. Department of the Army records show that accused is 30 years of age, married and has one child. He graduated from high school in 1936 and attended Auburn University, Auburn, Alabama, for one and one-half years. He had enlisted service from 1938 until he was commissioned a second lieutenant in 1942. He was promoted to first lieutenant in 1945. On 2 October 1947 he was separated from the service in grade of captain. On 16 October 1947, he reenlisted as a master sergeant and on 8 November 1948, was honorably discharged pursuant to Army Regulations 615-369. On or about 19 August 1950, he was ordered to extended active duty in grade of captain as commanding officer, 403d Signal Construction Company. He is entitled to wear the Good Conduct Medal, American Defense Service Medal, American Theater Medal, Soldier's Medal, and World War Victory Medal. The Soldier's Medal was awarded 18 April 1945 for heroism in rescuing an injured soldier. His numerical efficiency ratings of record show an average of 4.1 from 1 July 1944 to 31 December 1946.

6. The court was legally constituted and had jurisdiction over accused and 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 thereof. Dismissal is authorized upon conviction of a violation of Article of War 61 or 95.

(on leave), J.A.G.C.

Samuel S. Cowen, J.A.G.C.

Sumner A. Brown, J.A.G.C.

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 Captain Abihue J. Batson, Sr., 0-1635552, Headquarters and Headquarters Company, 317th Signal Construction Battalion, Camp Gordon, Georgia, 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.
MAY 9 1951
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

10 May 1951

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

JAGH CM 345228

APR 23 1951

UNITED STATES	)	25th INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at APO 25, 12 February 1951. Dismissal, total forfeitures after promulgation, and confinement at hard labor for two (2) years.
	)	
Second Lieutenant WILLIAM HASKELL, JUNIOR (O-972624), Company L, 35th Infantry Regiment, APO 25	)	

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

The Board of Review has examined the record of trial in the case of the officer above named and submits this, its opinion, to The Judge Advocate General and the Judicial Council.

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

> "* * * misbehave himself before the enemy by refusing to move from his position and aid in the defense of his unit, which he had been ordered to do, while his command was engaged with the enemy."

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 two (2) years. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

The record of trial discloses that the accused, Second Lieutenant William Haskell, Jr., joined Company L, 35th Infantry Regiment, for duty about 1200 hours, 27 November 1950. At that time he was given no particular

assignment but told by the company commander, Captain Harley L. Brown, to remain with the Command Post (CP) group.

On the night of 27 November 1950, Company L was in position in the vicinity of Yongbyon, Korea. At approximately 0230 hours, 28 November 1950, the Chinese Communists launched a frontal attack on the company, subjecting the CP area to artillery and mortar fire. At about 0300 hours, the communications sergeant, Sergeant Kesslering, informed Captain Brown by telephone that the enemy was approaching the CP up the draw from the rear, whereupon the captain gave the following order to the accused: "Lt. Haskell, get up, get out of your fox hole and go help Sergeant Kesslering to organize a defense for the rear of the CP" and added "They are coming up the draw behind us." At the time this order was given, Captain Brown was on his knees in the fox hole he occupied with Lieutenant Garretson, the executive officer, who was lying along the other side of the hole, observing the enemy; accused was lying in a fox hole with Corporal Watson, radio operator, about six feet to the right front of Captain Brown. Accused denied hearing any order directed to him although he admitted that he heard Captain Brown say something about Sergeant Kesslering, fire fight and attack in the rear. However, Captain Brown stated that he gave the order in a loud, clear voice and Corporal Watson testified that he distinctly heard the order which was given in a tone of voice "loud enough so that the second platoon on the hill could have heard it". Lieutenant Garretson did not hear Captain Brown give accused an order at any time, but stated that he was in and out of the fox hole several times and that it is possible that the captain might have spoken to accused without Garretson having seen or heard him do so. At this time "there was some small arms fire on the flanks of the CP", but it was "not of any volume." The Chinese Communists "were not right in our position but pretty close. We could hear them." However, there was no incoming mortar or artillery fire.

While checking positions of the remainder of the company by telephone for about five minutes after giving the order, Captain Brown observed that accused had not moved from his fox hole so the captain, himself, went to the rear defense position and participated in a fire fight which lasted about 15 or 20 minutes. After the enemy had been driven off and the firing had subsided, Captain Brown returned to his fox hole. He then ordered accused to get into a position where he could watch the draw in front of the CP, but during the five minutes while the captain was on the telephone talking to the 3rd platoon, he observed no indication that accused was going to obey this order either. Accused "just laid there in his hole." Corporal Watson who was saddling up his radio preparatory to accompanying the captain also heard the order and observed that accused "didn't move; didn't do nothing". As Captain Brown on his way to assist the 3rd platoon passed accused in his fox hole, he again told him to get into position to watch the draw in front of the CP. The captain stated that in order to observe the enemy properly accused would have to be on his knees at least, but that during the time the captain was in the CP area, accused did not assume that position; "he was laying on his back in his hole". The accused admitted that he heard this second order and that he was lying on his side at the time. He added, "It was several minutes later that I resumed the kneeling position and I stayed in that position so that I could observe the major part of that draw."

About a half hour after Captain Brown's departure from the CP to go up on the hill, Lieutenant Garretson had occasion to order accused to another fox hole to assist a wounded soldier and accused complied. At that time there were bullets going overhead, but the company CP was not under attack.

The testimony also disclosed that this was accused's first experience under fire. Captain Brown talked with accused on the day after the attack and was of the opinion accused was extremely nervous and acted as though he were frightened. Lieutenant Garretson did not think that accused was qualified as an infantry officer.

The specification in the instant case closely follows the form given in the Manual for Courts-Martial, U. S. Army, 1949,[1] and it is deemed adequate to state an offense in violation of Article of War 75. Misbehavior before the enemy is by statute an offense punishable by death or such other punishment as a court-martial may direct.[2] The Manual for Courts-Martial, U. S. Army, 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." [3]

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

> "* * * by <u>any officer or soldier</u>, 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." [4]

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[1] Page 318, <u>Manual for Courts-Martial, U. S. Army, 1949</u>.

[2] Article of War 75, 10 U.S.C. 1547.

[3] Paragraph 163a, <u>Manual for Courts-Martial, U. S. Army, 1949</u>.

[4] Winthrop, <u>Military Law and Precedents</u>, 2d Ed, 1920 Reprint, p. 623. Article 99 of the Uniform Code of Military Justice adds particularization under the Misbehavior Before the Enemy provision: "wilfully fails to do his utmost to encounter, engage, capture, or destroy any enemy troops ***".

In view of the recent decision of the Judicial Council in the Gilbert case, no question arises as to the applicability of Article of War 75 to the present situation in Korea.[5]

The evidence is uncontroverted that Company L was engaged with the enemy at the time and place alleged. The only question which requires consideration by the Board of Review is whether the evidence established beyond a reasonable doubt conduct of the accused amounting to misbehavior before the enemy.

The evidence discloses that accused failed to go to the rear to assist in the defense of the area when ordered by his commanding officer; that he continued to lie in his fox hole even after being ordered by his commanding officer to assume a position of watchfulness over a critical tactical area; and that he made no effort to assist actively in defense of the unit until after that area was no longer under attack.

Accused's denial that he ever heard the first order and his assertion that he complied with the second created issues of fact which the court resolved adversely to the accused. It was the function and duty of the court to weigh the evidence, judge the credibility of witnesses and determine controverted questions of fact prior to arriving at its findings,[6] 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.[7]

In our opinion, the competent evidence in the record of trial justifies acceptance of the court's view as to these issues. Corporal Watson, accused's companion in the fox hole, heard the captain's first order distinctly and accused admitted that he heard parts of it which he thought did not pertain to him. In any event he did not move out of his fox hole nor did he act promptly to obey the captain's second order which he admittedly heard clearly. After danger in the immediate area had passed, accused assumed the position ordered by the captain. In discussing tardy compliance with an order, the Judicial Council stated in CM 343980, Franklin; "Ultimate delayed compliance is no defense where prompt obedience is an essential purpose of the order * * *."[8] In the instant case the evidence reveals a tactical situation wherein immediate obedience to orders affecting defense of the CP would be of the gravest importance and unquestionably would be expected by the officer issuing the order.

5/ CM 343472, Gilbert, BR-JC November 1950.

6/ Subparagraph 139a of the Manual for Courts-Martial, U. S. Army, 1949; CM 325457, McKinster, 74 BR 233, 241.

7/ CM 323161, Lacewell, et al, 72 BR 105, 109; MGM v. Fear, 104 F.2d 892, 897, hn 2 (9th Cir. 1939).

8/ CM 343980, Franklin, BR-JC 25January 1951.

The conduct of the accused in failing to comply promptly with orders directing him to assist in the defense of the unit, when considered with the pertinent circumstances in evidence, establishes a pattern of cowardice and constitutes misbehavior before the enemy within the meaning of Article of War 75.[9] The refusal need not be verbal but may be by conduct in failing to comply with an order.[10] We agree with the court that the evidence establishes beyond a reasonable doubt that accused is guilty of a violation of Article of War 75.[11]

It is noted that the court, after arriving at its findings, received in evidence at the behest of the defense, for purposes of mitigation, an extract from accused's "Chronological Record of Military Service", listing past assignments as platoon leader and battery officer; also a psychiatric evaluation of the accused by the 25th Division Psychiatrist, dated 9 February 1951, describing the accused as mentally responsible but psychologically and emotionally "not particularly well suited --- to be an infantry officer." The court by its lenient sentence indicated that it took this into account.

The Board of Review has given consideration to the written brief and oral argument presented by accused's present counsel, Mr. Joseph F. O'Connell, and to the letter in accused's behalf from Senator Theodore Francis Green.

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 sentence is legal. 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.

The records of the Department of the Army reveal that accused is 26 years of age and single. His parents are living in Pawtucket, Rhode Island. He was graduated from high school in Providence, Rhode Island, in June 1943 and was inducted into the Army the following month. After training as a ground aircraft observer, he was sent to the European Theater of

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9/ CM 343953, Reed, BR-JC 9 January 1951; CM 343775, Williams, BR-JC 18 January 1951; CM 343980, Franklin, supra; CM 344038, Fulsom, BR-JC 13 March 1951.

10/ CM 343953, Reed, supra.

11/ CM 335526, Tooze, 3 BR-JC 313, 340-341; CM 338993, Pelkey, 6 BR-JC 289 308-309; CM 343793, Cruikshank, BR-JC 8 March 1951.

Operations where he served in Belgium, Holland and Germany. He returned to the United States in March 1946 and was honorably discharged 2 April 1946. After separation, he attended Rhode Island State College at Kingston, Rhode Island, for 3 years. In 1948 he became a member of the Rhode Island National Guard and on 13 June 1949, he was commissioned a second lieutenant, Infantry Reserve, having successfully completed the Senior ROTC course at the college. Following two 15-day tours of active duty, accused entered into the active military service 20 July 1950 on a competitive tour for a commission in the Regular Army. He was assigned initially to the 15th Infantry Regiment, Fort Benning, Georgia. On 2 October 1950 he arrived in Korea and on 16 October 1950 was assigned to Company L, 35th Infantry Regiment. No efficiency reports are available since the date of his entry into the active military service. There is no record of previous convictions or civil offenses.

Allan R. Browne J.A.G.C

Arthur P. Ireland J.A.G.C

Charles M. Wilkinson J.A.G.C

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

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

In the foregoing case of Second Lieutenant William Haskell, Junior, 0-972624, Company L, 35th 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.

C. B. Mickelwait, Brig Gen, JAGC

Edward H. Young, 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

29 May, 1951

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

JAGK - CM 345272

APR 3 1951

UNITED STATES v. Captain EDGAR L. WHITE (0-1049020), 4054th Area Service Unit, Fort Bliss, Texas.	)))))))))	ANTIAIRCRAFT ARTILLERY AND GUIDED MISSILE CENTER Trial by G.C.M., convened at Fort Bliss, Texas, 12 December 1950 and 3, 4, 5 and 6 January 1951. Dismissal, total forfeitures, and confinement for twelve (12) years.

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 (for convenience to the reader we include next to each specification the exhibit number of the check to which it pertains):

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

Specification 1: In that Captain Edgar L. White, 4054th Area Service Unit, Fort Bliss, Texas, did, at Fort Bliss, Texas, on or about 28 October 1949, feloniously steal a certain check drawn upon the Treasurer of the United States, payable to the order of First Lieutenant William H. Harden, dated 25 October 1949 in the sum of Twenty-five Dollars ($25.00), value of about Twenty-five Dollars ($25.00), the property of First Lieutenant William H. Harden, which check is more particularly described in specification 2, Charge I, below. (Pros Ex 3A-1)

NOTE: Odd numbered Specifications 3-13, inclusive, and 17-35, inclusive, are the same as Specification 1, except that each specification incorporates by reference the check set forth in the next successive even numbered specification and except in the following essential details:

Spec.	Date of check and Offense	Payee and owner of check	Amount and Value of check	
3	31 Oct 1949	Capt George W. Gerome	$402.00	(Pros Ex 4A-1)
5	31 Oct 1949	Capt Thomas L. Gairy	232.00	(Pros Ex 5A-1)
7	30 Nov 1949	Capt James P. Tillery	442.00	(Pros Ex 6A-1)
9	30 Nov 1949	Capt Edwin O. Mitchell	405.00	(Pros Ex 7A-1)
11	31 Dec 1949	2d Lt Roy L. Tussing	330.00	(Pros Ex 8A-1)
13	31 Dec 1949	Capt Maurice A. Rogers	242.00	(Pros Ex 9A-1)
17	31 Jan 1950	Capt Frank P. Worthen	362.00	(Pros Ex 11A-1)
19	31 Jan 1950	Maj Peter J. Lacey, Jr.	342.00	(Pros Ex 12A-1)
21	28 Feb 1950	1st Lt. Romaine S. Foss	357.00	(Pros Ex 13A-1 Ownership of check not alleged)
23	31 Mar 1950	Maj William G. King, Jr.	396.00	(Pros Ex 14A-1)
25	31 Mar 1950	Capt Maynard P. Wood	173.00	(Pros Ex 15A-1)
27	30 June 1950	1st Lt Harry V. Herlinger, Jr.	316.05	(Pros Ex 16A-1)
29	31 July 1950	1st Lt Walter Kern	408.00	(Pros Ex 17A-1)
31	15 Aug 1950	Capt Samuel V. Cox	78.00	(Pros Ex 18A-1)
33	27 Sep 1950 2 Oct 1950	Maj William P. Price	91.08	(Pros Ex 19A-1)
35	25 Sep 1950 5 Oct 1950	Lt Herbert Navarro	50.83	(Pros Ex 20A-1)

Specification 2: In that Captain Edgar L. White, 4054th Area Service Unit, Fort Bliss, Texas, did, at Fort Bliss, Texas, on or about 28 October 1949, with intent to defraud, willfully, wrongfully, unlawfully, and feloniously forge an endorsement on a certain check in substantially the following words and figures, to-wit:

OCT 25, 1949
15-51
000

TREASURER OF THE UNITED STATES

(TREASURY SEAL) Pay $**** 25. DOLLARS and 00 cts $**** 25.00

To the
Order of *** William H. Harden, 1st Lt.
Box 726, T.A.S.
Ft. Bliss, Texas

(Signature of Disbursing Officer)

by falsely writing on the back thereof, without authority, the name "William H. Harden," which said endorsement was a writing of a private nature which might operate to the prejudice of another. (Pros Ex 3A-1)

NOTE: Even numbered Specifications 4-14, inclusive, and 18-36, inclusive, are the same as Specification 2, except in the following essential details:

Spec.	Date of check and Offense	Payee and Indorsement	Amount of check	
4	31 Oct 1949	George W. Gerome	$402.00	(Pros Ex 4A-1)
6	31 Oct 1949 12 Nov 1949	Thomas L. Gairy	232.00	(Pros Ex 5A-1)
8	30 Nov 1949	James P. Tillery	442.00	(Pros Ex 6A-1)
10	30 Nov 1949	Edwin O. Mitchell	405.00	(Pros Ex 7A-1)
12	31 Dec 1949 16 Jan 1950	Roy L. Tussing	330.00	(Pros Ex 8A-1)
14	31 Dec 1949 27 Jan 1950	Maurice A. Rogers	242.00	(Pros Ex 9A-1)
18	31 Jan 1950 1 Feb 1950	Frank P. Worthen	362.00	(Pros Ex 11A-1)
20	31 Jan 1950 1 Feb 1950	Peter J. Lacey, Jr.	342.00	(Pros Ex 12A-1)
22	28 Feb 1950	Romaine S. Foss	357.00	(Pros Ex 13A-1)
24	31 Mar 1950	William G. King, Jr.	396.00	(Pros Ex 14A-1)
26	31 Mar 1950 3 Apr 1950	Maynard P. Wood	173.00	(Pros Ex 15A-1)
28	30 June 1950 7 Mar 1950	Harry V. Herlinger, Jr.	316.05	(Pros Ex 16A-1)
30	31 July 1950 1 Aug 1950	Walter Kern	408.00	(Pros Ex 17A-1)
32	15 Aug 1950 18 Aug 1950	Samuel V. Cox	78.00	(Pros Ex 18A-1)
34	27 Sep 1950 3 Oct 1950	William P. Price	91.08	(Pros Ex 19A-1)
36	25 Sep 1950 6 Oct 1950	Herbert Navarro	50.83	(Pros Ex 20A-1)

Specifications 15 and 16: (Findings of not guilty).

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

Specification 5: In that Captain Edgar L. White, 4054th Area Service Unit, Fort Bliss, Texas, did, at El Paso, Texas, on or about 30 November 1949, with intent to defraud, willfully, wrongfully, unlawfully, and feloniously, pass as true and genuine, a certain check in words and figures substantially as follows, to-wit:

NOV 30 1949
15-51
TREASURER OF THE UNITED STATES 000

(TREASURY SEAL) PAY $*** 405 DOLLARS AND 00 CTS $***405.00
To the
Order of *** Edwin O. Mitchell, Capt
543, AA & GM Br TA S
Ft. Bliss, Tex.

(Signature of Disbursing Officer)

bearing on the back thereof an endorsement substantially as follows, to-wit: "Edwin O. Mitchell," a writing of a private nature which might operate to the prejudice of another, which endorsement was, as he, the said Captain Edgar L. White, then well knew falsely made and forged. (Pros Ex 7A-1)

NOTE: Specifications 7, 15 and 18 are the same as Specification 5 except in the following essential details:

Spec.	Date of checks and Offense	Payee of Check	Amount of Check	
7	31 Dec 1949 27 Jan 1950	Maurice A. Rogers	$242.00	(Pros Ex 9A-1)
15	31 July 1950 1 Aug 1950	Walter Kern	408.00	(Pros Ex 17A-1)
18	25 Sep 1950 6 Oct 1950	Herbert Navarro	50.83	(Pros Ex 20A-1)

NOTE: Other Specifications of Charge II: (Findings of not guilty).

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

NOTE: Specifications 1 and 2 are the same as Specification 1, Charge I, except as follows:

Spec.	Date of Offense	Payee and owner of Check	Amount and Value of Check	
1	10 Oct 1950	Mrs. A. P. Gray, Jr.	$ 7.14	(Pros Ex 23)
2	23 Oct 1950	1st Lt Charles J. DeMone	199.68	(Pros Ex 21A-1)

Specification 3: The same as Specification 2, Charge I, except the date of check and offense, "23 October 1950," the payee and indorsement of the check, "Charles J. DeMone," and the amount of the check, "$199.68." (Pros Ex 21A-1)

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

Specification: The same as Specification 5, Charge II, except the date of offense and of the check, "23 October 1950," the payee and indorsement, "Charles J. Demone," and the amount of the check, "$199.68." (Pros Ex 21A-1)

He pleaded not guilty to the charges and specifications, and was found not guilty of Specifications 15 and 16, Charge I, not guilty of Specifications 1-4, inclusive, 6, 8-14, inclusive, 16 and 17, Charge II, and guilty of the other specifications and the charges. 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 fifteen years. The reviewing authority approved the sentence but reduced the period of confinement to twelve years and forwarded the record of trial for action under Article of War 48.

3. Evidence

a. For the Prosecution

Since June 1949, accused has been the immediate supervisor of Captain Robert Brabec, who was in charge of "TAS Post Office, the School Post Office," Fort Bliss, Texas. The post office was located in the basement of Building 516A, Breitung Hall, and had an inclosure within it. Three walls of the inclosure include mail boxes individually numbered, one of the three walls containing post office boxes with combination locks, and the other two walls, screened boxes. Normally, Captain Brabec had four people working in the post office, including Corporal Norma Arnson. In the period 1 October 1949 to 31 October 1950, Captain

Brabec received approximately twenty complaints that checks expected by their addressees were not delivered. Most checks received at the School Post Office originated in the Fort Bliss Finance Office and were turned over to the Fort Bliss Post Office from where they would be carried to the School Post Office. At the School Post Office the checks together with other mail would be alphabetized and then distributed to the boxes of the addressees. On pay days, the last day of each month, a quantity of officers' checks were usually received. Captain Brabec could not recall a month in which accused did not stop by and assist in the distribution of such checks (R 93-96). Complaints concerning nonreceipt of checks were received by the United States Secret Service in December 1949 and an investigation was initiated by Joseph L. Brownlow, Special Agent, United States Secret Service, El Paso, Texas. Preliminary investigation led Brownlow to conclude that interception of the checks was not occurring either at the Fort Bliss Finance Office or at the Fort Bliss Post Office. On or about 1 January 1950, arrangements were made at the Fort Bliss Post Office to log out checks alphabetically, after which they were placed in a bundle and given to a military messenger for delivery to the School Post Office (R 118-120). On occasion, Captain Brabec served as messenger to bring the checks from the Fort Bliss Post Office to the School Post Office. On such occasions, he observed the log being prepared and would check "the quantity of the checks and the individual checks and receipt for them." He then carried the checks to his post office and distributed them to the boxes. He could find no way for a single check to be lost between the Main Post Office and the School Post Office (R 99-100). Brownlow independently reached the same conclusion, although the "depredations" continued. Complainants were shown either the photostatic copy of the check involved or the original, and were instructed to maintain complete secrecy on the matter. Brownlow's examination of the checks as they came to his attention led him to the conclusion that the indorsements on the checks were executed by the same hand. Comparison of the handwriting exemplified by the indorsements with handwriting of the personnel of the School Post Office, and of the civilian and military branches of the Main Post Office led Brownlow to conclude that such personnel were not involved. This conclusion was strengthened by the composite description of the passer of the checks obtained by Brownlow (R 120-121,127). By approximately the latter part of September, Brownlow had accused "under suspicion." With the knowledge and consent of the military authorities at Fort Bliss, Brownlow arranged to have close surveillance maintained over first class mail containing United States Treasury checks inclosed in window type envelopes. A logging out process was set up at the School Post Office. The log was to show -

> "*** the point of origin, the name and address of the involved payee and in the event of checks which might have been forwarded, to also include the information as to the

original address shown on any particular item. And to likewise cause such log to show the definite date of receipt and whether or not such item was received from the Military Branch of the Post Office at Fort Bliss or in a tie from the Main Post Office at El Paso, which also dispatches mail to the Artillery School Post Office." (R 130)

Instructions concerning the log were given to Captain Brabec and to Corporal Arnson and they were further instructed to watch the accused (R 129-130). Corporal Arnson set up the log on 2 October 1950. She further on that day made periodic checks at 15 or 30 minute intervals of all checks in boxes. Accused entered the post office, made casual conversation, wandered around the post office and left. Corporal Arnson immediately made a physical check of the checks and discovered missing a check to Major William P. Price, which originated in Washington, D. C. Corporal Arnson immediately called Captain Tavormina, who was "G-2" and to whom she was to report in the absence of Captain Brabec. On 5 October 1950, just subsequent to Corporal Arnson's observation that all checks were present and accounted for, accused visited the post office. No one else was present at the time. After he departed, Corporal Arnson discovered that a check to Lieutenant Herbert Navarro originating at the Finance Office, Fort Sam Houston, was missing, and immediately reported to Captain Tavormina. On 10 October 1950, Corporal Arnson observed accused outside the post office inclosure trying to open Box 203, a lock box belonging to Mrs. A. P. Gray, Jr. Accused's box was 204, adjacent to box 203. Accused came into the inclosure just after Corporal Arnson had distributed checks into the boxes, and, after he left, Corporal Arnson discovered that a check to Mrs. A. P. Gray, Jr. was missing. On 23 October 1950, a check to Lieutenant Charles J. Demone was found by Corporal Arnson to be missing immediately after accused had visited the post office. Corporal Arnson did not see accused take any mail matter on his visits on 2, 5, 10 and 23 October 1950 (R 107-114).

There were introduced in evidence as Prosecution Exhibits 3-9, inclusive, and 11-21, inclusive, photostatic copies of checks and claims authenticated as true copies of official documents of the Treasury Department, each exhibit containing a photostatic copy of a claim designated A-2, and a check designated A-1 (R 123).

The faces of Prosecution Exhibits 3A-1 to 9A-1, inclusive, and 11A-1 to 21A-1, inclusive, are identical respectively to the faces of checks set forth in even numbered Specifications 8-14, inclusive, and 18-36, inclusive, of Charge I and Specification 3 of Additional Charge I. It was stipulated that the photostats of checks are identical copies of original checks introduced in evidence as Prosecution Exhibit 27 (R 180).

It is noted that a check set forth in an even numbered specification

of Charge I is incorporated by reference in the preceding odd numbered specification and that the check set forth in Specification 3 of Additional Charge I is incorporated by reference in Specification 2 of Additional Charge I. The checks set forth in the specifications of Charge II are, respectively, identical to the checks set forth in the even numbered specifications of Charge I, and the check set forth in the Specification of Additional Charge II is identical to the check set forth in Specification 3 of Additional Charge I.

The claim in each exhibit relates to the same specification as the accompanying check, and, except as to the claims contained in Prosecution Exhibits 14 and 17, respectively, the claims of Major King (Specs 23,24 of Chg I) and Lieutenant Kern (Specs 29,30 of Chg I) were executed by the claimants in the presence of Brownlow who observed the claimants affix their signatures thereon as handwriting exemplars (R 124-126). The claims were to be considered "solely as evidence of a fact that a claim for the amount involved in the specification to which it has reference has been made and as some evidence of the valid and genuine signature of the person purporting to have made the claim."

By stipulation, it was established that "the checks listed in Specifications 1,3,5,7,9,11,13,15,17,19,21,23,25,27,29 and 31 of Charge I and Specification 2 of Additional Charge I were issued by the Fort Bliss, Texas, Finance Office"; that the check listed in Specification 33 of Charge I was issued by the Washington, D.C. Finance Office; that the check listed in Specification 35, Charge I, was issued by the Fort Sam Houston Finance Office; that the check listed in Specification 1 of Additional Charge I was issued by the New York City Finance Office; that the checks enumerated had not been received by the payees thereof or anyone authorized by the payees to receive them; and that claims were made and stop orders entered (R 92, Pros Ex 2). It was further established by stipulation that the checks described in the Specifications of Charge II and the Specification of Additional Charge II were passed and uttered as true and genuine on or about the dates indicated in each specification and at the place named in each specification by an individual who, in each instance, represented himself to be the payee named in the instrument (R 92, Pros Ex 1).

Each of the payees of the checks included in Prosecution Exhibits 3-6, inclusive, 8 and 9, and 11-21, inclusive, denied receipt of the check upon which he was designated as payee, denied that the indorsement of his name upon the check was in his handwriting, and denied authorizing accused to receive the check or to inscribe the payee's name upon the check (Specs 1,2, Chg I, R 296, Pros Ex 33; Specs 3,4, Chg I, R 325-327; Specs 5,6, Chg I, Pros Ex 38, R 297; Specs 7,8, Chg I, Pros Ex 37, R 297; Specs 11,12, Chg I, R 318-322; Specs 13-14, Chg I, Spec 7, Chg II, Pros Ex 36, R 297; Specs 17,18, Chg I, Pros Ex 29, R 294; Specs 19,20, Chg I, Pros Ex 34, R 296; Specs 21,22, Chg I, Pros Ex 35, R 296; Specs 23,24, Chg I, Pros Ex 30, R 295; Specs 25,26, Chg I, R 303-306; Specs 27,28, Chg I, Pros Ex 32, R 296; Specs 29,30, Chg I, Spec 15, Chg II, R 312-317; Specs 31,32, Chg I, R 306-309; Specs 33,34, Chg I, R 300-303; Specs 35,36, Chg I, Spec 18, Chg II, R 310-312; Specs

2,3, Add'l Chg I, Spec, Add'l Chg II, R 322-324).

It was stipulated that the handwriting contained in Prosecution Exhibits 24 and 25 with the exception of the body of a "buck-slip" dated 24 October 1950 was written by accused (R 155).

Lon H. Thomas, an examiner of questioned documents employed by the United States Treasury Department, whose qualifications as a handwriting expert were not contested by the defense, made a comparison of the handwriting contained in the indorsements of the twenty checks contained in Prosecution Exhibit 27 (the originals of the photostats designated as Pros Exs 3a-21a) with the handwriting contained in Prosecution Exhibits 24 and 25, and, upon the basis of identical writing habits appearing in both the questioned handwriting and the handwriting stipulated to be accused's, Thomas concluded that the indorsements on the checks were written by accused (R 174-191).

Early in December 1949, at the credit department of Sears-Roebuck and Company, accused presented the original of Prosecution Exhibit 7A-1 (check to Mitchell) to Mr. Paul D. Buchholz to be cashed. Since the check was over Buchholz' "limit" he took accused's identification and the check to Mr. Millard L. Allen, then credit manager. The indorsement on the check was placed there by accused in Buchholz' presence. Allen had Buchholz bring "Captain Edwin O. Mitchell" to his office (R 167-170). Accused had two cards, one being recalled by Allen as a "Pass to Juarez," and the other as "a little card about the same size which had a stamp on it with General Homer's signature." The two cards were made out to "Captain Mitchell." Allen asked accused for his "AGO card" but accused claimed he had to turn it in because it was mutilated. After some further conversation with accused about "Fort Bliss and Military things," Allen approved the check and referred him to the main cashier to get the money. The check was cashed (R 162-163,165).

On 27 January 1950, at the Southwest National Bank, accused presented for cashing the original of Prosecution Exhibit 9 (check to Rogers) to Mrs. Edith Kilbourne, an employee of the bank. When Mrs. Kilbourne asked for his identification, accused "arrogantly tossed" an "AGO card" in the window. The name on the "AGO card" was the same as the payee's name, and Mrs. Kilbourne, believing that "it was correct identification," cashed the check (R 328-333).

On approximately 24 October 1950 at Food Mart 22, 77 North Loop Road, accused dressed in civilian clothes cashed the original of Prosecution Exhibit 21 with August S. Meissner, Manager of the store. Prior to cashing the check, Meissner was shown by accused an "AGO card" with the name "Charles J. Demone." Meissner gave accused an indelible pencil with which to indorse the check, and after accused signed it "Charles J. Demone"

Meissner cashed the check (R 157-159).

In approximately November 1950 at the Warner Drug Store, 206 Mills Street, El Paso, Texas, Miss Eva R. Hernandez, the cashier of the drug store, cashed the original of Prosecution Exhibit 20 (Navarro check) for accused, who was dressed in civilian clothes. Miss Hernandez gave accused the amount of the check, $58.83 (R 171-172).

Approximately three months prior to trial, at the Geneva Loan and Jewelry Company, El Paso, Texas, accused purchased a Hallicrafter radio for $42.50. In payment thereof, accused tendered the original of Prosecution Exhibit 17 (Kern check) to the salesman, Alberto Barragan, who gave accused the radio and cash for the balance of the $408.00 check. Prior to the completion of the transaction, accused showed Barragan an "Officer's Identification card" which had on it the name of the payee of the check (R 335-336).

On 27 October 1950, Brownlow, the Secret Service Agent, acting under instructions of the Commanding General, searched accused's office, and, among some cancelled checks and a bank statement issued to accused and to Mrs. Virginia G. White, found a window envelope containing an original Treasury check "Serial No. 1 197 469, dated New York, New York, October 4, 1950, over symbol *** No. 48, 480, *** the disbursing symbol of Paymaster Albert Goldman" payable to Mrs. A. P. Gray, Jr., 409 Summit Avenue, Lawton, Oklahoma, in the amount of $7.14 (R 132-133). Mrs. Gray had been awaiting a check in that amount in satisfaction of a claim against the post office for damage to a clock. She had not authorized accused to have possession of such a check, and had not placed the check in his desk (R 344-345).

Lieutenant Colonel Alva E. Miller, Chief, Neuropsychiatric Service, William Beaumont Army Hospital, Fort Bliss, Texas, whose qualifications as a psychiatrist were not contested by the defense, examined accused several times in the period 31 October 1950 to 9 November 1950 when accused was hospitalized at the Beaumont Army Hospital, and also examined him for an hour and a half prior to testifying in court. During accused's stay in the hospital, Colonel Miller performed both physical and neurological examinations and, under his supervision and control, had experts on his staff perform various psychological and intelligence tests, including the Rorschach examination, the Thematic Apperception Test, and the Wechsler-Bellevue Test, and other types of tests which included an "electro-encephalogram." Based upon his examinations of accused, including the one immediately prior to his appearance in court, Colonel Miller was of the opinion that accused had no neuropsychiatric disease, and had no neuropsychiatric disease in the period 1 October 1949 through 31 October 1950, and that during that period accused could distinguish right from wrong and adhere to the right. Colonel Miller was further

of the opinion that cases of true amnesia are infrequent and that an individual who had periods of vague memory or amnesia over an extended period would show some "well-recognized" mental disease "if the situation were true." He concluded that accused is not at present suffering from any recognized form of amnesia (R 260-267).

b. For the Defense

After being apprised of his rights with reference to testifying in his own behalf, remaining silent, or making an unsworn statement, accused elected to testify in his own behalf (R 229-231).

He testified that he is 30 years of age and that he enlisted in the Army in November of 1939, and graduated from Officers Candidate School in December 1942. Late in 1943 or early in 1944 he was promoted to first lieutenant. He went overseas to England in May 1944. He was a Battalion Adjutant until the "Battle for the Bridge" at Ramagen when he became commander of a "Firing Battery." He returned from overseas around Christmas 1945. At no time during that tour or a subsequent overseas tour did he indulge in "black market activities." In April 1946 he went to Hawaii where he stayed for four or five months when he volunteered to go to Korea. He served in Korea until June 1948 when he was evacuated because of yellow jaundice. He was assigned to the "88th Airborne" at Fort Bliss early in 1949 and in May 1949 he was assigned to the School. He was awarded the Purple Heart in England and earned the Good Conduct Medal as an enlisted man. He also has four battle stars and the Victory Medal (R 231-233, 240-241). For seven months preceding trial, in addition to other duties, he served as Agent Finance Officer for the 4054th Army Service Unit (R 234).

He explained that he pleaded guilty to the charges and specifications (on arraignment), because while in confinement he had read over the Secret Service reports and "other matters" and was thoroughly convinced of his guilt, although the period during which the events alleged occurred was hazy to him (R 234-235). With reference to the making, uttering or forging of "the checks," he testified as follows:

> "*** That I was in a position in my normal duties to have access to checks, material and so forth. Not only did I have access to checks and other material from the Postoffice during this period of approximately one year, I also knew that an investigation was being conducted to ascertain the loss of these particular checks from the Postoffice. *** I knew that a very rigid watch was being put on the checks that were delivered to the Student Officer Postoffice. I knew the checks were being registered in and out; as a matter of fact, I have very often registered checks out

> myself and obtained receipts for them from student officers. From time to time in my duties as Student Officer Coordinator I have had checks mailed to me to give to student officers and this I have always done, too. *** As far as the taking of the checks was concerned, very often as I can remember, and again this is not a detailed description of any one larceny, forgery, utterance, it is a general description that I am trying to present to this Court of my actions, I very often had the desire to go down to the Postoffice and take a check and sometimes I would have that desire for say several hours and finally I would succumb to it and would go down and take a check from the Postoffice, and immediately upon taking such a check from the Postoffice it was my habit to cash the check, immediately cash it, and to immediately spend the money, and that was another abnormal feature of my action which I wanted an explanation of. As far as AGO Cards and other cards are concerned, it was my duty as Student Officer Coordinator to issue certain cards for identification, identification cards, Juarez Passes, and Commissary Cards, and although I understand it is incriminating to make this statement, I simply would put the name of the individual or the person named on the check on the card and go downtown and cash the check. ***" (R 237-238).

After cashing the checks he had a compulsion to get rid of the money, although he had no compulsion to get rid of the large amounts of money which he would collect as "BOQ fees." On occasions he played the slot machines to get rid of the proceeds of the checks. On two or three occasions he "simply threw the money away." He made loans and was never repaid. He did not want his family to benefit from the money, and it did not, and he did not deposit any of the money in a bank. He generally stole, forged, and uttered "an instrument" in a "one-day period," and got rid of the money. He could not recall taking the check of Mrs. Gray and could not explain its presence in his desk. The only check which he recalled cashing was the check cashed at the Food Mart. He supposed that the reason this incident remained in his memory was his apprehension immediately thereafter. He expressed the belief that there is some unknown psychiatric explanation for his behavior (R 237-238, 241-244).

He recalled that his father died in 1949 and that he took a 45 or 50 day emergency leave to Idaho where his father had lived. It took approximately two days to make the trip. His father left a valuable estate but there was considerable conflict between accused and his father's wife concerning its disposition. Under the terms of the will, accused must wait until five years from his father's demise to inherit his share. At that time, accused expects to be able to remunerate persons who have sustained losses by virtue of his actions (R 248-251).

Mrs. Virginia White testified that she has been married to accused for ten years, during which time accused has been in the Army. Accused and Mrs. White were orphans and in Korea adopted a son who is presently four years old. The only source of disagreement between them during this period was accused's love for the Army. Two weeks after Mrs. White arrived in Hawaii, accused accepted a transfer to Korea although Mrs. White begged him not to take the transfer. In 1949, Mrs. White noticed a change in accused's attitude toward home life. It followed a visit by accused's father from whom they did not hear after the visit. In August, they learned that accused's father was ill, but the father's present wife concealed the seriousness of his illness with the result that accused was not present when his father died. Accused had learned that he was an orphan, but in September 1949 Mrs. White learned additional details concerning his nativity which she disclosed to him. Then, accused learned that his foster mother was his natural mother although his foster father was only that. Mrs. White always ran her household within accused's financial means, but did have three charge accounts including one with Sears-Roebuck. In addition, she and accused have an automobile on which they are making payments of $44.75 a month. In the past year, however, accused became "cross" with Mrs. White if she started to buy anything. With reference to the money acquired by accused in his operations, accused told Mrs. White that "he would throw money out of the car-window and in garbage cans." None of the money was spent on her (R 222-231).

Doctor Arlin B. Cooper, a specialist in neuropsychiatry, whose qualifications as a neuropsychiatrist were admitted by the prosecution, testified that he examined accused on 6 December 1950. Based upon his examination he feels that accused is not insane, that his judgment was "very good and very satisfactory," that he could find no sign of symptoms of physical disease which would indicate that accused would have momentary periods of mental derangement, that accused definitely knows right from wrong, that, although from accused's tale of strong impulsive desires, other psychiatrists might conclude accused had an irresistible impulse, the witness did not concur. From what he was told by accused, Doctor Cooper believes these impulsive traits began to manifest themselves in June of 1949. Doctor Cooper was puzzled because accused showed none of the characteristics of an habitual criminal, although he was aware of the "wrong nature of his actions." Doctor Cooper could not determine the force motivating the repetition of the wrongful acts. He suggested, however, the possibility of self-punishment, the death of one's father, or the realization of actual parentage, as the motivating factor. He did not believe that accused would "instantly reform" unless some punishment or treatment were brought to bear. Doctor Cooper was of the opinion that accused was abnormal, that the abnormality was not in the nature of mental defectiveness or of insanity, but could be an inadequate personality (R 208-221).

The testimony of Brigadier General Jesmond D. Balmer (R 193-195), Lieutenant Colonel Reinhard L. Speltz (R 196-200), Lieutenant Colonel Sidney I. Parsell (R 200-203), and Lieutenant Colonel Paul A. Anson (R 204-207) pertained to accused's excellent performance of duty as an officer, and his good reputation in the community.

4. Discussion

Accused has been found guilty of the larceny of 19 United States Treasury checks which with one exception (Spec 21, Chg I) were alleged to be the property of the payees thereof, and which, with two exceptions (Spec 1, Chg I and Spec 1, Add'l Chg I) were alleged to be of a value in excess of $50.00 (odd numbered Specs 1-13, incl, and 17-35, incl, Chg I, and Specs 1 and 2, Add'l Chg I); the forgery of 18 of the allegedly stolen checks (even Specs 2-14, incl, and 18-36, incl, Chg I, and Spec 3, Add'l Chg I); and uttering five of the checks (Specs 5,7, 15,18, Chg II, and Spec, Add'l Chg II).

It is conceded that the Treasury checks, subject of the findings of guilty above enumerated, were issued to the payees thereof by Finance Offices of the United States. Uncontradicted evidence shows that none of the payees received the checks, that accused had opportunity to intercept all the checks in issue, that some of the checks were missing from the post office of destination after visits by accused, that one check (Spec 1, Add'l Chg I) was found in a desk in his office, and that the indorsements of the payees' names on the other checks were in the handwriting of accused without the authorization of the payees. It was established by stipulation that the 18 checks indorsed by accused were uttered and passed as genuine on the dates alleged in the Specifications of Charge II, and the Specification of Additional Charge II. We here interpose mention of that presumption whereby it may be presumed that, in the absence of anything to the contrary showing, instruments are executed on the dates shown thereon. Comparison of those dates with the dates alleged in the Specifications of Charge II and the Specification of Additional Charge II shows that in no instance was a check uttered more than 27 days after the date of its execution, and a fortiori, by virtue of his handwriting on the checks accused must have had each of the indorsed checks in his possession within 27 days of their execution.

Larceny is defined as "the unlawful appropriation of personal property, which the thief knows to belong either generally or specially to another, with intent to deprive the owner permanently of his property therein. Unlawful appropriation may be by trespass or by conversion through breach of trust or bailment" (MCM, 1949, par 180g). The taking of a United States Treasury check from an Army message center prior to delivery of the check to the payee constitutes larceny of personal property of the payee of a value of the amount shown to be due thereon

(England v. United States, 174 F. 2d 466, 468). That the United States Treasury checks, subject of the findings of guilty, were abstracted from an Army Post Office by an officer having general supervision over the officer in charge of the post office does not constitute a distinction of substance from the case cited.

There was no direct evidence that the accused in this case actually took the checks, although, as noted, he had opportunity to take all the checks, and as to some of the checks there was evidence that they were discovered to be missing from the post office immediately after visits by accused. In addition, one check, dated 4 October 1950, was found in a desk in his office on 27 October 1950. Finally, all the checks were in accused's possession at a time within 27 days of their execution. In such instance, it is provided that:

> "Proof that a person was in possession of recently stolen property may raise a presumption that the person stole it, and, if it is shown that the property was stolen from a certain place, at a certain time and under certain circumstances, that the person stole it at the particular place and time and under the circumstances shown." (MCM, 1949, par 125a, p 151)

The evidence in this case shows that the checks in issue were stolen and that, within 27 days of their theft, accused had possession of them. Such evidence, there being no adequate explanation of accused's possession of the recently stolen checks, warrants the findings of guilty of larceny.

We note that Specification 21 of Charge I does not allege the ownership of the check allegedly stolen. Otherwise, the specification alleges the theft of a United States Treasury check which is minutely described and on its face shows that it is payable to a named payee. An allegation of ownership is not indispensable to the validity of a specification alleging larceny if the offense is sufficiently described and the accused is apprised of the offense to the extent that he is able to marshal his defenses, if any, and "to enable the conviction or acquittal to be pleaded in bar of a subsequent prosecution for the same offense" (Falgout v. U.S., 279 F. 513, 514).

The evidence shows that all the checks except that subject of Specification 1, Additional Charge I, bore the purported indorsement of the payees, and that such indorsements were in the handwriting of accused. With the exception of the Mitchell check (Spec 10, Chg I), all the payees of the checks in issue testified that accused was not authorized to inscribe their names on the checks. It was otherwise established that accused was without authority to have possession of the Mitchell check and, hence, it must be concluded that he was without authority to indorse it.

Pertinent to this factual situation is the following statement of law:

> "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.
>
> "Some of the instruments that are subjects of forgery are checks, ***.
>
> "The instrument must be false--must purport to be what it is not. Signing the name of another to a check with intent to defraud is forgery as the instrument purports on its face to be what it is not. ***
>
> "To constitute a forgery the instrument must on its face appear to be enforceable at law, for example, a check or note; ***
>
> "*** It is immaterial, however, whether anyone be actually defrauded or injured, or that no further step be made toward carrying out the intent to defraud than the making of the false writing." (MCM, 1949, par 180i, p 243)

The evidence further shows that the checks in question were passed as genuine and true. Such acceptance of the checks was a natural and probable consequence of accused's false indorsement on the checks, and, hence, there was substantial basis for the court to infer accused's fraudulent intent (CM 343142, Wilder, 8 Nov 1950).

Specification 28 of Charge I alleges in effect that a check executed on 30 June 1950 was forged on 7 March 1950. Specification 27, Charge I, alleges that accused stole the same check on 30 June 1950. Specification 14, Charge II, which alleged the uttering of the same check initially charged that the check was uttered on 7 March 1950, but by amendment (R 91), it was alleged that the check was uttered on 3 July 1950. Under all the circumstances, it is apparent, and must have been apparent to the defense, that the check could not have been forged prior to the date of its execution, that in effect the date of the forgery is not alleged. The forgery, however, could not have been committed prior to 30 June 1950 nor subsequent to 27 October 1950, the date of the affidavit to the original charges and specifications, and accused was so apprised (CM 319163, Rice, 68 BR 135,138). It does not appear that accused's substantial rights were injuriously affected by the allegation of an obviously incorrect date of commission of the offense.

The evidence further shows that accused negotiated five of the checks which he had forged and received a then present consideration in the face amount of the checks (Specs 5,7,15 and 18, Chg II; Spec, Add'l Chg II). The foregoing summary of evidence contains all the elements of the offense

of uttering as set forth in paragraph 183c, Manual for Courts-Martial, U.S. Army, 1949, and warrants the findings of guilty of the specifications under consideration.

In attaining our conclusions that the record of trial is legally sufficient to sustain the findings of guilty of the several charges and specifications, we have not had recourse to the judicial admissions of accused. Suffice it to say that accused generally admitted the theft of checks from the post office at the Artillery School and the forging and uttering of such checks. His testimony was particularized only with reference to the check which he uttered at the Food Mart.

5. Accused is 30 years of age, married, and has an adopted son four years of age. He completed one year of college work at Williamette University and in civilian life was employed as an automobile salesman. He had enlisted service in the Army from 6 November 1939 until he was commissioned as second lieutenant on 23 December 1942. He was promoted to first lieutenant in July 1943 and to captain in October 1946. He had foreign service in the European Theater from May 1944 to October 1945, and in Hawaii and Korea from June 1946 to May 1948. His overall efficiency ratings of record are as follows: "085," "111," "090," "135," "140," "143."

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. Dismissal is authorized upon conviction of a violation of Article of War 96 or 93.

Albert J. Barkin, J.A.G.C.

Samuel S. Cowles, J.A.G.C.

J. W. Lynch, J.A.G.C.

(110)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

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

In the foregoing case of Captain Edgar L. White, O-1049020, 4054th Area Service Unit, Fort Bliss, 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. A United States Penitentiary is designated as the place of confinement.

Sick in hospital
C. B. Mickelwait, Brig Gen, JAGC

Edward H. Young
Edward H. Young, Colonel, JAGC

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

APR 27 1951

I concur in the foregoing action.

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

25 April, 1951

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

JAGH CM 345277

MAY 1 4 1951

UNITED STATES	)	SIXTH ARMY
v.	)	Trial by G.C.M., convened at Presidio of San Francisco, California, 28 November-1-December 1950. Dismissal, total forfeitures after promulgation, and confinement at hard labor for one year.
Lieutenant Colonel LESLIE EDWARD ADAMS (O-29561), Headquarters, Sixth Army, Presidio of San Francisco, California	)	

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

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.

The accused was tried upon the following Charges and Specifications:

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

Specification 1: Finding of not guilty

Specification 2: In that Lieutenant Colonel Leslie Edward Adams, Transportation Corps, Headquarters, Sixth Army, did at Chicago, Illinois, on or about 17 March 1950, with intent to deceive Lieutenant Colonel J. G. Edwards, Inspector General Department, an officer detailed to conduct an investigation, officially state to the said Lieutenant Colonel J. G. Edwards, in reply to the following question: "It is further alleged that you introduced Mrs. Newton to General McKay as Mrs. Adams", make the following answer: "That allegation, likewise, is absolutely false", which answer was known by the said Lieutenant Colonel Leslie E. Adams to be untrue and false, in that he did introduce Mrs. Nerissa Newton, a woman not his lawful wife, as his wife, to Brigadier General Neal Henry McKay, on or about 7 September 1947.

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

Specification 1: Finding of not guilty.

Specification 2: In that Lieutenant Colonel Leslie Edward Adams, Transportation Corps, Headquarters Sixth Army, did at Chicago, Illinois, on or about 17 March 1950, with intent to deceive Lieutenant Colonel J. G. Edwards, Inspector General Department, an officer detailed to conduct an investigation, officially state to the said Lieutenant Colonel J. G. Edwards, in reply to the following question: "It is further alleged that you introduced Mrs. Newton to General McKay as Mrs. Adams", make the following answer: "That allegation, likewise, is absolutely false", which answer was known by the said Lieutenant Colonel Leslie E. Adams to be untrue and false, in that he did introduce Mrs. Nerissa Newton, a woman not his lawful wife, as his wife, to Brigadier General Heal Henry McKay, on or about 7 September 1947.

Specification 3: Finding of guilty disapproved.

Specification 4: In that Lieutenant Colonel Leslie Edward Adams, Transportation Corps, Headquarters Sixth Army, a married man, did at San Francisco, California, on divers occasions during the months of March and April 1949, wrongfully have sexual intercourse with one Nerissa Newton, a woman not his wife.

The accused pleaded not guilty to both charges and all specifications. He was found not guilty of Specification 1, Charge I, and Specifications 1, Charge II, but guilty of Specification 2, Charge I, of Charge I, of Specifications 2, 3 and 4, 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 disapproved the finding of guilty of Specification 3, Charge II, approved the sentence and designated 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. The record of trial was forwarded for action under Article of War 48.

The evidence pertinent to the findings of guilty as approved is summarized as follows:

The accused, a married man, began living with Mrs. Nerissa Newton as "man and wife" in or about December 1942, at Camp Roberts, California and continued this relationship until his departure overseas in May 1944.

From overseas he wrote to Mrs. Nerissa Newton frequently and regularly, indicating his intention of marrying her. Upon his return in 1947 they resumed their intimate relations in and near Camp Stoneman, California. These relations continued with a few interruptions caused by his absence on official business until a few days before Christmas, 1948.

The accused reported for duty to Camp Stoneman, California, about 18 or 19 August 1947. On or about the second Sunday afterward Mrs. Nerissa Newton was with the accused at the camp and she was introduced to Brigadier General Neal Henry McKay (now retired, then Commanding General of San Francisco Port of Embarkation) on the boat "Doughboy" as Mrs. Adams. General McKay remembered that on or about 6 and 7 September 1947 he and a family group made a trip to Stockton and on the return trip stopped at Pittsburg, loading point for troops from Stoneman, that the accused was present and aboard the boat from a half hour to forty-five minutes with a woman (Mrs. Nerissa Newton was identified by him in the courtroom as the woman) who was introduced, addressed and considered to be Mrs. Adams. On 17 March 1950 the accused appeared before Lieutenant Colonel John G. Edwards, IGD, Inspector General Section, Fifth Army, pursuant to a directive of the Commanding General, Fifth Army, that he (Lieutenant Colonel Edwards) conduct an investigation of the accused's activities. Among the questions by Lieutenant Colonel Edwards and the sworn answers thereto by the accused were the following:

"426. Q. It is further alleged that you introduced Mrs. Newton to General McKay as Mrs. Adams.

"A. That allegation likewise is absolutely false."

The accused had been divorced from his first wife and on 15 May 1948 had married in New York a German woman by whom he had a son during his overseas tour of duty. Mrs. Nerissa Newton suffered a nervous breakdown between Christmas 1948 and New Year's Day 1949 and was in bed about five weeks. The accused saw her constantly during this period of illness and that of her relapse after return to work. While she was sick, accused and she had no intimate relations but in March and from 1 to 16 April 1949, they resumed sexual contacts, six or eight times in March and five or six times in April, 2 or 3 times weekly except when she was ill. A telegram was received in evidence, from accused to Mrs. Newton, dated 2 May 1949, stating, "* * * Hope all is well with you. Love. Les". She became pregnant between the last part of March and 16 April 1949 and the responsibility for this pregnancy was admitted by the accused to Mrs. Nerissa Newton's physician, Dr. Polk, who established the term of pregnancy as from six to eight weeks prior to 13 May 1949. On 8 June 1949 Mrs. Nerissa Newton married Mr. Irving Joseph. She had no sexual connection with him prior to their marriage.

Mrs. Adams, present wife of the accused, testified that in March and part of April (1949) she was sick, could not be left alone, and that she was positive that her husband did not visit Mrs. Newton from the middle of February to about the middle of April.

After explanation of accused's rights by the law member, the former elected to testify "to the incidents and duration of his military service" but "not on the issue of his guilt or innocence", in substance, as follows: Upon graduation from the University of Illinois in 1929 he was appointed 2d Lieutenant, FA, in the ORC and entered upon active duty as 1st Lieutenant, FA, on 14 February 1942. He was assigned as Classification and Assignment Officer, Recruit Reception Center, Fort Custer, Michigan, from which he was transferred in May, 1942, to Camp Roberts as Assistant Classification and Assignment Officer; promoted to Captain, AUS, 8 October 1942; transferred 1 April 1943 to Army Service Forces Unit Training Center, New Orleans, as Classification and Assignment Officer and later as Chief of Personnel; was promoted to Major, AUS, 17 December 1943; was then assigned to 13th Traffic Regulation Group. In May 1944 he went overseas with that group to the United Kingdom, arriving 5 June 1944; served as Transportation Officer in England; on 19 August 1944 was sent to Paris and assigned as Administrative Officer, Seine Section Transportation Office. On 26 December 1944 he was transferred to Belgium in Transportation Section, Third Army, and with "this Advance Section" served through Belgium, Luxemburg, Germany, and on V-E Day was outside Prague in Czechoslovakia. "During all this time I (he) served largely as Rail Transportation Officer, part of the time with the Advance Section of Communications and part of the time with Forward and Rear, Third Army." Five days after V-E Day, he was transferred to 106th Infantry Division as Staff Transportation Officer and then was Assistant Transportation Officer at Metz, Germany; in 1945 he became District Transportation Officer at Augsburg and Munich. He returned to Zone of the Interior July 1947; was promoted to Lt Colonel, AUS, 19 November 1945. He reported to Camp Stoneman 16 August 1947 and was assigned first as Camp Executive Officer, then as Commander of Troops. On 21 April 1948, he was sent to Camp Knox to inspect (observe) the Universal Military Training Unit. After a short leave, he returned to Camp Stoneman in the latter part of May 1948 and was assigned duty as Transport Commander on Army Transports, sailing out of San Francisco and New York Ports of Embarkation until 15 September 1948; he then was assigned as G-1, San Francisco Port of Embarkation, Fort Mason, remaining at Fort Mason until 6 July 1949 when he was then assigned to the University of Illinois as Assistant PMS&T; on 23 January 1950 he was transferred to Headquarters Fifth Army, Chicago, Illinois and on 1 July 1950 was transferred to Headquarters Sixth Army, reporting at the latter station on 17 July 1950. He then was assigned as Assistant Army Transportation Officer, Headquarters Sixth Army, his most recent assignment. On 26 July 1946 he was promoted to permanent Lieutenant Colonel, Regular Army, date of rank - 1 July 1948. He has never been subject to any disciplinary action under Article of War 104 or ever court-martialed. His efficiency ratings, without

exception, have been "Superior" and "Excellent". He has the usual campaign ribbons - Northern France, Central Europe, Rhineland, Ardennes; he was awarded the Bronze Star and Army Commendation Ribbon.

Accused's general reputation for truth, honesty and integrity, and as an officer and a gentleman, according to his superior, Colonel Whitcomb, was "very high"; General McKay's opinion of accused, "* * * personally and officially, was quite high".

On 18 October 1950 Mr. Hirschberg and other defense counsel attended the pre-trial investigation of charges against accused and made formal demand, orally and later by letter, upon the Investigating Officer for an opportunity to cross-examine Mrs. Joseph and Irving V. Joseph. The Investigating Officer informed Mr. Hirschberg that he had written Mrs. Joseph, requesting her to make herself available for cross-examination and that she had telephoned that she was refusing to do so on the grounds that she had made a statement relative to the facts and did not feel that she had to make herself available at that time; that he (the I.O) told her that he had no power of subpoena to bring her in. Accused, after being properly advised of his rights as a witness, testified under oath that on 18 July 1950 he was told by Lieutenant Colonel Gray, Staff Judge Advocate, Sixth Army, that the Commanding General had issued an order that he (the accused) "was not to contact Mrs. Newton Joseph or her husband in any way"; that he had complied with that order; that at that time he had not engaged counsel and did not know why he was asked to stay away; that Mrs. Joseph had asked him to telephone on 17 July 1950 and, when he did so, her husband answered the telephone and refused to talk to him or to let her speak to him.

During the trial, in oral argument before this Board and in individual counsel's brief, much emphasis was placed on the assertion that due process of law was violated in that defense counsel had no opportunity to cross-examine Mrs. Joseph and her husband during the pre-trial investigation and that, as a result thereof, accused's substantial rights were invaded. Mrs. Joseph testified that she asked to be excused from such cross-examination and that the Investigating Officer, in fact, excused her. Although Colonel Dillaway, the Investigating Officer, was not called as a witness, it may be ascertained from the quotation in the record of his remarks to counsel that he did not excuse the witness but merely replied to her inquiry, when she indicated objections to appearing, that he had no power to compel her presence. Even accepting as true the facts as stated by Mr. Hirschberg, the accused, and Mrs. Joseph, there was, if anything at all, no more than a procedural error in the conduct of the pre-trial investigation which did not affect accused's substantial rights. If a defect, this would be a "non-jurisdictional" one. 1/ It was correctly stated that the Investigating

1/ CM 337089, Aikins, 5 BR-JC 331, 346; Humphrey, Warden v. Smith, 336 U.S. 695, 697, hn 2 (1949).

Officer could not have compelled the attendance of Mr. or Mrs. Joseph by the issuance of any process.[2] Consequently, whether he did or did not excuse her from attendance, after she took exceptions to appearing, is unimportant since it is apparent that neither she nor her husband intended to be present for such cross-examination.[3]

Defense counsel requested a short continuance during cross-examination of Mrs. Joseph, explaining that he wanted the Court to "take an earlier adjournment in order to give us time to prepare for further cross-examination on the grounds that it is the first time that we have had to cross-examine the witness at all from her own testimony." There was a short recess with the understanding that the trial judge advocate and the court might continue examination of the witness without prejudice to defense counsel renewing his cross-examination "later on". After a recess for lunch, examination by the court continued until defense counsel was asked by the law member if he had any questions; thereupon the former replied affirmatively. Cross-examination of Mrs. Joseph continued with no renewal of the request for continuance. After Mr. Joseph testified, defense counsel was queried as to whether he wished to continue cross-examination of Mrs. Joseph and he replied in the negative. The law member inquired of defense counsel whether his cross-examination was completed "except for any after-thought that may come up" and defense counsel replied in the affirmative but continued with the statement that he "was going to ask the indulgence of the court a -- for a short continuance so that -- in order to give us an opportunity to adduce evidence relative to the cross examination of this witness on the ground that we never have had an opportunity --". Then the law member asked defense counsel whether he meant that "something may arise that you may want to question her further" to which defense counsel replied "Yes". Nothing more was said about a continuance. In passing, it may be noted that the accused retained the services of the regularly appointed defense counsel both of whom were present throughout the trial and both of whom were officers of the Judge Advocate General's Corps, one a Lieutenant Colonel and the other a Captain. It may be assumed that these officers fully advised the two individual counsel of their right to request a reasonable continuance to prepare for cross-examination,[4] or for other purposes if there was any real need of one.

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[2] CM ETO 25, Kenney, 1 BR ETO 13, 18; page 31, Manual for Courts-Martial, U. S. Army, 1949.

[3] "*** The determination of whether there has been a thorough and impartial investigation (which is the real object of Article of War 46b) is a question of fact primarily for the decision of the appointing authority and in the absence of an abuse of discretion his determination is conclusive (CM 322052, Shamel, 71 BR 19, 28; CM 204275, Lichtenfels, 7 BR 395, 402); Cf. Henry v. Hodges, 171 F.2d 401, 402, hn 1 (2d Cir. 1948).

[4] CM 336419, Halprin, 5 BR-JC 301, 323.

It is concluded that the law member acted properly in denying the motion to dismiss the proceedings for failure to comply with Article of War 46b and Paragraph 35a of the Manual for Courts-Martial, U. S. Army, 1949. 5/

Defense counsel moved to dismiss Specification 4, Charge II, on the ground that no offense was alleged, asserting that adultery is not pleaded, absent a statement that both parties were married, adding that in any event the offense of adultery is not a crime in the State of California and additionally, that there is no allegation that the offense was committed on a military reservation; he appended the ground that the specification is ambiguous and indefinite in point of time. These points are also urged by defense counsel in his brief submitted to this Board. The first contentions are not acceptable for the reason that the accused was not prosecuted for a crime under the law of the State of California but for an offense under military law, the 96th Article of War. 6/ As for the question of alleged ambiguity and indefiniteness, the place and approximate dates of the offenses were clearly pleaded. Under the circumstances there was no legal necessity to be more specific. 7/ The law member acted properly in denying this motion. An additional motion at the outset of the case, to dismiss, because four witnesses requested by the defense were not present, was denied as premature but was apparently abandoned inasmuch as after the prosecution rested, the defense failed to pursue it further, and made no request for a continuance as to their testimony. Nor does it appear what, if anything they would have added to the facts in the stipulations. 8/

5/ Cf. United States v. Five Cases, 179 F.2d 519, 523, hn 13 (2d Cir. 1950), holding that one may not silently nurse along an expected error to the point of reversibility and then be allowed to take advantage of a situation which by his silence he has helped to create.

6/ CM 276559, Francis, 48 BR 359, 367; subparagraph 117c of the Manual for Courts-Martial, U. S.Army, 1949; CM 329522, Love, 78 BR 93, 94, cited by counsel does not hold that both parties mentioned in an adultery charge must be alleged as married (as accused asserts) but only that one be so pleaded. In the instant case, it was alleged that accused was married.

7/ Manual for Courts-Martial, U. S. Army, 1949, App. 4g.

8/ Jackson v. Sanford, 79 F. Supp. 74, 76; hn 4, 5 (N.D. Ga. 1947), affd. 163 F.2d 875, cert. den. 332 U.S. 848; McKinster, MO-JAGA 81, 88; Quattlebaum, MO-JAGA 224, 227; Riise, MO-JAGA 237, 241. At the close of the case after the Law Member inquired if accused had been afforded an opportunity at the trial to "present all the evidence on behalf of the accused that you know about", individual defense counsel replied, "Nothing occurs to the Defense at this moment."

Defense counsel objected to the introduction of testimony by the prosecution relative to the intimate relations between the accused and Mrs. Joseph prior to the offenses alleged in Specification 4, Charge II. The weight of opinion favors permitting this kind of evidence for purposes of corroboration.[9] Although the evidence introduced by the prosecution went back in time to 1942 there was no actual interruption in the amorous and sexual relationship between the accused and Mrs. Joseph except a period of enforced separation caused by accused's overseas duty. It cannot be said that the law member abused his discretion or prejudiced the accused's rights by permitting this background to be introduced.[10] At worst, the evidence with a remote time element was merely cumulative of other indications of sexual connections of more current date; hence, in the face of additional and compelling evidence of guilt, it cannot be considered as prejudicial error.[11]

The competent evidence sustained beyond a reasonable doubt the findings of guilty as approved by the reviewing authority. Mrs. Joseph (then Mrs. Nerissa Newton) was introduced by the accused as Mrs. Adams at the time and place alleged in Specification 2 of Charge I and Specification 2 of Charge II. This was corroborated by Brigadier General McKay, to the extent at least that accused interposed no objection when she was referred to by that name in the presence of the General. There can be no question that the accused knew that he made a false statement to Lieutenant Colonel Edwards when he swore that the allegation that he had introduced Mrs. Nerissa Newton as his wife was absolutely false. The pattern of accused's relations with Mrs. Newton over such a long period of time was such that beyond any reasonable doubt the accused felt the impact of the question put by Lieutenant Colonel Edwards and deliberately made his response forceful

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9/ 167 A.L.R. p. 601 "The rule is quite generally adhered to that proof of prior offenses of the same kind with the same person is admissible in evidence in prosecutions charging adultery or fornication, in corroboration of the offense for which conviction is sought" and cases cited. 167 A.L.R. p. 603 (The fact that prior acts of intercourse between the parties, if treated as an offense would be barred by the statute of limitations, has been held not to render evidence of such acts inadmissible in a trial on a charge of adultery" and cases cited; also see King v. United States, 144 F.2d 729, 732, hns 9, 10 (8th Cir. 1944), cert. den. 324 U.S. 854; Weiss v. United States, 122 F.2d 675, 682, hns 14, 15 (5th Cir. 1941); 1 Am Jur, Adultery, sec. 56.

10/ Cohan, MO-JAGA 370, 374; Cf. p. 154, subparagraph 125b of the Manual for Courts-Martial, U. S. Army, 1949.

11/ CM 237711, Fleischer, 24 BR 89, 99; Clark, MO-JAGA 304, 306; CM 230928, Lanyon, 18 BR 115, 125; Article of War 37, 10 U.S.C. 1508.

with intent to deceive. With reference to the offenses of wrongful sexual contacts charged in Specification 4, Charge II, the testimony of Mrs. Joseph establishing the times and places of the illicit sexual intercourse, corroborated by accused's telegram and admissions, together with evidence that the latter was a married man supplied all the elements of the offenses required by law. Strong corroboration additionally appears from the testimony of Dr. Polk that the accused admitted that he was responsible for Mrs. Nerissa Newton's pregnancy which Dr. Polk established to have been from six to eight weeks' duration as of 13 May 1949.

The oral argument and written brief of appellate defense counsel have been considered in this review.

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 as approved and the sentence, and to warrant confirmation of the sentence. The sentence is legal.

The reviewing authority designated a place of confinement. In the instant case, the confirming authority, the Judicial Council acting with the concurrence of The Judge Advocate General, is the proper agency to designate the place of confinement. 12/

The accused was born on 5 April 1906 at DeLand, Illinois. He was married to Doris Depuy on 6 January 1934. This marriage ended in divorce obtained by her on 21 January 1948 in Cook County, Illinois. On 15 May 1948 he married Anneliese Weigelt, in New York City. He was the father of a son born to Anneliese Weigelt in July 1946. He finished high school in 1925 and was graduated from the University of Illinois with a B.S. degree in 1929. He was superintendent of city schools in Brownstown, Illinois from 1929 - 1931; assistant prinicpal and director of athletics in the High School, DeLand, Illinois from 1931 - 1934; a camp educational adviser with the CCC from 1935 - 1937; and Field Office Manager with the Federal Social Security Board from 1937 - 1942. He obtained his M.S. in Education from the University of Illinois in 1934. After being commissioned as a Reserve Second Lieutenant in Field Artillery upon graduation from the University of

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12/ Subparagraph 87b, of the Manual for Courts-Martial, U. S. Army, 1949; Article of War 48 (c) (3) 10 U.S.C. 1519; CM 343793, Cruikshank, BR-JC, 8 March 1951, (BR Opinion, p. 14).

Illinois in June 1929, he was promoted to First Lieutenant on 16 September 1933, and went on active duty in that grade on or about 14 February 1942, became a Major on 17 December 1943 and Lieutenant Colonel on 19 November 1945. He was integrated in the Regular Army as a Captain on 26 July 1946 and was promoted to Lieutenant Colonel in the Regular Army on 15 July 1948. He was awarded the Bronze Star and the Army Commendation Ribbon. His performance of duty was rated excellent or superior from 1942 through 1947; it varied from excellent to superior to very satisfactory from 1948 to May 1950. He has no record of prior disciplinary action.

Allan R. Browne J.A.G.C.

William J. Flynn J.A.G.C.

Arthur P. Iveland J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

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

In the foregoing case of Lieutenant Colonel Leslie Edward Adams, 0-29561, Headquarters, Sixth Army, Presidio of San Francisco, California, 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.

C. B. Mickelwait, Brig Gen, JAGC Edward H. Young, 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

29 May, 1951

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

APR 1 3 1951

JAGH CM 345284

UNITED STATES v. Sergeant First Class GRAYSON A. WALKER (RA-17241881), Company "G", 35th Infantry Regiment, APO 25.	TWENTY-FIFTH INFANTRY DIVISION Tried by G.C.M., convened at APO 25, 13 February 1951. 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 Judge Advocate General and the Judicial Council.

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

CHARGE: Violation of the 92nd Article of War

Specification 1: In that Sergeant, First Class Grayson A. Walker, Company "G", 35th Infantry Regiment, APO 25, did, near Ipchang, Korea, on or about 14 January 1951, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill Kim Jae Sun, a human being, by shooting him with a carbine.

Specification 2: In that Sergeant First Class Grayson A. Walker, Company "G", 35th Infantry Regiment, APO 25, did, near Ipchang, Korea, on or about 14 January 1951, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill Bak Un Yun, a human being, by shooting her with a carbine.

The accused pleaded not guilty to, and was found guilty of, the Charge and its Specifications. No evidence of previous convictions by court-martial 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 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. The accused was charged with and found guilty of two specifications 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, 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. 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, 8 BR-JC 219, 249, 263; CM 344372, Davis, BR-JC, April 1951).

The evidence establishes that on 14 January 1951, near Ipchang, Korea, the accused, accompanied by Sergeant Earl J. Hilt, entered a house occupied by two elderly Koreans and ordered them to leave. He followed the old man outside and shot him through the head with his carbine. He dragged the body to the rear of the building and covered it with straw. The accused then importuned Sergeant Hilt to shoot the old woman and, upon Hilt's refusal, accused went to the door of the house and shot the old woman as she was sitting by the "hibachi". Sergeant Hilt did not examine the bodies but he observed that the old man had been shot through the forehead and was losing lots of blood and that the old lady fell back against the "hibachi" after she had been shot. The next day Kim Sang Nam, a Korean woman, discovered the bodies in the same position in which they had been left by the accused. She identified the two as her father, Kim Jae Sun, 69 years of age, and her mother, Bak Un Yun, 67 years of age. Both persons had been shot through the head and were dead. The accused offered no evidence and declined to testify.

Clearly, the factual situation in this case reveals cold-blooded murder, consciously conceived and deliberately executed. That the accused realized the iniquity of his crimes is manifest in his admonition

to Sergeant Hilt and the others upon his return to the road block immediately thereafter "to keep quiet about it". Without justification in law or fact, the accused shot these two aged, defenseless people through the head inflicting wounds of a nature likely to produce death. He left them as dead and they were so discovered the next day by their daughter. There need be no direct expert testimony as to the cause of death; the death may be presumed to have been caused by apparent wounds, particularly, when there is no suggestion in the record that the deceased died from any other cause than that relied upon by the prosecution (40 CJS sec. 186, p. 1088; Franklin v. State, 180 Tenn 41, 171 SW 2d 281, 282 (1943)). Not a scintilla of evidence was offered to negate this presumption. We conclude that the accused was fully and convincingly proven guilty of the premeditated murders of Kim Jae Sun and Bak Un Yun (CM 339254, Barnes et al, supra; CM 343929, Ibarra, BR-JC, January 1951).

4. The accused is 21 years of age. He enlisted 27 May 1948 for a period of six years at Jefferson, Missouri. There is no evidence of previous convictions or of civil offenses.

5. 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 sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. 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 P. Jackson, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

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

In the foregoing case of Sergeant First Class Grayson A. Walker, RA 17241881, Company "G", 35th Infantry Regiment, APO 25, 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.

Sick in hospital
C. B. Mickelwait, Brig Gen, JAGC

Edward H. Young, Colonel, JAGC

Robert W. Brown, Brig Gen, JAGC
Chairman

I concur in the foregoing action.

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

27 April, 1951

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

JAGK - CM 345320

MAY 1 7 1951

UNITED STATES v. Captain ELWOOD E. STORM (0-1636706), 7461st Army Unit (Signal).	UNITED STATES ARMY CARIBBEAN Trial by G.C.M., convened at Fort Clayton, Canal Zone, 8,9,10 and 19 January 1951. Dismissal, total forfeitures after promulgation, and confinement for two (2) years.

OPINION of the BOARD OF REVIEW
BARKIN, WOLF and BROWN
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 I: Violation of the 96th Article of War.

Specification 1: In that Captain Elwood E. Storm, 7461st Army Unit (Signal), did, at Albrook Air Force Base, Canal Zone, on or about 9 October 1950, with intent to defraud wrongfully and unlawfully make and utter to the Albrook Air Force Base Exchange, a certain check, in words and figures as follows, to wit:

No. 815 NAT. BANK OF FT. SAM HOUSTON
SAN ANTONIO, TEXAS

9 Oct 1950

Pay to The Order of Albrook Exchange $30 15/100

Thirty and 15/100 DOLLARS
U. S. Currency

7461st A.U.
87-4208

Elwood E. Storm
01636706 Capt.

and by means thereof did fraudulently obtain from the Albrook Air Force Exchange, $30.15 lawful money of the United States he, the said Captain Elwood E. STORM, then well knowing that he did not have and not intending that he should have sufficient funds in the National Bank of Fort Sam Houston, San Antonio, Texas, for payment of said check.

NOTE: Specifications 2 through 6, 8 through 27, and 29 through 31 vary materially from Specification 1 only with respect to the payee, the date and the amount of check as follows:

Spec.	Payee	Date	Amount of check
2	Albrook Air Force Base Exchange	12 Oct 1950	$50.00
3	" " " " "	13 Oct 1950	25.00
4	" " " " "	14 Oct 1950	35.00
5	Cash (National City Bank of New York, Panama Branch)	13 Oct 1950	40.00
6	Fort Gulick Noncommissioned Officers Club	7 Oct 1950	25.00
8	Fort Davis Officers Club	3 June 1950	20.00
9	" " " "	10 June 1950	20.00
10	Fort Gulick Officers Club	13 May 1950	20.15
11	" " " "	14 May 1950	50.00
12	" " " "	17 May 1950	30.00
13	" " " "	27 May 1950	30.00
14	" " " "	7 Oct 1950	25.15
15	Pacific Sector Officers Mess	13 Sep 1950	40.00
16	" " " "	25 Sep 1950	25.00
17	" " " "	27 Sep 1950	25.15
18	Fort Kobbe Exchange	7 Oct 1950	40.15
19	" " "	10 Oct 1950	50.00
20	" " "	16 Oct 1950	50.00
21	Fort Amador Exchange	13 Oct 1950	50.00
22	" " "	16 Oct 1950	45.15
23	Fort Kobbe Noncommissioned Officers Club	13 Oct 1950	50.00
24	Fort Kobbe Exchange	13 Oct 1950	50.00
25	Commissioned Officers Mess (Open)	29 Sep 1950	45.00
26	" " " "	16 Sep 1950	25.00
27	" " " "	15 Oct 1950	20.15
29	U.S. Navy Ships Stores	6 Oct 1950	50.15
30	" " " " "	10 Oct 1950	30.15
31	" " " " "	12 Oct 1950	50.00

Specification 7: (Disapproved by reviewing authority).

Specification 28: In that Captain Elwood E. STORM, 7461st Army Unit (Signal), did, at Panama City, Republic of Panama, on or about 9 October 1950, with intent to defraud wrongfully and unlawfully make and utter to the Motores De Colon, S.A., a certain check, in words and figures as follows, to wit:

TO NAT. BANK OF FT. SAM HOUSTON
Name of Bank
SAN ANTONIO, TEXAS
Name of Branch

Bank Address (City and State) DATE 9-Oct 1950

Pay to the Order of Motores De Colon, S.A. $ 45.100 00

Forty Five and no/100 DOLLARS

Printed Name Elwood E. Storm Sign Here Elwood E. Storm

Military Address 7461st A.U. Serial No. 01636706

87-4208 Rank Capt. S.C.

and by means thereof did fraudulently obtain from the Motores de Colon, S.A. credit in the amount of $45.00 on the purchase price of an automobile, he, the said Captain Elwood E. STORM, then well knowing that he did not have and not intending that he should have sufficient funds in the National Bank of Fort Sam Houston, San Antonio, Texas for payment of said check.

Specifications 32-41: (Disapproved by reviewing authority).

Specification 42: In that Captain Elwood E. STORM, 7461st Army Unit (Signal), did, at Quarry Heights, Canal Zone, on or about 15 May 1950, borrow the sum of $100.00 from Corporal Americo Scogno, an enlisted man, to the prejudice of good order and military discipline.

Specification 43: In that Captain Elwood E. STORM, 7461st Army Unit (Signal), did, at Quarry Heights, Canal Zone, in June 1950 borrow the sum of $100.00 from Corporal Americo Scogno, an enlisted man, to the prejudice of good order and military discipline.

Specification 44: In that Captain Elwood E. STORM, 7461st Army Unit (Signal), did, at Corozal, Canal Zone, on or about 9

August 1950, with intent to defraud, wrongfully and unlawfully make and utter to the Corozal Noncommissioned Officers' Club, Corozal, Canal Zone, a check drawn on the National Bank of Fort Sam Houston, San Antonio, Texas in the amount of $50.00 (the said check having been returned, is now in the possession of Captain Elwood E. Storm) and by means thereof did fraudulently obtain from the Noncommissioned Officers' Club, Corozal, Canal Zone, $50.00 lawful money of the United States, he, the said Captain Elwood E. STORM, then well knowing that he did not have and not intending that he should have sufficient funds in the National Bank of Fort Sam Houston, San Antonio, Texas, for payment of said check.

NOTE: Specifications 45, 47 and 49 vary materially from Specification 44 only with respect to the payee, the date and the amount of check as follows:

Spec.	Payee	Date	Amount of Check
45	Corozal Noncommissioned Officers Club	26 August 1950	$ 50.00
47	Fort Clayton Noncommissioned Officers Club	24 August 1950	100.00
49	Quarry Heights Exchange	27 January 1950	25.00

Specifications 46, 48, 50-53: (Disapproved by reviewing authority).

Specification 54: (Finding of not guilty),

Specifications 55 through 68 and 71 through 85: (Disapproved by reviewing authority).

Specifications 69 and 70: (Findings of not guilty).

Specification 86: In that Captain Elwood E. STORM, 7461st Army Unit (Signal), having on or about 15 May 1950, become indebted to Richard H. Harper in the sum of $200.00 for money received, and having failed without due cause to liquidate said indebtedness, and having on or about 1 September 1950 promised said Richard H. Harper to repay the $200.00 in monthly payments of $50.00 each and, after making one such payment, on 16 October 1950 again promised said Richard H. Harper in writing that he would pay the $150.00 balance due by making payments of $50.00 each between the first and the fifth day of the months of November, December and January, did, without

due cause at Balboa, Canal Zone, between 1 November and 10 December 1950 wrongfully and dishonorably fail to keep said promise.

CHARGE II and Specification: (Nolle Prosequi).

He pleaded not guilty to Charge I and its specifications, and was found not guilty of Specifications 54, 69 and 70 and guilty of the other specifications and of Charge I. 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 the proper authority may direct, for five years. The reviewing authority disapproved the findings of guilty of Specifications 7, 32 through 41, 46, 48, 50 through 53, 55 through 68, and 71 through 85, approved the sentence, reduced the period of confinement to two years and forwarded the record of trial for action under Article of War 48.

3. Evidence

Only the evidence relating to the offenses of which accused was found guilty as approved by the reviewing authority will be summarized.

a. For the Prosecution

It was duly stipulated that accused "was, at the time of the alleged commission of the offenses charged, in the military service of the United States of America, and that since that time he has continuously been and now is in said service" (R 43).

Specifications 1-4

Miss Francisca Robles, Main Cashier, Albrook Air Force Base Exchange, Canal Zone, testified that she cashed four checks for accused, payable to the Albrook Air Force Base Exchange, drawn on the National Bank of Fort Sam Houston, San Antonio, Texas, on dates and in amounts, as follows:

Spec. No.	Date	Amount	
1	9 October 1950	$30.15	(Pros Ex 2)
2	12 October 1950	50.00	(Pros Ex 4)
3	13 October 1950	25.00	(Pros Ex 5)
4	14 October 1950	35.00	(Pros Ex 8)
			(R 203-206).

The checks were returned unpaid by the drawee bank on 17, 21 and 24 October 1950 because of insufficient funds in accused's account (R 51-52,

Pros Ex 60-3). Restitution of these checks was made in full on 8 January 1951 (R 210, Def Ex A).

Specification 5

Mr. John P. Sidebottom, Submanager, National City Bank of New York, Panama City, Republic of Panama, testified that, on 13 October 1950, he cashed a check for accused, payable to "Cash," drawn on the National Bank of Fort Sam Houston, San Antonio, Texas, in the amount of $40.00. The check was returned unpaid by the drawee bank on or about 19 October 1950 because of insufficient funds in accused's account. Upon being informed through official channels and by the witness personally, that the check had been dishonored, accused made restitution in full on or about 18 November 1950 (R 147-153; Pros Exs 47,48,48A,48B,48D, 60-3).

Specification 6

Master Sergeant William L. Graham, Secretary-Treasurer, Noncommissioned Officers Club, Fort Gulick, Canal Zone, testified that, on 7 October 1950, he cashed a check for accused, payable to the Fort Gulick Noncommissioned Officers Club, in the amount of $25.00, drawn on the Bank of Fort Sam Houston, San Antonio, Texas. It was returned unpaid by the drawee bank on 17 October 1950 because of insufficient funds in accused's account. Restitution was made in full on 4 January 1950 (R 166-170, Pros Exs 56, 56A, 60-3).

Specifications 8 and 9

First Lieutenant Albert E. Hill, Secretary, Fort Davis Officers Club, Fort Davis, Canal Zone, testified that accused cashed two checks at the Club, payable to the Fort Davis Officers Club, drawn on the National Bank of Fort Sam Houston, San Antonio, Texas, on dates and in amounts, as follows:

Spec. No.	Date	Amount	
8	3 June 1950	$20.00	(Pros Ex 54)
9	10 June 1950	20.00	(Pros Ex 55)

The checks were returned unpaid by the drawee bank on 15 and 20 June 1950 because of insufficient funds in accused's account. Accused made restitution in full of both checks within a short time after he was notified of their return unpaid (R 161-165, Pros Ex 60-3).

Specifications 10-14

Captain Earl W. Scarborough, Club Officer, Fort Gulick Officers Club, Fort Gulick, Canal Zone, testified that he cashed five checks for accused,

payable to the Fort Gulick Officers Club, drawn on the National Bank of Fort Sam Houston, San Antonio, Texas, on dates and in amounts as follows:

Spec. No.	Date	Amount	
10	13 May 1950	$20.15	(Pros Ex 49)
11	14 May 1950	50.00	(Pros Ex 50)
12	17 May 1950	30.00	(Pros Ex 51)
13	27 May 1950	30.00	(Pros Ex 52)
14	7 October 1950	25.15	(Pros Ex 53)

The first four checks (Pros Exs 49,50,51,52) were returned unpaid by the drawee bank on 22, 25 and 31 May 1950 because of insufficient funds in accused's account, and the fifth check (Pros Ex 53, 53A) was returned unpaid by the drawee bank on 17 October 1950 for the same reason. Accused made restitution in full of the first four checks (Pros Exs 49, 50,51,52) within a week after he was notified of their return unpaid, and of the fifth check (Pros Ex 53) on 4 January 1951 (R 153-161, Pros Ex 60-3).

Specifications 15-17

Mr. Arthur L. Yearwood, Bartender, Pacific Sector Officers Mess, Fort Kobbe Branch, testified that he cashed three checks for accused, payable to the Pacific Sector Officers Mess, Fort Kobbe Branch, drawn on the National Bank of Fort Sam Houston, San Antonio, Texas, on dates and in amounts as follows:

Spec. No.	Date	Amount	
15	13 September 1950	$40.00	(Pros Ex 12)
16	25 September 1950	25.00	(Pros Ex 13)
17	27 September 1950	25.15	(Pros Ex 14)
		(R 197-200).	

The checks were returned unpaid by the drawee bank on 19 and 20 October 1950, respectively, because of insufficient funds in accused's account (R 76-79, Pros Ex 60-3). Accused made restitution in full of these checks on 16 January 1951 (R 187).

Specifications 18-20,24

Mrs. Ann Lute, Cashier, Fort Kobbe Exchange, Fort Clayton, Canal Zone, testified that she cashed four checks for accused, payable to Fort Kobbe Exchange, drawn on the National Bank of Fort Sam Houston, San Antonio, Texas, on dates and in amounts as follows:

Spec. No.	Date	Amount
18	7 October 1950	$40.15 (Pros Ex 1)
19	10 October 1950	50.00 (Pros Ex 3)
20	16 October 1950	50.00 (Pros Ex 9)
24	13 October 1950	50.00 (Pros Ex 6)
		(R 193-197).

The checks were returned unpaid by the drawee bank on 17, 21 and 26 October 1950 because of insufficient funds in accused's account (R 51-54, Pros Ex 60-3). Restitution of these checks was made in full on 8 January 1951 (R 210, Def Ex A).

Specifications 21 and 22

Miss Carmen Fong, Cashier, Fort Amador Exchange, Fort Amador, Canal Zone, testified that she cashed two checks, payable to the Fort Amador Exchange, drawn on the National Bank of Fort Sam Houston, San Antonio, Texas, on dates and in amounts as follows:

Spec. No.	Date	Amount
21	13 October 1950	$50.00 (Pros Ex 7)
22	16 October 1950	45.15 (Pros Ex 10)
		(R 200-202).

The checks were returned unpaid by the drawee bank on 21 and 24 October 1950, because of insufficient funds in accused's account (R 52,58,127-129; Pros Exs 7 and 10). Restitution of these checks was made on 8 January 1951 (R 210, Def Ex A).

Specification 23

Sergeant First Class Maurice E. Belisle, Secretary-Treasurer, Noncommissioned Officers Club, Fort Kobbe, Canal Zone, testified that, on 13 October 1950, he cashed a check for accused, payable to the Fort Kobbe Noncommissioned Officers Club, drawn on the National Bank of Fort Sam Houston, San Antonio, Texas, in the amount of $50.00. The check was returned unpaid by the drawee bank on 21 October 1950 because of insufficient funds in accused's account. On contacting accused's organization, Sergeant Belisle was informed that accused had been transferred to the Separation Center, Fort Dix, New Jersey. Sergeant Belisle sent a telegram to accused at that address and, three or four days later, received a money order in the amount of $52.00 in full restitution of the check (R 125-129, Pros Exs 37, 37A,38).

Specifications 25-27

Mr. Harold W. Dick, bookkeeper and civilian manager, Commissioned

Officers Mess (Open), Naval Station, Coco Solo, Canal Zone, testified that he cashed three checks for accused, payable to the Commissioned Officers Mess, Coco Solo, Canal Zone, drawn on the National Bank of Fort Sam Houston, San Antonio, Texas, on dates and in amounts as follows:

Spec. No.	Date	Amount	
25	29 September 1950	$45.00	(Pros Ex 44)
26	16 September 1950	25.00	(Pros Ex 43)
27	15 October 1950	20.15	(Pros Ex 45)

The checks were returned unpaid by the drawee bank on 20 October and 16 November 1950 because of insufficient funds in accused's account. Accused made restitution in full on 10 January 1951 (R 141-146, Pros Exs 43-A, 45-A, 60-3).

Specification 28

Mr. Frederic M. G. Townshend, salesman, Motores de Colon, Panama City, Republic of Panama, testified that he sold accused an automobile on credit. As first payment therefor, accused gave a check dated 9 October 1950, payable to Motores de Colon, drawn on the National Bank of Fort Sam Houston, San Antonio, Texas, in the amount of $45.00. The check was returned unpaid by the drawee bank on or about 19 October 1950 because of insufficient funds in accused's account. Accused was notified of this fact through official channels. Subsequently Motores de Colon received a cashier's check in full restitution of the check (R 96-101, Pros Exs 18,20-23,60-3).

Specifications 29-31

Miss Miriam H. Prendergast, Cashier, Naval Exchange, United States Naval Station, Rodman, Canal Zone, testified that she cashed three checks for accused, payable to the United States Navy Ships Stores, drawn on the National Bank of Fort Sam Houston, San Antonio, Texas, on dates and in amounts as follows:

Spec. No.	Date	Amount	
29	6 October 1950	$50.15	(Pros Ex 24)
30	10 October 1950	30.15	(Pros Ex 25)
31	12 October 1950	50.00	(Pros Ex 26)

The checks were returned unpaid by the drawee bank on 19 and 21 October 1950 because of insufficient funds in accused's account. Accused subsequently made full restitution of the checks. (R 101-108; Pros Ex 60-3)

Specifications 44 and 45

Sergeant William Wilkins, Junior, Chief Steward, Noncommissioned Officers Club, Corozal, Canal Zone, testified that, on or about 24 August 1950, he contacted accused relative to a dishonored check in the amount of $50.00 which accused had previously cashed at the club (Spec 44). Accused stated in effect that the check would be honored upon representment, and gave Sergeant Wilkins another check in the amount of $50.00 for which Sergeant Wilkins gave accused $50.00 in cash (Spec 45). Both checks, drawn on the National Bank of Fort Sam Houston, San Antonio, Texas, were returned to the payee unpaid, accompanied by a statement from the Chase National Bank of the City of New York, Balboa, Canal Zone, dated 15 September 1950, listing "Pay Check not in" as the reason for nonpayment. Sergeant Wilkins notified accused of this fact and, about two or three days later, accused made restitution in full for the checks (R 130-134, Pros Ex 39).

Specification 47

Master Sergeant Walter C. Harris, Club Steward, Fort Clayton Noncommissioned Officers Club, Canal Zone, testified that, on or about 7 August 1950, he contacted accused relative to a worthless check in the amount of $50.00, which accused had previously given the Club. On or about 24 August 1950, accused gave Sergeant Harris a check for $100.00 payable to the Fort Clayton Noncommissioned Officers Club, drawn on the National Bank of Fort Sam Houston, San Antonio, Texas, in exchange for the worthless check and $50.00 in cash. The $100.00 check was also returned to the payee unpaid, accompanied by a statement from the Chase National Bank of the City of New York, Balboa, Canal Zone, dated 31 August 1950, listing "Not Sufficient Funds" as the reason for nonpayment. Sergeant Harris notified accused of this fact and accused subsequently reimbursed the club with $90.00 in cash and a check for $10.00. The $10.00 check was also returned unpaid by the drawee bank. Upon being notified of this fact, accused made restitution in full by giving Sergeant Harris $10.00 in cash (R 134-139, Pros Exs 40,41,42).

Specification 49

Juan Donato, Cashier, Caribbean Army and Air Force Exchange Service, Panama City, Canal Zone, testified that he received all checks cashed by various post exchanges, including the Quarry Heights Exchange, under the supervision of the Caribbean Army and Air Force Exchange Service, and deposited them to the Exchange Service account in the Chase National Bank of New York, Balboa, Canal Zone. He stated that a "debit advice" dated 13 February 1950 from the Chase National Bank was received by his office stating that accused's check in the amount of $25.00, drawn on

the National Bank of Fort Sam Houston, San Antonio, Texas, and cashed at the Quarry Heights Exchange, was returned unpaid because of "pay check not in." Accused made restitution of this check in full on 8 January 1951 (R 44-45,48,210, Def Ex A).

Specifications 42 and 43

Sergeant (then Corporal) Americo Scogno, Club Steward, Quarry Heights Officers Club, Quarry Heights, Canal Zone, testified that on or about 15 May 1950, at accused's request, Sergeant Scogno loaned accused $100.00. In June 1950, Sergeant Scogno loaned accused another $100.00. Accused repaid Sergeant Scogno about the first of the month following each loan. During May and June 1950, accused was assigned to Quarry Heights for duty, and was quartered at and ate at the Officers Mess where Sergeant Scogno was a steward (R 63-70).

Specification 86

Mr. Richard H. Harper testified by deposition that, on or about 16 May 1950, at accused's request, he loaned accused $200.00 in cash and accused promised to repay him on 1 June 1950. On that date, at accused's request, Harper extended the time for repayment upon accused's promise to repay him on 1 July 1950. On 1 July 1950 accused failed to keep his promise. On 1 September 1950, accused gave Harper four checks, each in the amount of $50.00, drawn on the Chase National Bank of New York, Balboa Branch, Canal Zone, dated September 30, October 31, November 30 and December 31, 1950, respectively. Accused assured Harper that there would be sufficient funds in the drawee bank for their payment when presented. The check dated 30 September 1950 was paid. On 16 October 1950, upon learning that accused was leaving the Canal Zone for the United States, Harper contacted accused and requested repayment of the balance of the loan of $150. Accused admitted that he was leaving for the United States on permanent change of station but promised Harper that there would be sufficient funds in his bank account to honor the three checks when presented. At Harper's request, accused also gave him a "personal note" in the amount of $150.00 and "continued to insist that /Harper/ had nothing to worry about as he was going to see that /Harper/ was fully paid." When Harper deposited the check dated 31 October 1950, it was returned unpaid by the drawee bank because of insufficient funds in accused's account. Harper redeposited it several times and it was returned unpaid each time by the drawee bank because of insufficient funds in accused's account, the last date of return being 27 December 1950. Harper did not contact accused about the matter after 16 October 1950 (R 70, Pros Ex 11).

Thomas M. Gregory, Manager, Chase National Bank of New York, Balboa, Canal Zone, testified that he was the legal custodian of the records of

his bank and identified a transcript of accused's ledger sheet which was admitted in evidence without objection. It revealed that from 3 October to 27 December 1950 accused's account never contained more than $2.19 (R 87-90, Pros Ex 17).

As to all Specifications

Mr. E. J. Vogel, Assistant Cashier, National Bank of Fort Sam Houston, San Antonio, Texas, testified by deposition that he is the custodian of the bank's records. These records disclose that accused had a checking account with his bank against which accused was the only person authorized to sign checks. From 22 June 1949 to 23 October 1950, the bank mailed accused monthly bank statements at his address in the Canal Zone and also mailed duplicate deposit tickets the same day deposits were received. The bank had no agreement with accused to cash his checks if there was not sufficient funds in his account to pay them (R 206-207, Pros Ex 60).

The bank statement of accused, identified by Mr. Vogel as the record of accused's account during the periods in question, revealed the following information showing the balance of accused's account on the dates of the utterance and dates of dishonor of the checks in issue:

Spec.	Amount of Check	Balance of account on date of utterance of check	Balance of account on date of dishonor of check
1	$30.15	$ 4.67	$ 13.37
2	50.00	4.67	Overdrawn
3	25.00	54.52	"
4	35.00	14.37	"
5	40.00	54.52	8.37
6	25.00	4.67	13.37
8	20.00	64.69	Overdrawn
9	20.00	24.69	"
10	20.15	20.69	1.69
11	50.00	20.69	1.69
12	30.00	19.69	Overdrawn
13	30.00	116.69	14.69
14	25.15	4.67	13.37
15	40.00	Overdrawn	8.37
16	25.00	12.67	3.37
17	25.15	10.67	3.37
18	40.15	4.67	13.37
19	50.00	129.67	13.37
20	50.00	13.37	Overdrawn
21	50.00	54.52	"
22	45.15	13.37	"
23	50.00	54.52	"

24	50.00	54.52	Overdrawn
25	45.00	9.67	3.37
26	25.00	264.82	3.37
27	20.15	14.37	Overdrawn
28	45.00	4.67	8.37
29	50.15	4.67	8.37
30	30.15	13.37	8.37
31	50.00	129.67	Overdrawn
44	50.00	106.69	6.69
45	50.00	421.46	Overdrawn
47	100.00	421.46	321.46
49	25.00	3.51	8.07 (Pros Ex 60-1)

Adelbert S. Munyan, Agent, Criminal Investigation Division, United States Army Caribbean, Fort Amador, testified that, after advising accused of his rights under Article of War 24, accused made a written pretrial statement, dated 21 August 1950, which was admitted in evidence without objection (R 79-85, Pros Ex 15). Accused stated therein, in pertinent part, that he remembered cashing only one check in the month of January 1950, which he cashed at the Quarry Heights Exchange and which was returned because of insufficient funds. In the months of May and June 1950, he cashed several "personal checks" in Army Exchanges, the Fort Davis and Fort Gulick Officers Clubs and the Pacific Officers Clubs, and at the Albrook Officers Club, drawn on the National Bank of Fort Sam Houston, San Antonio, Texas. Several of these checks were returned because of insufficient funds. He stated that all checks were dated the day he cashed them, and that when cashed he did not request that they be held for any time before presentation to the drawee bank for payment. Accused also informed Agent Munyan orally that when the checks "first came back marked 'Insufficient Funds,' he believed it was an error on the part of the bank" or due to "poor arithmetic on his part." However, he made no inquiry at the bank and continued to write checks because he was "in such financial difficulty." He wrote checks to obtain funds to pay personal and gambling debts and to cover other worthless checks. He wrote and cashed some of the checks "when he was fully aware that he did not have sufficient money in the bank" (R 82-83).

b. For the Defense

Having been advised of his rights as a witness, accused elected to testify. He stated that he is 32 years old, married, and the father of one child. He entered active military service as an enlisted man on 2 November 1936. On 12 September 1942, he "graduated" from Officers Candidate School and "left the service" in April 1946. He "rejoined the service in April of 1948 and was assigned at Panama, to the 7461st Signal." He was awarded a certificate of appreciation for service in

the Military Intelligence Division, War Department, Washington, D.C., from 4 November 1942 to 8 December 1942 (R 216, Def Ex B). On 27 November 1945, he was recommended for a commission in the regular Army by a former commanding officer (R 214-217, Def Ex C).

Mrs. Madeline H. Storm, accused's wife, testified by deposition that she and accused were married on 20 December 1941 and that they have a 3-1/2 year old son. In response to accused's request, she sent accused $800.00 in November 1950. She stated that she did not write any checks on accused's account at the National Bank of Fort Sam Houston, San Antonio, Texas (R 217, Def Ex D).

Captains Robert E. McDonald, Charles Sovern, and Louis Nelp, III, testified to accused's excellent performance of duty (R 211-214).

4. Discussion

Specifications 1-6, 8-31, 44,45,47,49

Under these specifications, accused was found guilty of making and uttering, with fraudulent intent, thirty-four checks (one for each specification), and fraudulently obtaining value therefor, without having sufficient funds on deposit to pay them.

The evidence is uncontroverted that, on dates and at places alleged, accused made and uttered thirty-four checks totaling $1316.35, drawn on the National Bank of Fort Sam Houston, San Antonio, Texas, and received face value therefor. The checks, processed through banking channels in due course, were dishonored by the drawee bank because of insufficient funds in accused's account, and were returned unpaid to their respective payees. One check in the amount of $25.00 was uttered the latter part of January 1950 (Spec 49), six checks totaling $170.15 were uttered between 13 May and 10 June 1950 (Specs 8-13), three checks totaling $200.00 were uttered between 9 and 24 August 1950 (Specs 44,45,47), and twenty-four checks totaling $921.20 were uttered between 13 September and 16 October 1950 (Specs 1-6,14-31). As to the majority of the checks in issue (Specs 1,2,4,6,11,12,14-18,20,22,25,27-30,49), accused did not have sufficient funds on deposit to pay them either at the time of utterance or when presented in due course. As to the remainder of the checks in issue except Specification 47 (Specs 3,5,8-10,13,19,21,23,24,26,31,44,45), there were sufficient funds to cover payment when uttered, but the issuance by accused of other checks reaching the bank prior to the checks in question depleted his account and rendered it insufficient to cover these checks when presented in due course. As to Specification 47, the bank balance showed that there were sufficient funds to pay the check in question both on the date of utterance and the date of dishonor and

at all times between those dates.

The evidence showed that accused was fully informed by the bank of the status of his account as the bank sent him statements monthly and duplicate deposit tickets the same day deposits were received. Accused admitted that he made and uttered worthless checks in order to obtain funds with which to pay personal and gambling debts. It was otherwise shown that accused issued worthless checks to redeem other worthless checks which had been returned unpaid.

The circumstances that accused issued numerous checks against an insufficient bank account, that the condition of the account was the result of his own acts, and that the checks were returned on presentation for want of sufficient funds, creates an inference that the accused knew that his account was insufficient to pay his checks when presented to the drawee bank for payment and that he did not intend that it should be sufficient. The burden of going forward with proof to dispel this inference is on the accused (CM 342031, Drake, 8 BR-JC 13,21; CM 337978, Gallo, 4 BR-JC 193,199; CM 249232, Norren, 32 BR 95,103). This the accused did not do. It follows, therefore, that accused's uttering of 34 worthless checks during relatively short periods of time and thus obtaining $1316.35 was fraudulent. As to the checks for which there were not sufficient funds at presentment to the drawee bank in due course, it is well settled that the course of conduct of accused in writing a large number of checks within comparatively short periods of time, and his failure to exercise ordinary care with respect to the condition of his bank account at the time the checks were negotiated for a then present consideration, reflects more than inadvertence, indifference or carelessness. Such repeated wrongful and unlawful acts lead to but one conclusion, that accused made and uttered the checks specified, with knowledge of the inadequate state of his bank account, and with intent to defraud as alleged (CM 337978, Gallo, supra; CM 315578, Bell, 65 BR 47,52). His uttering of several of the checks in issue on dates when there were sufficient funds in accused's account but which were dishonored at the drawee bank upon presentation in due course because the account had been depleted by other checks uttered by accused which reached the bank prior thereto was also fraudulent. Under such circumstances, there were not in fact funds sufficient for the payment thereof. Such funds as he then had were, as it developed, sufficient only to pay checks which had cleared the bank before the worthless checks were presented for payment (CM 332879, Boughman, 81 BR 223,233; CM 307125, Keller, 60 BR 335,343).

As to Specification 47, although the evidence showed that the check in question was returned unpaid by the drawee bank because of insufficient funds in accused's bank account, accused's bank statement

revealed that there were sufficient funds to meet its payment from the date of utterance to and including the date of dishonor. On the basis of the records of the drawee bank, it is believed that the check was dishonored through inadvertence and the record is not legally sufficient to sustain a finding of guilty as to that specification.

Accused apparently made restitution of all the checks in issue, 22 of which were redeemed while the trial was in progress (Specs 1-4, 6,10-22,24-27). Two other checks were redeemed only after official correspondence on the matter. The fact, however, that accused made restitution is no defense to the fraud initially attaching to the transactions (CM 322546, Barton, 71 BR 257).

From all the facts and circumstances, the Board of Review is of the opinion that the findings of the court were fully justified as to all specifications discussed herein, except Specification 47, and establishes beyond a reasonable doubt the commission of the offenses alleged therein (CM 322546, Barton, supra).

Specifications 42 and 43

Under these specifications, accused, an officer, was found guilty of borrowing $100.00 on two occasions from Sergeant (then Corporal) Americo Scogno.

The evidence showed that accused borrowed the money as alleged, that accused and Sergeant Scogno were both stationed and assigned for duty at the same post and that accused was quartered and messed where Sergeant Scogno was steward. Where there is a relationship between officer and enlisted man arising from membership in the same command or from duty on the same camp, post, or station, the negotiating of a loan by an officer from an enlisted man weakens discipline and respect for authority, and is conduct to the prejudice of good order and military discipline (CM 314056, Heaton, 64 BR 3,11; CM 302838, Zaleski, 59 BR 45, 52).

Specification 86

Under this specification, accused was found guilty of wrongfully and dishonorably failing to keep his promise to Richard H. Harper to repay a $150.00 balance on a $200.00 loan previously made.

The uncontroverted evidence established that, on or about 15 May 1950, at the Canal Zone, accused, an officer of the Army of the United States, borrowed $200.00 from Mr. Harper, a civilian, on accused's

promise that he would repay Harper in about two weeks. Accused not only failed to keep his promise but made similar promises on 1 June and 1 July which he likewise failed to keep. On 16 October, Harper learned through a source other than accused that accused was being transferred to the United States. He thereupon confronted accused again and requested payment of the balance of $150.00 which was then due. At that time, accused promised Harper that he would have sufficient funds on deposit at the drawee bank to honor three postdated checks in the amount of $50.00 each he had previously given Harper, although his bank balance was then $2.19 and gradually decreased to $.69 on 27 December 1950. Harper deposited one of the checks several times and each time it was returned dishonored because of insufficient funds in accused's account.

The evidence thus shows that accused made and failed to keep numerous promises to repay a long overdue loan to Mr. Harper, a civilian who had befriended him, that accused had given checks to Harper at a time when he did not have and did not intend to have sufficient funds in the drawee bank to cover them, which in and of itself is deceitful, and that accused had apparently intended to depart from the Canal Zone surreptitiously. Under all the circumstances the court was warranted in concluding that accused's promise as alleged was conceived in misrepresentation and deceit, and that his failure to keep such promises was wrongful and dishonorable (CM 339424, Elliot, 5 BR-JC 71,89).

The Board of Review concludes therefore that the record is legally sufficient to sustain the finding as to Specification 86, Charge I.

5. The Department of the Army records show that the accused is 32 years of age, married, and has one child. He completed two years of high school in 1935 and enlisted in the Army on 2 November 1936. During his enlisted status he attained the rank of staff sergeant and, upon successfully completing Officers Candidate School on 12 September 1942, was commissioned a second lieutenant. On 30 December 1943 and 17 December 1944 he was promoted to the grade of first lieutenant and captain, respectively. From 5 March 1943 until 8 August 1945 he served in the European Theater engaging in five major campaigns. From 4 August 1946 until 28 March 1948 he was in an inactive status and returned to extended active duty on the latter date. He is entitled to wear the European Theater ribbon with five battle stars, American Service medal, Good Conduct ribbon, and the World War II Victory ribbon. His overall efficiency ratings of record are 079, 076, 073 and 072.

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 insufficient to support the finding of guilty of Specification 47, Charge I, legally sufficient to support the findings of guilty of Specifications 1 to 6, inclusive, 8 to 31, inclusive, 42 to 45, inclusive, 49 and 86, Charge I, and Charge I, and legally sufficient to sustain the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

_____, J.A.G.C.

_____, J.A.G.C.

_____, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

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

In the foregoing case of Captain Elwood E. Storm, 0-1636706, 7461st Army Unit (Signal), upon the concurrence of The Judge Advocate General the finding of guilty of Specification 47 of Charge I is disapproved and 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.

C. B. Mickelwait, Brig Gen, JAGC

Edward H. Young, Colonel, JAGC

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

MAY 28 1951

I concur in the foregoing action.

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

29 May 1951

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

(147)

APR 1 9 1951

JAGQ - CM 345377

UNITED STATES v. Pvts-1 HUSTON C. SPEARS (RA 16265953), 581st Trans. Trk. Co., THOMAS J. WRIGHT (RA 16265796), Btry B, 32d AAA AW Bn and GILBERT T. KING (RA 19295639), Det B, Hq Btry 4052d ASU, all DS to Det E, Hq Btry, 4052d ASU, Ft Bliss, Texas.	ANTIAIRCRAFT ARTILLERY & GUIDED MISSILE CENTER Trial by GCM, convened at Fort Bliss, Texas, 19 February 1951. All: Dishonorable discharge, total forfeitures after promulgation and confinement for six (6) years. Federal Institution.

HOLDING by the BOARD OF REVIEW
TIBBS, SITNEK and SLADE
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 jointly upon the following Charge and Specifications:

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private-1 Huston C. Spears, 581st Transportation Truck Company Fort Bliss, Texas, now on Detached Service with Detachment "E", Headquarters Battery 4052nd Area Service Unit, Fort Bliss, Texas, Private-1 Thomas J. Wright, Battery "B" 32nd Antiaircraft Artillery Automatic Weapons Battalion, Fort Bliss, Texas, now on Detached Service with Detachment "E", Headquarters Battery 4052nd Area Service Unit, Fort Bliss, Texas, and Private-1 Gilbert T. King, Detachment "B", Headquarters Battery 4052nd Area Service Unit, Fort Bliss, Texas, now on Detached Service with Detachment "E", Headquarters Battery 4052nd Area Service Unit, Fort Bliss, Texas, acting jointly and in pursuance of a common intent, did, at Fort Bliss, Texas, on or about 20 January 1951, feloniously steal $62.50 (Sixty-two dollars and Fifty cents), lawful money of the United States, the property of Mr. Eugene L. Callery.

Specification 2: In that Private /s/ *** Spears, *** Wright, *** and *** King, *** acting jointly and in pursuance of a common intent, did, at Fort Bliss, Texas, on or about 20 January 1951, unlawfully enter the Headquarters Battery 4052nd Area Service Unit Writing Room (building No. T-876), with intent to commit a criminal offense, to wit: larceny, therein.

Each accused pleaded not guilty to the Charge and Specifications. Each was found guilty of Specification 1, except the words and figures "Sixty-two dollars and fifty cents ($62.50)", substituting therefor the words "More than Fifty Dollars ($50.00)", of the excepted words and figures, Not Guilty; of the substituted words, Guilty; and guilty of Specification 2 and the Charge. Evidence of two previous convictions was introduced as to accused Spears and Wright and one previous conviction as to accused King. 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: Spears and King for six years and Wright for seven years. The reviewing authority approved the sentence as to each accused but reduced the period of confinement as to accused Wright to six years. As to each accused a United States penitentiary or reformatory or other such institution was designated as the place of confinement, each prisoner to be committed to the custody of the Attorney General or his designated representative, for classification, treatment and service of sentence of confinement. Pursuant to Article of War 50e, the order directing execution of the sentence as to each accused was withheld.

3. The findings of guilty of the larceny alleged in Specification 1 of the Charge are supported by the evidence. The question presented by Specification 2 of the Charge is whether entering a building with the intent to commit larceny therein is considered the "unlawfully entering" requisite to the offense of housebreaking, where the accused had a right to enter the building. The evidence and discussion herein are, therefore, limited to that pertaining to Specification 2.

4. Evidence.

The facts disclosed by the evidence are undisputed and may be briefly summarized as follows:

On the evening of 20 January 1951, the three accused decided to break open and loot the cash box of an ice cream coin vending machine located in the day room of their organization. Pursuant to their

agreement and selecting an occasion when the day room was unoccupied one of the accused entered the room, broke open the machine and removed the cash box therefrom, while the other two accused acted as lookout or otherwise aided in the theft.

5. Discussion.

Specification 2 of the Charge alleges the offense of housebreaking, which is defined as "unlawfully entering the building of another with intent to commit a criminal offense therein" (MCM, 1949, subpara. 180e, p. 237). The elements of proof of housebreaking are stated as:

> "(a) That the accused entered the place alleged and
> (b) facts and circumstances indicating an intent to commit a criminal offense therein, as alleged." (id, p. 238)

The evidence establishes, as to each of these two elements of proof:

> a. That the accused entered their organization day room without any force, fraud, deception or other illegal means and that they had a right so to enter at that time.
>
> b. That the accused intended, prior to and at the time of entering, to break open a coin vending machine located in the day room in order to steal the contents of its cash box.

With further reference to the nature of the "entering" requisite to the offense of housebreaking, the model form for the specification of housebreaking alleges that the accused did "unlawfully enter" the building (MCM, 1949, App 4, Spec No. 90, p. 323; underscoring supplied). It would seem, therefore, from the definition of, and the model form for the specification for, this offense that the first element of proof is intended to be an "unlawful" entering of the building (See CM 237644, Miller, 24 BR 83, 86, in which the Board stated: "Unlawful entry is an essential element of the crime."). Although not controlling in this case, it is to be noted that Article 130 of the Uniform Code of Military Justice defines housebreaking as "unlawfully" entering with intent to commit a criminal offense, that the first element of proof of the offense includes "unlawfully" entering (MCM, 1951, par. 209), and that the suggested form for the specification charging such offense alleges that the accused did "unlawfully" enter (MCM, 1951, App 6, Spec No. 104). The Federal courts have already construed the District of Columbia housebreaking statute (22 D.C. Code 1801) as punishing the unlawful entry of

a building with intent to commit a criminal offense therein. As was stated in Lee v. United States, 37 App. D.C. 442, 444-445, 39 Wash. L. Rep. 750 (1911):

> "Count 1 charged unlawful entry into the dwelling house of one Anderson, with intent to commit larceny. *** Article 823 of the [D.C.] Code *** makes it an offense to break and enter, or to enter without breaking, any dwelling house or other structure specified therein, with the intent to commit any criminal offense. ***
>
> * * * *
>
> "To constitute the crime of housebreaking, it is necessary to show an unlawful entry, with the intent to commit some other offense." (Underscoring supplied)

This offense thus requires proof of two separate and distinct elements: (a) an unlawful entry into a building and (b) an intent to commit a criminal offense therein. For an entry to be "unlawful", as the first element of the offense, it appears that something more than proof of the second element of the offense is required. In other words, it is not believed that proof of one of two separate and independent elements of proof of an offense was ever intended to satisfy both elements of proof.

> "'It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.' A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error." (2 Sutherland, Statutes and Statutory Construction (3d Ed, 1943) 339, Sec 4705, and cases cited therein).

Applying the foregoing, if the intent to commit a criminal offense is considered sufficient to prove the "unlawful" nature of the entry, requisite to the first element of proof, in addition to serving as the second element of proof, the word "unlawful" would be inoperative, superfluous and void. In order to avoid such a result, it is necessary to conclude that there was no unlawful entering of the building as an element of a separate criminal offense in this case, inasmuch as the entry by the accused with the intent to commit larceny was otherwise lawful.

Board of Review Holdings

A search of the published holdings of the Board of Review and of other opinions of this office discloses no case in which the precise question here involved was determined. One case nearly in point is CM 237644, Miller, supra, in which the Board of Review held that the accused was not properly convicted of housebreaking, stating:

> "The evidence shows that on 15 June and 26 June 1943 accused was found late at night with one or more companions, in the mess hall of his company, cooking or preparing food which was the property of the United States. The circumstances indicated that he intended to eat such food. He had no right to be in the mess hall outside of meal hours unless accompanied by a cook or other kitchen personnel and none was with him on either occasion.
>
> "The crime of housebreaking, of which accused was charged by Specifications 1 and 2, is the unlawful entry of a building of another with intent to commit some criminal offense therein (MCM 1928, par 149a). Unlawful entry is an essential element of the crime. There is no testimony in the record as to when or in what manner accused entered the mess hall either on 15 June or 26 June. The fact that accused was found in the mess hall is proof that he entered it but is not proof that his entry was unlawful. He may have entered lawfully at mealtime and thereafter remained in the building until found. No reasonable inference that his entry was unlawful can be drawn from the time at which he was found in the mess hall because the record is silent as to what were the regular meal hours or when the personnel of the company were permitted to be in the building for mess purposes." (pp 85-86).

The companion cases of CM 322500, Barnes and Tarlton, 71 BR 223, and CM 322931, Wolsey, 71 BR 339, also touch upon the present question in part. In these cases each of the accused was charged with unlawful entry, in violation of Article of War 96, but not charged with an unlawful entry of the ship's hold with the specific intent of committing a criminal offense. The evidence established that the accused entered the hold for the purpose of pilfering the cargo contained therein. In holding the record of trial legally insufficient to support the findings of guilty and the sentence, the Board stated:

"and consequently, evidence of such intent will not support the inference that such entry was unlawful, unauthorized or prohibited in the first instance. Under these circumstances, it is just as probable that accused's presence in the hold was authorized. Where the only competent evidence is circumstantial, it must, in order to be sufficient to support a conviction, be of such nature as to exclude every reasonable hypothesis except that of accused's guilt (CM 153330, CM 169811, Dig Ops JAG 1912-40, Sec 395 (9))." (p. 342).

It is noted that the Board of Review in the Barnes and Wolsey cases did state that evidence of an intent to commit a criminal offense is not sufficient, of itself, to render an entry unlawful, unauthorized or prohibited. Although the Board might rely upon this statement as determinative of the present case, in view of the fact that this question is here squarely presented, apparently for the first time, in our military law, it is considered proper that further reference be made to decisions of the civilian courts. An exhaustive search has been made for cases in which an accused either broke and entered, or entered, the building, or one of the rooms of a building, of another, then intending to commit a criminal offense therein, and as to which breaking and entering, or entering, the accused had the permission or consent or invitation of the owner. All these elements are present in the cases mentioned in this discussion, which is limited to what appear to be leading and representative cases from the various jurisdictions.

State cases punishing whoever "enters" with criminal intent.

In State v. Moore, 12 N.H. 42 (1841), a guest at an inn entered the bar room of the inn through an open door during business hours and stole liquor therefrom. He was charged with burglary which, in that jurisdiction, included a lesser offense punishing whoever "enters". It was held that he was not guilty of this offense in view of his right to enter a public room of the inn. The court further stated that the intent to commit an offense within the bar room did not cause a trespass ab initio, such as would render unlawful the lawful entry. On this latter point, the United States Supreme Court has stated that "This fiction [the doctrine of trespass ab initio] *** has only been applied as a rule of liability in civil actions ***.": McGuire v. United States, 273 U.S. 95, 98, 47 Sup. Ct. 259, 260, 71 L. Ed. 556, 558 (1927). In State v. Mish, 36 Mont. 168, 92 Pac. 459, 122 Am. St. Rep. 343 (1907), also involving a statute punishing whoever "enters", the defendant entered his own room with intent to steal a third person's property therein. The court stated that the unlawful entry must be

itself a trespass and that the Montana legislature did not intend to declare a lawful entry with an unlawful intent, an offense. Stowell v. People, 104 Colo. 255, 90 P. 2d 520 (1939) involving a similar statute, concerned a freight conductor who had a key to a railroad warehouse and permission to use it to enter at all hours and who entered and stole parcels therefrom. He was held not guilty of a violation of this statute as he had a right to enter the building, which right was not destroyed by his intent to steal therefrom.

A leading case to the contrary is People v. Barry, 94 Calif. 481, 29 Pac. 1026 (1892), involving a statute similar to the cases previously mentioned, in which the defendant was said to be guilty of the offense where he entered a grocery store through the public entrance during business hours with unlawful intent. The court reasoned that the legislature has said that every person who enters a store with intent to commit larceny is guilty, that this language is clear and its meaning patent, and that a person who enters a store with felonious intent is not one of the public invited, nor is he entitled to enter. The reasoning of the California court was followed in Pinson v. State, 91 Ark. 434, 121 S.W. 751 (1909) in which the defendant was found guilty of "unlawfully" entering, where he entered a saloon during business hours through the regularly open entrance with intent to steal. McCreary v. State, 25 Ariz. 1, 212 Pac. 336 (1923) and State v. Bull, 47 Ida. 336, 276 Pac. 528, Note, 15 St. Louis L. Rev. 92 (1929), each of which involved a statute similar to that of California, also apply the same reasoning. In McCreary v. State, supra, the defendant who had permission to pass through an adjoining room at will stole a watch while passing through and was convicted. In State v. Bull, supra, the defendant's conviction was sustained where he acted as lookout while his accomplice entered a pool room through the front door during business hours with intent to steal.

State Cases Punishing Whoever "Breaks and Enters" With Criminal Intent.

Entry into a store during business hours, through a closed door, with the intent to commit an offense therein, has been held not to be a breaking and entering: State v. Newbegin, 25 Me. 502 (1846). The court stated:

> "The offence of breaking is a violation of the security designed to exclude. *** The opening of a shop door in the day time [or in the evening], which had been closed only to exclude the dust or cold air, with a design that it should be opened by all, who should be inclined to enter, could not be a violation of any security designed to exclude, and therefore not a breaking. It would not even be a trespass, for the custom of trade in it would be evidence of a general license to enter. ***"

Another early American case involving a prosecution for burglary where the defense was that the breaking and entering was with the consent of one with a right of entry is Clarke v. Commonwealth, 25 Grat. (Va.) 908 (1874). In this case the defendant and H, pursuant to a conspiracy, used H's key to unlock and open the door of a room with the intent of stealing the property of H's roommate. The court held that an owner or a joint tenant cannot be guilty of burglary of his own house because, by definition, burglary is the breaking and entering of the house of another. There was no breaking here and the entry was lawful, being with the consent of the owner or occupier.

In State v. Corcoran, 82 Wash. 44, 143 Pac. 453, L.R.A. 1915 D, p. 1015 (1914), an employee received the key of a store to open it only during business hours. He used the key to enter and steal from the store at times when it was not open for business. The court stated that if the defendant was authorized to enter at any time of the day or night there could be no unlawful breaking or entering. In State v. Stephens, 150 La. 944, 91 So. 349, 23 A.L.R. 286 (1922), involving prosecution for breaking and entering a habitation, the court stated:

> "*** The opening of the doors of the store is an invitation to enter; hence the intention cannot possibly have been to make the mere entering a crime. It is against all reason, for instance, that a person entering one of the large department stores of this city with the intention of shoplifting should be punished as for burglary. Such an act is certainly not an offense against habitations."

Although the defendant was found not guilty in the Louisiana case primarily because a store was not a habitation, the quoted language of the court is considered relevant. In Britton v. State, 145 S.W. 2d 878 (Tex. Cr. App. 1940), a neighbor who had the owner's consent to enter at any and all times was held not guilty of burglary when he entered and stole property therein.

There are cases with a contrary view. In Lowder v. State, 63 Ala. 143, 35 Am. Rep. 9 (1879), the court stated, by way of dictum, that an office boy who had a key to the office and slept there would be guilty of breaking and entering if, at the time he entered, he opened a door with intent to steal money from an adjoining bedroom. State v. Howard, 64 S. Car. 344, 42 S.E. 173, 92 Am St. Rep. 804, 58 L.R.A. 685 (1902), held that a servant who shared his master's quarters would be guilty of breaking and entering if, when he opened the door, he intended to steal therefrom. In Young v. Commonwealth, 126 Ky. 474, 104 S.W. 266, 128 Am. St. Rep. 326, 15 Ann. Cas. 1022 (1907), a servant

who occupied a house jointly with the owner obtained a leave of absence for several days upon the pretense of visiting elsewhere. After his master had locked the house and departed the servant obtained the key from his master's wife saying that he desired to obtain some of his own clothing from the house (which he had a right to do). In fact he intended to steal his master's clothing from the house. The court held him properly convicted of breaking and entering as his right of entry had terminated during his leave of absence and as the key had been obtained by fraud.

The New York cases pertaining to unlawful entry are in conflict: People v. Kelley, 253 App. Div. 430, 3 N.Y.S. 2d 46 (1938), holds that there can be no breaking or entering of a building as an element of the crime of statutory burglary if the person entering has the right to do so, whereas in People v. Sine, 277 App. Div. 908, 98 N.Y.S. 2d 588 (1950), containing a dissenting opinion, a shoplifter who entered through the public entrance by opening the door during business hours was held guilty of statutory burglary. The decision of the latter case has been adversely criticized in 2 Syracuse L. Rev. 193-195 (1950). It is also noted that the Sine case, supra, is on appeal to the New York Court of Appeals: 98 N.Y.S. 2d 661 (14 July 1950).

It will be noted that the State cases are divided into two groups: first, those where only an entry with criminal intent was required, and second, those requiring both a breaking and entering with criminal intent. However, most of the later cases, except possibly those following the California doctrine, consider all the cases interchangeably as proper precedent. Ignoring, therefore, the distinction previously made, analysis of these cases from another aspect discloses certain legal principles common to both groups of cases.

Discussion of Cases.

All the foregoing cases (to which reference will be made only by name hereafter) as well as other authorities (6 Cyc. 180 et seq.; 9 C.J. 1016 et seq.; Anno., L.R.A. 1915 D, 1015 et seq.; Anno., 23 A.L.R. 288 et seq (1923); Note, 2 Syracuse L. Rev. 193 (1950); cf. 12 C.J.S. 675 et seq.; Note, 15 St. Louis L. Rev. 92 (1929); Note, 6 Mo. L. Rev. 209 (1941)) appear to establish the following principles:

a. Where a sole or joint owner or joint occupant enters his own dwelling with criminal intent he is not guilty of burglary, housebreaking or unlawful entry: Clarke v. Comm. (Va.), State v. Howard (S. Car.), State v. Mish (Mont.); contra: McCreary v. State (Ariz.). The reasons given for such rule are: each of these offenses, as a matter of definition, requires a breaking and entering, or entering,

the property of another; the unlawful entry must be itself a trespass; the legislature did not intend to declare a lawful entry with unlawful intent, an offense; and the owner has a right to break and enter his own property.

b. As the owner or occupant has the right to break and enter his own property, one accompanying the owner or occupant with the same criminal intent with his consent likewise is not guilty because he had a right of entry derived from the consent of one with a right of entry: Clarke v. Comm. (Va.); nor would one be guilty who had the consent of the owner to enter at any and all times: Britton v. State (Tex.).

c. A servant or slave, however, breaking and entering a house or a room with criminal intent is considered guilty in some jurisdictions: United States v. Bowen, 4 Cranch C.C. 604, Fed Cas No. 14,629 (Cir. Ct. D.C. 1835); Lowder v. State (Ala.), State v. Howard (S. Car.). These decisions with respect to servants appear to be based upon early English precedents: Edmonds Case, Hutton 20, J. Kelyng 67, 123 English Reprint 1071 (C.P., circa 1618) and Rex v. Gray, 1 Strange 481, 93 English Reprint 648 (K.B., circa 1721) which state that the breaking or the entry was not within the servant's trust, but to the contrary is 2 Hale, Pleas of the Crown, 354-355 stating: "*** the opening the door *** is within his trust and so no breaking of the house ***" (For a further discussion of the English cases, see Lowder v. State, and Note, L.R.A. 1915D, 1015). Other jurisdictions agree with Hale, supra, that the opening of the door (technically a "breaking") is "within his trust" and so there is no unlawful breaking or entering: State v. Corcoran (Wash.) and Stowell v. People (Colo.).

d. Anyone obtaining entry by force, fraud or conspiracy with a servant with criminal intent is universally considered to have unlawfully broken and entered: Lowder v. State (Ala.) and Young v. Comm. (Ky.). Similarly, if a person's right to enter is limited as to time or place of entry, there is no authority or permission to enter at a time or place other than that authorized: Colbert v. State, 91 Ga. 705, 17 S.E. 840 (1893), in which case the janitor of a boarding house took a key which was hanging up in the hall and with it opened and entered with criminal intent a room forbidden to him.

e. Where a guest at an inn enters the barroom of an inn through an open door during business hours and steals therefrom, he is not guilty of burglary in view of his right to be received as a lodger by the innkeeper and his accompanying right to enter a public room of the inn; and there is no trespass ab initio caused by the intent to commit an offense therein such as would make unlawful the initial lawful entry: State v. Moore (N.H.). To the same effect is Love v. State, 52 Tex. Cr. App. 84, 105 S.W. 791 (1907), in which breaking open a drawer in a public

telephone booth located in a railway waiting room and stealing money therefrom was not burglary. The court stated that any party desiring to use the booth had the authority and consent, and was invited, to enter and use it by paying the customary charges.

f. Entry with criminal intent into a store during business hours through the public entrance is not an offense: State v. Newbegin (Me.), but People v. Barry (Calif.) and those jurisdictions adopting the California view (Pinson v. State (Ark.) and State v. Bull (Ida.)) hold to the contrary, stating that the legislative intent was to punish a person who entered a building with criminal intent.

Conclusion.

When the accused entered their organization day room it was with permission, consent, authorization and by invitation. It appears that the Congress intended to require an unlawful entering of a building as well as a concurrent intent to commit a criminal offense therein, as elements of the offense of housebreaking. This view is supported by rules of statutory construction as well as by what is considered the more persuasive reasoning. Inasmuch as a coin vending machine located within a building obviously is not a "building", breaking and entering such a machine does not constitute this criminal offense.

6. For the foregoing reasons, the Board of Review holds the record of trial legally sufficient to support the findings of guilty, as to each accused, of Specification 1 of the Charge and the Charge, legally insufficient to support the findings of guilty, as to each accused, of Specification 2 of the Charge, and legally sufficient to support only so much of the sentence, as to each accused, as provides for 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 five years.

Richard L. Gibbs, JAGC

William G. Sitnek, JAGC

Arthur R. Slade Jr., JAGC

JAGQ - CM 345377 1st Ind APR 30 1951

JAGO, Dept of the Army, Washington 25, D. C.

TO: Commanding General, Antiaircraft Artillery and Guided Missile Center, Fort Bliss, Texas

1. In the case of Private-1 Huston C. Spears (RA 16265953), 581st Transportation Truck Company, Private-1 Thomas J. Wright (RA 16265796), Battery B, 32nd Antiaircraft Artillery Automatic Weapons Battalion, and Private-1 Gilbert T. King (RA 19295639), Detachment B, Headquarters Battery, 4052nd Area Service Unit, all on Detached Service with Detachment E, Headquarters Battery, 4052nd Area Service Unit, Fort Bliss, Texas, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty, as to each accused, of Specification 1 of the Charge and the Charge, legally insufficient to support the findings of guilty, as to each accused, of Specification 2 of the Charge, and legally sufficient to support only so much of the sentence, as to each accused, as provides for 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 five years. Under Article of War 50e this holding and my concurrence therein vacate the findings of guilty, as to each accused, of Specification 2 of the Charge, and so much of the sentence, as to each accused, as is in excess of 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 five years.

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 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 345377).

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

1 Incl
R/T.

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

JAGZ CM 345388

APR 5 1951

UNITED STATES	)	82D AIRBORNE DIVISION
	)	
v.	)	Trial by G.C.M., convened at Fort Bragg, North Carolina, 9 March 1951. Dishonorable discharge (suspended), total forfeitures after promulgation and confinement for one (1) year. Disciplinary Barracks.
Private E-1 THOMAS G. McDONOUGH (RA 13353556), Company C, 504th Airborne Infantry Regiment.	)	

HOLDING by the BOARD OF REVIEW
LUDINGTON, WOLF and BYRNE
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 charged with and found guilty of absence without leave for the period 13 November 1950 to about 12 December 1950, and from 21 December 1950 to about 23 January 1951, in violation of Article of War 61 (Specifications 1 and 2, Charge I); and failure to obey the lawful order of a superior officer in violation of Article of War 96 (Specification, Charge II). Evidence of one previous conviction was introduced. The court sentenced the accused 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 the reviewing authority may direct for one year. The reviewing authority approved the sentence but suspended the execution of the dishonorable discharge until the soldier's release from confinement and designated the Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, as the place of confinement. The result of the trial was promulgated in General Court-Martial Orders Number 23, Headquarters, 82d Airborne Division, Fort Bragg, North Carolina, 17 March 1951.

3. The Board is of the opinion that the record of trial is legally sufficient to support the findings of guilty. The sole question for consideration is whether the findings of guilty support the sentence.

4. The act of accused in absenting himself without leave from 21 December 1950 to 23 January 1951 (Specification 2, Charge I) is merely an additional aspect of his failure to obey the lawful order of his superior officer to report to the Commanding Officer, Company "C", 504th Airborne Infantry, Fort Bragg, North Carolina, not later than 2400 hours, 22 December 1950, as alleged in the Specification of Charge II. (SPCM 1711, Davis, 6 BR-JC 335; CM 345000, Langley, 15 March 1951). Accordingly, these two offenses constitute but different aspects of the same transaction and the court should have imposed punishment only with reference to the act in its most important aspect (MCM, 1949, par. 80a). Here the failure to obey the lawful order of his superior officer in violation of Article of War 96 is the most serious aspect of the act or transaction which had its inception on 21 December 1950, as alleged. The maximum authorized period of confinement for the offense of failure to obey the order of a commissioned officer, is six months, and for the offense of absence without leave from 13 November 1950 to 12 December 1950 (Specification 1, Charge I), is two months and twenty-seven days. Since the authorized period of confinement for the two offenses exceeds six months, bad conduct discharge and forfeiture of all pay and allowances to become due after the order directing execution of the sentence, is authorized (MCM, 1949, par. 117c, Section B).

5. For the foregoing reason the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as involves a discharge from the service with a bad conduct 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 eight months and twenty-seven days.

_____, J.A.G.C.

_____, J.A.G.C.

_____, J.A.G.C.

JAGZ CM 345388 1st Ind. APR 10 1951

JAGO, Dept. of the Army, Washington 25, D. C.

To: Commanding General, 82d Airborne Division, Fort Bragg, North Carolina

1. In the case of Private E-1 Thomas G. McDonough (RA 13353556), Company C, 504th Airborne Infantry Regiment, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of the Specifications and the Charges, and legally sufficient to support only so much of the sentence as provides for discharge from the service with a bad conduct 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 eight months and twenty-seven days. Under Article of War 50e this holding and my concurrence vacate so much of the sentence as is in excess of a bad conduct 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 eight months and twenty-seven days.

2. It is requested that you publish a general court-martial order in accordance with said holding and this indorsement, restoring all rights, privileges and property of which the accused has been deprived by virtue of that portion of the sentence so vacated. A draft of a general court-martial order designed to carry into effect the foregoing recommendation is attached.

3. 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 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 345388).

E. M. Brannon

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

2 Incls
1. R/T
2. Dft GCMO

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

JAGK CM 345443

APR 1 3 1951

UNITED STATES)	FORT LEONARD WOOD, MISSOURI
)	
v.)	Trial by G.C.M., convened at Fort Leonard Wood, Missouri, 1 and 2 March 1951. Dismissal, total forfeitures after promulgation, and confinement for eighteen (18) days.
)	
First Lieutenant JOHN R. IMLER (0-1535776), 5017 Army Service Unit, Fort Leonard Wood, Missouri)	

OPINION of the BOARD OF REVIEW
BARKIN, WOLF and BROWN
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.

Specifications 1, 3, 7,8,9,11,12 and 13: (Findings of not guilty).

Specifications 5 and 6: (Nolle Prosequi).

Specifications 2 and 14: (Disapproved by reviewing authority).

Specification 4: In that 1st Lt John R Imler, Chemical Warfare Section, 5017 ASU, did, at Fort Leonard Wood, Missouri, on or about 15 November 1950, with intent to deceive, wrongfully and unlawfully make and utter to Mrs. Iris V Imler, a certain check, in words and figures as follows, to wit:

80-1804
WAYNESVILLE SECURITY BANK 815

WAYNESVILLE, MO., 15 November 1950 No.

PAY TO THE
ORDER OF Mrs. Iris V Imler $100.00

One-hundred and No/100 ---------- DOLLARS

s/ John R Imler 1/Lt

for payment of family expenses, the said 1st Lt John R. Imler, then well knowing that he did not have and not intending that he should have sufficient funds in the Waynesville Security Bank for payment of said check.

Specification 10: In that 1st Lt John R Imler, Chemical Warfare Section, 5017 ASU, did, at Crocker, Missouri, on or about 30 December 1950, with intent to defraud, wrongfully and unlawfully make and utter to the Bank of Crocker, a certain check, in words and figures as follows, to wit:

PINE BLUFF, ARK. 12-30-50 19 81-43
THE SIMMONS NATIONAL BANK OF PINE BLUFF 861

PAY TO THE
ORDER OF Bank of Crocker $50.00

Fifty & No/100 ---------- DOLLARS

s/ John R. Imler 1/Lt

and by means thereof, did fraudulently obtain from the Bank of Crocker, $50.00 in cash, he, the said 1st Lt John R Imler, then well knowing that he did not have and not intending that he should have sufficient funds in the Simmons National Bank for payment of said check.

CHARGE II: Violation of the 96th Article of War. (Disapproved by reviewing authority)
Specifications 1 and 2: (Findings of not guilty).

Specification 3: (Disapproved by reviewing authority).

CHARGE III: Violation of the 61st Article of War

Specification: In that 1st Lt John R Imler, Chemical Warfare Section, 5017 ASU, did without proper leave absent himself from his station at Fort Leonard Wood, Missouri, from about 22 January 1951 to about 6 February 1951.

CHARGE IV and Specifications: 28 Jan (Findings of not guilty).

He pleaded not guilty to all charges and specifications. He was found guilty of Specifications 2,4,10 and 14 of Charge I and of Charge I, guilty of Specification 3 of Charge II and of Charge II, guilty of the Specification of Charge III and of Charge III; not guilty of Specifications 1,3,7, 8,9,11,12 and 13 of Charge I, not guilty of Specifications 1 and 2 of Charge II, and not guilty of the Specifications of Charge IV and of Charge

IV. 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 six months. The reviewing authority disapproved the findings of guilty of Specifications 2 and 14 of Charge I and Specification 3 of Charge II and Charge II, approved "only so much of the findings of guilty of Charge III and its specification as involves findings that the accused absented himself without leave at the place and time alleged and remained so absent until 28 January 1951 in violation of Article of War 61," 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 to be confined at hard labor for eighteen days," and forwarded the record of trial for action under Article of War 48.

3. Evidence

a. For the Prosecution

Specification 4, Charge I

Only the evidence relating to the offenses of which the accused was found guilty as approved by the reviewing authority will be summarized.

By deposition dated 14 February 1951, Mrs. Iris V. Imler testified without objection that she is the wife of the accused. She and the accused did not live together "within the past year and a half." They have two children who live with her. As the accused has not adequately provided for the support of his family, Mrs. Imler found it necessary to move into the home of the accused's mother. On 15 November 1950 she secured employment to maintain herself and the children (R 13,14,27).

Mrs. Eula Burchard, Assistant Cashier, Waynesville Security Bank, testified that she handles all the accounts of persons who have checking accounts in the bank and "give /s/ /her/ O. K. on all checks cashed." Mrs. Burchard stated she is familiar with the accused's signature and identified Prosecution Exhibit 7 as a photostatic copy of a check dated 15 November 1950 in the amount of $100 drawn on the Waynesville Security Bank, payable to Mrs. Iris V. Imler and signed by the accused. This check, received by the bank "in the normal course of banking" on 25 November 1950 was dishonored because of "insufficient funds" in the accused's account (R 62,63). Prosecution Exhibit 8, a ledger sheet of the accused's checking account which was "prepared in the course of usual business of the bank" reflects that on 15 November 1950 the balance of the accused's checking account was $6.64. At no time between 15 November and 5 December 1950 did accused's bank balance exceed $58.62. On 5

December 1950 his bank balance was zero (R 63-65).

Specification 10, Charge I

Mr. D. D. Salveter, Cashier, Bank of Crocker, Crocker, Missouri, identified Prosecution Exhibit 11 as a photostatic copy of a check in the amount of $50.00, the original of which he cashed for a person giving the name of the accused. This check, admitted in evidence without objection, bears the date 30 December 1950, was drawn on the Simmons National Bank of Pine Bluff, Arkansas, and bore the name of the accused. After being duly deposited to the drawee bank for collection the check was returned unpaid because "there were no funds to pay it" (R 70,72).

It was stipulated that if John R. Miller, Cashier of the Simmons National Bank of Pine Bluff, Arkansas, were present in court he would testify "that he is the custodian of the bookkeeping records of said bank; that all checks drawn on said bank by anyone having a checking account in said bank and which are returned to the payee named therein for insufficient funds, account closed, or any other reason, are personally handled by him"; that the accused's checking account in the bank was closed on 14 December 1950 as there were no funds in the account; that about 5 January 1951 a check in the sum of $50 dated 30 December 1950, payable to the order of the Bank of Crocker and signed by the accused, drawn on the Simmons National Bank of Pine Bluff, Arkansas, was received through the mails for payment by said bank and was stamped "Returned, Account Closed"; that on the date of said check and on the date said check was returned the accused had no account in said Simmons National Bank of Pine Bluff, Arkansas; that Prosecution Exhibit 11 is a photostatic copy of said check, and that the signature on said check was the same as the signature of the accused (R 36, Pros Ex 14).

Charge III and its Specification

A duly authenticated extract copy of a morning report of "5017 ASU, Sta Comp., Ft Leonard Wood, Mo." was admitted in evidence without objection by the defense as Prosecution Exhibit 19 (R 45).

This exhibit lists the following pertinent entries:

"27 Jan 51

Imler John R 01535776 1st Lt
Fr absent sk Walter Reed GH Wash DC ID
unk to AWOL eff 22 Jan 51 hour unk

"5 Feb 51

Imler John R 01535776 1st Lt
Fr AWOL to absent sk Valley Forge GH
Phoenixville Pa 2200 hours 3 Feb 51 LD
unk

Imler John R 01535776 1st Lt
Fr sk Valley Forge GH Phoenixville Pa to
hands mil auth 1900 hours 4 Feb 51
***"

b. For the Defense

The testimony of Major Mitchel Goldenthal and the stipulated testimony of Major Raymond O. Manker, Lieutenant Colonel Gregory J. Freeman, T. P. Crusius, Pastor of the Greenfield Parish, Evangelical and Reformed Church, Claysburg, Pennsylvania, and Lieutenant Colonel David Armitage pertained to the excellent efficiency of the accused as an officer and to his good reputation (R 111-116, Def Exs D,E,F).

Major Ernest E. Grunewald, Registrar, U.S. Army Hospital, Fort Leonard Wood, Missouri, testified he was custodian of the medical records at the hospital. He identified Defense Exhibit H as a duplicate copy of a "Sick and Wounded Report" of the U.S. Army Dispensary, Pittsburgh, Pennsylvania, which he received "in the ordinary course of business." This exhibit, a copy of which was admitted in evidence without objection showed that the accused "came under military control" of the U.S. Army Dispensary, Pittsburgh, Pennsylvania, from absent without leave on 28 January 1951, and that he was transferred to Valley Forge Army Hospital, Phoenixville, Pennsylvania, on 2 February 1951 (R 117,118).

The accused, having been apprised of his rights as a witness, elected to make an unsworn statement (R 120).

In August, 1949, his child became ill with typhoid fever. The child was in a civilian hospital and because of quarantine regulations she could not be moved to an Army hospital. During this time his wife was also admitted to the hospital for child birth. His expenses up to and including 31 December 1949 were approximately $2,700. He was hard pressed financially to pay his bills. In June, 1950, he developed symptoms of "polio" which left him with a weakness in his right leg. After his release from the hospital he entered the Atomic Energy School on 1 July. Shortly after entering the school he had a nervous breakdown "due to the studies and also *** financial difficulties which were on /his/ mind." He was sent to Walter Reed Hospital and he was soon able to return to duty, being assigned to Fort Leonard Wood, Missouri, as Staff Chemical Officer. Because of complaints from his creditors he was advised by superior officers to liquidate his debts. Early in 1951, he

was advised that his child was sick again and, with the help of the American Red Cross, he obtained leave and went home. His domestic situation and nervous condition were such that he returned to Walter Reed Hospital on 17 January for further psychiatric treatment. Because of the crowded conditions at the hospital it was recommended that he return to Fort Leonard Wood for treatment at the station hospital. He requested orders sending him back to his station, but was told by a medical officer that it was "not the policy to issue orders for casual patients." He visited his home on the way back to Fort Leonard Wood. There, at the suggestion of his family physician, he entered the Veterans Hospital in Altoona, Pennsylvania. On 3 February, he was transferred to Valley Forge Hospital at Phoenixville, Pennsylvania, and the following day two officers from Fort Leonard Wood arrived and accompanied him back to Fort Leonard Wood. Shortly after his arrival he was placed in a "closed ward" in the station hospital. He was told his mail would be censored and he was denied contact with every one except his defense counsel, the doctor and his family (R 121-127).

Captain Thomas P. Clark, MC, a psychiatrist at the United States Army Hospital, Fort Leonard Wood, Missouri, testified the accused's condition was diagnosed as being one of neuropsychiatric depressive reaction and that his reactions to his present situation are normal. It was his opinion that the accused could at all times distinguish right from wrong and that he was able to adhere to the right (R 128-131).

4. Discussion

Specification 4, Charge I, alleges that the accused did, with intent to deceive, wrongfully and unlawfully make and utter a check in the amount of $100 payable to Mrs. Iris V. Imler, drawn on the Waynesville Security Bank, Waynesville, Missouri, well knowing that he did not have, and not intending that he should have, sufficient funds in the drawee bank for payment of said check, in violation of Article of War 95.

The essential elements of proof of the offense charged are:

(a) The making and uttering of a check,

(b) with intent to deceive thereby;

(c) having insufficient funds on deposit to pay it when presented in due course to the drawee bank; and

(d) knowing that there are not, and not intending that there be, sufficient funds on deposit in the drawee bank to pay it when presented in due course.

Although there was no direct evidence that the accused had in fact issued the check, the proof shows that the check, admitted in evidence without objection, was in the accused's handwriting, that it bore the purported signature of the payee as indorser, and that the check was dishonored at the drawee bank because of insufficient funds in the accused's account. Thus the question is whether or not the court was entitled to infer from these circumstances that the accused in fact uttered the check as alleged. No objection was made either to the genuineness of these signatures or to the genuineness of the check itself. "A failure to object to a proffered document on the ground that the genuineness of any signature appearing thereon has not been shown, or on the ground that the genuineness of the document in general has not been shown, may be regarded as a waiver of such objection" (MCM, 1949, par 129b, p 164). In addition, the check shows cancellation stamps of banks and clearing houses through which it must have passed in the course of usual banking processes. These facts are evidence that would warrant the court in finding that the checks were presented to the drawee bank in due course (CM 318727, Hoffman, 68 BR 1,14). The accused offered no evidence to establish that after he made the check it was lost or stolen from him or that he otherwise parted with it other than by negotiation thereof. Although an accused's silence may not be commented on by the trial judge advocate, nevertheless, an accused's failure to produce evidence, which if favorable would naturally have been produced, justifies the inference that the facts are unfavorable to his case (CM 294486, Gault, 57 BR 333, 338-339). Here the accused's failure to produce evidence to show that he lost possession of the check through some means other than negotiation justifies the inference that he did not lose possession of it through such other means. Accordingly, the court was warranted in inferring from the foregoing evidence that the accused parted with possession of the check by negotiating it as alleged (CM 318727, Hoffman, supra).

There remains to be considered the question whether the evidence established sufficiently that the check was uttered with intent to deceive as alleged. It was shown that the accused and his wife were estranged and lived apart, that he had not been providing adequately for her and their children's support, and that the check was presumably issued to his wife as a contribution to their support and maintenance. The issuing of the check thus appears to have been a deceitful ruse calculated to gain temporary respite from the pressure on the accused to discharge his legal obligation of supporting his family. His intent to deceive his wife by uttering the check when he must have known that his bank account was insufficient to satisfy it may thus be inferred (CM 322695, Pattison, 71 BR 309, 313-314).

In our opinion the making and uttering of the check in question under such circumstances constitutes a military offense and is conduct unbecoming an officer and a gentleman (CM 322695, Pattison, supra).

Specification 10, Charge I, alleges that on or about 30 December

1950 the accused made and uttered to the Bank of Crocker with intent to defraud a check in the amount of $50 and by means thereof did fraudulently obtain $50 in cash, knowing that he did not have and not intending that he should have sufficient funds in the drawee bank for the payment of said check.

It is undisputed that the accused wrote and cashed the check described in the specification, and that he obtained the face amount in cash from the payee thereof on 30 December 1950. It is also undisputed that the accused's account with the drawee bank was wholly depleted and consequently closed at the time he cashed the check and had been closed since 14 December. From these facts, the court could infer that the accused was aware of the fact that his account was closed, and that he did not intend to make the check good. The obtaining of a then present consideration by the accused for the checks with the knowledge of the void state of his account constitutes the intent to defraud as alleged (CM 336419, Halprin, 5 BR-JC 301,319; CM 343015, Hutchins, 28 Sep 1950). The evidence warrants the findings of guilty of the specification in violation of Article of War 95 (CM 343015, Hutchins, supra).

The accused was also charged with and found guilty, as approved by the reviewing authority, of absence without proper leave from his station at Fort Leonard Wood, Missouri, from 22 January 1951 until 28 January 1951, in violation of Article of War 61. A duly authenticated extract copy of the morning report from the accused's organization showed the date of his initial absence (Pros Ex 19). By defense evidence it was established that the accused returned to military control on 28 January 1951. The proof thus sustains the court's finding of guilty of the charge and its specification as modified by the reviewing authority beyond a reasonable doubt.

5. The reviewing authority designated the Post Stockade, Fort Leonard Wood, Missouri, as the place of confinement. Paragraph 87b, Manual for Courts-Martial U.S. Army, 1949, provides, inter alia,

> "If the sentence of a general court-martial as ordered executed provides for confinement, the place of confinement will be designated. In cases involving imprisonment for life, dismissal and confinement of officers, and the dismissal and confinement of cadets, 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 336706, Pomada, 3 BR-JC 209).

6. The Department of the Army records show that accused is 27 years of age, married, and has one child. Upon his graduation from

high school in 1940 he was self-employed as a truck driver until he enlisted in the Army on 16 September 1942. During his enlisted service he was acting first sergeant of an Antiaircraft Headquarters Battalion. He was commissioned as a second lieutenant after successfully completing Officers Candidate School on 11 November 1944. From 26 March 1945 until 16 April 1946 he served in the Asiatic Pacific Theater. On 23 April 1946 he was promoted to a first lieutenant and reverted to inactive status on 30 May 1946. His present tour of active duty extends from 12 July 1948. His overall efficiency ratings of record are 076, 101, 112, 105, 099,076,095 and 053.

7. 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. Dismissal is mandatory upon a conviction of a violation of Article of War 95 and is authorized upon conviction of a violation of Article of War 61.

Arthur Barkin, J.A.G.C.

Samuel S. Cowen, J.A.G.C.

Sumner A. Brown, J.A.G.C.

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

JAGU CM 345443

MAY 9 1951

UNITED STATES	)	FORT LEONARD WOOD, MISSOURI
	)	
v.	)	Trial by G.C.M., convened at Fort Leonard Wood, Missouri, 1 and 2 March 1951. Dismissal, total forfeitures after promulgation, and confinement for eighteen days.
	)	
First Lieutenant JOHN R. IMLER, 0-1535776, 5017 Army Service Unit, Fort Leonard Wood, Missouri	)	

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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 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 wrongfully and unlawfully making and uttering to Mrs. Iris V. Imler, with intent to deceive, a check dated 15 November 1950, drawn on Waynesville Security Bank, payable to the order of Mrs. Iris V. Imler in the amount of $100.00 for payment of family expenses, at Fort Leonard Wood, Missouri, on or about 15 November 1950, the accused then well knowing that he did not have and not intending that he should have sufficient funds in the bank for payment of the check, in violation of Article of War 95 (Specification 4, Charge I); wrongfully and unlawfully making and uttering to the Bank of Crocker, with intent to defraud, a check dated "12-30-50," drawn on the Simmons National Bank of Pine Bluff (Arkansas), payable to the order of Bank of Crocker in the amount of $50.00, at Crocker, Missouri, on or about 30 December 1950, and by means thereof fraudulently obtaining from the payee $50.00 in cash, the accused then well knowing that he did not have and not intending that he should have sufficient funds in the bank for payment of the check, also in violation of Article of War 95 (Specification 10, Charge I); and absenting himself without proper leave from his station at Fort Leonard Wood, Missouri, from about 22 January 1951 to about 6 February 1951, in violation of Article of War 61 (Specification, Charge III).

No evidence of previous convictions was introduced. The accused 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 six months. The reviewing authority, along with other action, in effect approved only so much of the finding of guilty of the specification of Charge III as involved a finding that the accused absented himself without leave at the place and time alleged and remained so absent until 28 January 1951, approved only so much of the sentence as provided for dismissal, total forfeitures after promulgation and confinement at hard labor for eighteen days, 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. The Judicial Council concurs with the Board that the record of trial is legally sufficient to support the findings of guilty of Charge I and Specification 10 thereof and of Charge III and its specification as modified and to support the sentence as modified. The only question is whether the record is sufficient to support the findings of guilty of Specification 4 of Charge I and of Charge I with respect to that specification. We concur with the Board that the evidence, although circumstantial only, justifies the inference that the accused made and uttered the check in question. We also concur that the presentation of the check for payment and its dishonor by the drawee bank because of insufficient funds are adequately established. The only question is whether the evidence establishes that at the time the accused made and uttered the check he had the intent to deceive, knowing that he did not have and not intending that he should have sufficient funds in the drawee bank for payment of the check. From the fact that the check was dishonored because of insufficient funds in the accused's account may be inferred his awareness of the inadequacy of the account, his lack of intent to make it adequate and his intent to deceive, as alleged (CM 338736, Lucas, 6 BR-JC 259, 263, and cases therein cited; CM 343015, Hutchins, BR-JC, October 1950; see CM 343752, Scoratow, BR-JC, March 1951). These inferences, standing unrebutted, warrant the finding of guilty. In view of this conclusion, we find it unnecessary to pass upon the propriety of the Board's consideration of and inferences from the deposition of the accused's wife, to the admission of which the defense objected.

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 as modified by the reviewing authority and to warrant confirmation of the sentence as so modified.

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

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 John R. Imler, 0-1535776, 5017 Army Service Unit, Fort Leonard Wood, Missouri, upon the concurrence of The Judge Advocate General the sentence as modified by the reviewing authority is confirmed and will be carried into execution. An appropriate Guardhouse 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.

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

10 May 1951

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

JAGK - CM 345454

MAY 22 1951

UNITED STATES v. Captain NICHOLAS VAN ECK (0-1945510), Headquarters 9201 Technical Service Unit-Transportation Corps.	NEW YORK PORT OF EMBARKATION Trial by G.C.M., convened at Headquarters New York Port of Embarkation, 28 February and 2 and 3 March 1951. Dismissal.

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

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 96th Article of War.

Specification 1: In that Captain Nicholas Van Eck, Transportation Corps, Headquarters, 9201 Technical Service Unit-Transportation Corps, did, at New York City, New York, in or about the month of February 1950, make and utter to Park & Tilford Import Corporation, a certain check, in words and figures as follows, to wit:

Check No. 675 New York June 30 1950 63

THE NATIONAL CITY BANK OF NEW YORK 1-8/210

BUSH TERMINAL BRANCH
Third Avenue at Thirty-Fifth Street
Brooklyn, N.Y.

Pay To The Order Of Park & Tilford Import Corp. $200.00

Two hundred and xx/xx ---------- DOLLARS

Captain Nicholas Van Eck

and did wrongfully fail to maintain a sufficient balance in the drawee bank to meet payment on said check when presented for payment.

NOTE: Specifications 2 through 9 vary materially from Specification 1 only with respect to the payee, date of issuance of check, date of check, number of check and amount of check as follows:

Spec.	Payee	Date of Issuance	Date of Check	No. of Check	Amount
2	Park & Tilford Import Corp.	Feb 1950	31 Aug 1950	677	$200.00
3	Henry Kelly Imp. & Dist. Co. Inc.	3 Jan 1950	3 Jan 1950	583	500.00
4	" " " " "	13 Mar 1950	13 Mar 1950	unnumbered	300.00
5	" " " " "	10 Apr 1950	15 June 1950	682	100.00
6	" " " " "	10 Apr 1950	15 July 1950	683	100.00
7	" " " " "	10 Apr 1950	15 Aug 1950	684	100.00
8	" " " " "	10 Apr 1950	15 Sep 1950	685	100.00
9	Citizens Savings Bank	1 May 1950	1 May 1950	21	119.50

He pleaded not guilty to and was found guilty of the charge and all 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

(1) Specifications 1 and 2

During December 1949 the accused made three open account purchases, principally for whiskey, from Park and Tilford Import Corporation, New York, New York, in the amounts of $451.99, $1511.65 and $1354.79. The first two purchases were paid for promptly. The accused made initial payments on the third purchase of $50.00 on 17 February 1950, of $100.00 on 2 March 1950, and of $100.00 on 20 March 1950. During the latter part of March 1950, the accused issued to Park and Tilford Import Corporation six postdated checks drawn on the National City Bank of New York, Bush Terminal Branch, to cover the unpaid balance of the third purchase, as follows:

Check Number	Date	Amount
672	31 March 1950	$ 150.00
673	30 April 1950	154.79
674	31 May 1950	200.00
675	30 June 1950	200.00
676	31 July 1950	200.00
677	31 August 1950	200.00

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Checks numbered 672, 673, 674 and 676 were honored by the drawee bank when presented for payment. Checks numbered 675 and 677, described in Specifications 1 and 2, were presented to the drawee bank for payment on 6 July 1950 and 1 September 1950, respectively, but were not honored because of insufficient funds in the accused's bank account on those dates (R 45, 47,48,50,53,55,80-89; Pros Exs 1,2,4,10,12,13,17,18; Def Exs O-V).

In May 1950, the accused by letter advised Park and Tilford Import Corporation that he had been disciplined by the Army for his "liquor dealings" and was subject to a fine of $125.00 per month for three months commencing 1 May 1950 and requested that he be permitted to make monthly payments of $100.00 in lieu of the two postdated checks hereinabove described. Park and Tilford Import Corporation denied his request. About 20 September 1950 Park and Tilford Import Corporation requested the assistance of the Commanding General, New York Port of Embarkation, in collecting checks numbered 675 and 677. Thereafter the accused made three cash payments on these checks, $200.00 on 26 September 1950, $100.00 on 15 October 1950, and $100.00 on 15 November 1950, and was given a written release by Park and Tilford Import Corporation on 20 November 1950 (R 88-91; Pros Ex 19, Def Ex W).

(2) Specifications 3 and 4

In January 1950, the accused maintained an open account with Henry Kelly Importing and Distributing Company, Inc., New York, New York, on which there was due and payable $2,703.92 for liquor purchased by the accused. The accused issued to Henry Kelly Importing and Distributing Company, Inc., two checks, one numbered 583, dated 3 January 1950, in the amount of $500.00, and the other, unnumbered, dated 13 March 1950, in the amount of $300.00, both drawn on the National City Bank of New York, Bush Terminal Branch, in partial payment of his account. The checks were presented to The National City Bank of New York, Bush Terminal Branch, for payment on 13 January 1950 and on 16 March 1950, respectively. The drawee bank refused to honor the checks when presented because of insufficient funds in the accused's bank account. The checks were subsequently honored by the drawee bank on 19 January 1950 and 24 March 1950, respectively, when presented a second time by the payee subsequent to the accused's making additional deposits to his account with the drawee bank (R 48,50,55-59,66-70; Pros Exs 3-5, 12-14; Def Exs B-E).

(3) Specifications 5,6,7 and 8

In March 1950, Henry Kelly Importing and Distributing Company, Inc., New York, New York, placed the unpaid balance of the accused's account with them, in the amount of $1,903.92, in the hands of their attorneys

for collection. In "settlement of a cause of action," the accused, at the request of the attorneys for the Henry Kelly Importing and Distributing Company, Inc., gave them a series of 19 postdated checks secured against possible loss by a chattel mortgage on the accused's car. Included in this series of checks drawn on the National City Bank of New York, Bush Terminal Branch, and payable to Henry Kelly Importing and Distributing Company, Inc., were the following:

Check Number	Date	Amount
682	15 June 1950	$100.00
683	15 July 1950	100.00
684	15 August 1950	100.00
685	15 September 1950	100.00

These checks, presented to the drawee bank for payment on 19 June 1950, 18 July 1950, 23 August 1950 and 19 September 1950, respectively, were not honored because of insufficient funds in the accused's bank account. Subsequently, the accused made restitution in full to the Henry Kelly Importing and Distributing Company, Inc. (R 51-53,55,56,66-71,92; Pros Exs 4,7-9,11-14; Def Ex M).

(4) Specification 9

On 2 May 1950, the accused tendered to the Citizens Savings Bank of Stamford, Connecticut, check numbered 21, dated 1 May 1950, drawn on The National City Bank of New York, Bush Terminal Branch, in the amount of $119.50, in payment of a monthly installment on his mortgage indebtedness to the payee. This check was returned by the drawee bank to the payee on 4 May 1950 because of insufficient funds in the accused's bank account. On 10 May 1950, a member of the accused's family redeemed the check (R 51,56, 72-78; Pros Exs 4,6,12,13,15 and 16).

b. For the Defense

In March 1950, the accused consulted with his attorney, Mr. J. Nicholas Long of New York City, with reference to his indebtedness of an amount slightly over $1,900.00 to the Henry Kelly Importing and Distributing Company, Inc. Mr. Long, through the creditor's counsel, arranged for the accused to give the Henry Kelly Importing and Distributing Company, Inc., a series of 19 postdated checks secured by a chattel mortgage on the accused's car as a method of liquidating the indebtedness, since the creditor "recognized [the postdated checks] as being in lieu of promissory notes." The first of these checks was dated 15 April 1950, the others being dated the 15th of each month thereafter to and including 15 October 1951. The checks dated 15 April 1950 and 15 May 1950 were honored when presented to the drawee bank for payment.

Mr. Long advised the accused that, under the law of the State of New York, no criminal liability attached to giving postdated checks. Mr. Long admitted, however, that, at the time he gave accused this advice, he knew nothing about military law or the Articles of War (R 93-95; Def Ex X).

In September 1950, the accused consulted Mr. Long with reference to $400.00 which the accused owed Park and Tilford Import Corporation on two postdated checks. Mr. Long arranged for the payment of this indebtedness in October and November 1950 (R 96-97).

On 24 October 1950, Major Richard F. Frank, JAGC, trial judge advocate, caused to be served on The National City Bank of New York, Bush Terminal Branch, a subpoena which directed the production before a general court-martial of a transcript of the accused's account, microfilms and all data and correspondence pertaining to checks drawn on said bank by the accused and which had not been honored from 1 January 1950 to 24 October 1950. Pursuant to terms of the subpoena those documents were made available to Major Frank. The accused did not give the bank authority to allow Major Frank to examine his accounts with the bank. Prior to obtaining the bank's records pertaining to the accused's checking account, Major Frank had no knowledge of the checks described in Specifications 3 to 9 inclusive (R 104,107,111-113; Def Exs AA,BB).

The accused, after having his rights as a witness explained to him, elected to make an unsworn statement. From 1946 to 1949 he was the "liquor officer" at Fort Hamilton. Six months prior to being relieved therefrom, the "liquor detail" was assumed by another officer who, with others, caused the accused's accounts to be short, and prevented him from paying the Park and Tilford Import Corporation and Henry Kelly Importing and Distributing Company, Inc. accounts on time. The accused stated that the complaint made by the Park and Tilford Import Corporation to Army officials in regard to the collection of two postdated checks was the only complaint received and caused the charges initially preferred against him. As the result of information obtained by the trial judge advocate without the accused's permission, additional charges were preferred against the accused (R 114-115).

The accused sent the check for $500, dated 3 January 1950, to the payee on that date with a request that the payee deposit the check on the 15th of the month because of definite assurances available to the accused that he would receive ample funds to cover the check before 15 January 1950. Although the accused received $1000 on 13 January 1950, it came too late to be deposited that day or the following day, a Saturday, when his bank was closed. Consequently he deposited the $1000 on Monday, 16 January 1950. Although the bank statement shows the payee deposited the check on 13 January 1950, the check would have been honored if the payee had responded to the accused's request. The payee received $500 on 19 January 1950 (R 115-116).

The accused sent the check for $300, dated 13 March 1950, to the payee a little more than a week before that date and requested the payee to deposit it on that date. Funds which the accused expected to be on deposit by 13 March 1950 "unfortunately" did not arrive before that date. The check was paid on 24 March 1950 when it was redeposited (R 116).

The four checks described in Specifications 5, 6, 7 and 8 were drawn in April 1950 by the accused and postdated on the advice of his civilian counsel. In view of his resources and expected income, the accused was certain that he could meet the checks when their due dates arrived and did not anticipate that a fine of $125 a month would be imposed on him thereby reducing his income to the extent that he was unable to pay the checks when due. The first of the checks were paid on their due dates and all were paid as soon as it was possible for the accused to pay them. At the time the accused issued the postdated checks he executed and delivered to the payee a chattel mortgage on his Cadillac automobile (R 116-117).

The check for $119.50, dated 1 May 1950, was issued in error because the next payment was not due until 1 July 1950. Upon being informed that the check had been dishonored, accused deposited sufficient funds in the drawee bank to cover its payment (R 117).

The two $200 checks to Park and Tilford Import Corporation were part of a series of six postdated checks given by the accused on the advice of civilian counsel. They were all given for a past indebtedness as "evidence of the balance still due." The accused anticipated that his future income would be sufficient to meet these obligations. The first of these checks were honored upon presentment to the drawee bank. However he was fined "$125 a month" which reduced his income to the extent that he could not deposit funds to pay the remaining checks. He informed the Park and Tilford Import Corporation of his predicament but the Corporation deposited the checks on their due dates and they were dishonored.

The accused stated that if he had given promissory notes instead of postdated checks he would not have been prosecuted for issuing worthless checks. He pawned his jewelry, mortgaged his car "to the limit," obtained financial assistance from relatives, and cashed his war bonds in an effort to pay his debts (R 114-119).

The accused has approximately 10 years of Army service in an enlisted status. He received his commission as second lieutenant upon graduating from Officer Candidate School. There were admitted in evidence seven letters of commendation and appreciation from various Army officers and civilians in high Government office referring to his excellent performance of military duty (R 119,123).

4. Discussion

The accused was found guilty of nine specifications involving the making and uttering of checks as alleged and wrongfully failing to maintain a sufficient balance in the drawee bank to meet payment of said checks when presented for payment in violation of Article of War 96.

The essential elements of the offenses herein charged are:

(a) that accused uttered the checks, as alleged, and

(b) that he wrongfully failed to maintain a sufficient balance in the drawee bank when the checks were presented for payment.

The uncontroverted evidence shows that accused made and uttered nine checks, six of which were postdated. Eight were given to two liquor firms in payment of merchandise previously purchased (Specs 1-8) and one was given to a bank as part payment on a mortgage obligation (Spec 9). When presented for payment by the payees on or shortly after the dates borne by the checks, they were dishonored by the drawee bank because of insufficient funds in the accused's bank account.

It is well established that the nonfraudulent offense of wrongfully failing to maintain a sufficient bank balance to pay a check made and uttered by a member of the military service is a violation of Article of War 96 (CM 284260, Hayes, 55 BR 319,324).

As stated in CM 249232, Norren, 32 BR 95, 102,103:

"A member of the military establishment is under a particular duty not to issue a check without maintaining a bank balance or credit sufficient to meet it. Such conduct is not only a reflection on the individual and a violation of civil law if committed with wrongful intent, but is service-discrediting as well. Frequently checks are cashed not because of the assurance derived from the implied representation attached to the check so much as the faith created by the uniform. The individual may be satisfied by the exculpation which flows from an explanation rooted in carelessness or neglect. The hurt to the credit and reputation of the Army is not so easily removed."

The fact that six of the nine checks in issue were postdated does not affect the accused's guilt of the offenses of uttering checks without maintaining a sufficient bank balance to pay them. Although the checks were postdated and the delivery thereof was conditional until arrival of

the date thereof, nevertheless, the delivery became absolute when that day arrived. The offenses were committed when, on the day the checks were dated and thereafter, the accused failed to maintain a sufficient bank balance so that, when presented for payment, the checks were dishonored because of insufficient funds in the accused's bank account (CM 342651, Reese, 8 BR-JC 139,146; CM 270641, Smith, 45 BR 329,342).

It is asserted by the defense that the postdated checks in issue were not checks at all but were given in "lieu of promissory notes." The evidence, however, clearly indicates that the intention of the drawer and the payees was that the postdated checks were what they purported to be and were not intended to be mere evidences of indebtedness.

Proof that a check given for value by a member of the military establishment is returned for insufficient funds imposes on the drawer of the check, when charged with service discrediting conduct, the burden of showing that his action was the result of an honest mistake not caused by his own carelessness or neglect. Where the accused has sole control of the account he should be charged with the responsibility for its depleted state, and his failure to provide funds adequate for the payment of checks upon presentment, while lacking the elements of fraud and deceit, is necessarily and manifestly of a nature to bring discredit and disrepute to the military service (CM 284447, Turner, 55 BR 351,357). The accused was fully aware of the fact that his bank balance was insufficient to meet payment. His explanation for its insufficiency, made in an unsworn statement, is that unfortunate personal circumstances arose after he issued the checks which resulted in his not obtaining funds which he intended to use to pay the checks and that as a result he could not meet their payment. The court was amply justified in rejecting this explanation as inadequate (CM 249232, Norren, supra). The Board of Review is of the opinion that the record of trial is legally sufficient to sustain the findings of guilty of all specifications and the charge.

Among the errors assigned by counsel for accused in his "Outline of Appeal" which merit discussion is an allegation that error was committed by the trial judge advocate in his closing argument to the court in commenting on the effect of the unsworn statement of the accused. The remarks of the trial judge advocate apparently referred to are as follows:

> "*** Of course, as the Law Member will tell you, an unsworn statement is not evidence for the best of reasons. The accused does not submit himself to the searching examination of cross-examination and questioning by the court as to the verity of the statements. There is no way of checking by the searching

light of cross-examination the weight, if any, to be given to his comments. That is solely within the discretion of the court. ***" (R 139).

The remarks of the trial judge advocate were factual to the extent that an unsworn statement is not evidence and an accused cannot be cross-examined upon it (MCM 1949, par 76). Clearly, however, such comment was unwarranted and improper. It is basic that an accused may not be required to testify unless he so elects and that it is error for the trial judge advocate to comment upon his failure to testify at any stage of the court-martial proceedings (MCM 1949, par 77; CM 330426, Hill, 79 BR 29, 32).

In the instant case, however, the competent evidence of record is compelling as to the guilt of the accused. The Board of Review, therefore, concludes that the error above pointed out did not prejudice his substantial rights (CM 330426, Hill, supra, at p 35; CM 275792, Blair et al, 48 BR 151,155; Dig Op JAG 1912-1940, par 395 (55)).

Another assignment of error by counsel for the accused is that most of the members of the court attended an officers' call, at which the appointing authority referred to the facts of this case, and that therefore a motion for change of venue should have been granted.

The record of trial shows that the defense counsel questioned each member of the court not otherwise excused, except the law member, relative to his knowledge of the case. All members questioned but one were present at the officers' call, at which time the Commanding General discussed derelictions by officers. Neither accused's name nor the facts pertaining to the instant case were mentioned. Each member stated that he had not previously discussed the facts pertaining to this case and that he had formed no opinion as to the guilt or innocence of the accused, and that he would decide the case only on the evidence presented at the trial. There is nothing in the record of trial which would indicate that the appointing authority in any manner influenced the court in the exercise of its judicial functions.

As to the motion for a change of venue, it is well settled that the jurisdiction of courts-martial is geographically universal, a motion for a change of venue to a court-martial in another location being unknown to military law. In its place, an accused is given the opportunity to challenge any and all members of a particular court (CM 317064, Johns, 66 BR 169,184). In the instant case the accused did not challenge any member of the court for cause and a peremptory challenge made by him was granted. The Board of Review is, therefore, of the opinion that the ruling of the law member denying the motion for a change of venue was proper.

In a prior trial held on 11 December 1950, the accused was tried and found guilty of specifications alleging that he did wrongfully make and utter essentially identical checks involved in the instant case, without intending to assure that he should have sufficient funds in the drawee bank for payment thereof. By exceptions and substitutions, he was found not guilty as charged but guilty of wrongfully failing to have a balance in the drawee bank sufficient to pay the checks upon presentment and sentenced to be dismissed the service. The reviewing authority disapproved the findings and the sentence. In the instant case, the accused was charged with and found guilty of uttering the checks and wrongfully failing to maintain a sufficient balance in the drawee bank to meet payment thereof when presented for payment and sentenced to be dismissed the service.

It has been stated that the finding of wrongfully failing to maintain a sufficient balance in the drawee bank to meet payment when presented is not a lesser included offense to a specification alleging the utterance of checks with intent to defraud (CM 336515, Stewart, 3 BR-JC 115,131). It has also been held that a finding that an accused uttered a check without intending to assure that he should have sufficient funds in the drawee bank for payment thereof is a lesser included offense of a specification alleging that the accused, with intent to defraud, uttered a check, and did fraudulently obtain certain funds thereby (CM 335159, Smith, 2 BR-JC 69,78). Logically, therefore, a specification that an accused uttered checks and wrongfully failed to maintain a sufficient balance in the drawee bank to meet payment when presented is not a lesser included offense to a specification alleging that accused uttered checks without intending to assure that he should have sufficient funds in the drawee bank for payment.

As the offenses alleged in the present case are not lesser included of those offenses charged at the former trial of which the accused was found not guilty, but are in fact separate offenses, no question of double jeopardy is involved.

In arriving at its opinion in this case the Board of Review has carefully considered the "Outline of Appeal" submitted on behalf of the defense as well as the matters presented in oral argument by Mr. Paul Mishkin, Attorney at Law of New York City, before it in Washington, D.C., on 18 May 1951.

5. The Department of the Army records show that accused is 40 years of age and unmarried. He completed three years at Villanova College. In civilian life he was variously employed as a plumber and as an engineering inspector for the City of New York. He enlisted in the Army on 29 October 1940 and remained in an enlisted status until successfully completing Officers Candidate School on 28 April 1943, when he was commissioned a second lieutenant. On 26 July 1944 and 13 September 1945 he was promoted to the grades of first lieutenant and captain, respectively. On 28 March

1950 punishment under Article of War 104 was imposed upon him. On 6 September 1950 he received an administrative reprimand. His overall efficiency ratings of record are 071, 065, 118, 104, 053, and 119.

6. The court was legally constituted and had jurisdiction over 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 and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 96.

Albert Barkin, J.A.G.C.

Samuel S. Wolf, J.A.G.C.

Sumner A. Brown, J.A.G.C.

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

JUN 8 1951

JAGU CM 345454

U N I T E D S T A T E S	)	NEW YORK PORT OF EMBARKATION
	)	
v.	)	Trial by G.C.M., convened at
	)	Headquarters New York Port of
Captain Nicholas Van Eck	)	Embarkation, 28 February and
0-1945510, Headquarters 9201	)	2 and 3 March 1951.
Technical Service Unit-	)	
Transportation Corps	)	

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Opinion of the Judicial Council
Harbaugh, Mickelwait, and Young
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 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 making and uttering nine checks, between 3 January 1950 and 1 May 1950, two payable to Park and Tilford Import Corporation at dates subsequent to issuance, six payable to Henry Kelly Importing and Distributing Company, Incorporated, of which four were payable subsequent to issuance, and one payable to Citizens Savings Bank, in amounts from $100.00 to $500.00 and wrongfully failing to maintain a sufficient balance in the National City Bank of New York, Bush Terminal Branch, the drawee bank, to meet payment on each check when presented for payment, in violation of Article of War 96. 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. 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.

3. We concur with the Board of Review in its opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. The only question presented by the record is whether, under the circumstances in this case, the degree of culpability involved in these offenses is such as to warrant the execution of the sentence of dismissal.

The evidence shows, with respect to the two checks involved in Specifications 1 and 2, that in the latter part of March 1950 the accused issued six postdated checks to Park and Tilford Import Corporation to cover the unpaid balance of a pre-existing debt due that corporation. The checks were dated, respectively, 31 March, 30 April, 31 May, 30 June, 31 July and 31 August 1950. The checks dated 30 June and 31 August 1950, each in the amount of $200.00 were dishonored by the drawee bank upon presentment. The other four checks were paid upon presentment. The two were subsequently paid by partial payments made on 26 September, 15 October and 15 November 1950. In May 1950, prior to the dates on the two dishonored checks, the accused advised Park and Tilford Import Corporation by letter that as a result of his "past liquor dealings" the "Army (had) given (him) a monetary penalty which (meant) that $125.00 (was) being deducted from (his) monthly allotment for a period of three months" and requested that he be permitted to forward a check each month for $100.00 instead of the usual $200.00. This request was refused.

The evidence shows with respect to Specifications 3 and 4 that each check was given as part payment on a pre-existing debt due the Henry Kelly Importing and Distributing Company, Incorporated. The check issued and dated 3 January 1950 and dishonored on 13 January 1950 was paid on 16 January 1950 and the check issued and dated 13 March 1950 and dishonored on 16 March 1950 was paid on 24 March 1950.

The checks involved in Specifications 5, 6, 7 and 8 were part of a series of nineteen postdated checks given to the Henry Kelly Importing and Distributing Company, Incorporated, in March 1950 in payment of a pre-existing debt. In addition the accused gave a chattel mortgage on his automobile to secure the payment of the debt. The first two checks in the series were paid upon presentment, but the checks involved in these specifications, dated 15 June, 15 July, 15 August and 15 September 1950, respectively, were not. These latter checks were paid in full prior to trial.

The evidence shows that the check involved in Specification 9 was given by the accused to the Citizens Savings Bank of Stamford, Connecticut, in payment of a monthly installment on the mortgage indebtedness on his home. The check was issued and dated 1 May 1950 and was dishonored upon presentment. On 10 May 1950 the check was "redeemed" by a cash payment. The payment and redemption were made prior to the date such payment was due.

It is apparent from the evidence as set forth above that this is not the usual case of uttering checks and wrongfully failing to maintain a sufficient balance in the drawee bank to meet their payment upon presentment. Six of these checks were postdated, all were given to cover unpaid balances on pre-existing debts, and restitution was made on all prior to trial. Subsequent to the issuance of the postdated checks he received

disciplinary punishment which curtailed his ability to maintain his bank balance. The accused advised at least one of his creditors of this situation, thus indicating his desire to do what he could to prevent the checks from being presented to the bank and their resultant dishonor.

4. In view of these and all the other mitigating circumstances shown by the evidence, we are of the opinion that execution of the sentence of dismissal, although authorized upon conviction of a violation of Article of War 96, is not warranted in this case.

C. B. Mickelwait, Brig Gen, JAGC

Edward H. Young, Colonel, JAGC

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

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

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

In the foregoing case of Captain NICHOLAS VAN ECK, O-1945510, Headquarters 9201 Technical Service Unit-Transportation Corps, the sentence is confirmed but commuted to a reprimand and forfeiture of fifty dollars pay per month for six months. As thus commuted, the sentence will be carried into execution.

C. B. Mickelwait, Brig Gen, JAGC

Edward H. Young, Colonel, JAGC

1951

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

14 June, 1951

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

JAGK - CM 345478

UNITED STATES v. Private First Class LONNIE B. KAIGLAR (RA 16215648), Headquarters and Headquarters and Service Company, 811th Engineer Aviation Battalion, APO 970.	2ND LOGISTICAL COMMAND (C) Trial by G.C.M., convened at APO 59, Pusan, Korea, 7 February 1951. Dishonorable discharge, total forfeitures after promulgation, and confinement for life.

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

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 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 First Class Lonnie B. Kaiglar, Headquarters and Headquarters and Service Company, 811th Engineer Aviation Battalion, did, at Kimpo District, Kimpo, Korea, on or about 12 December 1950, with malice aforethought, willfully, feloniously, and unlawfully kill Corporal William Warren, a human being, by shooting him with a carbine.

He pleaded not guilty to and was found guilty of the charge and specification. There is no evidence of any previous convictions. 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

About 1030 hours, 12 December 1950, in the area of Company B, 811th Engineer Aviation Battalion, near Kimpo, Korea, Private First Class Lonnie B. Kaiglar, Headquarters and Headquarters and Service Company, 811th Engineer Aviation Battalion, the accused, asked Sergeant Emory Flowers to loan the accused Flowers' carbine, which bore a number 10 on its stock, because the accused said his "M1 was too heavy to carry around". Flowers loaned the accused his carbine and a full clip containing 15 rounds of ammunition. Weapons Noncommissioned Officer Sergeant Thomas A. Warren, Company B, 811th Engineer Aviation Battalion, identified an M1 carbine, serial number 1320787, bearing company stock number 10, as the carbine he had issued to Sergeant Flowers. This carbine was admitted in evidence without objection (R 25-27,29; Pros Ex 3).

Corporal Leo Edwards, 811th Engineer Aviation Battalion, testified that at about 1430 or 1500 hours of the same day, he visited a house of prostitution located in the Kimpo District, Kimpo, Korea, where he met the accused who was armed with a carbine. Edwards, the accused, and another soldier drank two or three bottles of whiskey. About 1615 or 1630 hours, the accused "passed out". Edwards kept the carbine for safekeeping. Meanwhile, Corporal William Warren, a "colored" soldier, with whom the accused had previously come to Korea from Okinawa, had come to the house. When the accused woke up at about 1805 or 1810 hours, Edwards asked Corporal Warren to take the accused back to camp. Corporal Warren agreed to do so. After Edwards returned the carbine to him, the accused loaded it and Edwards told him not to do so. The accused said, "I'm not", and left the house at about 1825 or 1830 hours with Corporal Warren. Edwards watched Corporal Warren and the accused walk about 25 or 30 feet from the house, moving "at a pretty good clip" (R 12,15-18,32).

About 8 or 10 minutes later Edwards heard several shots fired from a semiautomatic weapon, jumped up, grabbed a rifle, and went outside the door of the house. He was unable to see anything and returned to the house. At that time a sergeant told Edwards that "one of the guys had been shot", whereupon Edwards crawled between 75 and 100 yards from the house where he saw Corporal Warren lying on the ground, his rifle at "sling arms". Edwards called "Warren, Warren", but Corporal Warren did not answer. Corporal Warren's face was bloody. Edwards went to camp, reported the incident, and rode on the ambulance which brought Corporal Warren to "the dispensary". Edwards stated that the accused and Corporal Warren appeared to be good friends and had not quarreled (R 16,17).

Sergeant Elery Robbins, Company B, 811th Engineer Aviation Battalion, testified that at about 1600 hours he met the accused and others at the house of prostitution. He, the accused, and another soldier drank several bottles of whiskey. After Robbins "stayed" with a woman, he went back to camp, where he discovered his wallet and gun were missing. He returned to the house of prostitution to get them, arriving at about 1830 hours when he heard six or eight shots fired "one after another". He left the house and, approaching the company area at a point about 50 yards from the house, he saw a man, with blood on his right side, nose, and mouth, lying on the road with his rifle slung on his right shoulder. Robbins felt the man's pulse and "found it weak". He ran back to the house and informed Corporal Leo Edwards. Both returned to the injured man, after which Robbins returned to the company area and reported the incident. Robbins stated that the accused had been "drinking" but was unable to say that he was drunk (R 20-22).

Private Cephus Bell, Jr., testified that at about 1830 hours, 12 December, while in his barracks at Kimpo Air Base, the accused, armed with a carbine, came in and asked Bell to help move the accused's bed from the barracks in which Bell was quartered (R 22-23). Bell's testimony as to what then occurred is as follows:

> "Q Will you tell the court what else happened?
> "A Well, me and Kaiglar went out to the other barrack and started to move the stuff out and he told me that he had got him one tonight, and I asked him what did he mean. He said he dropped a hammer on a fellow who had been messing with him a lot and so we moved his bed back up to the other barrack. Then he told me if anyone asked where he had been, tell them he had been in the barracks all afternoon" (R 23).

Bell stated that at the time of this conversation the accused appeared to have been drinking but was not drunk, as he spoke clearly and knew what he was saying (R 22-24).

Between 1900 and 1930 hours, while "acting as sergeant of the guard", Corporal C. B. Gaylor, 811th Engineer Aviation Battalion, found the accused asleep in bed in his quarters with a carbine at the head of his bed. Gaylor examined the carbine, saw that it was an "M1", "opened the barrel", smelled burned powder in it, and removed the clip which was empty, and noted a "white number *** 10 or 12" on the carbine. Thereupon, Gaylor shook the accused. He woke up and said, "What have I done?" The accused appeared to be in an "all right" condition and walked "straight" as he and Gaylor proceeded to Company B Orderly Room where Gaylor turned the accused and the carbine over to the "Air Police" (R 30-32).

At approximately 1845 hours, 12 December, Staff Sergeant Morris F. Evans, 51st Air Police Squadron, Tsuiki Air Base, Japan, went to the scene of the shooting near the 811th Engineer Aviation Battalion area located in Kimpo District, Kimpo, Korea. There he found a hat, a large pool of blood, eight expended carbine casings, two M1 cartridges, and pieces of a stock of a gun. The blood spot was about six feet from the expended casings, the M1 cartridges being two or three feet away. Later, Evans went to the Graves Registration Section, 4th Field Hospital, Ascom City, Korea, where he saw "the body of the man that was allegedly shot in the 811th area at Kimpo". He described the deceased as a light complexioned "colored" man. On the body he saw two wounds of entry in the left portion of the abdomen and two wounds of exit in the right portion of the back (R 32-34).

On 12 December 1950, upon receipt of a homicide report, Lieutenant John J. Ferriter, 6001 Criminal Investigation Bureau, and Mr. Reyes interrogat the accused at the Office of Special Investigations from 2030 to 2130 hours. The accused then slept for about 40 minutes and was again questioned until 2400 hours. From about 1330 hours to 1630 hours, 13 December, he was questioned by Captain Cooper, Special Agent Kimball, and Lieutenant Ferriter. Between 1630 and 1900 hours, 13 December, the accused was taken to the Air Police. At about 1900 hours, 13 December, Lieutenant Ferriter again interrogated the accused and at 1930 hours the accused began writing a voluntary statement, which he completed at about 2130 hours. Before the accused made his statement, Lieutenant Ferriter warned him of his rights under the 24th Article of War. At no time did anyone use any threats, violence, or force to induce a statement from the accused, and no offer or promise of immunity or promise of reward was made for the statement obtained. Ferriter identified the written statement and signatures thereon (R 34-38,47).

Having been apprised of his right to testify concerning the involuntary nature of his statement, the accused testified that on the night of 12 December, he was questioned steadily and Lieutenant Ferriter "continually hollered at" him. When turned over to the Air Police he was compelled to stand for an hour or more. After he obtained a cot from his organization, it was set up in a doorway where men came in and "bumped into" the cot four or five times. He was kept awake as people talked all night and because a blanket was pulled from his head on one occasion. While he was in the custody of the Air Police he was asked such questions as, "Why did you kill the man?" He was made to stand against a wall for several hours. The accused admitted that he was not aware of any systematic attempt to keep him awake. The accused's pretrial statement was admitted in evidence over defense objection (R 39-45; Pros Ex 4).

Accused related therein that on 12 December 1950 he borrowed Sergeant Flowers' carbine, "marked 10 in white paint". At about 1330 hours he took the carbine and a loaded clip to a village where he went to a house of prostitution. Thereafter, he was joined by Sergeant Robbins, Corporal Edwards, and Private First Class Holland, and two bottles of liquor were consumed. Thereafter, accused loaded his carbine. The accused continued:

"* * * From there all things were hazy I do not remember too much, due to the fact I was well under the influence of alcohol.

"To my remembrance I do not recall saying too much to Cpl Warren, the only thing I recall a very little of is Cpl Lee telling Warren to take me to camp, and I said I do not need anybody to take me in. I do not recall leaving the house or how I got to my barracks. The next thing I recall a little of is being at the barracks asking somebody to help me move my bedding. After getting my things I went to bed, and placed [my] carbine at [the] head of my bed. I do not recall saying anything else to anybody, until I was woke up by Sgt Hutton, Cpl Gaylor, Air Policemen and guards. I barely remembered what all was said, but I do recall Cpl Gaylor talking about a clip with one shell left in it or something similar. The time of custody I can not say because I don't know. The Cpl Lee I referred to in my statement is Cpl Leo Edwards" (Pros Ex 4).

Lieutenant Ferriter examined the weapon that had been removed from the deceased's body and observed that the upper hand guard was "split into three sections - pieces". In the "pistol grip" of that weapon he saw a hole "caused by a bullet" (R 46,47).

It was duly stipulated that if Major Jack B. Richmond, MPC, Examiner, Criminal Investigation Laboratory, Far East Command, Tokyo, were present in court he would testify that -

"* * * the eight empty fired cartridge cases found by Staff Sergeant Morris F. Evans, on 12 December 1950 at approximately 1845 hours were examined by him in the laboratory in conjunction with test fired cartridge cases fired from US Carbine, Caliber .30, M1, #1320787, and in his opinion the eight empty fired cartridge cases found by Sergeant Evans were discharged from US Carbine, Caliber, .30, M1, #1320787" (R 47, Pros Ex 5).

Captain Bernard S. Larivee, Registrar, 4th Field Hospital, identified an original "Admissions and Dispositions Sheet", dated 13 December 1950, signed by him as registrar of that hospital and covering the 24-hour period ending at 2400 hours, 12 December 1950, as an official record of the 4th Field Hospital which by regulations he was required to maintain and which he did personally maintain in the regular course of his duty at the hospital. The "Admissions and Dispositions Sheet", admitted in evidence over objection, listed the name of "William J. Warren", as having been received at the hospital "dead on arrival", and further showed that Warren had sustained a gunshot wound in the abdomen, with internal hemorrhage and shock, and that the injury was not the result of battle. Also admitted over objection, was an original "Casualty

Report", prepared and signed by Captain Larivee, which he was required to keep in the regular course of his official duties at the hospital. The "Casualty Report" showed that "Pfc William J. Warren" was "dead on arrival" at the hospital on 12 December 1950, and showed the following: "Diagnosis: Bullet wounds of abdomen Point of entry: right & left lower quadrant. Point of exit: right & left lower costal region. Hemorrhage & shock * * *". Captain Larivee stated that he personally examined the body of the only "colored soldier" who was received at the hospital on 12 December 1950 and found Warren's name on the identification tags attached to the body (R 9-14; Pros Ex 1; R 11; Pros Ex 2, R 12).

b. For the Defense

Having been apprised of his rights as a witness, the accused elected to testify. At about 1030 hours, 12 December 1950, the accused borrowed Sergeant Flowers' carbine because he did not feel like carrying his "M1" around. The accused left his weapon with Flowers and promised to bring him a "drink" when he returned. Armed with Flowers' carbine, the accused went to the village. There, at his request, he was directed to a house of prostitution. Shortly thereafter, he was joined by Corporal Leo Edwards, Sergeant Robbins, and other soldiers. Whiskey was obtained and the group, including the accused, proceeded to drink it. While drinking, the accused noticed a Korean boy pointing a rifle at him. The accused took the rifle away from the boy and upon examining it, found that it was defective. He then returned it to the boy. The accused tried to save a drink for Sergeant Flowers but was dissuaded by Sergeant Robbins (R 53-55). Concerning a conversation with Sergeant Robbins and events thereafter, the accused related:

> "* * * /I/said, 'It is a little late. You know the curfew /is/ on. If you get caught after seven,' and he said, 'That is right. I think I'll go down the road to another house.' I said, 'I'll probably see you down there a little later,' and I said, 'I'm going back in the house,' and I went back, and I don't remember too much after from there on, sir. I think I remember Corporal Edwards telling Warren would he take me to camp, something to that effect, and I hollered, saying 'I don't need anybody to take me to camp.' So as far as my leaving the house, I don't know anything about it. I don't even remember leaving. The next time I remember, was asking at the barracks, asking somebody to help me. Whether I asked someone particular, I don't know" (R 55).

Asked why he moved his bed when he returned to his barracks, the accused explained that everybody had been told to move their belongings, that they were supposed to move to Pusan shortly, and that he did not want to be left by himself. When apprehended he could not recall where the clip for the carbine found in his possession was located, but he remembered Corporal Gaylor saying

"there was one shell left" (R 55, 56).

On cross-examination, the accused testified in part as follows:

"Q Did you kill Corporal Warren?
"A I don't know anything about it, sir.

"Q Can you deny that you killed Corporal Warren?
"A I couldn't say one way or the other, sir" (R 56).

Private Archie L. Moore, 811th Engineer Aviation Battalion, testified that between 1900 and 2000 hours, 12 December, the accused entered the barracks where Moore was quartered and asked Moore to go with him to the next barracks to help the accused move his blankets. Moore did so. The accused then asked Private Bell to help the accused move his bed and Bell complied. As to accused's intoxication, Moore stated "I don't know whether he was drunk or wasn't drunk" (R 51-52).

4. Discussion

The accused has been found guilty of unpremeditated murder under a specification that he did at the time and place alleged "with malice aforethought, willfully, feloniously, and unlawfully kill Corporal William Warren, a human being, by shooting him with a carbine".

Murder is the unlawful killing of a human being with malice aforethought. Unlawful means without legal justification or excuse (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, 164 U.S. 388, 391).

The elements of proof of the offense 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; * * *" (MCM 1949, Par. 179a, p. 232).

Proof of the elements of the offense in the instant case rests largely on circumstantial evidence, the rule of which has been stated in Buntain v. State (15 Tex. App. 490), quoted with approval by the Board of Review, as follows:

> "While we may be convinced of the guilt of the defendant, we cannot act upon such conviction unless it is founded upon evidence which, under the rules of law, is deemed sufficient to exclude every reasonable hypothesis except the one of the defendant's guilt. We must look alone to the evidence as we find it in the record, and applying it to the measure of the law, ascertain whether or not it fills the measure. It will not do to sustain convictions based upon suspicions ***. It would be dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around the lives and liberties of the citizens" (CM 233766, Nicholl, 20 BR 121,123).

Uncontroverted evidence clearly established that at about 1830 hours, 12 December 1950, Corporal William Warren was seriously wounded by gunfire, that just before he was taken to a dispensary Corporal Warren was bleeding profusely, appeared to be unconscious and had a feeble pulse. It was also established through the "Admissions and Dispositions Sheet" (Pros Ex 1), of the 4th Field Hospital dated 13 December 1950 for the period 0001 to 2400 hours, 12 December 1950, that a "William J. Warren, RA 36391302," was dead on arrival at that hospital on that date, the cause of death was gunshot wounds in the abdomen together with internal hemorrhage and shock resulting therefrom. Similarly, a "Casualty Report" (Pros Ex 2) of that hospital, dated 13 December 1950, established without refutation that "Pfc William J. Warren, RA 36391302," was dead on arrival, and that the cause of death was diagnosed as: "Bullet wounds of abdomen Point of entry: right & left lower quadrant. Point of exit: right and left lower costal region." In addition, Captain Larivee testified that on 12 December he saw the body of the only colored person received dead on arrival at the 4th Field Hospital on 12 December and read the name "Warren" on two identification tags found by Larivee on that body. Moreover, Staff Sergeant Evans testified that he went to the 4th Field Hospital graves registration office, saw the body of a man allegedly shot in the 811th Engineer Aviation Battalion area at Kimpo, Korea, and noted that the body was that of a light complexioned colored person on which were found two wounds of entry in the left portion of the abdomen and two wounds of exit in the right portion of the back.

The specification alleged the death of "Corporal William Warren," the "Admissions and Dispositions Sheet" referred to "William J. Warren," and the "Casualty Report" referred to "Pfc William J. Warren." The identity of

the given names and surnames in each of the above three instances, together with all the other circumstances proved in this case by competent evidence, justified the court in concluding that the Corporal William Warren named in the specification as the deceased was the same person which the evidence shows was fatally injured by gunfire on 12 December 1950 and was, on that date, received dead on arrival at the 4th Field Hospital. The doctrine of idem sonans is applicable. That two negro soldiers located in the same area with the same given name and surname were both suffering from similar gunshot wounds from which death resulted on the same day is such a remote coincidence as not to constitute a reasonable hypothesis inconsistent with guilt. (MCM 1949, Par. 125a, p. 151; Secs 104, 1047, 1048, Wharton's Criminal Evidence, 11th Ed; CM 339254, Barnes,, et al., 8 BR-JC 219,239; CM 331601, Brill, et al., 80 BR 75, 82; CM 329968, Mowell, et al., 78 BR 205,209; CM 324519, Davis, et al., 73 BR 251, 262; CM 319474, Mulvaney, 68 BR 315,318; CM 252987, Fortney, 33 BR 345; CM ETO 12486, Herbert, 25 BR (ETO) 223).

The "Admissions and Dispositions Sheet" (Pros Ex 1) and "Casualty Report" (Pros Ex 2) were properly admitted in evidence as official records. As registrar of the 4th Field Hospital, Captain Larivee, pursuant to an official duty imposed upon him by regulations, recorded the matters contained in those exhibits, from information which he had received from customary and trustworthy channels. The matters thus recorded were competent prima facie evidence of the facts stated therein and were not rebutted by the defense. Furthermore, Captain Larivee testified that he verified the identity and death of William Warren by personal examination of two identification tags on the body of the only deceased negro received at the hospital on 12 December 1950. Inasmuch as the competency of the exhibits was not rebutted by the defense, those documents obtained by Captain Larivee from other officials acting in the proper performance of their duties were the best evidence of the facts stated therein (MCM 1949, Par 129a,130b; CM 324519, Davis, et al., supra; CM 323197, Abney, 72 BR 149,157; CM ETO 11059, Tanner, 23 BR (ETO) 285,289).

The credible evidence of record supports the findings of the court that the person identified in the "Admissions and Dispositions Sheet" and in the "Casualty Report" and by Captain Larivee and Staff Sergeant Evans as dead, was the Corporal William Warren wounded by gunfire, found by Sergeant Robbins and Corporal Edwards, whom Corporal Edwards accompanied to a dispensary.

Both the cause of the death of Corporal Warren and the accused's exclusive agency in producing that cause may be shown by circumstantial evidence (CM 331601, Brill, et al., supra; Sec 872, Wharton's Criminal Evidence, 11th Ed).

The following chain of credible evidence established beyond a reasonable doubt that Corporal William Warren's death was from gunshot wounds received by Corporal Warren at about 1830 hours, 12 December 1950, through the exclusive act of the accused.

The accused borrowed Sergeant Flowers' carbine, bearing serial number 1320787 and a number 10 painted on its stock, together with a full clip containing 15 rounds of ammunition for the carbine. He had the carbine at a house of prostitution where he attempted to load it between 1800 and 1830 hours, 12 December 1950, just before he left the house with Corporal Warren. Between 1825 and 1830 hours, 12 December, the accused left the house of prostitution with Corporal Warren and was seen to have progressed with him for at least 25 or 30 feet from the house in the direction of, and on a route toward the 811th Engineer Aviation Battalion area. Shortly after the accused and Corporal Warren left the house, Sergeant Robbins and Corporal Edwards heard between six and 10 shots fired, one after another, from a semiautomatic weapon. Soon thereafter the accused entered his barracks armed with a carbine and remarked to Private Bell that he, the accused, "had got him one tonight", explaining that he had "dropped a hammer on a fellow who had been messing with him a lot". Accused then told Bell that if anyone inquired as to his whereabouts that afternoon, Bell was to establish an alibi for the accused by stating that the accused "had been in the barracks all afternoon". At approximately 1830 hours, 12 December, Sergeant Robbins and Corporal Edwards found Corporal Warren unconscious, in a seriously wounded condition with a feeble pulse, and lying on a road at a point between 50 and 100 yards from the house of prostitution near the 811th Engineer Aviation Battalion area. When found, Corporal Warren bore his weapon at sling arms, the weapon being apparently damaged in two places by gunfire, indicating that he had not used his weapon but had been fired upon. No one other than the accused was seen with Corporal Warren between the time the accused and Corporal Warren left the house of prostitution together and the time Corporal Warren was discovered shot. At about 1900 hours, 12 December, Corporal Gaylor found at the head of the accused's bed a carbine containing an empty clip and a smell of burned powder in its barrel. This carbine was the one which the accused had previously borrowed from Sergeant Flowers. Corporal Edwards accompanied Corporal Warren to the dispensary in an ambulance. The eight expended cartridge cases found by Staff Sergeant Evans at the scene of the crime were established by expert testimony to have been discharged from the carbine the accused had borrowed from Sergeant Flowers and which was in the accused's exclusive possession from the time he left the house of prostitution with Corporal Warren until the carbine was taken from him by Gaylor after the incident. The testimony of Captain Larivee, registrar of the 4th Field Hospital, and of Staff Sergeant Evans, who viewed the deceased, together with the "Admissions and Dispositions Sheet" and the "Casualty Report" established that Corporal Warren was dead on arrival at the 4th Field Hospital and that the cause of his death was hemorrhage and shock resulting from gunshot wounds in the abdomen.

In response to a direct question under cross-examination, as to whether or not he had shot Corporal Warren, the accused responded: "I couldn't say one way or the other, sir." It is also significant that the accused showed a remarkable lack of memory in both his pretrial statement and in his testimony concerning his activities during the critical period after he left the house of prostitution with Corporal Warren and before he arrived at his barracks after the shooting of Corporal Warren is established as having occurred, as contrasted with the accused's relatively clear and detailed recollection of events before and after the shooting.

The chain of evidence hereinbefore set forth leads inexorably to the conclusion that the accused shot Corporal Warren. The unrebutted evidence which shows that Corporal Warren was presumably a healthy individual until shot by the accused, and that shortly thereafter he died, is sufficient to establish beyond a reasonable doubt, in the absence of evidence to the contrary, that the wound inflicted by the accused was the cause of death (CM 344743, Brown, Feb 1951).

The circumstances of the shooting of Corporal Warren, which caused his death, as thus related, established unpremeditated murder. Immediately before he left the house of prostitution with Corporal Warren, the accused evidenced aggressiveness by his act of loading the borrowed carbine, and hostility toward Corporal Warren, as shown by the fact that when Corporal Edwards asked, and Corporal Warren agreed, to take the accused back to camp, the accused "hollered * * * I don't need anybody to take me to camp," indicating that the accused was irked at having Corporal Warren accompany him. The evidence that Corporal Warren was found at about 1830 hours seriously injured from gunshot wounds while he still bore his weapon, damaged from gunfire, in an unaggressive position at sling arms, and the accused's statement to Private Bell, which he made spontaneously following the incident, that he had "dropped a hammer on a fellow who had been messing with him a lot," and that Bell should establish an alibi for the accused by stating that "he had been in the barracks all afternoon," evidenced a consciousness of guilt on the part of the accused that he shot Corporal Warren without legal justification or excuse (Secs 117,122, Wharton's Criminal Evidence, 11th Ed).

From the accused's possession and use of a deadly weapon, malice aforethought may be presumed (MCM 1949, par 125a, p 151; Ibid, par 179a, p 231; CM 339254, Barnes, et al., supra, p 248; CM 340628, Diamond, 6 BR-JC 161, 175; CM 334752, Wilson, et al., 1 BR-JC 253,265).

It was suggested by the defense that the accused was so far under the influence of intoxicating liquor that he was incapable of entertaining the requisite malice. It was a question of fact generally for the court to determine. The weight of the evidence clearly supports the court's decision that the accused was not under the influence of intoxicants at about 1830 hours, 12 December 1950, to the extent that he was incapable of entertaining

the requisite malice. The voluntary intoxication of the accused does not excuse murder, unpremeditated, of which he was found guilty (Bishop v. United States, 107 F. 2d 297,301; CM 344743, Brown, supra; CM 340628, Diamond, supra, p. 174; CM 319168, Poe, 68 BR 141,173).

The accused contended that his pretrial statement, which was partly self-serving and generally corroborated by his testimony, and which was admitted in evidence over defense objection, was made after prolonged interrogation under adverse conditions. However, he stated that he was not "touched" or molested and suffered no discomfort, with the exception that "being accused wasn't comfortable". He was properly warned of his rights under the 24th Article of War. By its findings, the court concluded that the treatment accorded the accused was not unlawful, and the Board of Review is of the opinion that such a conclusion was justified (CM 334745, Higgs, 4 BR-JC 377, 396).

No question was raised as to the sanity of the accused. He gave clear, responsive answers to questions propounded and showed no lack of intelligence or the presence of any obvious psychosis noticeable to witnesses or the court. It is, therefore, presumed that he was sane at the time of the offense and the trial (MCM 1949, Par. 125a, p. 151).

Under all the facts and circumstances contained in the record of trial, the Board of Review is of the opinion that the accused shot Corporal William Warren without legal justification or excuse, that malice requisite to murder is presumed from accused's use of a deadly weapon in a deadly manner, and that the malice thus presumed was not excused by adequate provocation. All the elements of murder as hereinbefore defined are proved beyond a reasonable doubt by the record of trial.

5. The charge sheet shows that the accused is 28 years of age. He enlisted 7 July 1949 for three years and appears to have had three years of 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 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 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.

Cecil Baxter J.A.G.C.

Samuel S. Cowles J.A.G.C.

Sumner A. Brown J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

Harbaugh, Young and Roberts
Officers of The Judge Advocate General's Corps

In the foregoing case of Private First Class Lonnie B. Kaiglar, RA 16215648, Headquarters and Headquarters and Service Company, 811th Engineer Aviation Battalion, APO 970, 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.

Edward H. Young, Colonel, JAGC

Nathan J. Roberts, 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 May 1951

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

JAGH CM 345595

MAY 1 0 1951

UNITED STATES v. Private First Class GEORGE A. HOBSON (RA-14363648) and Private First Class WILLIE W. NORRIS (RA-43027880), both of Headquarters and Headquarters Company, 24th Infantry Regiment, APO 25.	25TH INFANTRY DIVISION Trial by G.C.M., convened at APO 25, 2 March 1951. Each accused: Dishonorable discharge, total forfeitures after promulgation and confinement at hard labor for life.

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

The Board of Review has examined the record of trial in the case of the soldiers named above and submits this, its opinion, to The Judge Advocate General and the Judicial Council.

Pursuant to authorization by the appointing authority the accused were tried, in a common trial, respectively, upon the following charges and specifications:

As to Private First Class George A. Hobson

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class George A. Hobson, Headquarters and Headquarters Company, 24th Infantry Regiment, APO 25, did, at or near Suwon City, Korea, on or about 31 January 1951, forcibly and feloniously against her will, have carnal knowledge of Shim Mal Soon, a Korean National.

As to Private First Class Willie W. Norris

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Willie W. Norris, Headquarters and Headquarters Company, 24th Infantry Regiment, APO 25, did, at or near Suwon City, Korea, on or about 31 January 1951, forcibly and feloniously against her will, have carnal knowledge of Shim Mal Soon, a Korean National.

Each accused pleaded not guilty to, but was found guilty of the pertinent Charge and Specification. No evidence of previous convictions was introduced. 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 the term of his natural life. The reviewing authority approved the sentence as to each accused and forwarded the record of trial for action under Article of War 48.

The record of trial discloses that at approximately 1700 hours on 31 January 1951, Shim Mal Soon, a Korean national 21 years of age and her 18 year old brother, Shim Kyong Soon, were finishing their supper in the room which constituted their home, in Suwon, Korea. Through the window they observed two colored soldiers approaching. The girl quickly put on a cap and, when her brother was summoned outside by the soldiers, he told them there was no "sexie" (no girl) in the room. However, one of the soldiers ordered Mal Soon out of the room, directed her to take off her cap, and told her to turn around, whereupon they "inspected" her "front side" and "back side". One of the soldiers, later identified as accused Norris, pointed a "gun" at her and dragged her into the room. Mal Soon "yelled and resisted and asked for help" but the soldier slapped her very hard on the face and continued to force her into the room. Once inside, he locked the door but the girl opened it. He again fastened the lock, put a piece of bedding on the floor, and told the girl to "lay down." When she refused, he slapped her, and, by pushing, forced her to lie down. He then tore away her underclothes, dropped his trousers, and forced her legs apart. She tried to elude his attempt at intercourse by rolling on the floor, bending her knees and pushing him away, but he slapped and choked her and finally succeeded in effecting penetration. The girl cried for help and complained of the pain and "after a while he got up". She testified that she did not consent to this act of intercourse. Before leaving the room, her assailant kicked her twice as she attempted to arise.

During the above, which lasted approximately thirty minutes, the other soldier, later identified as accused Hobson, remained outside the room guarding Mal Soon's brother with a weapon. When the soldier pointed

out as Norris came out of the room, the other entered, unbuttoned and took down his pants and "jumped on" the girl, who was still lying on the floor. As before, Mal Soon pushed, bent her knees and rolled on the floor, but her second attacker also succeeded in effecting coitus. She did not consent to this act of intercourse, cried out from pain and called for help.

The two soldiers left the complainant's house at approximately 1800 hours (31 January) and the girl's brother immediately went after the MPs.

At the trial the complaining witness, her brother and Lee Youn Su, owner of the house who was also present outside the room during the occurrences, unhesitatingly identified both accused as the soldiers referred to above.

After being advised of his rights by the court and their counsel, each of the accused elected to testify. Both swore, in substance, that on the morning of 31 January 1951 they had been sent to the Suwon area to set up a forward command post (CP). They arrived at the proposed CP site about 1330, and, after the British, who had been occupying the area, had moved out (approximately 1500-1530 hours), accused began readying a place for the new CP. About an hour later, according to their testimony, they took their sleeping bags and equipment down to the village near the CP location, "washed up and ate C rations * * * and then went to bed."

The next morning they were picked up by MPs in a jeep. At the MP station they were questioned in the presence of a girl and a boy (complainant and her brother) and subsequently on two occasions they were taken to the victim's house where they were further questioned. Accused Norris stated that at a line-up conducted at the MP station the girl said that Private First Class Hobson "looked like one of them, but * * * wasn't sure," and "I know she didn't identify me." Approximately eight days later the two accused and another soldier were lined up before the girl, the boy, and an old man. The girl and boy immediately identified the accused but the old man did so only after accused removed their hats.

The accused admitted that they were identified four times by the girl and Norris testified that he was identified by the boy on four occasions. They attributed the ease with which they were identified to the numerous and extended opportunities the witnesses had to observe them.

Accused Norris stated that there were no other colored troops in the area to his knowledge and that it would be a 10-15 minute walk from their location to the girl's house. Both stated that they were not at the girl's house and did not rape her.

In the instant case the appointing authority properly recommended that accused be tried in a common trial in view of the fact that the alleged offenses occurred at approximately the same time and place and were provable by the same evidence.[1]

Both accused were charged with and convicted of rape in violation of Article of War 92. In connection with this offense the Manual for Courts-Martial states:

> "Rape is the unlawful carnal knowledge of a woman by force and without her consent.
>
> "Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not."
>
> *** *** ***
>
> "Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient if there is no consent.
>
> "Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and if a woman fails to take such measures to frustrate the execution of a man's design as she is able to take and are called for by the circumstances, the inference may be drawn that she did in fact consent." [2]

The evidence, when measured by the foregoing applicable yardsticks, is fully adequate to establish every element of the offenses charged. The complainant's testimony was corroborated by that of her brother and of the owner of the house as to events preceding the attacks in the room, as to identification of both the accused, and as to the victim's continuous calls for help, her screams of pain and "slapping sounds" heard after the door was shut. [3] The denials of the accused that they participated in the offenses were in every respect uncorroborated except by each other.

[1] Subparagraph 34i of the Manual for Courts-Martial, U.S. Army, 1949.

[2] Subparagraph 179b of the Manual for Courts-Martial, U. S. Army, 1949.

[3] Ewing v. United States, 135 F.2d 633, 635, hn 3 (App. D.C. 1942) cert. den. 318 U.S.776; Wincelowicz, MO-JAGA 229, 233; Lussmyer, MO-JAGA 327, 329.

The court, acting within its appropriate province as a judge of the credibility of the witnesses and the weight to be given their testimony, rejected the version of the two accused as to their innocent actions on the day in question and as to the validity of the identifications.[4] By virtue of the superior position the court enjoyed in observing the witnesses and in hearing them testify its findings are entitled to considerable weight.[5] The Board of Review in exercising a similar function upon appellate review pursuant to the provisions of Article of War 50g concludes that all the essential elements of the offense of rape were established beyond a reasonable doubt, as to each accused, and that the court was fully justified in finding them guilty as charged.[6]

The court was legally constituted and had jurisdiction of the persons and of the offenses. No errors injuriously affecting the substantial rights of either accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient as to each accused to support the respective findings of guilty and the sentences and to warrant confirmation of the sentences. A sentence to dishonorable discharge, total forfeitures after promulgation and confinement at hard labor for life is authorized upon conviction of rape, in violation of Article of War 92.

The papers accompanying the record of trial indicate the following:

Accused Hobson is 26 years of age, single and claims no dependents. He completed 3 years of high school in 1942 and has no civilian occupation. He had prior service from 5 October 1943 to 30 September 1947 in the United States Marine Corps and enlisted in the Army on 28 July 1950 for 3 years. He joined his present organization on 5 October 1950 and his company commander rates him "unknown" as to character and "satisfactory" as to efficiency. There is no record of previous convictions by courts-martial.

4/ Subparagraph 139a of the Manual for Courts-Martial, U. S. Army, 1949; Cohen v. United States, 36 F.2d 461, 462, (3d Cir. 1929) cert. den. 281 U.S. 742; Cook, MO-JAGA 242, 244; CM 260940, Ellerbee, 40 BR 67, 72, CM 325457, McKinster, 74 BR 233, 241.

5/ CM 323161, Lacewell, et al, 72 BR 105, 109; Roller, MO-JAGA 634, 637; Larsen v. Portland, 66 F.2d 326, 329, hn 1 (9th Cir. 1933); MGM v. Fear, 104 F.2d 892, 897, hn 2 (9th Cir. 1939).

6/ CM 335526, Tooze, 3 BR-JC 313, 340-341; CM 338993, Pelkey, 6 BR-JC 289, 308-309; CM 343793, Cruikshank, BR-JC, March 1951 (BR Opinion 17 November 1950, page 12).

Accused Norris is 25 years of age. He had prior service from 5 September 1945 to 4 November 1948 in the United States Air Force, and enlisted in the Army on 10 October 1950 for 3 years. He joined his present organization in December 1950 and his company commander rates him "unknown" as to character and "satisfactory" as to efficiency. There is no record of previous convictions by courts-martial. No further information pertaining to his civilian background is presently available.

Allan R. Browne J.A.G.C

William J. Hyman J.A.G.C

Arthur P. Jackland J.A.G.C

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

Harbaugh, Young and Roberts
Officers of The Judge Advocate General's Corps

In the foregoing case of Private First Class George A. Hobson, RA 14363648, Headquarters and Headquarters Company, 24th Infantry Regiment, APO 25, 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.

Edward H. Young, Colonel, JAGC

Nathan J. Roberts, Colonel, JAGC

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

MAY 21 1951

I concur in the foregoing action.

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

21 May, 1951

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

Harbaugh, Young and Roberts
Officers of The Judge Advocate General's Corps

In the foregoing case of Private First Class Willie W. Norris, RA 43027880, Headquarters and Headquarters Company, 24th Infantry Regiment, APO 25, 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.

Edward H. Young, Colonel, JAGC

Nathan J. Roberts, Colonel, JAGC

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

MAY 21 1951

I concur in the foregoing action.

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

21 May 1951

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

JAGK - CM 345614

MAY 17 1951

UNITED STATES)	SOUTHWESTERN COMMAND
)	
v.)	Trial by G.C.M., convened at Headquarters, Southwestern Command, APO 15, 28 December 1950 and 13, 15 and 16 January 1951. Dishonorable discharge, total forfeitures after promulgation, and confinement for life.
Private HOWARD L. CANNON (RA 16255039), Kobe Base Composite Service Company, APO 317.)	

OPINION of the BOARD OF REVIEW
BARKIN, WOLF and BROWN
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 92nd Article of War.

Specification: In that Private Howard L. Cannon, Kobe Base Composite Service Company, APO 317, then of the 541st Transportation Truck Company, APO 317, did, at Kobe, Honshu, Japan, on or about 2 May 1950, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill Yoshiko Kametani, a human being, by shooting her with a rifle.

He pleaded not guilty to the charge and its specification. He was found guilty of the specification 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 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

After dark, at 2040 or 2050 hours, 2 May 1950, the accused, in uniform and armed with a rifle, was on guard inside the high fence of Camp Carver, popularly known as West Camp, located near the junction of 22nd Street and California Avenue, Kobe City, Honshu, Japan. The fence consisted of a grill of crossed wires about one or one and one half inches apart. The lights of West Camp and a light on a telephone pole located outside the gate were on (R 16,17,38,42,54,55,59,61,62, 70-73,77,78,98).

At that time, Yoshiko Kametani, a Japanese female, Hatuse Shibata, Enichan Harumoto and Kazno Harumoto approached the fence. The accused asked Kazno to buy him some whiskey. Kazno did so and the accused engaged in a conversation with them. From the outside of West Camp, facing the gate and fence Enichan stood with her hand on the fence and to the immediate right of Kazno. Farther to the right, near the telephone pole, and between the pole and the fence, at a distance of about two or three feet from the fence, stood Hatsue. To her immediate right, also near the telephone pole, stood Yoshiko holding the fence with her right hand, her right foot placed on the brick foundation of the fence and her right side turned toward the fence. The accused was standing inside the fence in a position between that of Hatsue and Yoshiko (R 38-46,57,69-72,78, 81,82).

The accused and Yoshiko spoke to each other in English which Hatsue and Kazno overheard but could not understand. There was nothing in the tone of voice used or manner of speaking to indicate that either Yoshiko or the accused were excited or that their conversation might be terminated by violence. None of those present made any threatening gestures during their conversation nor did any of them attempt to enter West Camp. Yoshiko was unarmed (R 39,78,79,81,82,85,86,98).

Hatsue overheard Yoshiko say to Enichan in Japanese, "If you want to die, die yourself." Within two seconds thereafter, the accused made a remark in English to Yoshiko and before she had made a reply he moved his rifle from his shoulder to a position of port arms, then pushed the muzzle about two inches through the fence, pointed it directly at Yoshiko's breast, and fired a round. Yoshiko immediately fell to the ground beneath the fence screaming, her face downward and her left hand on her breast. Following this, the accused aimed the rifle downward through the fence at the prostrate Yoshiko and shot her a second time at close range. Thereupon, the accused pointed the rifle at himself, in the general direction of his neck, fired twice, and fell backward to the

ground (R 45,46,48,50,61,62,79,81,82,85-89).

Immediately following the shooting Yoshiko and the accused were taken to the 8th General Hospital. There photographs of Yoshiko were taken by Donald L. Smith, Agent, 7th Criminal Investigation Detachment, who stated that she appeared to be dead. (R 16-18,21,25,29,31,52,53,91-93; Pros Exs 8-11)

On the morning of 3 May 1950, in the autopsy room of the Hyogo Prefectural Medical College, Kobe City, Doctor Zensuke Aoyama and Police Technician Toshio Arai examined the clothing and dead body of Yoshiko Kametani in the presence of Assistant Police Technician Takazawa Omai, Agent Smith and others. Yoshiko Kametani had been dressed in a dark brown, reddish wool jacket, a blouse and a skirt immediately before she was shot by the accused and was similarly dressed at the time of this examination. After Takazawa Omai cut the clothing from the body of Yoshiko Kametani, it was subjected to tests and examination by Toshio Arai, a graduate from Osaka Medical College as a Master of Pharmacology and experienced in approximately 15 or 20 similar gunshot cases. He testified that he found positive evidence, in the form of black, sooty rings, of nitrate around two of the four holes he found in the jacket removed from Yoshiko Kametani's body. He stated that in his opinion the holes in the jacket were caused by gunfire which occurred at a distance of about one meter from the jacket (R 16,17,19,20,29-35, 52,53,69,90; Pros Ex 12).

Between 1000 and 1200 hours, 3 May 1950, Doctor Aoyama, a graduate of the Medical College of Nagoya University, Nagoya City, Japan, and a practicing doctor in Kobe City employed as the Inspecting Doctor of the Medical Examination Section, Hyogo Prefectural College, Kobe City, performed an autopsy on the body of Yoshiko Kametani. Doctor Aoyama stated that he observed two holes in the breast and two holes on the back of Yoshiko Kametani. In his opinion, they were caused by "two rifle or two pistol" bullets which had been discharged at a point within five meters of her body. Further he stated that in his opinion the hole made by the bullet fired first penetrated Yoshiko Kametani's right breast and the aorta, then exited from her right hip. He also explained that the bullet fired second penetrated the right hip, passed through the liver, heart and lung of Yoshiko Kametani, and exited through her left breast. His determination of which bullet was fired first was based upon the nature of the wounds inflicted on the body, the condition of the body and clothing of the victim, and other circumstances observed. Doctor Aoyama stated that his examination led him to conclude that Yoshiko Kametani's death was caused immediately or simultaneously with the striking of the bullet fired second, although either of the two bullets fired at Yoshiko Kametani could have caused her death. The time of death was fixed by Doctor Aoyama at "approximately 2200 hours, 2 May 1950" (R 18-27).

Hatsue testified that she had known the accused for about three months prior to the shooting. During that time Yoshiko rented a room in Hatsue's house and the accused visited Yoshiko in the room three or four times a week in the evening. Hatsue stated that the accused and Yoshiko conducted themselves in "a husband and wife relationship." The accused and Yoshiko conversed in English and Japanese. No one else visited Yoshiko at her room during the three months. For one week prior to the incident, the accused had not visited Yoshiko (R 74-77).

b. For the Defense

The accused, after being apprised of his rights as a witness, elected to remain silent (R 100).

4. Discussion

The accused has been found guilty of premeditated murder under a specification that he did at the time and place alleged "with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill Yoshiko Kametani, a human being, by shooting her with a rifle."

Murder is defined as "the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse" (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, 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. 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 344372, Davis, BR-JC, March-April 1951; CM 339254, Barnes et al, 8 BR-JC 219,249,263; CM 337089, Aikins and Seevers, 5 BR-JC 331,375,390).

The uncontroverted evidence shows that at about 2050 hours, 2 May 1950, the accused shot and killed a Japanese female, Yoshiko Kametani, by shooting her twice at close range with a rifle. About two seconds before he shot her, Yoshiko Kametani stated to a companion in Japanese, "If you want to die, die yourself." As the evidence indicates that the accused understood some Japanese and as the statement was substantially contemporaneous with the shooting, it may be reasonably inferred that the statement was of a type which would naturally follow some remark of the accused pertaining to homicide or suicide (CM 339254, Barnes et al, supra, at p 242,263). Although her remark may have provoked the accused,

the evidence shows that the homicide which followed was unlawful and without justification or excuse. The evidence further discloses that prior to the offense the accused and Yoshiko Kametani had lived for about three months in a "husband and wife relationship" and that for a week preceding the shooting he had stopped seeing her, indicating that there had been some misunderstanding between them. The accused's act of shooting himself immediately after he shot Yoshiko Kametani was in effect an act of flight from which a consciousness of guilt may be presumed. In any event, the lack of a motive for the shooting is immaterial. While motive may frequently explain the commission of a homicide, it is not an essential element of the crime of murder (CM 334570, Morales, 1 BR-JC 197,208). No basis exists for any inference that the shooting was perpetrated in the heat of passion brought about by adequate provocation. On the contrary, the homicide was calculated, deliberate and premeditated as is shown by the fact that after he fired at Yoshiko Kametani at close range, causing her to fall to the ground, he again fired at her as she lay prostrate before him, to assure himself that death would result (MCM 1949, par 179a, p 231; CM 342409, Woodall, 8 BR-JC 69,78; CM 340628, Diamond, 6 BR-JC 161,175; CM 336405, Jonson, 3 BR-JC 69,73,74; CM 322487, Dinkins, 71 BR 185,199).

The Board of Review is of the opinion that the record of trial amply supports the findings of guilty of the specification and charge.

5. Accused is 22 years of age. He enlisted on 22 April 1948 for three years. His character and efficiency as of 14 November 1949 was shown as "poor" and "unsatisfactory," respectively.

6. The court was legally constituted and had jurisdiction over 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 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.

Ernest Brown, J.A.G.C.

Samuel S. Wolf, J.A.G.C.

Sumner A. Brown, J.A.G.C.

(218)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

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

In the foregoing case of Private Howard L. Cannon, RA 16255039, Kobe Base Composite Service Company, APO 317, 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.

C. B. Mickelwait, Brig Gen, JAGC

Absent on leave
Edward H. Young, Colonel, JAGC

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

25 May 1951

I concur in the foregoing action.

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

26 May, 1951

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

JAGH CM 345657 MAY 9 1951

UNITED STATES v. First Lieutenant WILLIAM E. MOORE (0-1547406), Medical Company, 9th Infantry Regiment, 2d Infantry Division, APO 248.	)	2ND INFANTRY DIVISION Trial by G.C.M., convened at 2d Infantry Division, Yonggung, Korea, 28 February and 1 March 1951. Dismissal and total forfeitures after promulgation.

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

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.

The accused was tried upon the following Charges and Specifications:

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

Specification: In that First Lieutenant William E. Moore, MSC, Medical Company, 9th Inf Regt, 2d Inf Division, did at Lodol, Korea on 3 February 1951, draw and fire a weapon, to wit: a pistol, 45 caliber at Maynard J. Snell, Captain, MSC, Commanding Officer of Medical Company, 9th Inf Regt, 2d Inf Division, his superior officer, who was then in the execution of his office.

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

Specification 1: In that First Lieutenant William E. Moore, MSC, Medical Company, 9th Inf Regt, 2d Inf Division, did, at Lodol, Korea on 3 February 1951, commit an assault upon Captain Maynard J. Snell, MSC, Commanding Officer of Medical Company, 9th Inf Regt, 2d Inf Division, by shooting at him with a dangerous weapon, to wit: a pistol, 45 caliber.

Specification 2: In that First Lieutenant William E. Moore, MSC, Medical Company, 9th Inf Regt, 2d Inf Division, was, at Lodol, Korea, on 3 February 1951, drunk and disorderly in quarters.

The accused pleaded not guilty to but was convicted of both Charges and all Specifications. He was sentenced to dismissal and total forfeitures after date of promulgation. No evidence of previous convictions was introduced. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

In brief, there is substantial evidence in the record to the following effect:

On 3 February 1951 Captain Snell was the commanding officer of Medical Company, 9th Infantry Regiment, 2nd Infantry Division, located at Lodol, Korea. Accused was his subordinate in the unit. During the day the accused had been imbibing alcoholics and toward evening continued his drinking with the mess sergeant, several enlisted cooks and others in the company "kitchen" (mess tent). The sergeant, concluding that the officer was "under the influence" of the intoxicants, secured the latter's .45 caliber pistol, unloaded and concealed it. During the course of the visit to the "kitchen", accused spoke disrespectfully of Captain Snell, criticising the method of distributing liquor, employing the designation "Corporal Snell", and generally disparaging the commanding officer's manner of "running things". Later, the mess sergeant, fearing the heat and drink might cause nausea, persuaded the lieutenant to proceed to the officers' quarters, assisting him there. No one else became sick. The sergeant noticed that the outside air, cooler than the hot mess tent with its "fumes", served to revive the weak and drowsy accused and to enable him to regain control of his legs; however, he did accompany him into the billet and say to the other officers present, "I think he is all right". At accused's insistence, however, he returned the pistol, having first reloaded it.

When accused entered the house where he was quartered, two other officers, Captain Collier and Lieutenant Lower, were there. He interrupted Lower's letter writing, was told to "move away" and lay on Captain Snell's cot "with his muddy feet". Presently the captain entered, asked him to remove his feet, sat down and commenced perusing intelligence reports. Accused kicked his commander on the elbow, was asked to desist but persisted in his actions. The commanding officer then "jabbed him in the elbow" and tried to resume his reading. He was again interrupted, feeling a pistol in the hands of his disturber "poke me in the back." A request that he move it brought the rejoinder, "I won't". The commander attempted to return to his reading, but hearing the slide on the pistol pulled back, became frightened, demanded that the annoyer "take the gun off my back", threatening force as an alternative. He ignored the accused's reply "No you won't, I'll clip you first", again endeavored to read, was once more jabbed in the back with the pistol and finally by a direct order was

able to effect the lieutenant's movement to his own nearby cot. As the captain resumed his futile effort to work, Captain Collier, a dental officer, was blocked by the lieutenant's threatening pistol in his effort to approach accused and pick up a lighted cigarette which the latter had dropped on the floor. When warned by accused, the dentist desisted. There followed a shot from the pistol which barely missed Captain Snell's head. As the captain sought cover, the pistoleer, applying an insulting epithet to him, pointed the weapon at his commander's head and said "lay down and take it". Notwithstanding that another officer verbally intervened, and that the commanding officer "pleaded" with accused, the latter announced his intention of killing the captain.

At this point Lieutenant Lower made a hasty exit.

The commander continued to try to "talk down" the pointed pistol. Presently, a distraction enabled him to follow the other officer in an escape from the room, (at which time another shot was fired in the room) leaving of the original four only the dentist and the accused together.

Aid having been stationed outside, the commanding officer returned to his cot and the dentist in turn disappeared rapidly. Accused ejected a shell and again with offensive words directed the pistol at his superior. The latter, noticing that the slide was arrested, approached for an attempt at disarming the aggressor but the lieutenant saw and corrected the defect in time. The arrival of others was stayed by Captain Snell's warning, "For God's sake, stay out", upon the subordinate's threat of death to him. Finally, as the grip on the pistol tightened, the frantic captain by mentioning their wives and children and by producing a crucifix was able to secure a distraction which enabled a second escape. A well-liked sergeant volunteered to enter the house and found accused on the floor with the weapon on the bed beside him. Accused was later given a sedative and removed to the rear. Several witnesses testified that Lieutenant Moore was intoxicated. There was substantial evidence, however, that his drunkenness did not extend so far that he was unable to recognize the officers present at the time of the violence charged.

Accused testified to having taken several drinks during the day and to drinking liquor with the cooks and others in the mess tent. He asserted that he left for his quarters, accompanied by the mess sergeant, because the "fumes" began to make him ill. He denied drunkenness but asserted amnesia as to all occurrences on the evening in question after he had arrived at his quarters and deposited his pistol belt on his bed, testifying that his next recollection was of being at a distant clearing company at 3:30 a.m. the morning of 4 February; his inquiry as to the reason for his presence there produced the information that it was "acute alcoholism, suicidal and homocidal tendencies manifested by firing a .45." His testimony included recital of three occasions upon which he had become drunkenly unconscious

prior to 3 February. He added that on the last mentioned date he "was sane".

Other evidence introduced by defense was to the effect that accused enjoyed an excellent reputation among officers and men and that his record in the medical services in combat was commendable.

At the outset of the trial, defense objected to the formal investigation, alleging that the investigating officer, on 8 February 1951, exhibited a charge sheet to accused which set out an offense of willful disobedience, not assault upon a superior officer, together with one of drunk and disorderly in quarters. He further asserted that he was asked if he had any "friend to act as counsel to examine witnesses", but replied in the negative. The accused stated that he was shown sworn statements of witnesses concerning an incident of 3 February 1951 (denying that they were the same as those attached to the investigating officer's report), that he did not ask that the affiants be produced, and that he requested no additional witnesses. His testimony was that at the trial he desired three additional witnesses. 1/ Defense additionally asserted by motion that Specification 1 of Charge II and the Specification of Charge I were duplicitous.

It has been held that the provisions for a formal pre-trial investigation are directory only and that compliance therewith is not an indispensable prerequisite to a fair trial. 2/ In any case, from an examination of the instant record it is concluded that there was substantial compliance with Article of War 46. 3/ The charge sheet and the letter referring it to the investigating officer are dated 9 February 1951. The specifications as written on the charge sheet are apparently in their original form and the jurat is dated 9 February 1951. The statements attached to the report of the investigating officer appointed under Article of War 46, on regimental level, are detailed

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1/ The statement of one of these in the allied papers supports the prosecution's evidence; testimony of another is stipulated and was introduced by defense at the trial; no mention of the third is found anywhere in the record evidence or allied papers. The prosecution suggested a request by accused for a continuance and the possibility of stipulations. The accused declined, but later offered the stipulation mentioned above.

2/ Humphrey v. Smith, 336 U.S. 695, 700, hn 2 (1949).

3/ Henry v. Hodges, 171 F.2d 401, 402, hn 3 (2d Cir. 1948), cert. den. 336 U.S. 968, rehearing denied sub nom Henry v. Smith, 337 U.S. 927; Vlahakis, MO-JAGA 561, 565.

and complete, include facts as outlined above,[4] and are sworn to variously on 10 and 11 February 1951 before the investigating officer. His report is dated 12 February 1951. Statements secured in the preliminary investigation conducted in the medical company are dated 8 February and are attached to the letter dated 9 February transmitting the charges to the 9th Infantry Regiment. It is manifest that accused confuses the two investigations. In any event, no evidence has been presented which adequately counters the presumption of regularity which attends acts of public officials and public documents.[5] The question of duplicitous pleading is without importance here,[6] inasmuch as the sentence is fully supported by conviction of either of the specifications mentioned.[7]

On the merits little need be remarked. It is clear from the foregoing recital that ample and compelling, in fact uncontroverted, evidence supported the specifications alleging the vicious attack upon Captain Snell by the disgruntled subordinate.[8] Drunkenness was likewise persuasively shown to

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4/ With the report also is inclosed a psychiatrist's report to the effect that accused was sane at the time of the offense, and although intoxicated, was then capable of forming an intent to commit the offense.

5/ Johnson v. United States, 225 U.S. 405, 411, hn 5 (1912); United States v. Helwig, 159 F.2d 616, hn 2 (3d Cir, 1947); Moss v. United States, 193 F.2d 395, 398, hn 8 (Ct C & P App. 1939). Derry MO-JAGA 463, 469.

6/ However, one specification pleads an offense civil in nature while the other alleges a purely military one. CM 153372 (1922), Sec. 428 (5) Dig Ops JAG 1912-1940; CM 334097, Anderson, 4 BR-JC 347, 358.

7/ Whitfield v. Ohio, 297 U.S. 431, 438, hn 3 (1936); Claassen v. United States, 142 U.S. 140, 146 hn 2 (1891); Jordan MO-JAGA 365, 369; Cf. pages 135, 138 of the Manual for Courts-Martial, U. S. Army, 1949.

8/ CM 281164, Gartrell, 54 BR 61, 66, 69, Mathieu MO-JAGA, 449, 451; Ladyka MO-JAGA 217, 219, 221. Defense introduced evidence that accused was a good shot, evidently to indicate that if he had actually fired at the commander, the shell would have struck home; however, the assailant's wobbly condition amply explains his two misses.

the extent that the natural inhibitions of the officer were deadened [9] to the point where his expressed dislike of his commander crystallized into the violent actions charged. [10] No question of sanity is presented. [11]

The court had jurisdiction over the accused and over the offenses of which he was convicted. There was no error which injuriously affected the substantial rights of the accused and it is determined that his trial was properly conducted in that the procedures provided by military law were applied in a fundamentally fair manner. [12] The evidence properly admitted supports the findings, and the sentence is legal.

It is accordingly the opinion of the Board of Review that the record of trial is legally sufficient to support the sentence and to warrant its confirmation.

According to available records, accused is 29 years of age, married and has one child. He has four years' enlisted service and approximately seven as an officer. His efficiency ratings as an officer vary from very satisfactory to superior. He was reprimanded and fined as a result of a general court-martial sentence in December 1948 for being drunk and disorderly in quarters.

Allan R. Browne J.A.G.C

William J. Flynn J.A.G.C

William P. Jackson J.A.G.C

9/ Intent is not a necessary element of any of the offenses charged (Subpara. 152a and paragraph 183 of the Manual for Courts-Martial, U. S. Army, 1949; CM 279831, Monk, 52 BR 337, 341); however, it is apparent from accused's coherent, though violent, speech and actions that he was capable of harboring an intent to shoot at Captain Snell (Monk, supra); the intent to fire may be inferred from the act of pulling back the slide and with threatening words pointing the pistol at the victim. Dunlap v. United States, 70 F.2d 35, 37 hn 4 (7th Cir. 1934); Cooper, MO-JAGA, 607, 610; Powell, MO-JAGA 160, 162).

10/ Tucker, MO-JAGA 153.

11/ Cf. Heliseva, MO-JAGA 196, 199; LeCleire, MO-JAGA 552, 556.

12/ Reaves v. Ainsworth, 219 U.S. 296, 304, hn 2 (1911); Reilly v. Pescor, 156 F.2d 632, 635, hn 8 (8th Cir. 1946); United States ex rel Innes v. Hiatt, 141 F.2d 664, 666, hn 6 (3d Cir. 1944).

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

Harbaugh, Young and Roberts
Officers of The Judge Advocate General's Corps

In the foregoing case of First Lieutenant William E. Moore, O-1547406, Medical Company, 9th Infantry Regiment, 2d Infantry Division, upon the concurrence of The Judge Advocate General the sentence is confirmed and will be carried into execution.

Edward H. Young, Colonel, JAGC

Nathan J. Roberts, Colonel, JAGC

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

MAY 16 1951

I concur in the foregoing action.

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

17 May 1951

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

JAGH CM 345690

MAY 4 1951

UNITED STATES	)	FORT CAMPBELL KENTUCKY
v.	)	Trial by G.C.M., convened at Fort Campbell, Kentucky, 16 March 1951. To be confined at hard labor at such place as proper authority may direct for six months and to forfeit $50.00 per month for a like period.
Private LeROY T. WILLIAMS, JR., US 57206313, Battery C, 544th Field Artillery Battalion, Fort Campbell, Kentucky	)	

HOLDING by the BOARD OF REVIEW
BROWNE, FLYNN and IRELAND
Officers of The Judge Advocate General's Corps

The record of trial in the case of the soldier named above, having been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings of guilty and the sentence, has been examined by the Board of Review. The Board of Review holds the record of trial legally sufficient to support the findings of guilty and sentence.

Allan R. Browne (Concur) J.A.G.C.

William J. Flynn (Concur) J.A.G.C.

(Dissent) J.A.G.C.

1st Indorsement

Dept. of Army, JAGO., Board of Review #1, 3 May 1951 - To The Judge Advocate General.

Submitted under the provisions of Article of War 50e.

Allan R. Browne
ALLAN R. BROWNE
Colonel, JAGC
Chairman, Board of Review

15112

JAGE CM 345690 2d Ind

JAGO, SS USA, Washington 25, D. C. MAY 15 1951

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

In the foregoing case of Private LeRoy T. Williams, Jr., US 57206313, Battery C, 544th Field Artillery Battalion, Fort Campbell, Kentucky, 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.

1 Incl
Record of trial

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

15112

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

JAGU CM 345690

UNITED STATES v. Private LEROY T. WILLIAMS, JR., US 57206313, Battery C, 544th Field Artillery Battalion, Fort Campbell, Kentucky	FORT CAMPBELL, KENTUCKY Trial by G.C.M., convened at Fort Campbell, Kentucky, 16 March 1951. Confinement for six months and forfeiture of $50.00 per month for six months.

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

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1. Pursuant to Article of War 50e(2) the record of trial in the case of the soldier named above and the holding by 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 absence without proper leave from his organization and station at Fort Campbell, Kentucky, from about 15 May 1950 to about 8 November 1950, in violation of Article of War 61, and escape from confinement at Fort Campbell at or about 0130 hours, 25 December 1950, in violation of Article of War 69. Evidence of two previous convictions by summary court-martial was introduced. He was sentenced to be confined at hard labor for six months and to forfeit fifty dollars per month for a like period. The reviewing authority approved the sentence, ordered it executed and designated the Post Stockade, Fort Campbell, Kentucky, as the place of confinement. The proceedings were published in General Court-Martial Orders Number 24, Headquarters Fort Campbell, Fort Campbell, Kentucky, dated 31 March 1951. The record of trial was examined in the Military Justice Division of the Office of The Judge Advocate General and there found legally insufficient to support the findings of guilty and the sentence. The Board of Review, one member dissenting, has held the record legally sufficient to support the findings of guilty and the sentence. The Acting Judge Advocate General has not concurred in the Board's holding.

3. The record of trial shows the following:

The appointed trial judge advocate of the general court-martial before which the accused was tried, Captain Martin R. Haskell was a member of the Judge Advocate General's Corps, whereas the appointed defense counsel, Captain Edward J. Roxbury, Armor, according to his certificate attached to the record, was not a lawyer qualified in the sense of Article of War 11. The appointed assistant trial judge advocate, First Lieutenant William L. Denend, Infantry, according to his certificate attached to the record, was a lawyer so qualified, and the appointed assistant defense counsel, First Lieutenant Glenn F. Manning, was a member of the Judge Advocate General's Corps (Par 19, SO 57, Hq. Ft Campbell, Ft Campbell, Ky, 9 Mar 1951). At his express request, the accused was represented at the trial by his individual counsel, Mr. Jack A. Caspar, a qualified attorney at law, as shown by his certificate attached to the record, and by Lieutenant Manning, the appointed assistant defense counsel (R 3). Both Captain Haskell, the trial judge advocate, and Captain Roxbury, the defense counsel, the latter "Excused VOCG with consent of accused," were absent from the trial (R 2-3).

4. The question is whether the proceedings were invalidated because the officer appointed as defense counsel and excused from attendance at the trial with the accused's consent, was not a member of the Judge Advocate General's Corps or a member of a Federal court or of the highest court of a State, when the officer appointed as trial judge advocate was a member of The Judge Advocate General's Corps.

Article of War 11 provides in effect, inter alia, that in all general and special court-martial cases in which the appointed trial judge advocate is a member of the Judge Advocate General's Corps or a member of the bar of a Federal court or of the highest court of a State, the appointed defense counsel shall likewise be so qualified. The Manual for Courts-Martial, 1949, provides in effect that where the appointed trial judge advocate is legally qualified in the sense of Article of War 11, the appointed defense counsel must be similarly qualified (par 43a, p 40; par 56, p 51). The Manual further provides that "this particular requirement cannot be waived by the accused, although the regularly appointed defense counsel may be excused with the consent of the accused (A.W. 11)" (par 56, p 51).

This question has been effectively disposed of in the office of The Judge Advocate General. In both CM 313709, Velarde, 63 BR 237, and CM 337855, Watson, 4 BR-JC 157, concurred in by The Judge Advocate General, there was no appointed defense counsel. In the Velarde case the accused was represented by individual counsel, and in the Watson case the accused was represented by the appointed assistant defense counsel and two individual counsel. Nevertheless, the Board of Review held in each case that the provision of Article of War 11 directing the appointment of defense counsel is mandatory and failure to follow it constitutes fatal error. In Sp CM 1770, Ness, 6 BR-JC 345, concurred in by The Judge Advocate General, a warrant officer was appointed as defense counsel and, at the express request

of the accused, acted as such at the trial. The Board of Review held that under Article of War 11 the regularly appointed defense counsel must be a commissioned officer, and that the convening authority's attempt to appoint an individual not qualified as required by that Article was tantamount to appointing a court-martial without a defense counsel. The Board thereupon applied the rule of the Velarde and Watson cases, supra, and held that the error was fatal. Consonant with the above holdings, in our opinion the provision in Article of War 11 directing that where the appointed trial judge advocate is legally qualified the appointed defense counsel shall also be so qualified, is mandatory. It follows that failure to comply therewith constituted fatal error, and the findings of guilty and the sentence therefore must be disapproved.

5. 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.

Edward H. Young, Colonel, JAGC

Nathan J. Roberts, Colonel, JAGC

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

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

(232)

THE JUDICIAL COUNCIL

Harbaugh, Young and Roberts
Officers of The Judge Advocate General's Corps

In the foregoing case of Private LeRoy T. Williams, Jr., US 57206313, Battery C, 544th Field Artillery Battalion, Fort Campbell, Kentucky, 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 Private Williams has been deprived by virtue of the findings of guilty and the sentence so vacated will be restored. A rehearing is authorized.

Edward H. Young, Colonel, JAGC

Nathan J. Roberts, 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 May 1951

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

JAGK CM 345713

UNITED STATES v. Private First Class WALTER C. EVANS (RA 15278871), Headquarters Headquarters and Service Company, 73d Heavy Tank Battalion, APO 301	HEADQUARTERS EIGHTH UNITED STATES ARMY KOREA (EUSAK) Trial by G. C. M., convened at Headquarters EUSAK, APO 301, 8 March 1951. Dishonorable discharge, total forfeitures after promulgation, and confinement for life.

OPINION OF THE BOARD OF REVIEW
BARKIN, WOLF and BROWN
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 charges and specifications:

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

Specification: In that Private First Class Walter C. Evans, Headquarters Headquarters & Service Company, 73d Heavy Tank Battalion, did, acting in conjunction with Private First Class William C. McFerson, Headquarters Headquarters & Service Company, 73d Heavy Tank Battalion, at Sangam-Tong Wachong-Myong Kyong Sam-Gun, on or about 24 December 1950, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill Ho Yun Kil, a human being, by shooting him with a rifle.

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

Specification: In that Private First Class Walter C. Evans, Headquarters Headquarters & Service Company, 73d Heavy Tank Battalion, did, without proper leave, absent himself from his organization at Tokchon Dong, Korea from about 5 January 1951, to about 16 January 1951.

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 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 at such place as proper authority may direct for the term of his natural life. The reviewing authority approved only so much of the finding of guilty of the Specification of Charge I as involves a finding of guilty of unpremeditated murder, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. Private First Class Walter C. Evans, the accused in this case, and Private First Class William C. McFerson, were arraigned on a joint charge of murder under the Specification of Charge I. Each was also charged under a separate specification of Charge II with absence without leave. A defense motion for a severance as to accused McFerson was granted and the specifications were amended accordingly (R 6-9).

4. Evidence

a. For the Prosecution

At about 1300 or 1400 hours, 24 December 1950, accused, Private First Class William C. McFerson and Corporal Robert W. Arnold, all members of the 73d Heavy Tank Battalion, went on a hunting trip, in the vicinity of Sangam-Tong Wachong-Myong Kyong Sam-Gun. Accused was armed with an "M-1" rifle. At about the same time in the same vicinity, Ho, Suk Chun and his nine year old son, Ho, Yun Kil, were returning home after gathering firewood. The soldiers saw Ho, Yun Kil, who was walking about 300 meters ahead of his father. McFerson said, "Let's shoot at the Korean down there to scare him," and he and accused started firing at the boy. As the boy ran, bullets struck the ground around him. He was hidden from sight by an embankment for a moment, and when he again came into view, McFerson and accused continued to fire at him. McFerson stopped firing but accused continued to fire and was the only person shooting at the boy when he fell to the ground face downward. Arnold asked who had shot the boy. McFerson said, "It wasn't I." Accused said, "It was me" and laughed. Ho, Suk Chun ran to the boy and saw that he had been shot in the head. He removed the boy's bloodstained rubber shoes and ran to the soldiers crying and shouting in Korean, "Why you kill my son?" Accused, who did not understand him, told Ho to "go away and leave him alone." The soldiers continued on their way. Later that afternoon accused told Arnold to forget the incident and not say anything about it (R 14-25).

At about 1540 hours of that day, Ho, Suk Chun, accompanied by his wife, arrived at the 7th Division Clearing Station, Tokchon Dong, Korea, carrying their son, Ho, Yun Kil. Captain Joel H. Richert, Medical Corps,

assigned to the Station, examined the boy and pronounced him dead. The only "abnormal finding" he observed on the boy's body was a perforating head wound, which entered in the center of the head, about 3/8 of an inch in diameter, and exited at the right side of the head over the ear, about 1-1/4 inches in diameter. In Captain Richert's opinion, this wound was the cause of death (R 11-12).

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 11). Entered thereon are the following entries pertaining to accused:

"5 Jan 51

Evans Walter C RA 15278871 Pfc
Above EM dy to AWOL 0815 hrs

/s/ OTIS D SAUM
/t/ Otis D Saum
Capt Armor
Commanding" (Pros Ex 1)

"16 Jan 51

Evans Walter C RA 15278871 Pfc
Above EM AWOL to dy 1445 hrs

/s/ OTIS D SAUM
/t/ OTIS D SAUM
Capt Armor
Commanding" (Pros Ex 2)

b. For the Defense

The accused, having been advised of his rights as witness, elected to testify (R 25-26).

He stated that he was 19 years of age and had been in the military service for one year and seven months. On the afternoon of 24 December 1950, accused, while hunting with Corporal Arnold and Private First Class McFerson, saw a Korean boy. The boy disappeared behind a hill, and accused fired five rounds in his direction. When the boy reappeared, accused fired the last round in his weapon at him, and the boy fell. After the incident, a Korean, holding a pair of shoes, approached them and spoke in a language they did not understand. Accused did not report the incident (R 26-33).

On direct examination, accused said, "We didn't mean to shoot him - we just wanted to scare him." (R 28) He admitted that, when Arnold asked who shot the boy, accused said "Well, I guess I did because I fired the last shot," but he denied that he laughed at that time (R 28).

On cross-examination, accused testified as follows:

"Q. Why did you shoot at that boy, Evans?
A. We were just shooting at him to scare him.

"Q. Did it ever enter in your mind that you might hit him while you were shooting at him?
A. I wasn't thinking about that at the time.

"Q. What were you shooting at him then?
A. Just firing the weapon.

"Q. Just shooting at him for the fun of it?
A. Yes, Sir." (R 31)

5. Discussion

As modified by the reviewing authority, accused has been found guilty of unpremeditated murder, 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 24 December, while on a hunting trip, accused shot Ho, Yun Kil in the head with his M-1 rifle from which injury he expired shortly thereafter. The unrebutted evidence that the deceased was apparently a healthy and active individual until he was shot by accused and that he died shortly thereafter is sufficient to establish conclusively in the absence of evidence to the contrary that the wound inflicted by accused was the cause of death (CM 344743, Brown, 1951).

All the facts and circumstances contained in the record of trial show that the shooting was without legal justification or excuse, and malice requisite to murder may be presumed from accused's use of a deadly weapon in a deadly manner (CM 333032, Beckoff, 4 BR-JC 337-345). Accused's act cannot be justified on the grounds of adequate provocation or for any other reason, real or fancied. Accused's explanation of his actions was that he shot at the boy to scare him. Such a state of mind establishes the element of malice aforethought. Accused must have known that shooting at his victim would probably result in his being struck and that a wound inflicted by a high powered rifle might result in death. His complete indifference to the consequences of such an act signifies "a depraved nature and a heart regardless of social duty and fatally bent upon mischief" (Winthrop's Military Law and Precedents, 2nd Ed, page 672). Malice aforethought exists where accused has knowledge that the act will probably cause the death of,

or grievous bodily harm to, the victim, even though such knowledge is accompanied by indifference whether death or great bodily harm is caused, or by a wish that it may not be caused (MCM, 1949, supra).

All the elements of murder of which accused was found guilty, as modified by the reviewing authority, are conclusively proved by the evidence in the record of trial (CM 344743, Brown, supra).

The accused was also charged with and found guilty of absence without leave from his organization from about 5 January 1951, to about 16 January 1951, in violation of Article of War 61. Two duly authenticated extract copies of morning reports from accused's organization, admitted in evidence without objection, constituted prima facie evidence of accused's guilt of absence without leave for the period alleged in the Specification of Charge II and warrant the findings of guilty thereof (CM 344852, Campbell, 1951).

6. 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 imprisonment for life, * * * the confirming authority will designate the place of confinement."

In the instant case, pursuant to the provisions of Article of War 48(c) (2), the confirming authority is the Judicial Council, acting with the concurrence of The Judge Advocate General.

7. Accused is 19 years of age and single. He completed the ninth grade in school. He enlisted on 26 July 1949 for a period of three years.

8. The court was legally constituted and had jurisdiction over 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 sustain 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 92d Article of War.

(ON LEAVE), J.A.G.C.

Samuel S. Cowles, J.A.G.C.

Sumner A. Brown, J.A.G.C.

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 Private First Class Walter C. Evans, RA 15278871, Headquarters Headquarters and Service Company, 73d Heavy Tank Battalion, 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
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

23 May 1951

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

JAGN-CM 345745

MAY 9 1951

UNITED STATES v. Corporal RICHARD B. SHERWOOD (RA 17095519), Headquarters Company, 1st Infantry Division.	1ST INFANTRY DIVISION Trial by G.C.M., convened at Darmstadt, Germany, 19 February 1951. 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

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1. The Board of Review has examined the record of trial in the case of the soldier named above and submits this, its 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 Charges and Specifications:

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

Specification 1: In that Corporal Richard B. Sherwood, Headquarters Company, 1st Infantry Division, did, at Paris, France on or about 7 December 1950, wrongfully, unlawfully, and falsely have in his possession, with intent to defraud, a certain instrument purporting to be leave orders, knowing the same to be false.

Specification 2: (Finding of Not Guilty).

Specification 3: (Finding of Guilty disapproved by Reviewing Authority).

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

Specification: In that Corporal Richard B. Sherwood, Headquarters Company, 1st Infantry Division, did, without proper leave, absent himself from his organization at Bad Tolz from about 3 December 1950 to about 7 December 1950.

After the court overruled certain defense motions, the accused pleaded not guilty. He was found guilty of all Specifications and Charges, except Specification 2, Charge I. (The exceptions and substitutions made by the court in its findings as to Specification 3, Charge I are not material in view of the action of the Reviewing Authority thereon.) 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 two years. The Reviewing Authority disapproved the finding of guilty of Specification 3, Charge I, 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.

Only the evidence for the prosecution relating to the offenses of which accused was found guilty will be summarized.

The accused went absent without leave from his organization at Bad Tolz, Germany, on 3 December 1950 (R 38, 75, Pros Ex 1).

Sergeant First Class Fernand C. Quinn was a member of the Paris Detachment of the 7966 EUCOM Detachment, stationed in Paris, France, and was an investigator attached to the Provost Marshal Division (R 38, 53). On 8 December 1950 he "accompanied a French police inspector to arrest" the accused (R 39). Sergeant Quinn, as a representative of the U. S. Army, and the inspector entered the Lucy Hotel, 36 rue Poissonnier, Paris, France, and walked into the manager's office (R 39). The French inspector and Sergeant Quinn together arrested the accused as he entered the Hotel, took him to a French police station, and confined him there pending further disposition (R 39, 54, 61). The Lucy Hotel was a privately owned and operated French establishment, not within or a part of any military installation and not used as billets for soldiers or military persons, except "those who individually rent their own room from the proprietor" (R 52).

While the accused was so confined (R 48), Sergeant Quinn and the French police inspector returned to the Lucy Hotel (R 39). They ascertained from the hotel register in the manager's office that accused

was listed as the sole occupant of Room 6 (R 45); accused later acknowledged to Sergeant Quinn that No. 6 was his room (R 48). The Sergeant knew the room had been rented to an American Military person (R 57). Sergeant Quinn accompanied — i.e., "followed directly behind" — the French inspector, while the latter searched Room 6 in the named hotel (R 53). Sergeant Quinn described the room as being furnished with a wall closet containing men's clothing, a bed, and a closet screen (R 48, 49). Sergeant Quinn had the inspector's permission to accompany him and remained present throughout the search (R 53). The sergeant did not have a search warrant or writ authorizing him to search the premises; he was not accompanied by any commissioned officer of the United States Army (R 53). The accused had not consented to the search of the private hotel room rented by him (R 55, 56). As a result of the search so conducted Sergeant Quinn came into possession of a "caliber 45 Army pistol and copies of leave orders with [the accused's] name on them" (R 40, 54).

The pistol (Pros Ex 2) and a copy of the leave orders (Pros Ex 3) were received in evidence over the objection of the defense timely made on the grounds, among others, that they were obtained by means of an unlawful search and seizure (R 40-42, 46).

The copy of the leave orders, purporting to have emanated from Headquarters, 1st Infantry Division on 28 November 1950, granted leave to a Corporal John J. McSorley, a Private Harold D. Pyle and the accused; the accused's leave was for 25 days commencing 1 December 1950 (R 42, 43-45). The copy appeared to have been signed by Chief Warrant Officer Arthur J. Conrad, Assistant Adjutant General of the Division (R 42, 43-47, 49, 54 (Pros Ex 3).

As a part of the cross-examination by Defense Counsel, Sergeant Quinn testified that he was familiar with the French law which has to do with the inspection of private hotel rooms; that the French law on the subject had once been read to him by "one of [their] girl translators," but that he could not make reference to its exact provisions (R 56); that as a French inspector the French police officer had the right to enter and search accused's room without his permission (R 56). On redirect examination the witness was asked what subjects he was instructed in, and the following colloquy took place (R 59):

> "DEFENSE: I'm going to object to that on the grounds that that is not material or relevant to the issues before this court what sort of police instruction he had.
>
> "PROSECUTION: I think it would be, I'm going to lay the foundation for testimony as to the laws of France.

"DEFENSE: Well if that's what the purpose of it is I respectfully submit that under the Courts-Martial Manual that is not the way of proving the laws in a foreign country.

"LAW MEMBER: One moment, please. With respect to your objection - your objection is denied. However, if no other testimony along those lines comes along the court will respect the objection of the defense.

"DEFENSE: I'll hold off my objection."

On further direct examination Sergeant Quinn testified that in his 3 years' experience in Paris he had received training and instruction on the subject matter of recovery of property and the processing of that property for future use as evidence (R 58, 59, 60).

The Sergeant further testified that since he was accompanied by the French inspector, he had the right to arrest a person subject to military law (R 60, 61); that there existed a liaison between "American and French," and that he had no right to enter a public building without a French police officer; that the inspector spoke English and also served in the capacity of an interpreter (R 62).

There was testimony to the effect that the leave orders found in accused's hotel room were not published by Headquarters, 1st Infantry Division and were not signed by Chief Warrant Officer Arthur J. Conrad, who purportedly signed them (R 63-68, 69, 73).

The pistol so found was reflected in the records of Headquarters Company, 1st Infantry Division, as belonging to that unit (R 69). It previously had been issued to a field grade officer (R 87). The accused had not been authorized to carry a .45 caliber pistol (R 69, 70).

At the close of the Government's case the defense by motions for findings of not guilty again objected to the receipt in evidence of the pistol and leave orders as having been obtained by an illegal search, but the motions were overruled (R 79-85).

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

The accused was advised of his rights in the matter of testifying and elected to remain silent (R 89-91).

No evidence was offered by the defense.

4. Discussion.

The accused's guilt of absence without leave was fully established by the evidence, and the record of trial is legally sufficient to support the findings of guilty as to Charge II and the Specification thereunder.

The accused was found guilty under Specification 1 of Charge I of the offense of unlawful possession, with intent to defraud, of an instrument purporting to be leave orders, knowing the same to be false.

The record of trial shows that the accused was taken into custody in the lobby of the Hotel Lucy in Paris, France, by a military police investigator and a French inspector of police, acting in concert, and was incarcerated in a French police station. Thereafter, the two police officials, without the accused's permission, entered and searched a hotel room occupied by the accused in a private French hotel, and there seized the leave orders, the subject matter of this offense, and a pistol (subject matter of Specification 3, Charge I, disapproved by the Reviewing Authority). The military policeman, though on duty, had no search warrant, writ, or other authorization to search the accused's room. The French inspector was performing an official duty and acting in liaison with the American.

Paragraph 138 of the Manual for Courts-Martial, U. S. Army, 1949, provides in pertinent part as follows:

> "138. CERTAIN ILLEGALLY OBTAINED EVIDENCE.—Evidence obtained as a result of an unlawful search (see 18 USC 2236) of the property of an accused conducted or instigated by persons acting under authority of the United States, * * * is inadmissible in a trial by court-martial. All evidence obtained through information supplied by such illegally obtained evidence is likewise inadmissible.
>
> "A search of property owned or controlled by the United States, or located in a foreign country or in occupied territory and occupied or used by persons subject to military law or to the law of war, which search has been authorized by the commanding officer having jurisdiction over the locality where the property is situated or, if the property is situated in a foreign country or in occupied territory, over personnel subject to military law or to the law of war in such locality, is lawful."

Accordingly, unless the search and concomitant seizure were legal, the leave orders found by the two police officials and all evidence obtained through information supplied thereby were inadmissible.

That Room 6 in the Hotel Lucy was accused's admits of no doubt. This fact was clearly established by the testimony of witnesses, and Defense Counsel urged it by his objections to the admissibility of evidence. In the absence of such fact no problem would be posed because, if the room were not accused's, the leave orders would not have been in his possession, constructive or otherwise, and possession of the leave orders is the very gravamen of the offense charged.

At the time of the entry by the police officials the accused continued to be entitled to the peaceable possession of the hotel room shown by the evidence to be his place of abode at the time, and his legitimate right of occupancy was secure against an unlawful search (Johnson v. U.S.,333 U.S. 10, 92 L. Ed. 436 (1948); McDonald v. U.S., 335 U.S. 451, 93 L. Ed. 153 (1948); Brown v. U.S., 83 F. 2d 383 (3d Cir. 1936); Roberson v. U.S., 165 F. 2d 752 (6th Cir. 1948); U. S. v. Novero, 58 F. Supp. 275 (D.C.E.D. Mo. E.D. 1944); Giles v. State, 133 Tex.Cr. 454, 112 S.W. 2d 473 (1938)).

The evidence unequivocally establishes the manner and extent of Sergeant Quinn's personal and active participation in the search of the accused's hotel room. His search was "exploratory and general and made solely to find evidence of * * * guilt" (U.S. v. Lefkowitz, 285 U.S. 452, 465, 76 L. Ed. 877, 883 (1932)). The record contains no evidence justifying his actions in this respect, but on the contrary it was affirmatively and positively shown that he acted unlawfully, and any presumption to the contrary was overcome by the evidence.

Sergeant Quinn had not been authorized to make the search by the commanding officer having jurisdiction over personnel subject to military law in the locality of Paris, France. He had no search warrant or similar writ. The accused had not consented to the search. The search was not incident to a lawful arrest, since the accused was not in the room at the time he was apprehended; the apprehension of the accused had been completed, and he was in confinement in a French police station, at the time the search was instituted. Neither the pistol nor the leave orders were of the type of property which by reason of physical characteristics would furnish credible evidence of the commission of a crime. Immediate action was not imperative because of the exigencies of the situation. At least one of the foregoing conditions must have existed to make Sergeant Quinn's search lawful

(MCM, 1949, para. 138 (as to the order); CM 252103, Selevitz, 33 BR 383, CM 258550, Shroyer, 38 BR 75, CM 317327, Nash, 66 BR 277, 301 (as to consent); Agnello v. U.S., 269 U.S. 20, 70 L. Ed. 145 (1925), U.S. v. Coffman, 50 F. Supp. 823 (D.C.S.D. Cal. S.D. 1943), Elmore v. Commonwealth, 282 Ky. 443, 138 S.W. 2d 956 (1940) (as to search not being incident to a lawful arrest); CM 264149, Englehardt, 42 BR 23 (as to seizure due to credible evidence of crime or exigencies of the situation)).

Therefore, so far as it was conducted by Sergeant Quinn, the search of the accused's hotel room and seizure of the pistol and leave orders were unlawful, the evidence so obtained was legally inadmissible at the trial, and findings based thereon are not valid (CM 196526, Ray, 3 BR 19).

To advert to the question of whether the French inspector of police accomplished a lawful search, it is clear the search so far as conducted by him was at the instigation of the American military police investigator, and evidence obtained as the result of an unlawful search by the French inspector would be similarly inadmissible (MCM, 1949, para. 138).

Sergeant Quinn testified to the existence of a liaison arrangement between American and French authorities, and his actions in connection with the entry into accused's hotel room attested to an understanding whereby investigative police action by a French official is employed in aid of American law enforcement. Additionally, it is a matter of common and universal knowledge within the Army that American military police customarily conduct their affairs in collaboration with local officialdom.

Under all these circumstances, a search made by a foreign official in accordance with the laws of his country and within its jurisdiction may be regarded in a court-martial as lawful, provided that the law of that country sets up safeguards against unreasonable searches and seizures substantially similar to those established by military law as it applies to members of the United States Armed Forces and by the Fourth Amendment to the Constitution of the United States as judicially applied in the Federal courts.

In measuring the instant case the two requirements of this rule are:

(1) That the French inspector complied with the French law of search and seizure, and

(2) That the French law of search and seizure measures up to our own concept of reasonableness.

The first requirement is sufficiently satisfied by the testimony of Sergeant Quinn that the inspector was a French Inspector of Police and acted in accordance with French law. It is further met by the presumption of regularity, which here permits the inference that the French inspector was legally in office and performed his duties properly according to French law (MCM, 1949, subpara. 125a).

But the second requirement is not satisfied. Subparagraph 133b of the Manual for Courts-Martial, U. S. Army, 1949, provides in pertinent part:

> "b. Foreign law.--With the exception of the law in effect in a country or territory occupied by the armed forces of the United States, a court-martial cannot take judicial notice of foreign law or foreign regulations having the force of law. Such law must be proved like any other fact. * * *"

The principle enunciated in the Manual is in consonance with the holdings of the Federal courts (e.g., Dainese v. Hale, 91 U.S. 13, 23 L. Ed. 190 (1875); Wigmore, Evidence (3d Ed., 1940) sec. 2573). This outright prohibition against taking judicial notice of foreign law is controlling; it interdicted the court and prevents the Board from obtaining information as to the French law on the subject of search and seizure from sources outside the record of trial, no matter how authentic the source might appear to be.

The record of trial is devoid of proof as to the French law. Sergeant Quinn did not undertake to testify concerning it, his statements as a witness being limited to the conclusion that the French inspector complied therewith. Furthermore, as shown by the remarks of Counsel and the Law Member set out on page 4 hereof, it was not intended that Sergeant Quinn testify as to the French law, for, if he had, the Law Member would have considered the objections thereto which Defense Counsel obviously would have made. There is a complete absence of any evidence upon which the court could have predicated, and the Board now can make, a judicial determination that the French law of search and seizure is substantially equivalent to the American. Therefore, the leave orders seized by him and all evidence obtained through information supplied thereby were inadmissible as evidence, the Law Member committed fatal error in receiving them in evidence over objection of the Defense, and there is not sufficient evidence to sustain the findings of guilty.

JAGN-CM 345745

5. For the foregoing reasons the Board holds the record of trial legally insufficient to support the findings of guilty of Specification 1, Charge I, and of Charge I, legally sufficient to support the findings of guilty of the Specification of Charge II and Charge II, and legally sufficient to support only so much of the sentence as provides for forfeiture of $25.36 and confinement at hard labor for twelve (12) days.

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

George E. Michel, J.A.G.C.

Erik Moe Clayi, J.A.G.C.

JAGE CM 345745 1st Ind

JAGO, SS USA, Washington 25, D. C. MAY 24 1951

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

In the foregoing case of Corporal Richard B. Sherwood (RA 17095519), Headquarters Company, 1st Infantry Division, The Judge Advocate General has not concurred in the holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Specification 1, Charge I, and of Charge I, legally sufficient to support the findings of guilty of the Specification of Charge II and Charge II, and legally sufficient to support only so much of the sentence as provides for forfeiture of $25.36 and confinement at hard labor for twelve (12) days. Pursuant to Article of War 50e(4) 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.

1 Incl
Record of trial

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

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

JUN 1 1951

JAGU CM 345745

U N I T E D S T A T E S	)	1ST INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Darmstadt, Germany, 19 February 1951. Dishonorable discharge, total forfeitures after promulgation and confinement for two years.
Corporal RICHARD B. SHERWOOD RA 17095519, Headquarters Company, 1st Infantry Division	)	

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Opinion of the Judicial Council
Harbaugh, Mickelwait and Young
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 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, as approved by the reviewing authority, was found guilty of wrongfully, unlawfully and falsely with intent to defraud having in his possession at Paris, France, on or about 7 December 1950, a certain instrument purporting to be leave orders, knowing the same to be false, in violation of Article of War 96, and absence without leave from his organization at Bad Tolz from about 3 December 1950 to about 7 December 1950, in violation of Article of War 61. 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 two 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 insufficient to support the findings of guilty of wrongful possession of the leave orders, legally sufficient to support the findings of guilty of absence without leave and legally sufficient to support only so much of the sentence as provides for forfeiture of $25.36 and confinement at hard labor for twelve days. The Judge Advocate General has not concurred in the Board's holding.

3. We agree with the Board of Review that the record is legally sufficient to support the findings of guilty of absence without leave. We are also of the opinion that the record of trial is legally sufficient to support the findings of guilty of wrongful possession of the leave orders, as alleged, unless the introduction into evidence of these orders was erroneous because they were seized as the result of an unlawful search. Accordingly, we will limit our summary of the evidence to the events surrounding the seizure of the orders.

a. For the prosecution.

The accused was arrested in the lobby of the Lucy Hotel, 36 Rue Poissonnier, Paris, France, by Sergeant First Class Fernand C. Quinn, an investigator attached to the Provost Marshal Division, 7966 EUCOM Detachment, Paris, France, and a French police inspector and confined in a French jail (R 39, 54, 61). Sergeant Quinn and the French inspector returned to the Lucy Hotel and went to the accused's room, where the French inspector conducted a search. The Lucy Hotel was a privately owned and operated French establishment not under or a part of any military installation and not used as a billet for U. S. military personnel, except "those who individually rent their own rooms from the proprietor" (R 52). Sergeant Quinn was present during the search with the permission of the French inspector (R 53). The accused had not consented to the search (R 55, 56). The sergeant did not have a search warrant or writ authorizing him to search the hotel room nor was he accompanied by a commissioned officer (R 53). As a result of the search Sergeant Quinn came into possession of a .45 caliber Army pistol and the leave orders (R 40 54). Both of these items were introduced into evidence over the objections of the accused that they were the product of a search and seizure conducted in violation of the Manual for Courts-Martial, 1949, and the Fourth Amendment to the Constitution (R 40-42, 46).

Sergeant Quinn testified that under the French law the French inspector had the right to search the accused's room without the accused's, permission (R 56), but further attempts to prove the law of France through this witness were blocked by objection on the part of the defense (R 59). The sergeant also testified that since he was accompanied by the French inspector he had the right to arrest a person subject to military law (R 60, 61); that there existed a liaison between "American and French" and that he had no right to enter a public building without a French police officer; and that the inspector spoke English and also served in the capacity of an interpreter (R 62).

At the close of the Government's case the defense by motions for findings of not guilty renewed its objections to the reception in evidence of the pistol and leave orders, but the motions were denied (R 79-85).

b. For the defense.

No evidence was offered by the defense. The accused, after having been advised of his rights, elected to remain silent (R 89-91).

4. We need not decide whether the objection to the reception of this evidence on the grounds that it was the product of an unlawful search and seizure in violation of the Fourth Amendment to the Constitution should have been sustained and thus give extra-territorial effect to that Amendment (Compare Best v. United States, 1 Cir., 1950, 184 F2d 131 with In re Ross 140 U.S. 453 (1891)) since military law itself prohibits unreasonable searches and seizures and renders evidence gained as a result thereof inadmissible (CM 209952 Berry, 9 BR 155; CM 282058 Owens, 54 BR 309; CM 319591 Pogue 68 BR 385; CM 328248 Richardson, 77 BR 1).

As is evident from the above, the defense introduced no evidence to establish that the search was unlawful and beyond the admissions gained from Sergeant Quinn on cross-examination, there was no other evidence to that effect. While ordinarily the party who proffers evidence has the burden of establishing its admissibility, there are exceptions to this rule, based on the usual considerations which govern the allocation of burden of proof (1 Wigmore Evidence, 3d Ed. sec 18). It has been held that the burden of proving that evidence was obtained as a result of an illegal search and seizure is on the one who asserts it (United States v. Vatune 292 F 497 (1923) ; United States v. Rellie 39F Supp. 21 (1941); State v. McCowan 331 Mo. 1211, 56 S.W. 2 410 (1932); Terrell v. Comm. 196 Ky. 288, 244 S.W. 703 (1922)).

In this posture of the case, therefore, the search by the French inspector must be held to have been a valid search under French law. In addition, as a public official, there being no evidence to the contrary, there is a presumption that he performed his duties properly (MCM, 1949, par 125a, p 151). Accordingly, the question for decision is whether evidence gained by a search, lawful under the law of France is admissible against the accused in a court-martial.

It is not every search without a warrant that is illegal but only unreasonable searches (United States v. Rabinowitz, 339, U.S. 56 (1950)) and the courts have adapted this concept of reasonableness to the peculiar conditions existing as a result of the presence of military forces abroad. Thus in Best v. United States, 1 Cir., 1950, 184 F2d 131, it was held that a search by the military under competent orders, of the private apartment in Vienna of an American citizen suspected of treason was valid and evidence gained as a result thereof was properly received in evidence in his trial for treason.

Measured by the test of reasonableness we think that this search was lawful. We are not unmindful of the provision in the Manual (MCM, 1949, par. 138, p 183) that a search of property located in a foreign country is lawful if conducted with the authorization of the commanding officer having jurisdiction over the locality in question, but the manual does not pretend to lay down an exclusive test for a lawful search. It is, as we have said, solely a question of reasonableness and, in our opinion, a search by a French official valid under French law is reasonable for military purposes and therefore the evidence procured as the result of such search is admissible.

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, as modified by the reviewing authority, and the sentence and to warrant its confirmation.

C. B. Mickelwait, Brig Gen, JAGC

(Dissent)
Edward H. Young, Colonel, JAGC

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

15112

DISSENTING OPINION

by

JUN 12 1951

Young
Member of the Judicial Council

In my opinion this was a search conducted at the behest of the Army and solely for the purpose of detecting a violation of military law. There is nothing in the record to justify the conclusion that the French inspector was anything more than a liaison between the French and the Americans or that his presence at the search was due to any interest in uncovering evidence that French law had been violated. Since it was a search conducted at the instigation of the American military it must seek its justification under military law and not under French law, in the same way that a search conducted by the state authorities at the instigation of Federal officials must seek its justification under Federal law (Byars v. United States 273 U.S. 28 (1927); Sutherland v. United States 92 F 2d 305 (CCA 4th - 1937); Sloane v. United States 47 F 2d 889 (CCA 10th - 1931)). Since Sergeant Quinn did not have the permission of a competent commanding officer to make the search (MCM, 1949, par 138, p 183-4) and since he had ample time to procure such authorization, I think the search was unreasonable and that the evidence gained as a result of it should have been excluded. I do not want to be understood as holding that in every case the authorization of a competent commanding officer is a prerequisite to a valid search. The question in every case is whether the search is reasonable in the circumstances of that case (United States v. Rabinowitz 339 U.S. 56 (1950)). "The test of reasonableness cannot be stated in rigid and absolute terms" (Harris v. United States 331 U. S. 145, 150 (1947)). "Each case is to be decided on its own facts and circumstances" (Go-Bart Importing Company et al v. United States 282 U. S. 344, 357 (1931)).

Edward H. Young

Edward H. Young, Colonel, JAGC

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

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

In the foregoing case of Corporal Richard B. Sherwood, RA 17095519, Headquarters Company, 1st Infantry Division, 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.

C. B. Mickelwait, Brig Gen, JAGC

(Dissent)
Edward H. Young, Colonel, JAGC

JUN 12 1951

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

13 June, 1951

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

MAY 9 1951

JAGH CM 345823

UNITED STATES	)	25TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at APO 25, 27 & 28 March 1951. Dishonorable discharge, total forfeitures after promulgation, and confinement at hard labor for life.
Private First Class MARVIN A. TURNER (RA 19348370), Heavy Mortar Company 27th Infantry Regiment, APO 25	)	

OPINION of the BOARD OF REVIEW
BROWNE, FLYNN 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 by the Board of Review and the Board submits this, its opinion, to the Judicial Council and The Judge Advocate General.

Accused was tried upon the following charge and specification:

CHARGE: Violation of the 92nd Article of War

Specification: In that Private First Class Marvin A. Turner, Heavy Mortar Company, 27th Infantry Regiment, APO 25, did, at Northwest of Suwon, Korea, on or about 31 January 1951, forcibly and feloniously, against her will, have carnal knowledge of Cho Kyoung Ai.

He pleaded not guilty to, but was found guilty of the charge and its specification. Evidence of one previous conviction by special court-martial was introduced at the trial. Accused was sentenced to dishonorable discharge, total forfeitures after promulgation and confinement at hard labor for life. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

There is substantial evidence in the record of trial to the following effect:

At about 1500 hours on 31 January 1951, northwest of Suwon, Korea, three American soldiers appeared at the house of Cho Kyoung Ai, a 15 year old Korean girl of the Catholic faith; they picked up a pencil and some rouge and departed. The girl then went out to the kitchen, noticing seven American soldiers in the yard. She returned to the house and prepared to tend one of her brothers, a five year old. An American soldier, however, deposited the infant on the floor, forbade the girl to move and then, while another United States soldier stood guard at the door, took her to another room. There he endeavored to disrobe Ai but was frustrated by her flight to a small air-raid shelter "cave" out-doors. Presently, after three soldiers had appeared at the "cave" and dragged out and searched a trunk, one of them disposed himself in the shelter and attempted to remove the young girl's clothes. His response to her reaction of "hollering and yelling so loud," was to muffle her cries, pull out a knife, step on her hand and beat her. Unsuccessful still, the soldier called a companion to help, but even the combined efforts of the two in the small area failed to subdue the "fighting" victim to the point where they could disrobe her. Finally, they were replaced by a third American soldier "much stronger than the other two". She testified that he "held" her mouth, "threw" her on the ground, pulled off her clothes, beat her several times, held her down, and shortly with his genital organ achieved a penetration of her vagina, which caused her pain. Her testimony was that she resisted with all her strength, stating, "because I wanted to protect my virginity". All her clothes were torn, and dirty, her strength was sapped and she found that "all I can do is cry." The time of these occurrences is variously estimated at from 1630 to 1800 hours. The girl stated that the accused was in the shelter with her for about 20 minutes. Before the event was completely concluded, relatives appeared near the shelter buttressed by three Korean United Nations soldiers, a lieutenant and two interpreters for the nearby American forces (about 300 yards distant). When a brother called out to locate Ai, she commenced "yelling" * * * "my dear brother, you came to rescue me". A flashlight was focused into the shelter and she was discerned donning her underclothes. She immediately emerged crying and dishevelled but was quieted. In about "a minute" the soldier appeared at the entrance of the "cave", looked out, called one of the interpreters by name, and then withdrew his head, hiding his face. The two interpreters and the girl identified him as the accused. One of the interpreters had known him for several months. Ai's testimony was that this was her first sexual encounter.

The accused testified, denying that he participated in the occurrence or had ever been to the "cave" until taken there during the pre-trial investigation. He asserted that the "only way I know the girl is that she picked me out of a lineup". He added, "I may have seen her before among a group of prostitutes who had a house near the Battalion C.P."

Defense presented a battalion surgeon, a Naval officer, who examined Ai on 1 February. He found an intact, untorn, "fairly well developed" and undilated hymen, which to him indicated absence of previous intercourse. His testimony was, however, that it would be necessary for the male organ

to penetrate from one to one and one-half inches into the vagina before the hymen would be contacted. He discovered a white substance at the opening of the external genitalia; the character of this he was unable to analyze in the absence of laboratory equipment, but he was of the opinion that its presence was not necessarily significant of intercourse. He agreed that there was a possibility that the subject had experienced intercourse, although he discounted it, at least penetration beyond the hymen.

Two soldiers testified for the defense that they had seen accused briefly on 31 January at points within about 300 yards of the event in question; one recalled that accused passed in a truck between 1600 and 1700 hours; the other remembered seeing him for about 5 minutes between 1730 and 1800 hours.

Evidence of the excellent character and efficiency of accused was supplied by a stipulation as to the nature of the testimony of his company commander.

It will be seen from the foregoing that the only substantial dispute at the trial involved the twin questions of identity of the accused as the perpetrator, and penetration of the genitalia of the complainant.[1] The complainant pointed out the accused unhesitatingly, and her testimony was strongly corroborated [2] by that of the two Korean United Nations soldiers who practically caught the American soldier "in the act".

The fact that the accused called the name of one of them and had known him for several months minimizes the likelihood of mistake. No valid motive appears, or is suggested in the record, for these two disinterested soldiers, companions in arms of the accused, to testify falsely against him.[3] It is not without significance that competent defense counsel wisely refrained from cross-examining them,[4] doubtless sensing the steadfastness of their testimony. Additionally, in judging credibility, the decision of the court-martial which observed the witnesses, is entitled to great weight.[5] Independently evaluated, however, the evidence supports

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1/ In view of the conclusions reached, we pass the question as to propriety and consistency, in one case, of defenses of alibi and presence but non-penetration.

2/ Cf. Ewing v. United States, 135 F.2d 633, 635, 636, hn 3 (App. D.C. 1942); Morgan, MO-JAGA 621, 625.

3/ Cf. Quattlebaum, MO-JAGA 224, 227; Brown, MO-JAGA 341, 343.

4/ Berlin, MO-JAGA 655, 659.

5/ MGM v. Fear, 104 F 2d 892, 897 hn 2 (9th Cir 1939); Vlahakis, MO-JAGA 561, 565.

the court's determination as to the identity of the accused as the assailant. The evidence that he intended no good towards the girl in the "cave" gains further momentum from his initial attempted concealment of his face upon discovery.[6]

The two efforts at alibi must fail of their object, for with the elastic time elements in evidence,[7] it was entirely possible for the court to accept the statements of those witnesses as correct and yet properly to conclude that accused was present at the nearby scene of the offense, and to determine his nexus therewith for the 20 minutes alleged.[8]

This brings us to the second question, i.e., was there evidence of sufficient penetration to satisfy the law's requirements as to the proof? For this purpose it is held that any "penetration however slight of a woman's genitals is sufficient carnal knowledge * * *".[9] The victim (corroborated by the circumstances discovered when her rescuers arrived)[10] testified categorically to entry of the male organ into her vagina and nothing was offered which was inconsistent with such an occurrence. The physician, whose testimony, indeed, the court was at liberty to reject,[11] accepted the possibility of penetration for a distance of between one and one-half inches. The exhausted condition of the girl, her nudity, the consequent opportunity and patent desire of the assailant for coitus, and other circumstances in evidence afford reasonable grounds for inferring that at least a partial (hence actionable) penetration was effected.

A question as to propriety of substitution of a competent court interpreter for one of questionable ability was raised by the defense. Defense counsel objected to the quality of the first interpreter's work; the court agreed, secured a qualified substitute and required repetition of the testimony as to which objection had been made. To this clarification, defense also objected, urging undue prominence of the evidence.

6/ Hickory v. United States, 160 U.S. 408, 417, 422, hn 2; Allen v. United States, 164 U.S. 492, 499; Kanner v. United States, 34 F 2d 863, 866 hn 6 (7th Cir 1929); Cockrell, MO-JAGA 361, 365.

7/ Cf. Scott, MO-JAGA 457, 461.

8/ Powers, MO-JAGA 506, 509; Ray, MO-JAGA 594, 599.

9/ Subparagraph 179b of the Manual for Courts-Martial, U. S. Army, 1949; DeWar, MO-JAGA 543, 547.

10/ Scott, MO-JAGA, supra, 460.

11/ United States v. Porter, 9 F.2d 153, 161, hn 5 (E.D. Mich. S.D. 1925); United States v. Commercial, 43 F. Supp. 714, 718, hn 8 (E.D. Wash. N.D. 1942); Ford, MO-JAGA 527, 534.

The point is not persuasive. Disregarding the suggestion of invited, hence non-prejudicial error,[12] it is observed that the action of the court-martial was necessary and proper.[13] An interpreter whose accuracy is suspect is of minimal value. In this instance the court did not abuse its discretion to decide as to the qualifications and competency of the interpreter.[14] In any event there was nothing of prejudice to the accused in the procedure, for the defense was helped, not harmed thereby, [15] inasmuch as the complaining witness was compelled to undergo a dual cross-examination.

The court was legally constituted and had jurisdiction over the person and of the offense. [16] No error occurred which injuriously affected the substantial rights of the accused. The procedures provided by military law for trials by court-martial were applied in a fundamentally fair way. The sentence is within legal limits. [17]

From a consideration of the evidence properly admitted in the case, the Board of Review is of the opinion that the record of trial is legally sufficient to support the sentence and to warrant its confirmation. [18]

Available records disclose that the accused is 20 years of age, single and without dependents. He completed nine years of schooling.

12/ Cf. Senda, MO-JAGA 629, 631.

13/ Cf. CM 332393, Dumo, 81 BR 103, 108.

14/ Wise v. Short, 107 S.E. 134, 136 (N.C.); 21 CJS 216.

15/ Cf. Linn v. United States, 251 F. 476, 483, hn 11 (2d. Cir. 1918); Miller, MO-JAGA 168, 172; Heindorf, MO-JAGA 642, 645; See also United States v. Johnson, 319 U.S. 503, 519, 520, rehearing den. 320 U.S. 808.

16/ Article of War 2, 10 USC (Supp III) 1473; Article of War 92, 10 USC (Supp III) 1564.

17/ Article of War 92, supra.

18/ Cf. CM 342559, Vennie 8 BR-JC 95, 105, 108, 109.

His company commander (the accuser) rates his character and efficiency as excellent. He was convicted in April 1950, by special court-martial, of possession of a false pass, breach of restriction, and of two short unauthorized absences.

Allan R. Browne J.A.G.C.

William J. Flynn 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 345823

MAY 31 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, 27 and 28 March 1951. Dishonorable discharge, total forfeitures after promulgation, and confinement at hard labor for life.
	)	
Private First Class MARVIN A. TURNER, RA 19348370, Heavy Mortar Company, 27th Infantry Regiment, APO 25	)	

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Opinion of the Judicial Council
Harbaugh, Young and Roberts
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 the rape of Cho Kyoung Ai at "Northwest of Suwon," Korea, on or about 31 January 1951. Evidence of one previous conviction by a special court-martial 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 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 its confirmation.

3. In the opinion of the Judicial Council, the record of trial establishes beyond a reasonable doubt the accused's guilt of at least an assault with intent to commit rape upon the victim. The only question is whether the evidence establishes beyond a reasonable doubt that the accused succeeded in penetrating the person of the prosecutrix and was thus guilty of rape as charged. Only the evidence bearing on this issue will be considered.

The only Government witness who testified on this issue was the prosecutrix, a fifteen-year-old virgin (R 15, 24). She stated, through an interpreter, that the accused "put his penis into my vagina." She did not see him do this but she knew he did because his penis was "too big and it hurt" (R 20). She stated, however, she "did not get hurt" in the genital region (R 15).

Lieutenant (j.g.) John Cox, USNR, testified that he was Battalion Surgeon, 3d Battalion, 27th Infantry, and that he examined the prosecutrix on 1 February, the day after the alleged rape, at the request of an officer of the battalion (R 36). In the course of his career he had examined six or seven alleged victims of rape, at least two of whom were under sixteen years of age (R 38, 39). His examination of the prosecutrix revealed that:

> "There were no bruises or other marks of violence on the thighs, the abdomen, or evidence of such around the area of the outer obvious portions of the external genitallia [sic]. There were likewise no tears. There was no evidence whatever of trauma, nor injury to the outer extensions of the genitallia [sic], nor the hymen. The hymen was fairly well developed for a girl of this age and appeared to be normal. However, I did find a white substance which I was unable to determine the source of which was right at the opening of the external genitallia [sic] because of the lack of microscopic apparatus. I was not able to examine her fully to determine exactly where this was coming from. There was no bleeding either new or old at any part of the genitallia [sic] and she appeared to be a virgin."

There was no obvious dilation or tearing of the hymen, a condition found in sixty-five per cent to seventy-five per cent of women after their first intercourse (R 36, 38). The white substance he found was consistent with being a natural mucous secretion (R 37). Considering that the intercourse attempted was forced, he "imagine[d] she would feel some sort of pain" even without penetration (R 41). Moreover, there were no bruises on the outer lips of the vagina, a condition which would be present in a case of forced intercourse although the penis merely touched them (R 42). He stated, in short, "the evidence conclusively indicates a high possibility that there was no penetration in this case" (R 38).

4. Penetration is an essential element of the crime of rape, although the slightest penetration is sufficient (MCM 1949, par 179b, p 232). The issue we must resolve is whether the evidence is sufficiently convincing to establish beyond a reasonable doubt the necessary finding that such a penetration had occurred. For the uncorroborated testimony of a prosecutrix in a rape case to sustain a conviction, such testimony must be clear and convincing (CM 288015, Giles, 56 BR 307, 313; CM 302940, Manuel and Jones,

59 BR 197, 204). Such testimony, upon appellate review, will be closely scrutinized and if it appears incredible and too unsubstantial, the conviction and sentence should be disapproved (see 1 Wharton, Criminal Law, sec 724 and cases cited).

The prosecutrix' testimony is weakened by the testimony of the medical officer who examined her within hours after the incident and found that she had none of the evidences of trauma that would ordinarily be found if a young virgin had been penetrated, even with her consent. His examination was made at the request not of the accused but of an officer of the battalion, and he appears to have been a completely disinterested witness. There is no basis for believing that he did not testify accurately and completely as to the results of his examination and as to generally accepted medical opinion.

In view of the medical officer's testimony and the physical condition of the victim's body, one cannot escape the reasonableness of a conclusion that this young, frightened girl without previous sexual experience erroneously concluded from the pain she felt that the accused had effected a penetration of her body. The evidence does not convince us beyond a reasonable doubt that the accused accomplished the crime of rape. However, the record shows that every element of that crime except penetration is present. Accordingly, the accused is guilty of the lesser included offense of assault with intent to commit rape (CM 312274, Taylor, 62 BR 61), the maximum punishment for which is dishonorable discharge, total forfeitures after promulgation and confinement for twenty years (MCM 1949, par 117c, p 137).

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 at the time and place alleged assaulted Cho Kyoung Ai with intent to commit rape in violation of Article of War 93, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, total forfeitures after promulgation and confinement at hard labor for twenty years.

Edward H. Young, Colonel, JAGC

Nathan J. Roberts, Colonel, JAGC

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

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

Harbaugh, Young and Roberts
Officers of The Judge Advocate General's Corps

In the foregoing case of Private First Class Marvin A. Turner, RA 19348370, Heavy Mortar Company, 27th Infantry Regiment, APO 25, upon the concurrence of The Judge Advocate General only so much of the findings of guilty of the Charge and Specification is approved as involves findings that the accused, at the place and time alleged, with intent to commit rape, committed an assault upon the victim alleged in violation of Article of War 93, only so much of the sentence as provides for 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 twenty years is confirmed and will be carried into execution. A United States Penitentiary is designated as the place of confinement.

Edward H. Young, Colonel, JAGC

Nathan J. Roberts, Colonel, JAGC

MAY 21 1951

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

15112

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

JAGH CM 345853

MAY 2 4 1951

UNITED STATES v. First Lieutenant WILLIAM E. HODGE (O-2008077), Headquarters Signal Corps Center and Fort Monmouth, 9400 TSU-Sig C, Fort Monmouth, New Jersey.	SIGNAL CORPS CENTER AND FORT MONMOUTH Trial by G.C.M., convened at Fort Monmouth, New Jersey, 20, 21, 23, 28 February 1951. Dismissal, confinement at hard labor for five (5) years, and $3,000 fine.

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

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.

The accused was tried upon the following Charges and Specifications as amended:

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

Specification: In that First Lieutenant William E. Hodge, Headquarters, Signal Corps Center and Fort Monmouth, 9400 Technical Service Unit, Signal Corps, did, at Fort Monmouth, New Jersey, on or about 6 July 1949, desert the service of the United States, and did remain absent in desertion until he was apprehended by Military Authorities at Camp Gordon, Georgia, on or about 8 December 1950.

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

Specification 1: (Nolle Prosequi by direction of the Appointing Authority).

Specification 2: (Nolle Prosequi by direction of the Appointing Authority).

Specification 3: In that First Lieutenant William E. Hodge, Headquarters, Signal Corps Center and Fort Monmouth, 9400 Technical Service Unit, Signal Corps, then assigned 9635 Technical Service Unit, Signal Corps Research Unit, did, at Ladd Air Force Base, Alaska, on or about 15 April 1949, with intent to defraud, wrongfully and unlawfully make and utter to Ladd Air Force Base Officers' Club a certain check in words and figures as follows, to wit:

HAMILTON NATIONAL BANK
of Morristown

87-108
641

MORRISTOWN, TENN. April 15, 1949 No. 113

PAY TO THE
ORDER OF Cash $ 10.00

Ten and 00/100 - - - - - - - - - - - - DOLLARS

/s/ Lt W.E. Hodge
0-2008077 9635th TSU

Indorsed on the back thereof:

L A F B CLUB
M. C. Maxwell

and by means thereof did fraudulently obtain from the Ladd Air Force Officers' Club, Ten Dollars ($10.00) lawful money of the United States in payment of the check, he, the said First Lieutenant WILLIAM E. HODGE, then well knowing that he did not have and not intending that he should have sufficient funds with the said Hamilton National Bank for payment of said check.

Specification 4: (Identical with Specification 3, except the date of the check "16 April 1949", the number of the check, "No. 114" and the amount of the check and the amount obtained, "$20.00").

Specification 5: (Identical with Specification 3, except the date of the check, "18 April 1949", the number of the check, "No. 115", the amount of the check and amount obtained, "$15.00", and the serial number under the signature on the check, "0-2008077").

Specification 6: (Nolle Prosequi by direction of the Appointing Authority).

Specification 7: In that First Lieutenant WILLIAM E. HODGE, Headquarters, Signal Corps Center and Fort Monmouth, 9400 Technical Service Unit, Signal Corps, did, at Fort Monmouth, New Jersey, on or about 4 July 1949, with intent to defraud, wrongfully and unlawfully make and utter to Fort Monmouth Officers' Club at Fort Monmouth, New Jersey, a certain check in words and figures as follows, to wit:

July 4 1949 No

BANK OF COMMERCE
Morristown, Tennessee

PAY TO THE ORDER OF Cash $ 10.00

Ten and no/100 DOLLARS

/s/ Edward Hodge 1st Lt 0-2008077

Indorsed on the back thereof:

FOR DEPOSIT ONLY
TO THE CREDIT OF
FORT MONMOUTH OFFICERS' CLUB
FORT MONMOUTH, N.J.

and by means thereof did fraudulently obtain from the Fort Monmouth Officers' Club, Ten Dollars ($10.00) lawful money of the United States in payment of the check, he, the said First Lieutenant WILLIAM E. HODGE, then well knowing that he did not have and not intending that he should have sufficient funds in the said Bank of Commerce for payment of said check.

Specification 8: (Nolle Prosequi by direction of the Appointing Authority).

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

Specification 1: In that First Lieutenant WILLIAM E. HODGE, Headquarters, Signal Corps Center and Fort Monmouth, 9400 Technical Service Unit, Signal Corps, then assigned 9635 Technical Service Unit, Signal Corps Research Unit, did, at Ladd Air Force Base, Alaska, on or about 8 April 1949, with intent to deceive, wrongfully and unlawfully make and utter to Ladd Air Force Base Officers' Club a certain check in words and figures as follows, to wit:

HAMILTON NATIONAL BANK
of Morristown

87-108
641

MORRISTOWN, TENN. April 8 1949 No 110

PAY TO THE ORDER OF Ladd AFB Officers Club $ 80.00

Eighty and no/100 DOLLARS

For Ret Checks /s/ Lt W.E. Hodge
0-2008077

Indorsed on the back thereof:

FOR DEPOSIT ONLY TO THE CREDIT OF
LADD AIR FORCE BASE OFFICER'S CLUB

he, the said First Lieutenant WILLIAM E. HODGE, then well knowing that he did not have and not intending that he should have sufficient funds in the said Hamilton National Bank for payment of said check.

Specification 2: (Identical with Specification 1, except the date of the check is "April 14, 1949" the number of the check is "No. 112" and the amount of the check is "$90.00").

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

Specification 1: In that First Lieutenant WILLIAM E. HODGE, Headquarters, Signal Corps Center and Fort Monmouth, 9400 Technical Service Unit, Signal Corps, then assigned 9635 Technical Service Unit, Signal Corps Research Unit, did, at Ladd Air Force Base, Alaska, on or about 31 January 1949, make a claim against the United States by presenting same to Lieutenant Colonel Q. A. Pearson, Finance Officer at Ladd Air Force Base, Alaska, an officer of the United States, duly authorized to approve, allow, and pay such claim, in the amount of Two Hundred Five Dollars and Forty Cents ($205.40), for services alleged to have been rendered to the United States by him, the said First Lieutenant WILLIAM E. HODGE, which claim was false and fraudulent, in that he, the said First Lieutenant WILLIAM E. HODGE had theretofore, on or about 25 June 1948, duly authorized a Class "E" Allotment in the amount of Two Hundred Seventy-five Dollars ($275.00) per month, effective July 1948, for an indefinite period, payable to Bank of Commerce, Morristown, Tennessee, to credit of WILLIAM E. HODGE, and said First Lieutenant WILLIAM E. HODGE did fail to subtract said Class "E" Allotment for January 1949 in the amount of Two Hundred Seventy-Five Dollars ($275.00), in that said claim purported to cover a sum of money then due and owing and did receive

on said claim the sum of Two Hundred Seventy-five Dollars ($275.00) more than the amount to which he, the said First Lieutenant WILLIAM E. HODGE was entitled to receive for services from 1 January 1949 to 31 January 1949, which said claim was then known by the said First Lieutenant WILLIAM E. HODGE to be false and fraudulent.

Specification 2: (Identical with Specification 1, except the date of the claim is 3 March 1949, the amount of the claim is "One Hundred Thirty-One Dollars and Forty Cents, ($131.40)", month to which Class "E" Allotment applied is February 1949 and period of services for which payment claimed is "1 February 1949 to 28 February 1949").

Specification 3: (Identical with Specification 1, except the date of the claim is 31 March 1949, the amount of the claim is "Three Hundred Forty Dollars and Forty Cents, ($340.40)" month to which Class "E" Allotment applied is "March 1949" and period of services for which payment claimed is "1 March 1949 to 31 March 1949").

Specification 4: In that First Lieutenant WILLIAM E. HODGE, Head quarters, Signal Corps Center and Fort Monmouth, 9400 Technical Service Unit, Signal Corps, then assigned 9635 Technical Service Unit, Signal Corps Research Unit, did, at Ladd Air Force Base, Alaska, on or about 25 April 1949, make a claim against the United States by presenting same, in the form of a request for partial payment for services from 1 April 1949 to 25 April 1949, to Lieutenant Colonel Q. A. Pearson, Finance Officer at Ladd Air Force Base, Alaska, an officer of the United States, duly authorized to approve, allow, and pay such claim, in the amount of Two Hundred Eighty-nine Dollars ($289.00), for services alleged to have been rendered to the United States from 1 April 1949 to 25 April 1949, by him, the said First Lieutenant WILLIAM E. HODGE, which claim was false and fraudulent, in that he, the said First Lieutenant WILLIAM E. HODGE had theretofore, on or about 25 June 1948, duly authorized a Class "E" Allotment in the amount of Two Hundred Seventy-five Dollars ($275.00) per month, effective July 1948, for an indefinite period, payable to Bank of Commerce, Morristown, Tennessee, to credit of WILLIAM E. HODGE, and said First Lieutenant WILLIAM E. HODGE did fail to subtract said Class "E" Allotment for April 1949 in the amount of Two Hundred Seventy-five Dollars ($275.00), and in that said claim purported to cover a sum of money then due and owing, and did receive on said claim the sum of Two Hundred Seventy-five Dollars ($275.00) more than the amount to which he, the said First Lieutenant WILLIAM E. HODGE was entitled to receive for services from 1 April 1949 to 25 April 1949, which said claim was then known by the said First Lieutenant WILLIAM E. HODGE to be false and fraudulent.

Specification 5: In that First Lieutenant WILLIAM E. HODGE, Headquarters, Signal Corps Center and Fort Monmouth, 9400 Technical Service Unit, Signal Corps, did, at Fort Monmouth, New Jersey, on or about 30 April 1949, make a claim against the United States by presenting same to Major H. C. Eichen, Finance Officer at Fort Monmouth, New Jersey, an officer of the United States, duly authorized to approve, allow and pay such claim in the amount of Three Hundred Thirty-seven Dollars ($337.00) for services alleged to have been rendered to the United States by him, the said First Lieutenant WILLIAM E. HODGE, which claim was false and fraudulent in that he, the said First Lieutenant WILLIAM E. HODGE did not report to or notify said Major H. C. Eichen, Finance Officer at Fort Monmouth, New Jersey, that on or about 25 April 1949, while he, the said First Lieutenant WILLIAM E. HODGE was assigned to 9635 Technical Service Unit, Signal Corps Research Unit at Ladd Air Force Base, Alaska, he did, at Ladd Air Force Base, Alaska, present a claim in the form of a request for partial payment for services rendered to the United States from 1 April 1949 to 25 April 1949 to Lieutenant Colonel Q. A. Pearson, Finance Officer at Ladd Air Force Base, Alaska, an officer of the United States, duly authorized to approve, allow, and pay such claim in the amount of Two Hundred Eighty-nine Dollars ($289.00), which claim for partial payment in the amount of Two Hundred Eighty-nine Dollars ($289.00) was thereupon paid to him by the said Lieutenant Colonel Q. A. Pearson, Finance Officer at Ladd Air Force Base, Alaska, so that by his omission and failure to subtract the amount of said partial pay in the amount of Two Hundred Eighty-nine Dollars ($289.00), said First Lieutenant WILLIAM E. HODGE did receive on said claim as paid by Major H. C. Eichen, Finance Officer at Fort Monmouth, New Jersey, the sum of Two Hundred Eighty-nine Dollars ($289.00) more than the amount which he was entitled to receive for services from 1 April 1949 to 30 April 1949; which said claim was then known by the said First Lieutenant WILLIAM E. HODGE to be false and fraudulent.

Specification 6: (Substantially the same as Specification 5, except the date of the claim is 31 May 1949, the amount of the claim is "Three Hundred Twenty-nine Dollars and Sixty Cents ($329.60)", month to which Class "E" Allotment applied is "May 1949" and period of services for which payment claimed is "1 May 1949 to 31 May 1949").

He pleaded not guilty to, but was found guilty of, all the charges and specifications except that pertaining to the Specification of Charge I, he was found guilty with exceptions and substitutions which eliminated the words "apprehended by Military Authorities at Camp Gordon, Georgia" and substituted therefor the words "returned to military control at Knoxville, Tennessee." No evidence of previous convictions was

introduced. He was sentenced to be dismissed the service, to pay to the United States a fine of $5,000. 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 remitted $2,000 of the fine. The record of trial was forwarded for action pursuant to Article of War 48.

The record of trial contains substantial evidence to the following effect:

The accused absented himself without leave from his organization at Fort Monmouth, New Jersey, on 6 July 1949. He was returned to military control at the Knoxville County Jail, Knoxville, Tennessee, at about 0700 hours, 8 December 1950 by an FBI Agent, who had taken him into custody at his father's home in Morristown, Tennessee.

On 15, 16 and 18 April 1949 at Ladd Air Force Base Officers' Club, Alaska the accused cashed checks, Numbers 113, (Charge II, Specification 3) 114 (Charge II, Specification 4) and 115 (Charge II, Specification 5) respectively, drawn by him on the Hamilton National Bank, Morristown, Tennessee, in the sums of $10.00, $20.00 and $15.00 respectively. Payment of these checks was refused on 26 and 27 April 1949 by the drawee bank, reason, "no account". When the checks were drawn, the accused still had an account (although overdrawn) but by the time they were presented for payment the bank had closed the account.

On 4 July 1949, Mrs. Florence Gilbert, cashier at Officers' Club, Fort Monmouth, New Jersey, cashed accused's check in the amount of $10.00, No. _____, drawn on the Bank of Commerce, Morristown, Tennessee (Charge II, Specification 7). The drawee bank refused payment on 13 July 1949, reason, "insufficient funds". On that date the balance of the accused's funds in the drawee bank was zero.

On 8 and 14 April 1949, the accused made and uttered his Checks No. 110 (Charge III, Specification 1) and 112 (Charge III, Specification 2) in the amount of $80.00 and $90.00 respectively, payable to the Ladd Air Force Base Officers' Club and drawn on the Hamilton National Bank of Morristown, Tennessee. Payment of Check No. 110, was refused by the drawee bank on 20 April 1949, reason, "insufficient funds", and payment of Check No. 112 was refused by the drawee bank on 25 April 1949, reason, "no account". These checks were given to the Ladd Air Force Base Officers' Club by the accused to cover checks which had been returned not honored by the bank.

On 17 June 1948, the accused signed an allotment request, WD AGO Form 141 for a monthly allotment of $275.00 commencing with the month of July, 1948, and payable to the Bank of Commerce, Morristown, Tennessee, to his credit. This allotment request is on file at the Army Finance Center,

St. Louis, Missouri. Copy of WD AGO Form 141, dated 25 August 1948, signed by the accused, requesting discontinuance of above mentioned allotment of $275.00 as of last day of August, 1948, was found in the field 201 file of the accused in the Office of the Adjutant, Fort Monmouth, New Jersey, in a chronological position approximately the same as that indicated by the date, 25 August 1948. However, no record of receipt of a request for discontinuance was found in the office of the finance officer, Fort Monmouth, the place to which accused asserted he sent the original and a duplicate copy.

On or about 31 January 1949, the accused signed a War Department Pay and Allowance Account Voucher, and received the maximum cash he could be paid, the sum of $205.40 (Charge IV, Specification 1). He did not include among the debits the allotment for $275.00 referred to above. A check, drawn on the Treasurer of the United States, dated 1 February 1949, in the sum of $275.00 and payable to the order of Bank of Commerce, Morristown, Tennessee, "02 008 077cr William E. Hodge" was received by this bank and credited to the accused's account on 7 February 1949. On 9 February 1949, the sum of $275.00 was withdrawn from accused's account.

On 28 February 1949, the accused signed a War Department Pay and Allowance Account Voucher and received the maximum cash he could be paid, the sum of $131.40 (Charge IV, Specification 2). He did not include among the debits the allotment for $275.00 referred to above. A check drawn on the Treasurer of the United States, dated 1 March 1949, in the sum of $275.00 and payable to Bank of Commerce, Morristown, Tennessee, "0 2 008 077 cr William E Hodge" was received by this bank and credited to the accused's account. On 8 March 1949, the sum of $275.00 was withdrawn from accused's account.

On 31 March 1949, the accused signed a War Department Pay and Allowance Account Voucher and received the maximum cash he could be paid, the sum of $340.40 (Charge IV, Specification 3). He did not include among the debits the allotment for $275.00 referred to above. A check drawn on the Treasurer of the United States, dated 1 April 1949, in the sum of $275.00 and payable to Bank of Commerce, Morristown, Tennessee, "0 2 008 077 cr William E. Hodge" was received by this bank and credited to the accused's account. On 8 April 1949, the sum of $275.00 was withdrawn from accused's account.

On 25 April 1949, the accused signed a War Department Pay and Allowance Account Voucher and received cash in the sum of $289.00 "FOR PARTIAL PAYMENT ONLY" (Charge IV, Specification 4). He did not include among the debits the allotment for $275.00 referred to above.

On 30 April 1949, the accused signed a War Department Pay and Allowance Account Voucher and received the maximum cash he could be paid, the sum of $337.00 (Charge IV, Specification 5). He did not include among the debits the allotment for $275.00 referred to above. A check drawn on the Treasurer

of the United States, dated 1 May 1949, in the sum of $275.00 and payable to Bank of Commerce, Morristown, Tennessee, "0 2 008 077 cr William E Hodge" was received by this bank and credited to the accused's account. On 7 May 1949, the sum of $275.00 was withdrawn from accused's account.

On 31 May 1949, the accused signed a War Department Pay and Allowance Account Voucher and received the maximum cash he could be paid, the sum of $329,60 (Charge IV, Specification 6). He did not include among the debits the allotment for $275.00 referred to above. A check drawn on the Treasurer of the United States, dated 1 June 1949, in the sum of "275.00 and payable to Bank of Commerce, Morristown, Tennessee, "0 2 008 077 cr William E Hodge" was received by this bank and credited to the accused's account. On 6 June 1949, the sum of $275.00 was withdrawn from accused's account.

On 26 December 1950 the accused made a written statement to two CID agents which includes in substance, the following (admitted in evidence without objection by the defense):

He made and cashed all the checks above mentioned. He sent $375.00 to his father in March and April 1949 to deposit to his account in the Hamilton National Bank. Upon his return home in April 1949 he learned that his father had only deposited $50.00 and was holding the balance for him "due to previous money trouble with his ex-wife". He then sent two $100.00 money orders and $59.00 to Ladd Air Force Base Officers' Club to cover checks previously issued by him. He wanted to send $74.00 more to cover additional checks but as he was not paid in May 1949 he could not do so. During investigation of charges against him he tendered his resignation for the good of the service. When he cashed two checks on 3 and 4 July 1949 in the sums of $15.00 and $10.00 respectively at the Officers' Club, Fort Monmouth, New Jersey, he assumed that he had enough money in the bank to cover them. On 4 July 1949 he contemplated "self-destruction" but decided instead to absent himself from military control whereupon he went to Detroit to visit his son. He telephoned his father who sent him funds to return to Morristown, Tennessee. After he was home a few days his father received a notice that he was AWOL. He agreed to return to Fort Monmouth and bought a ticket for Newark, New Jersey. Enroute he changed his mind and went to Memphis where he obtained employment in a Texaco Service Station and worked there from the first part of July 1949 to the middle of February 1950. Then he went to Lakeland, Florida, where he worked until June 1950. He went to Kansas City, Missouri, and from there to Aransas Pass, Texas, where he worked as a truck driver until November 1950 when he decided to surrender at home. While he was absent, he knew "that no action had been taken upon my request for resignation and that I was still in military service". He opened an account at the Hamilton National Bank, Morristown, Tennessee, in addition to his account at the Bank of Commerce because of marital difficulties. From July 1948 through June 1949 he received only one statement from the Bank of Commerce. He has never received one from the Hamilton National Bank. When he made out the allotment in June 1948 for $275.00, above referred to, he thought it was effective, August 1948 and so he did not deduct $275.00 from his pay and allowances account for July 1948. In October 1948 he knew

that the allotment was still in effect but he submitted regular pay vouchers from then through June 1949 without deducting the allotment of $275.00. Nor did he show on his regular pay voucher in May 1949 the $289.00 partial pay he had received in April. He offered no explanation as to why he did not list this partial pay. He "knew that they would find it out through (his) pay data card eventually." He realized that as to this last partial pay voucher and his pay for April 1949 he "had submitted a false claim to the government and that he had received approximately five hundred and sixty-four dollars ($564) more than (he) was entitled to". It was his "impression that (he) is indebted to the government for approximately three thousand dollars ($3000) in monies which (he has) overdrawn". All the allotment money and the partial payment above mentioned he has "spent and converted to (his) own use." After 4 July 1949 he drew no more checks on the Bank of Commerce. The allotment payments continued to accumulate in his account with that bank. In January 1950 he saw a statement of that bank showing a balance of over $1600. The allotment checks continued during part of 1950 until the balance became approximately $3000. He expressed a willingness to forward a certified check in the amount of his bank balance and a desire to forfeit his pay and allowances accrued since his return to military control, both to be applied to his indebtedness to the government.

The accused having been advised of his rights by defense counsel and the law member, elected to make an unsworn statement in which he repeated much of what he told the CID agents in his statement dated 26 December 1950. In addition he stated, in substance, as follows:

After induction in May 1943 he rose through the non-commissioned grades to Warrant Officer, served with the 819th Signal Company at Fort Dix, New Jersey, in England and France until October 1944, then with Headquarters, Normandy Base Section. He was commissioned 2nd Lieutenant in February 1945 and promoted to 1st Lieutenant 13 July 1945. In the Army he has been principally engaged in personnel work. He had one classified assignment with the Signal Corps Laboratories and another with Evans Signal Laboratories. He is entitled to wear the Good Conduct Medal, European Theater Medal with two battle stars, World War II Victory Medal and the Army Commendation Ribbon.

In March 1946 he was married to Doris Waller, a former WAC Corporal, whom he had met in Belgium while serving overseas. A son and daughter were born to this marriage. After separation from the Army as a 1st Lieutenant in May 1946 which included 26 months service overseas, he was employed as a traveling salesman. Very soon after their marriage serious domestic difficulties arose, primarily due to his wife's extravagance. On 5 March 1947 he secured a position in Philadelphia to be near his wife's relatives, hoping that her attitude might change but it did not do so. In July 1947 he reenlisted in the Army as a Technical Sergeant and was assigned to Fort Monmouth, New Jersey. He was recalled to active duty in his present grade

in 1947. After his return to the service their domestic relations showed some improvement for a short while but after a few months his wife reverted to her previous habits. Nevertheless, he was very much in love with his wife and determined to try to keep their home together and their children secure. During the fall of 1947 and the spring of 1948 his wife was under the care of a civilian medical doctor and a psychiatrist. She could have received care from the Fort Monmouth Hospital and avoided this expense. Accused never obtained a real diagnosis of her illness. He was assigned to the 9635th Technical Service Unit, Signal Corps, Ladd Air Force Base, Alaska, in September 1948. He rented a house in Fairbanks, Alaska, in December 1948 and arranged commercial transportation for his wife to join him but she refused. He talked to her by telephone in January 1949. She wanted a divorce and planned to marry a man she had been seeing since his departure for Alaska. He was able to persuade his wife to postpone any divorce action and to go to his parents' home in Tennessee. In May 1949 he returned to Fort Monmouth.

He stated additionally that if he had any intent or desire to continue his absence without leave, he could have withdrawn over $3000 from the Bank of Commerce, Morristown, Tennessee. This would have assisted him in avoiding apprehension. He added that his civilian and military record has always been good. He has never before been subjected to disciplinary action of any kind. His efficiency ratings as an officer were superior except for an excellent one which covered a period from August 1944 to October 1944. He realized that an officer should not permit domestic problems to interfere with his military duties, however, he requested the court to consider the effect which four years of difficult marital relations had had upon him. He expressed the belief that if given an opportunity to serve his country as an officer or enlisted man, he could do so honorably and efficiently; if it is determined that he is indebted to the Government, he intends to utilize every means available to him to repay the Government.

Mr. Eugene Hodge, father of the accused, Chief of Police of Morristown, Tennessee, from April 1949 to January 1951, received a postcard from the accused in November 1950, indicating that the latter wanted to come home for a few days and then give himself up to the Army. The card was sent from Chattanooga, Tennessee. On 18 November 1950, the accused returned home and discussed his plans with his father, stating that he wanted to surrender and "get it over with". Mr. Hodge planned to accompany his son to Fort Monmouth, but he did not do so because of a snowstorm and illness. Prior to the accused's return home his father discussed his case with Mr. Mabry, FBI, Knoxville, Tennessee. For approximately a year's time the accused's father and Mr. Mabry had been working on the matter together. About 1 December 1950, Mr. Mabry came to Mr. Hodge's home in Morristown, Tennessee, and took the accused with him. In October 1950, Mr. Hodge went to the Bank of Commerce, Morristown, Tennessee, and talked with Mr. Rutherford, cashier, who told him that there was $3,004.75 deposited in the accused's account in that bank.

When accused came home in November 1950, his father told him that there was a little over $3,000 in his name in the bank, and the accused said that he would turn it back to the Government and would not draw any money out of it. Messrs. C. Frank Davis, an attorney at law and Mayor of Morristown, Tennessee; H. J. Reiland, Office Manager of Hale Brothers, dealers in wholesale produce for whom the accused worked approximately two years; Dr. Y. Alvin Jackson, who had known the accused for about 15 years; Lyman W. Smith, a member of the City Police Force of Morristown, Tennessee, and former Sheriff of Hamblen County, Tennessee, who has known the accused all of the latter's life; Paul Reese, Road Superintendant for Hamblen County Tennessee, who has known the accused for about ten years and for whom the accused worked occasionally; James C. Morrison, of Morrison Printing Company, who has been associated with the accused in school and church affairs for over twenty-five years; M. K. Strate, manager of J. C. Penny Store, Morristown, Tennessee, who has known the accused practically all the latter's life and who taught him in Sunday School in the Centenary Methodist Church; Reverend A. H. Hicks, Pastor of the First Baptist Church, Morristown, Tennessee, who has known the accused for about one and one half to two years; attested to accused's good reputation for truth and veracity in and around Morristown, Tennessee. Mr. James Barrett, accused's landlord from September 1947 until the fall of 1948, found the accused to be honest and his reputation in that community to be one for honesty and a prompt payment of his debts.

Captain R. D. DeHorsey, Training Division, The Signal School ROTC, Planning Branch, Fort Monmouth, New Jersey, has known the accused since June 1943, when the latter entered the 819th Signal Corps Service Company as a private. Captain DeHorsey was Adjutant of that organization at that time, and he placed the accused in the Personnel Section of the Company as a Personnel Clerk. Some time in November of that year, prior to the departure of the organization overseas, the accused was designated as the Sergeant Major of the Company in the grade of Staff Sergeant or Technical Sergeant. Overseas, between February and June 1944, the accused was made First Sergeant of the Company. Captain DeHorsey stayed with that organization until August 1944. During the period when the Captain was a member of the 819th Signal Company the accused's reputation in that military community for truth and veracity, to the best of his knowledge, was good. No disciplinary action of any sort was ever taken against the accused. He was an exemplary soldier at all times.

On 19 February 1951 (the day when the accused was served with the charges herein) the accused told Major H. C. Eichen, Finance Corps, Fort Monmouth, that he wanted to pay back the sum of $3,000 which was then in the Bank of Commerce, Morristown, Tennessee. The accused asked Major Eichen for his advice as to the best way to pay the money back, and Major Eichen told him to secure a draft from the Bank of Commerce payable to the Treasurer of the United States and to forward it to him. The accused also stated that he

believed that he was not entitled to this money and that was why he wanted to pay it back. At the time of his testimony Major Eichen had never received such a draft from the accused nor had it ever been tendered to him (subsequent to his trial the accused deposited a cashier's check drawn on the Bank of Commerce, Morristown, Tennessee in the sum of $3004.75 with the Finance Office, Fort Monmouth).

The uncontradicted evidence for the prosecution, corroborated by accused's admission of absence without leave in his unsworn statement to the court, establishes that the accused absented himself without leave at the time and place alleged and that such unauthorized absence was terminated by his return to military control at Knoxville, Tennessee. Although the accused impliedly denied an intention not to return to the service, he admitted that he did not return to military control until 8 December 1950. He gave no satisfactory explanation of this prolonged absence of seventeen months. This fact alone was sufficient to justify an inference by the court of an intent to remain absent permanently. 1/ The fact that he was under investigation; his quitting his post without leave before his tendered resignation was acted upon, his extended traveling from New Jersey to Michigan, Tennessee, Florida, Missouri and Texas, and his obtaining civilian employment logically and irresistibly compel the conclusion that the accused is guilty of the charge of desertion. 2/ In his unsworn statement to the court the accused said "If I had had any intention or desire to continue my absence without leave, I would have been able to withdraw over $3,000 from my bank, the Bank of Commerce, Morristown, Tennesee, to aid me in avoiding apprehension ***". This statement is certainly a novel and unstable basis for inferring any intent to return, especially when it is readily apparent that the cashing of any checks by him after he absented himself without leave would inevitably have given a clue of his whereabouts and led to his apprehension.

With reference to the offenses alleged under Specifications 3, 4, 5 and 7, Charge II, the evidence is clear beyond any reasonable doubt that the accused fraudulently obtained cash for each of the checks referred to therein. He knew or should have known that his bank balance was insufficient in both the Bank of Commerce and the Hamilton National Bank to cover these checks. The statement of the Bank of Commerce shows that no checks were charged against his account from 11 January 1949 through

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1/ Subparagraph, p. 199 "Intent", Subparagraph 146a, of the Manual for Courts-Martial, U. S. Army, 1949; CM 211586, Gerber, 10 BR 107, 115; CM 318130, Scott, 67 BR 151, 154.

2/ CM 270462, Ricker, 45 BR 295, 300; CM 286579, Pfeiffer, 56 BR 265, 279; CM 316657, Sheldon, 65 BR 369, 370; CM 326004, Shelby, 75 BR 111, 114.

7 July 1949 except monthly withdrawals of the proceeds of these allotment checks almost immediately after his account was credited each month. The records of the bank disclose that a bank statement was sent to the accused after 31 December 1948 and the accused admitted in his written statement of 26 December 1950 that he received one statement from this bank between July 1948 and the end of June 1949. His claim that when he cashed his check dated 4 July 1949 for $10.00 drawn on the Bank of Commerce at the Officers' Club, Fort Monmouth, New Jersey (Specification 7, Charge II) he "assumed" that he had sufficient money in the bank to cover it is hardly credible in the light of all the facts and circumstances. He certainly knew that no deposits had been made to his account since 11 January 1949 except the monthly allotments from the government of $275.00 which were withdrawn immediately after deposit. Each such withdrawal reduced his bank balance to zero until the next allotment check was credited to his account. As for the checks referred to in Specifications 3, 4 and 5, Charge II, all drawn on the Hamilton National Bank, the accused claimed that he sent $375.00 to his father to deposit in this account but that his father had only deposited $50.00, making the balance in the account $70.00. The accused's bank balance was in fact, $20.00 on 26 February 1949. On 3 March 1949 a check for $19.20 was charged against the account and a deposit of $50.00 was made to his account on 17 March 1949. However, it is noteworthy that when the deposition of accused's father was taken he was not asked any questions relative to receiving the alleged $375.00 from the accused. The defense offered no proof in the form of money order receipts or any other written evidence, if, indeed, any ever existed, to support the accused's claim that he sent such a sum to his father for deposit to his account in the Hamilton National Bank. If, in fact, such money order receipts were lost or mislaid by the accused, it would not have been at all impossible to obtain evidence via the postal authorities. It is fair to conclude that no such money was ever sent to accused's father, for the latter would be the first to come forward to corroborate his son's statement if it were possible to do so. It is also reasonable to believe that, if accused's father had, in fact, received that much money with a request to deposit it in a particular account and then decided not to do so, he would have promptly informed the accused. It should also be noted that as early as 11 March 1949 and subsequently on 12 and 16 March 1949 checks drawn by the accused were refused payment for insufficient funds by the Hamilton National Bank and a twenty-five cent charge against his account for each such check was made by the bank. A copy of this service charge was mailed to his last known address, 9635 Technical Service Unit, c/o Postmaster, APO 731, Seattle, Washington. There is no evidence that any such letters were returned undelivered to the bank. Thus, he was put on notice as to his bank balance not only by the return of the checks to the payees thereof who would certainly demand reimbursement from the accused but by the direct receipt of notices from his bank that these checks had been dishonored. The fact that he continued to negotiate additional checks (Specifications 3, 4 and 5, Charge II) despite the fact that he still had insufficient funds in his account and knew that certain checks had been dishonored together with all the other

circumstances establishes intent to defraud. 3/ This statement also applies to the question of intent not to have funds in his bank when the said checks were presented since the accused would have sent enough money to the bank and made sure of its credit to his account before drawing any more checks if he really had any intent to have funds in the bank when the checks were presented. 4/ His whole course of conduct indicates that he was entirely aware of the fact that checks referred to in Specifications 3, 4, and 5, Charge II were given with insufficient funds in the bank to meet them; although he received his pay for February and March 1949, "he carefully refrained from depositing" more than $50.00 of it "in his bank account." 5/ In view of all the circumstances it is manifest that the intent to defraud as alleged in Specifications 3, 4 and 5, Charge II was proved beyond any reasonable doubt. In the opinion of the Board of Review the acts of the accused established under Specifications 3, 4, 5 and 7 of Charge II fall below the standards of honesty and probity expected of an officer and amount to conduct unbecoming an officer and gentleman within the meaning of the 95th Article of War. 6/

The two checks referred to in Specifications 1 and 2, Charge III, were issued to cover pre-existing debts, (which fact prevents their utterance from being considered as fraudulent), 7/ evidenced by checks previously issued which accused knew had not been honored. There is no indication of any attempt to verify his bank balance or to replenish his account before issuing these two checks for $80.00 and $90.00. Accused wrote two more checks on 9 April 1949, one for $55.00 and another for $20.00, when he was on notice that several of his checks had been dishonored because of insufficient funds and when he had already issued the check for $80.00 referred to in Specification 1, Charge III for which there were insufficient funds in the bank. Then, after issuing the check for $90.00 referred to in Specification 2, Charge III, still without having verified his bank balance or replenished his account, he issued the checks referred to in Specifications 3 and 5, Charge II. Such conduct does not speak well for his supposed good faith, 8/ especially when

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3/ CM 228509, Bigelow, 16 BR 201, 216; CM 233722, Growdon, 20 BR 77, 85; CM 275648, Creighton, 48 BR 117, 122.

4/ CM 271588, Blackburn, 46 BR 121, 126.

5/ CM 275309, Sappington, 48 BR 21, 26, 27.

6/ CM 221992, Moore, 49 BR 153, 164; CM 332879, Boughman, 81 BR 223, 233.

7/ CM 272067, Langford, 46 BR 237, 241.

8/ CM 280747, Duncan, 53 BR 305, 313.

he collected $340. 40 in cash on his Pay and Allowance Account on 31 March 1949 and a partial payment of $289.00 in cash on 25 April 1949 before leaving Ladd Air Force Base. Yet he made no honest effort to make good his dishonored checks before leaving the Base. He waited until the full force of the pending investigation at Fort Monmouth into his check-writing activities got under way. In any case, the ultimate redemption of dishonored checks does not obliterate the offenses 9/ nor does it remove the taint of fraud initially attaching to such transactions. 10/

With reference to the six specifications of Charge IV, the gist of the offenses charged is that accused made false and fraudulent claims against the United States and he knew said claims to be false and fraudulent when he made them. 11/ Proof thereof was established herein by adequate evidence of payment to him upon the false vouchers. 12/ In the absence of a contrary showing, which was not present in this case, there is a presumption of compliance with the provisions of the cited regulations and it necessarily follows that accused presented the vouchers in question. 13/ The payment alleged may also be inferred as having occurred on the date of presentment. 14/ In addition to these presumptions there is evidence in the testimony of the two disbursing officers concerned that the payments were made in each instance to the accused. The accused knew that these claims were false since as far back as October 1948 he was notified by the Bank of Commerce that a check for $275.00 had been received and credited to his account. He admitted in his pre-trial statement, dated 26 December 1950, that nonetheless he submitted regular monthly vouchers thereafter through the month of June 1949 to the Finance Officers at Ladd Air Force Base and Fort Monmouth, New Jersey without deducting his Class "E" Allotment of $275.00; that each month $275.00 was being forwarded to the Bank of Commerce from the Finance Office, St. Louis, Missouri; that he obtained a partial pay at Ladd Air Force Base on or about 25 April 1949 in the amount of $289.00 without listing his Class "E" Allotment of $275.00 on this voucher; and that he did not list this partial payment on his May 1949 pay voucher.

9/ CM 259234, Holladay, 38 BR 293, 297, CM 257069, Bishop, 37 BR 7, 13.

10/ CM 322546, Barton, 71 BR 257, 261.

11/ Page 324 Form 98 and subparagraph 181a of the Manual for Courts-Martial, U. S. Army, 1949; Cf. Bridgeman v. United States, 140 Fed. 577, 584, hn 1 (9th Cir. 1905).

12/ Paragraph 8, 10a, 11a, AR 35-120, 27 December 1948.

13/ 1st Indorsement, CM 216029, Brown, 11 BR 91, 96; Basham, MO-JAGA 422, 424.

14/ CM 328246, Courage, 76 BR 349, 358.

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It is significant that the accused himself said in the same statement, dated 26 December 1950, that he could not offer any explanation as to why he did not list this partial pay. He knew that "they" would find it out through his pay data card eventually. He "realized" that he "had" submitted a false claim to the government in connection with this partial payment and his "pay for April 1949"; that he "had received approximately $564.00 more than (he) was entitled to. It is (his) impression that (he is) indebted to the government for approximately $3000.00 in monies which (he has) overdrawn." He further admitted in the same statement that he had spent and converted to his own use the Class "E" allotment payments of $275.00 sent to the Bank of Commerce for credit to his account and the partial payment he received in April 1949, asserting only that he stopped drawing on this account after 4 July 1949.

Assuming, without conceding, the truth of the accused's statement that he prepared and forwarded to the Finance Office, Fort Monmouth, New Jersey, in August 1948 an original and copy of the form discontinuing the above mentioned Class "E" allotment of $275.00 effective the last day of August 1948 and that the third copy was placed in his 201 File at the same station, the fact that no discontinuance of allotment was effected would not serve as any defense. A person may not take illegal advantage of a mistake to perpetrate a fraud.[15] In truth, however, the evidence reveals that the Finance Office, Fort Monmouth, New Jersey contained no records of an application by the accused to discontinue the allotment of $275.00. From the above, it appears that accused knew that he was falsifying his pay and allowance accounts and improperly enriching himself at the expense of the government despite all his protestations of an effort to discontinue the allotment payments and his offer to reimburse the government.[16]

Argument on behalf of the accused orally presented before the Board of Review by defense counsel, 1st Lieutenant Daniel J. Keane, Jr., JAGC, has been considered.

Records of the Department of the Army disclose that accused is over 33-7/12 years of age. He was married in 1946. He is separated from his wife who has their two children. Information from his mother that his wife had divorced him had not been verified prior to the receipt of the record of trial. He attended high school for 3½ years and graduated from an

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15/ CM 281234, Bond, 54 BR 95, 100.

16/ CM 281486, Lally, 54 BR 151, 156, 157, 158; CM 344194, McAllister, BR-JC, 18 January 1951 (BR Opinion, p. 5).

Accountants' Society. In civilian life he was employed as senior payroll clerk with a contracting firm and prior thereto as a truck driver. He had enlisted service from 7 May 1943 to 22 August 1944 when he was discharged to accept a warrant. He was a warrant officer, junior grade, from 23 August 1944 to 21 February 1945. When he was discharged to accept a commission. He was a 2nd Lieutenant, Signal Corps, 22 February 1945 to 30 June 1945, 1st Lieutenant, Signal Corps, from 1 July 1945 to 15 May 1946. He was in the Inactive Reserve from 16 May 1946 to 20 July 1947. He enlisted as Sergeant Major on 21 July 1947. He was recalled to active duty as 1st Lieutenant, Signal Corps, on 23 September 1947. He has no record of previous convictions. His efficiency records as an officer were superior or excellent through 31 August 1948. He is entitled to wear the Good Conduct Medal, ETO Service Ribbon with two bronze service stars for Normandy and Northern France campaigns, World War II Victory Medal and Army Commendation Ribbon for exceptionally meritorious service from 1 July 1945 to 31 December 1945 as Personnel and Administration Officer, Signal Section, Headquarters, Chanor Base Section. As far back as 1946 the accused has a record of incurring obligations and not paying them until forced to do so. Some of them are still unpaid but prosecution is barred by the Statutes of Limitations. Charges under the 95th and 96th Articles of War preferred against the accused in May 1949 involved six checks drawn by him in 1948 which were dishonored for insufficient funds and by means of which the accused admittedly (aliunde the record) obtained cash from the payees. Three other checks also drawn by him in 1948 were dishonored for the same reason and were given by him for pre-existing debts. Two specifications involved alleged dishonorable failure to pay debts. The Investigating Officer recommended no trial, but that the accused be permitted to resign his commission for the good of the service. The accused claims that restitution was made in connection with these 1948 checks between October 1948 and May 1949. Accused has admitted (aliunde the record) committing the offenses charged in Specifications 1, 2 and 6, Charge II (nolle prossed) involving the fraudulent obtaining of cash by means of worthless checks. He also has admitted (aliunde the record) that he owes $75.00 of the $119.20 referred to in Specification 8, Charge II (also nolle prossed) charging him with dishonorable failure and neglect to pay his debt.

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 and the sentence and to warrant confirmation of the sentence. The sentence, as modified, is legal.

Allan R. Browne J.A.G.C

William J. Flynn J.A.G.C

Arthur P. Ireland J.A.G.C

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

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THE JUDICIAL COUNCIL

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

In the foregoing case of First Lieutenant William E. Hodge, O-2008077, Headquarters Signal Corps Center and Fort Monmouth, 9400 TSU-Sig C, Fort Monmouth, New Jersey, 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.

C. B. Mickelwait, Brig Gen, JAGC

Edward H. Young, Colonel, JAGC

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

26 May 1951

I concur in the foregoing action.

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

28 May, 1951

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

JAGN-CM 345889

APR 27 1951

UNITED STATES	)	SEVENTH ARMY
v.	)	Trial by G.C.M., convened at Stuttgart, Germany, 2 April 1951. Dishonorable discharge, total forfeitures after promulgation and confinement for one (1) year. Disciplinary Barracks.
Private THOMAS E. HUNT (RA 16306475), Troop C, 24th Constabulary Squadron.	)	

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 Charges and Specifications:

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

Specification 1: In that Private Thomas E. Hunt, Troop C, 24th Constabulary Squadron, (US Constabulary) did, at Schweinfurt, Germany, on or about 10 February 1951, feloniously steal one radio, make "RCA Victor", value about $30.00, the property of Sergeant John E. Bowers, Troop C, 24th Constabulary Squadron.

Specification 2: In that Private Thomas E. Hunt, Troop C, 24th Constabulary Squadron, (US Constabulary) did, at Schweinfurt, Germany, on or about 10 February 1951, feloniously steal one radio, make "Spartan", value about $20.00, the property of Corporal Norman N. Quick, Troop C, 24th Constabulary Squadron.

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

Specification 1: (Finding of Not Guilty).

Specification 2: (Finding of Not Guilty).

He pleaded not guilty to all the Charges and Specifications and was found guilty of Specifications 1 and 2 of Charge I, except the words "value about thirty dollars ($30)," and "value about twenty dollars ($20)," respectively, substituting therefor "of some value," and guilty of Charge I. Evidence of three 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 the proper authority may direct for one year. 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. The evidence is legally sufficient to sustain the findings. The only question presented is the legality of the sentence imposed.

4. Specification 1 of Charge I alleges the larceny of one radio, the property of Sergeant John E. Bowers, on or about 10 February 1951. Specification 2 of Charge I alleges the larceny of one radio, the property of Corporal Norman N. Quick, on or about 10 February 1951. The proof conforms to the allegations of the offenses charged. The two radios were stolen, according to the evidence adduced, at approximately 2000 hours, 10 February 1951, from Niederwerrn Kaserne (also called Conn Barracks), Schweinfurt, Germany. There is nothing contained in the record of trial that indicates anything other than a single larceny, which should have been alleged in but one specification. The rule in such cases is stated in subparagraph 180g of the Manual for Courts-Martial, U. S. Army, 1949:

> "When a larceny of several articles is committed at substantially the same time and place it is a single larceny even though the articles belong to different persons. Thus, if a thief steals a suitcase containing the property of several individuals, or goes into a room and takes property belonging to various persons, there is but one larceny, which should be alleged in but one specification."

In the instant case, the election to charge the single larceny as two offenses is clearly violative of the principle quoted above (CM 333014, Brooks, 81 BR 273 at page 277; CM 345045, Lane). It remains to be determined whether this error in pleading injuriously affected the substantial rights of the accused.

Had the larceny been properly charged under a single specification the values of the articles stolen would have been aggregated to a total of some value less than $20.00, and the maximum period of confinement authorized would have been six months (subpara 117c, MCM, 1949).

It follows that the total confinement imposable is six months. By alleging the larceny as two offenses, the accused was sentenced to be confined for six months for the theft of Sergeant Bowers' radio "of some value" and to be confined for six months for the theft of Corporal Quick's radio " of some value." The error in pleading, therefore, injuriously affected the substantial rights of the accused to the extent indicated.

5. For the reasons stated, the Board of Review holds the record of trial legally sufficient to sustain the findings of guilty and legally sufficient to support only so much of the sentence as provides for 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 six months.

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

George L. Weiss, J.A.G.C.

Lieb B. Bradley, J.A.G.C.

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

MAY 18 1951

JAGU CM 345889

U N I T E D S T A T E S	)	SEVENTH ARMY
	)	
v.	)	Trial by G.C.M., convened at Stuttgart, Germany, 2 April 1951. Dishonorable discharge, total forfeitures after promulgation and confinement for one year. Disciplinary Barracks
Private THOMAS E. HUNT (RA 16306475), Troop C, 24th Constabulary Squadron	)	

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

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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 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 separate specifications alleging the larceny on or about 10 February 1951 of a radio of a value of about $30.00, the property of Sergeant John E. Bowers, and the larceny on the same date of a radio of a value of about $20.00, the property of Corporal Norman N. Quick, in violation of Article of War 93. He was found guilty of both thefts, the court in each case substituting the words "of some value" for the value alleged. Evidence of three previous convictions, one by special and two 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 one year. 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 sustain the findings of guilty and legally sufficient to support only so much of the sentence as involves 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 six months. The Judge Advocate General has not concurred in the Board's holding.

3. On 10 February 1951 Sergeant John E. Bowers was the owner of a radio which he kept in his room at Conn Barracks, Schweinfurt, Germany. When he went to his room about 2130 hours that day he found his radio gone, although it had been there about two hours previous (R 4, 6; Pros Ex 1). Corporal Norman N. Quick, also billeted at Conn Barracks, missed his radio sometime after 1630 hours on 10 February (R 7, 15). Neither non-commissioned officer gave anyone permission to take or use his radio (R 5, 6, 15; Pros Ex 1). At about 2000 hours on 10 February 1951 the accused came out of Conn Barracks with two radios, one of which he sold (R 9, 10). After the radios were recovered Sergeant Bowers and Corporal Quick each identified one of the radios as his property (R 5-7; Pros Ex 1).

4. The theft of each radio was alleged in a separate specification. The maximum punishment for larceny of property having a value of $20 or less is dishonorable discharge, total forfeitures and confinement at hard labor for six months (MCM 1949, par 117c, p 137). Since the court sentenced the accused to dishonorable discharge, total forfeitures and confinement at hard labor for one year it is obvious that it imposed the maximum sentence on each specification.

The manual provides:

> "When a larceny of several articles is committed at substantially the same time and place it is a single larceny even though the articles belong to different persons. Thus, if a thief steals a suitcase containing the property of several individuals, or goes into a room and takes property belonging to various persons, there is but one larceny, which should be alleged in but one specification." (MCM 1949, par 180g, p 240)

The great weight of authority is in accord with this statement (Clemm v. State, 154 Ala. 12, 45 So. 212, 129 Am. St. Rep 17 (1907); Chanock v. United States, 50 App. D. C. 54, 267 F 612, 11 ALR 799 (1920); State v. Sampson, 157 Iowa 257, 138 N. W. 473, 42 LRA (N.S.) 967 (1912); State v. Dalton, 91 Miss. 162, 44 So. 802, 124 Am. St. Rep. 637 (1907); State v. Maggard, 160 Mo. 469, 61 S. W. 184, 83 Am. St. Rep. 484 (1901); State v. Douglas, 26 Nev. 196, 65 P 802, 99 Am. St. Rep. 688 (1901)). Moreover it has been held to be only a single offense where the property of different owners has been taken at the same time from different footlockers in the same room (CM 200912, Archer, 5 BR 7) or from different handbags lying on the same table (CM 307207, Colton, 61 BR 1).

We need not enter into a discussion as to what is the "same place" or what is a "different place" within the meaning of this rule or, specifically, whether, if the radios were taken from different rooms, that would constitute two offenses, since there is no evidence which would warrant the conclusion that the Government had established beyond a reasonable doubt that they were taken from different rooms. The question at issue, therefore, is

whether, when the proof shows merely that two objects were stolen from the same building at apparently the same time by the same person, the court can regard the theft of each object as a separate offense and impose a greater sentence than is permissible if only one offense was committed.

The fact that the Government has chosen to treat the theft as separate offenses by multiplying specifications is not determinative of the issue (CM 200912, Archer, 5 BR 7; CM 199034, Wormuth, 3 BR 315; CM 216098, Weinberg, 11 BR 105, CM 232424, Smith, 19 BR 81; CM 280805, White, 53 BR 357; CM 333014, Brooks, 81 BR 273). Since the maximum period for which an accused can be confined is involved, whether separate offenses were committed is a question of substance, not form (MCM 1949, par 180g, p 240), and the Government cannot by using more than one specification lay a basis for punishing the accused for two or more offenses when he may be guilty of only one.

In CM 199034, Wormuth, supra, the accused was charged in four specifications with having committed larceny from the same person on four different days between 19 May and 31 May. The Board held that the accused could be punished for only one larceny since,

> "The circumstances established by the evidence are consistent with the hypothesis that all the property described in the specification was taken by accused at one time; that is, that in taking the property referred to there was but one trespass and asportation and therefore but one larceny."

In CM 288588, Hawkins, et al, 56 BR 397, the accused were jointly charged in one specification with stealing two pistols of a value of $70 on or about 29 July. If the theft of the two pistols was a single transaction the sentence was legal but if the taking of each pistol constituted a separate theft then the sentence was excessive. There was no evidence as to the exact time when the two pistols were stolen. The Board said:

> "It is equally as possible that they were filched at separate times as that they were stolen at the same time. The prosecution has not established beyond a reasonable doubt that the theft must be considered a single offense although both have been alleged in the same Specification."

It thus appears that if the prosecution relies on the fact that the taking occurred at different times to establish separate offenses, or at the same time to establish a single offense, and thus justify a greater sentence than would otherwise be permissible, the burden is on it to prove beyond a reasonable doubt that the thefts occurred at the times

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or time specified. No reason is apparent why a different rule should apply where the issue is dependent on the place of the theft or thefts. If the time of the theft is an essential element of the Government's case where it seeks to justify a greater sentence than could be otherwise imposed, then by the same token so is the place.

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 legally sufficient to support only so much of the sentence as involves dishonorable discharge, total forfeitures after promulgation and confinement at hard labor for six months.

Edward H. Young
Edward H. Young, Colonel, JAGC

Nathan J. Roberts
Nathan J. Roberts, Colonel, JAGC

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

(292)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

Harbaugh, Young and Roberts
Officers of The Judge Advocate General's Corps

In the foregoing case of Private THOMAS E. HUNT, (RA 16306475), Troop C, 24th Constabulary Squadron, upon the concurrence of The Judge Advocate General, only so much of the sentence as provides for 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 six months is confirmed and will be duly executed. An appropriate guardhouse is designated as the place of confinement.

Edward H. Young, Colonel, JAGC

Nathan J. Roberts, Colonel, JAGC

MAY 18 1951

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

18 May, 1951

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

JAGK CM 345914

MAY 4 1951

UNITED STATES	)	24th INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Ansong, Korea, 13 March 1951. Dismissal and total forfeitures after promulgation.
First Lieutenant EDSEL W. UNDERWOOD (0-946782), Company A, 21st Infantry	)	

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

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 61st Article of War.

Specification: In that 1st Lieutenant Edsel W. Underwood, Company A, 21st Infantry, did, without proper leave, absent himself from his organization at or near Mensegya, Korea, from about 21 December 1950 to about 3 January 1951.

He pleaded guilty to and was found guilty of the charge and specification. No evidence of any previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances 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, remitted the period of confinement adjudged, recommended that the sentence, as thus modified, be commuted to a reprimand and forfeiture of $100 pay per month for six months, and forwarded the record of trial for action under Article of War 48.

3. Evidence

a. For the prosecution

A duly authenticated extract copy of the morning reports of Company A, 21st Infantry Regiment, was admitted in evidence without objection as Prosecution Exhibit No. 2 (R 9). Entered thereon are the following entries pertaining to accused:

"M/R 29 Dec 50
Underwood Edsel W 0946782 1st Lt
Fr dy to AWOL 0800 hrs eff 21 Dec 50

s/Lewis Edelstein
t/LEWIS EDELSTEIN
CWO USA

M/R 7 Jan 51
Underwood Edsel W 0946782 1st Lt
Fr AWOL to dy 1430 hrs eff 3 Jan 51

s/Lewis Edelstein
t/LEWIS EDELSTEIN
CWO USA"

b. For the defense

Accused, after being advised of his rights as a witness, elected to testify under oath. He stated that he received a letter from a friend in the Fifth Cavalry Regiment and decided to visit him as he had nothing to do that day. He left by jeep accompanied by several members of his organization. As they arrived at the "Cav Area" the jeep which accused was driving was involved in an accident and accused suffered a wrenched back. He was taken to a first aid station by ambulance where his back was taped and he was transferred to a clearing station. When he arrived at the clearing station he arranged a ride to Seoul, Korea, in order to "get a little relaxation" for a few days before reporting to the hospital. He admitted that he was aware of the fact that he was absent without leave. He had been "drinking * * * the biggest part of the time" he was away. He returned to his organization by obtaining a ride with two newspaper correspondents (R 10, 12).

As to his prior military service, accused stated that he was assigned to the "30th Division" from 15 September 1940 to 3 January 1941 when he was discharged for "minority." He was drafted into the army on 11 January 1943 and served with the "35th Division" until 21 June 1945. On 16 March 1947, while in an inactive duty status, he was commissioned as a second lieutenant in the National Guard.

On 31 July 1948 he was placed on active duty with the 82d Airborne Division. On 22 July 1950, he was assigned to the 24th Infantry Division in Korea and participated in all engagements in which his company took part. He was wounded twice and is authorized to wear the Silver Star, Bronze Star, Combat Infantryman's Badge, and has "five battle stars" (R 11, 12).

4. Discussion

The offense of absence without leave was proved beyond a reasonable doubt by accused's plea of guilty, his judicial admissions, and the extract copy of the morning reports of his organization which warrants the findings of guilty of Article of War 61 and its specification (CM 322548, Oliver, 71 BR 265, 267).

5. Attached to the record of trial is a recommendation for clemency addressed to the Commanding General, 24th Infantry Division, signed by all members of the court, the trial judge advocate, and the defense counsel, recommending that the "entire sentence be suspended" and that the accused be returned to duty, on the basis of the accused's prior military record.

6. The Department of the Army records show that accused is 27 years of age, married, and has two children. He was inducted into the army on 10 September 1940 after completing three years of high school. On 3 November 1941 he was discharged for the reason of minority and was again inducted on 11 January 1943 serving in an enlisted status until honorably discharged as a Technical Sergeant on 21 June 1945. During his second tour of duty as an enlisted man he served in the European Theater from 12 May 1944 to 12 June 1945 engaging in three major engagements. On 14 October 1947 he was commissioned a second lieutenant in the National Guard of the United States and, on 31 July 1948, he was ordered to extended active duty. He was awarded the Silver Star for gallantry in action on 9 August 1944. He is also entitled to wear the Purple Heart with Oakleaf Cluster, European Theater Ribbon with three bronze stars, Good Conduct Medal, and the Combat Infantryman's Badge. His overall efficiency ratings of record are 114 for the period of 9 September 1948 to 2 November 1948; 109 for the period of 2 November 1948 to 14 January 1949; 124 for the period of 31 January 1949 to 13 April 1949; 084 for the period of 13 April 1949 to 14 July 1949; and 095 for the period of 12 April 1950 to 13 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

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trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the finding of guilty and the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of Article of War 61.

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

Samuel S. Cowles, J.A.G.C.

Sumner A. Brown, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

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

In the foregoing case of First Lieutenant EDSEL W. UNDERWOOD, O-946782, Company A, 21st Infantry, upon the concurrence of The Judge Advocate General the sentence as modified by the reviewing authority is confirmed and will be carried into execution.

C. B. Mickelwait, Brig Gen, JAGC

Edward H. Young, Colonel, JAGC

JUN 8 1951

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

14 June, 1951

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

JAGH CM 345970

MAY 1 6 1951

U N I T E D S T A T E S v. Second Lieutenant RALPH FRAZIER (0-1685716), Company "G", 351st Infantry, APO 209, United States Army.	TRIESTE UNITED STATES TROOPS Trial by G.C.M., convened at Trieste, Free Territory of Trieste, 28 March 1951. Dismissal, total forfeitures after promulgation and confinement at hard labor for two (2) years.

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

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.

The accused was tried upon seven specifications alleging the stealing of military payment certificates in violation of the 93rd Article of War. The dates, the approximate value of the property and the persons from whom the certificates were taken, as alleged in the specifications, are as follows:

SPECIFICATION NO.	DATE	APPROXIMATE VALUE	FROM WHOM TAKEN
1	3 March 1950	$200.00	Sergeant Tonet
2	30 June 1950	20.00	Corporal Geng
3	30 June 1950	50.00	Private First Class Corey
4	30 June 1950	30.00	Corporal Soltys
5	30 June 1950	50.00	Sergeant First Class Kiernan
6	31 July 1950	110.00	Corporal Molnar
7	30 June 1950	100.00	Corporal Page

The accused pleaded guilty to Specifications 1 and 6 of the Charge and to the Charge and not guilty to Specifications 2, 3, 4, 5 and 7. He was found guilty of Specifications 1, 2, 3, 4, 5 and 6; guilty of Specification 7, as amended to substitute the word "Private" for "Corporal"; and guilty of the Charge. 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 five years. The reviewing authority approved the sentence but reduced the period of confinement to two years, and designated a disciplinary barracks as the place of confinement. The record of trial was forwarded for action pursuant to Article of War 48.

The record of trial discloses that, upon arraignment, the accused pleaded guilty to all Specifications and the Charge, whereupon the law member explained to the accused the meaning and effect of his pleas, stating the maximum punishment for the alleged offenses to be dismissal from the service and confinement at hard labor for a period of 18 years and six months. Accused then changed his pleas as to Specifications 2, 3, 4, 5 and 7 to not guilty, contending that the acts alleged therein constituted but a single offense and that upon conviction thereof the sentence should be adjudged accordingly. The court accepted accused's pleas as amended.

The prosecution proceeded to introduce evidence to establish that, at the times and places alleged, accused took military payment certificates in the amounts alleged from the soldiers named in the specifications with intent unlawfully to deprive the owners permanently of their property therein. Such uncontroverted evidence, together with accused's own admissions, established conclusively that accused was guilty of committing the offenses alleged. Unlawful appropriation of the personal property of another with intent to deprive the owner permanently of his property is stealing, in violation of Article of War 93. 1/

It appears from the record of trial that accused was incorrectly advised by the law member as to the effect of his plea of guilty in that the maximum punishment which the court may adjudge, as stated by the law member, failed to include forfeiture of all pay and allowances to become due after the date of the order directing execution of the sentence. However, in view of the fact that evidence was introduced to establish accused's guilt as to each of the offenses alleged, the erroneous instruction was not materially prejudicial and the sentence adjudged by the court,

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1/ Article of War 93, 10 U.S.C., Supp III, (1946), 1565; Subparagraph 180g, p. 239, of the Manual for Courts-Martial, U. S. Army, 1949.

being within legal limits, 2/ is valid.3/

The reviewing authority designated a place of confinement.4/ In the instant case, this is of no effect since the confirming authority, the Judicial Council, acting with the concurrence of The Judge Advocate General, is the proper agency to designate the place of confinement. 5/

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 procedures provided for courts-martial by military law were applied in a fundamentally fair way. 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. The sentence is legal.

Allan R. Browne J.A.G.C

William J. Flynn J.A.G.C

Arthur P. Fretland J.A.G.C

2/ Subparagraph 117c, p. 137, of the Manual for Courts-Martial, U. S. Army, 1949.

3/ CM 280689, Madison, 53 BR 299, 301; CM 312773, Johnston, 62 BR 289, 291-292.

4/ Subparagraph 87b, p. 97, of the Manual for Courts-Martial, U. S. Army, 1949.

5/ Article of War 48(c)(3), 10 U.S.C. Supp III, (1946), 1519; CM 343793, Cruikshank, BR-JC, 8 March 1951, (BR Opinion, p. 14).

(302)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

Harbaugh, Young and Roberts
Officers of The Judge Advocate General's Corps

In the foregoing case of Second Lieutenant Ralph Frazier, 0-1685716, Company "G," 351st Infantry, APO 209, 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.

Edward H. Young, Colonel, JAGC

Nathan J. Roberts, 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

28 May 1951

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

JAGH CM 345975

MAY 2 8 1951

UNITED STATES	)	SOUTHWESTERN COMMAND
	)	
v.	)	Trial by G.C.M., convened at
	)	Sasebo, Kyushu, Japan, 16 - 19
First Lieutenant JOSEPH E. HARAYDA	)	March 1951. Dismissal.
(0-1332369), Headquarters, 2nd	)	
Logistical Command, APO 59	)	

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

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.

The accused was tried upon the following Charges and Specifications:

CHARGE I: (Finding of not Guilty)

Specification: (Finding of not Guilty)

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

Specification: In that 1st Lt Joseph E. Harayda, Headquarters, 2nd Logistical Command, APO 59, did, at Sasebo, Kyushu, Japan, on or about 20 January 1951, wrongfully and dishonorably enter the quarters of Mrs. Betty Hardy, a married woman not his wife, and therein was disorderly by using vile and obscene language in the presence of the said Mrs. Betty Hardy, and by making indecent advances toward the said Mrs. Betty Hardy, while he was in uniform to the disgrace of the military service.

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

Specification: In that 1st Lt Joseph E. Harayda, Headquarters 2nd Logistical Command, APO 59, within intent to deceive Sasaki Tatsuo, a Japanese Guard for the Occupation Forces, did, at Sasebo, Kyushu, Japan, at about 0400 hours, 20 January 1951, officially state to the said Sasaki Tatsuo, then being an agent of superior authority, that: "My house in number 16b" or words to that effect, which statement was known by the said 1st Lt Joseph E. Harayda to be untrue, and did thereby gain entry into the Dragon Gulch Housing Area, an Off Limits area to personnel not residing therein.

The accused pleaded not guilty to all Charges and Specifications. He was found not guilty of the Specification of Charge I and Charge I. He was found guilty of the Specification of Charge II, except the words "and therein was disorderly by using vile and obscene language in the presence of the said Mrs. Betty Hardy, and by making indecent advances toward the said Mrs. Betty Hardy", of the excepted words, not guilty, and guilty of Charge II. He was also found guilty of the Specification of the Additional Charge, not guilty of the Additional Charge but guilty of a violation of the 96th Article of War. No evidence of previous convictions was introduced. Accused 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.

The evidence pertinent to the findings of guilty is summarized as follows:

The accused, First Lieutenant Joseph E. Harayda, was assigned to the G-1 Section of the 2nd Logistical Command, stationed in Pusan, Korea (R 187). On 12 January 1951, accused returned to Japan as a member of an escort guard detail and, pursuant to the request of Second Lieutenant George P. Hardy, who worked in the same office in Korea, telephoned Mrs. Betty Hardy, the lieutenant's wife, who lived in the dependents housing area, known as Dragon Gulch, at Camp Mower, Sasebo, Japan. Accused informed Mrs. Hardy that her husband was "fine" and told her that he expected to return to Sasebo in about a week on his way to Korea and that if she desired to send anything to Lieutenant Hardy, he would be glad to take it back (R 42, 187).

According to Mrs. Hardy, the following occurred: About 0200 hours on 20 January 1951, accused telephoned Mrs. Hardy, identified himself, mentioned that he was leaving for Korea the next day and asked her if she had anything she wanted to send to her husband. Mrs. Hardy replied

that she wished to send some things but that they were perishable foods which she could not obtain until the following morning when the commissary opened (R 42). About an hour later, accused again telephoned and said that he was lonely, everybody at Camp Mower had gone to bed and he wanted to talk to somebody. He asked Mrs. Hardy to drive him from Camp Mower to Sasebo and, when she refused, he mentioned trying to get transportation from the motor pool to take him to town (R 43). About 0400 hours, Mrs. Hardy received a third phone call from accused who stated that he was going to find transportation into town. According to Mrs. Hardy, "He did not say he was coming to my house" and "*** I really didn't think he was ***". "I believe I said I didn't care a damn what he did. I had got pretty annoyed." (R 45)

On the other hand, accused's version of the three telephone calls which he admittedly made to Mrs. Hardy in the early morning hours of 20 January 1951 varies somewhat from her testimony as to the time and subject of the conversations. According to accused, he spent the evening of the 19th drinking and playing pool with a fellow officer at the Officers' Club. When the club closed about 2300 hours, he returned to his quarters. Remembering that he had promised to call Mrs. Hardy before his return to Korea, he telephoned her around midnight and, during the course of the conversation, stated that he wished the club had not closed so early because he would like to have a few more drinks. At that, Mrs. Hardy said, "Well, come on in here and have a couple of drinks." (R 187) Accused then tried to obtain transportation but was unsuccessful, so he called Mrs. Hardy again. She suggested he call a Japanese taxi and gave him the number. In response to his call for a cab to pick him up, they told him "they weren't allowed to do it unless the MP's said okay." He then called the Military Police station, told them who he was and that he would like to get a cab to go see a friend. The person on duty said, "Okay, we'll get one for you." While waiting for the cab to arrive at the gate, he telephoned Mrs. Hardy a third time and talked for some time. When he went to the gate, a Japanese cab was waiting (R 188). According to accused, he arrived at the Hardy residence about an hour or an hour and a half after the last call (R 190).

It was about 0330 hours, 20 January 1951, when the taxi picked up an American officer of the same build as accused(R 26)at the gate of Camp Mower (R 24). He was driven to Dragon Gulch, Sasebo City, where the taxi was stopped at the main gate by the Japanese guard who stated that they were not allowed to go inside the area (R 16, 24). The officer alighted from the cab and because of his insistence upon entry into the area, the guard said he would ask his superior, Sergeant Sasaki. The sergeant was sent for but before he arrived, the officer ran into the area pursued by the guard (R 17). Sergeant Sasaki met the two about 25 meters from the gate. When the sergeant asked, "Where are you going,sir." and the officer replied, "my house, 16b." and added that he would have the taxi return right away. The sergeant, thinking that 16b was the officer's quarters, let him go in (R 21).

The taxi went to quarters 16b and the officer got out. The cab driver asked for his fare but the lieutenant said that he did not have any yen and to "wait a minute". He went to the door and the lights went on. He returned in about a minute and offered to pay with a ten dollar bill. The cab driver told him that he was not allowed to handle American money, so arrangements were made to pay him later. The taxi left the area in about five minutes (R 25-26). The cab driver testified that during the subsequent investigation he was paid the taxi fare, 500 yen, by a person he identified as the assistant defense counsel (R 27).

It was established that the Dragon Gulch Housing Area was the responsibility of the Commanding Officer of Camp Mower and that the regulations governing the area were published by his authority (R 30). The area was designated off limits to all personnel except occupants (R 32). In addition, a Japanese security policeman was stationed at the main entrance 24 hours a day and other guards were stationed throughout the area (R 31). These Japanese guards were hired by the labor officer of Camp Mower and were under the supervision of the Provost Marshal of the camp for instruction and training (R 30). They were instructed to report any unusual occurrence in the area to the Provost Marshal's Office (R 31). Occupants of Dragon Gulch identified themselves by their commissary cards; visitors to the area were required to obtain a pass from the Provost Marshal's Office (R 34). The accused has never been an occupant of the area (R 36).

According to Mrs. Hardy, it was approximately 0500 when accused rang her doorbell. At that time she was dressed and downstairs preparing coffee. After she had turned on the porch light, Lieutenant Harayda identified himself and said that he got into town and decided he would come and talk to her. She told him it was rather early in the morning to "come visiting somebody". Because she was self-conscious about neighborhood gossip ("even one noise out of you and somebody has an incriminating remark to make about you") she said he could come in and have a cup of coffee. She states that he replied that he would have to tell the taxi to wait and went back to the street (R 46-48). According to the accused, Mrs. Hardy said to him when he arrived, "I didn't think you got in but I see you made it." He asked her if she had any yen so that he could pay the cab fare and when she said that she did not have any, he arranged to pay the cab driver later. He did not ask the cab to wait. He then entered the Hardy apartment (R 188).

For approximately the next two hours they sat downstairs and talked (R 49). Mrs. Hardy testified that they had coffee (R 49) but accused said that he had whiskey and she a Creme De Menthe (R 188). As to the events which transpired thereafter the testimony of the two is widely divergent. Mrs. Hardy stated that when she suggested he take his taxi and return to camp, he refused and initiated the acts which formed the bases of Charge I and part of Charge II (R 49). Accused contended that he had become sleepy and, at Mrs. Hardy's suggestion, went upstairs to

bed (R 188). In view of the fact that the court acquitted accused of the charge of rape (Charge I) and excepted from the second charge (Charge II) allegations of disorderly conduct within the quarters of Mrs. Hardy, it is unnecessary to detail the testimony as to what occurred in the apartment. Suffice it to say, it is undisputed that accused remained therein until after 1300 hours on the 20th at which time Mrs. Hardy drove him to the port in her car (R 65, 189, 203).

By excepting the words, "and therein was disorderly by using vile and obscene language in the presence of the said Mrs. Betty Hardy, and by making indecent advances toward the said Mrs. Betty Hardy", from the Specification of Charge II, the court found the accused guilty of wrongfully and dishonorably entering the quarters of Mrs. Betty Hardy, a married woman not his wife, while he was in uniform, to the disgrace of the military service, in violation of Article of War 95. Conduct violative of this article is defined as "*** action or behavior in an unofficial or private capacity, which, in dishonoring or disgracing the individual personnally, seriously compromises his position as an officer and exhibits him as morally unworthy to remain an officer of the honorable profession of arms." 1/ Included in such conduct are offenses against public morals or decorum. 2/

The first question for determination is whether the specification states an offense in violation of Article of War 95. The specification pleaded two separate phases of the misconduct involved, (1) the wrongful and dishonorable entry and (2) the disorderly actions following entry. The latter element was eliminated by the court. Although it may not state an offense per se to plead without more that an officer entered the quarters of a married woman not his wife, when words importing culpability or criminality, such as "wrongfully and dishonorably" and "to the disgrace of the military service", are used in connection therewith to describe the act, as here, 3/ an offense is alleged with sufficient certainty to apprise the accused of the conduct complained of. The language of the specification, with respect to the portion not deleted by the findings, considered as a whole connotes conduct offensive to public morals or decorum. A penetrating analysis of the specification discloses that addition of the words, "a married woman not his wife",

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1/ Paragraph 182, p. 254, of the Manual for Courts-Martial, U.S. Army, 1949; Winthrop, Military Law and Precedents, 2d Ed, 1920 Reprint, p. 713.

2/ Winthrop, supra, p. 711.

3/ Subparagraph 29a, p. 22, of the Manual for Courts-Martial, U. S. Army, 1949; CM 254704, Thompson, 35 BR 329, 339; CM 325107, Shatzer, 74 BR 83, 85.

was intended to and, by common sense construction, did advise accused that culpable irregularities involving the officers' code of morals and dishonorable conduct were charged. If the pleader had solely intended to charge an unlawful entry, it is to be expected that he would have alleged only wrongful or illegal entry of the Hardy quarters or Lieutenant Hardy's quarters (quarters are normally spoken of in Army parlance as those of the officer concerned) without adding "of Mrs. Betty Hardy, a married woman not his wife." This addition advised the accused that an irregularity involving, at the least, indecorous conduct was charged. Such an allegation differs from a pleading which merely states such an innocuous act as possession of a medicine, with the addition of the word "wrongfully" as an effort to allege culpability. 4/ Charges under the rules of military law need not be drawn with the particularity of a common law indictment. 5/ In the absence of objection by the defense, greater detail in the pleading was unnecessary. 6/ It is apparent from the record of trial that the accused was fully informed of the offense charged and was in nowise misled in his defense and that the substantial rights of the accused were not injuriously affected by failure of the accuser to amplify the specification. 7/ The Board of Review is of the opinion that the Specification of Charge II, as modified by the finding of the court-martial, states an offense violative of Article of War 95.

The next inquiry is whether the evidence supports the court's finding that the accused dishonorably entered the quarters of Mrs. Hardy, a married woman not his wife. The word "dishonorable" is defined as "bringing or deserving dishonor; shameful; disgraceful," and the noun "dishonor" as "disgrace; shame; ignominy." 8/ "Dishonorably" is used to describe the failure of an officer to exhibit the moral attributes common to the ideal officer and the perfect gentleman and indicates acts of indecency or indecorum. 9/

4/ CM 342763, Fish, 8 BR-JC 161, 182, 185, 186, 188.

5/ In re Yamashita, 327 U.S. 1, 17; Johnson v. Biddle, 12 F.2d 366, 379, (8th Cir. 1926); Cf. Hundertmark, MO-JAGA 413, 417.

6/ Subparagraph 64b, p. 58, and subparagraph 70b, p. 64, of the Manual for Courts-Martial, U. S. Army, 1949.

7/ Subparagraph 87b, p. 92, of the Manual for Courts-Martial, U. S. Army, 1949, CM 279014, Byars, 52 BR 99, 103.

8/ Webster's New International Dictionary, Unabridged, 2d Ed, 1949, p. 748.

9/ Paragraph 182, p. 254, of the Manual for Courts-Martial, U. S. Army, 1949.

Whether accused's conduct was dishonorable in the sense above indicated depends upon the surrounding circumstances. It is undisputed that, prior to the night in question, accused did not know Mrs. Hardy and had only talked to her once by telephone. He knew her husband, a fellow officer, was in Korea. Although it is true that he had promised to telephone Mrs. Hardy before his return to Korea to see if she had anything to send to her husband, he initiated a series of calls to her in the very early hours of the morning, 20 January 1951, when he knew that he was not leaving Japan until afternoon. As a result of these telephone calls, he, securing entrance to an "off limits" area by deceit, went to the Hardy quarters, whether by invitation or otherwise, at approximately 0500 hours and remained there until after 1300 hours. Accused admitted entertaining thoughts of sexual intercourse if the circumstances were favorable and also that he had been drinking and "was feeling no pain" at the time he went to the apartment. In view of the court's findings, questions as to disorderly actions of accused in the quarters during his visit may not be considered here, but his conduct in securing entry in the small hours of the morning by making repeated telephone calls at an unseemly hour to the wife of an absent brother officer spell out that he entered the dwelling for a discreditable purpose. The general appearance of such an irregular situation was such that the incident was likely to result in loss of the good reputation of the parties concerned and of the Army. Certainly, accused's actions in laying the groundwork for such a result were discreditable to the military service.[10] Yet, it can not be determined that the particular facts in this case, as limited by the findings of the court-martial, with nothing further, present a sufficient basis for a finding of dishonorable conduct violative of the 95th Article of War.[11] Consequently, the Board of Review concludes that the conduct charged and proved does not constitute dishonorable conduct to the disgrace of the military service in violation of Article of War 95, but does establish a lesser degree of culpability, conduct of a nature to bring discredit upon the military service in violation of Article of War 96.

As to the finding that accused made a false official statement to a Japanese guard for the Occupation Forces, with intent to deceive him, knowing such statement to be untrue, in violation of Article of War 96, the evidence discloses that at approximately the time alleged, an American officer was denied entry to the Dragon Gulch Housing Area by the Japanese guards who were charged with the security of the area under authority of

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10/ CM 333288, Shore, 81 BR 329, 346; CM 341450, Kempe, 7 BR-JC 101, 112-113.

11/ CM 237279, Jones, 23 BR 353, 358.

the Commanding Officer, Camp Mower. This officer stated, in reply to an inquiry by the Japanese supervisor on duty, that he was going to "my quarters, 16b". He was then permitted to enter and the taxi took him to the apartment with that number. Mrs. Hardy lived in Apartment 16c. That the officer mentioned was the accused appears from the following circumstances in which his actions match those which Mrs. Hardy ascribed to Lieutenant Harayda; he appeared in the early morning hours of the date in question (cab driver says at apartment 16b, Mrs. Hardy at 16c, admittedly adjacent), was riding in a Japanese taxi, had no yen for his fare, unavailingly tendered a ten dollar bill in payment, released the cab, was an American lieutenant and looked like the accused. Additionally, only one American officer came through the gate during the hours mentioned; he was in a Japanese cab with destination as Apartment 16b. It is noted that it is in evidence that the assistant defense counsel paid the taxicab fare incurred by the officer. There is no question that the statement accused made to the guard was untrue. It is equally clear that it was made with intent to deceive an individual under control of the Occupation Forces so that accused might gain admittance to an Army area where he was not authorized to be. It is not important that the guard was not technically a member of the Occupation Forces because the guard was acting under their orders in their behalf; the gravamen of the offense is the making of a false official statement. 12/ All elements necessary to support a conviction of the dereliction alleged have been established. 13/ Since making a false official statement in violation of Article of War 96 is a lesser included offense of the 95th Article of War, the court was warranted in finding the accused guilty under the 96th Article of War. 14/

Consideration has been given to the letter of defense counsel, appended to the record of trial, in which he complains for the first time of experiments of the court, upon occasion of a "view", consisting of ringing the door-bell, turning on the radio and scattering over the Hardy apartment in order to test the likelihood that the alleged rape and other kindred incidents, which assertedly occurred indoors, transpired without the knowledge of the neighbors and persons coming to the house. In view of the acquittal of the accused as to these allegations, any error in this respect would be harmless in the light of compelling evidence of guilt as to the remaining charges and specifications. 15/

12/ CM 280335, Alexander, 53 BR 177, 180; CM 340733, Heindorf, 6 BR-JC 179, 195; CM 344374, Hansen, BR-JC, 22 March 1951 (BR Opinion p. 13); Cf. CM 247753, Davis, 31 BR 7, 15(false statement to person not in military service); CM 280840,Fischer, 53 BR 361, 379-380.

13/ CM 334658, Flanagan, 1 BR-JC 233, 234; CM 339494, Clifford, 5 BR-JC 131, 138; CM 344374, Hansen, supra, (BR Opinion p. 11).

14/ Paragraph 182, p. 254, and subparagraph 78b, p. 76, of the Manual for Courts-Martial, U.S.Army, 1949; CM 326445, Barnett, 75 BR 223, 227, 229. CM 329973, Jolin, 78 BR 231, 233, 236.

15/ CM 232592, Law, 19 BR 117, 126; Furr MO-JAGA 501, 503.

Counsel expands the argument, however, stating that he only placed the accused on the stand to meet these asserted errors and thus that accused suffered prejudice to his rights. Since the testimony of the accused was either exculpatory or merely cumulative (aside from his statement of his amorous pre-entry thoughts, which is manifestly not essential to the findings of guilty) and since other incriminating proof is of the compelling nature mentioned, whether or not the accused took the stand is unimportant. 16/ The point urged, therefore, lacks persuasion.

Accused was born 7 May 1916 in Wilmington, Delaware. He is married and has a three year old son. His formal education ended in 1932 after 1½ years of high school. From 1936 to 1943 he worked as a painter and decorator. On 22 July 1943 he was inducted into the Army and served as an enlisted man until 16 February 1945 when he was commissioned a second lieutenant, AUS, upon graduation from the Infantry Officer Candidate School at Fort Benning, Georgia. He served in the Asiatic-Pacific Theater from 13 June 1945 until 20 August 1946. He was promoted to first lieutenant 29 July 1946, and was relieved from active duty 3 October 1946, retaining a reserve commission in the same grade. After his separation, he returned to his civilian occupation of painter-decorator. Accused was active in reserve affairs and completed the Infantry Officers Associate Basic Course at Fort Benning, Georgia, in May 1948. He was ordered to active military duty 22 December 1948. He was then sent to Japan and has served in the Far Eastern Command continuously since January 1949. Efficiency ratings reveal that his prior service was uniformly characterized as excellent and that he has received numerical ratings of 102, 083, 098. There is no evidence of civilian offenses or previous convictions by courts-martial.

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

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16/ Bailey, MO-JAGA 570, 573.

Board of Review is of the opinion that the record of trial is legally sufficient to sustain the findings of guilty of the Specification and Additional Charge, and of so much of the findings of guilty of the Specification, Charge II, and of Charge II as involves a finding of guilty of the Specification in violation of Article of War 96. The Board of Review is further of the opinion that the record of trial is sufficient to sustain the sentence and to warrant confirmation thereof.[17] A sentence to be dismissed the service is authorized upon conviction of violations of Article of War 96.

Allan R. Browne J.A.G.C

William J. Flynn J.A.G.C

Arthur P. Ireland J.A.G.C

17/ CM 334658, Flanagan, supra, p. 236, 237; CM 338522, Howard, 4 BR-JC 291, 295, 296 (as to false official statement); and CM 333288, Shore, supra, p. 347; CM 341450, Kempe, supra, p. 114, 115 (as to discreditable conduct).

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

JAGU CM 345975

JUN 12 1951

UNITED STATES	SOUTHWESTERN COMMAND
v.	Trial by G.C.M., convened at Sasebo, Kyushu, Japan, 16 - 19 March 1951. Dismissal.
First Lieutenant JOSEPH E. HARAYDA, 0-1332369, 2nd Logistical Command, APO 59	

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Opinion of the Judicial Council
Harbaugh, Mickelwait and Young
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 officer 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 wrongfully and dishonorably entering the quarters of Mrs. Betty Hardy, a married woman not his wife, while he was in uniform, to the disgrace of the military service at Sasebo, Kyushu, Japan, on or about 20 January 1951, in violation of Article of War 95 (Specification of Charge II) and making a false official statement to Sasaki Tatsuo, a Japanese Guard for the Occupation Forces, and an agent of superior authority, as follows: "My house in number 16b" or words to that effect and thereby gaining entrance into the Dragon Gulch Housing Area, an Off Limits Area to personnel not residing therein, at Sasebo, Kyushu, Japan, at about 0400 hours 20 January 1951, in violation of Article of War 96 (Specification of Additional Charge).

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. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Additional Charge and its specification, so much of the findings of guilty of Charge II and its specification as involves a finding of guilty of the specification in violation of Article of War 96, and the sentence and to warrant its confirmation.

3. We concur with the Board of Review in its opinion that the record of trial is legally sufficient to support the findings of guilty of the Additional Charge and its specification and the sentence. We do not concur

with the Board's opinion that the record is legally sufficient to support the findings of guilty of Charge II and its specification.

The Specification of Charge II alleges that the accused

"did at Sasebo, Kyushu, Japan, on or about 20 January 1951, wrongfully and dishonorably enter the quarters of Mrs. Betty Hardy, a married woman not his wife, and therein was disorderly by using vile and obscene language in the presence of the said Mrs. Betty Hardy, and by making indecent advances toward the said Mrs. Betty Hardy, while he was in uniform to the disgrace of the military service."

The court in its findings of guilty excepted the words "and therein was disorderly by using vile and obscene language in the presence of the said Mrs. Betty Hardy, and by making indecent advances toward the said Mrs. Betty Hardy." Thus the court found that the accused "did at Sasebo, Kyushu, Japan, on or about 20 January 1951, wrongfully and dishonorably enter the quarters of Mrs. Betty Hardy, a married woman not his wife while he was in uniform to the disgrace of the military service."

A consideration of the specification as originally drawn indicates that it alleged two offenses, a wrongful and dishonorable entry by the accused into the quarters of a married woman not his wife and disorderly conduct therein. The acquittal of the disorderly conduct raises the question whether the remaining language in the specification setting forth the accused's wrongful and dishonorable entry into the quarters of Mrs. Hardy, sufficiently alleges an offense in violation of the Articles of War and if so whether the evidence supports a finding of guilty thereof.

We deem it unnecessary to decide whether or not the specification as modified by the Court, even though omitting the words "unlawfully" or "without authority," states the offense of "unlawful entry" in violation of Article of War 96. Even assuming, without deciding, that it does, the evidence fails to establish any unlawful entry which is an entry without the consent or authority of the occupant (see CM 345377, Spears, et al, BR, 19 Apr 1951; CM 341604, Tilley, 7 BR-JC 137, 171, 183-184).

There remains the question whether the words "wrongfully and dishonorably" in the specification adequately inform the accused of the commission of an offense other than unlawful entry. We are of the opinion that they do not.

In CM 244014, LaLone, 28 BR 165, 176-177, it was held that an allegation that the accused, a warrant officer, wrongfully and unlawfully stated to the father of two soldiers that the soldiers would not be transferred from the accused's post, which statement was alleged to be "conduct to the prejudice

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of good order and military discipline and of a nature to bring discredit upon the Military service," did not state an offense. The Board of Review in its opinion commented that the statement could have been interpreted in many different ways, some of which were free of any wrong or wrongful intent.

In CM 342763, Fish, 8 BR-JC 161, 182, it was held that an allegation that the accused wrongfully had a quantity of "strophantine" in his possession for the purpose of sale or barter for personal gain, did not state an offense. In reaching this conclusion the Judicial Council stated on page 183 of its opinion:

> "The Boards of Review have repeatedly held in effect that if the specification alleges acts which are innocent on their face, an allegation that the acts were done wrongfully does not make the specification state an offense. It is essential that the specification contain a statement 'of the facts constituting the offense' (MCM, 1949, par 29a, p 22). The reason is that if the facts and circumstances which make otherwise innocent acts wrongful are not alleged, the accused is neither adequately informed of the offense against which he must defend nor adequately protected against double jeopardy (see Winthrop's Military Law and Precedents, 2d Ed, 1920 Reprint, pages 132-133)."

In our opinion, the instant case falls within the principles of the above cited cases. We have heretofore pointed out that the evidence fails to prove that the accused's entry into Mrs. Hardy's quarters was against her will and have thus disposed of the possible allegation of unlawful entry. The specification, on its face, alleges no other offense. If we permit any other inculpatory meaning to be given to the words "wrongfully and dishonorably" the accused would not be adequately informed of the offense against which he must defend nor be adequately protected against double jeopardy.

4. We conclude that the record of trial is legally insufficient to support the findings of guilty of Charge II and its Specification and legally sufficient to support the findings of guilty of the Additional Charge and its Specification and the sentence. A sentence of dismissal is authorized upon conviction of a violation of Article of War 96. However, the sentence of dismissal in this case was imposed by the court and approved by the reviewing authority on the basis of the accused's conviction of two offenses, the more serious of which we have held legally insufficient. Under these circumstances confirmation of the sentence to dismissal is not warranted.

C. B. Mickelwait, Brig Gen, JAGC

Edward H. Young, Colonel, JAGC

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

JAGJ CM 345975

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

In the foregoing case of First Lieutenant Joseph E. Harayda, O-1332369, Headquarters, 2nd Logistical Command, APO 59, upon the concurrence of The Judge Advocate General, the findings of guilty of Charge II and its Specification are disapproved, and the sentence is confirmed but commuted to a reprimand and forfeiture of seventy-five dollars pay per month for three months. As thus commuted, the sentence will be carried into execution.

C. B. Mickelwait, Brig Gen, JAGC

Edward H. Young, Colonel, JAGC

JUN 12 1951

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

12 June, 1951

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

JAGK - CM 346039

MAY 25 1951.

UNITED STATES v. Corporal ROBERT JAMES DOLON (RA 19278753), Company "C", 728th Military Police Battalion, APO 301.	EIGHTH UNITED STATES ARMY KOREA (EUSAK) Trial by G.C.M., convened at Headquarters EUSAK, APO 301, 2 April 1951. Dishonorable discharge, total forfeitures after promulgation, and confinement for life.

OPINION of the BOARD OF REVIEW
BARKIN, WOLF and BROWN
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 92nd Article of War.

Specification 1: In that Corporal Robert James Dolon, Company "C" 728th Military Police Battalion, APO 301, did, at Yodo-Nae, Korea, on or about 20 February 1951, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill Tae Sun Han, a human being, by shooting her with a carbine.

Specification 2: In that Corporal Robert James Dolon, Company "C" 728th Military Police Battalion, APO 301, did, at Yodo-Nae, Korea, on or about 20 February 1951, forcibly and feloniously, against her will, have carnal knowledge of Tae Sun Han.

He pleaded not guilty to and was found guilty of the charge and specifications. No evidence of any 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 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

About 1845 hours, 20 February 1951, accused, a member of Company C, 728th Military Police Battalion, Chungju, Korea, was ordered by Sergeant First Class Jaime A. Ramirez, the noncommissioned officer in charge of a detail of which accused was a member, to proceed by jeep to Headquarters Company, located at Changhowan-ni, Korea, exchange the jeep for another one, and return the same night. The road from Chungju to Changhowan-ni, known as the "Green Diamond" proceeds westwardly about nine miles to Yodo-Nae and then northwardly about 21 miles to Changhowan-ni. When accused left for Changhowan-ni at about 1945 hours he had a forty-five caliber pistol and a carbine in his possession (R 24,58-59; Pros Ex 5).

At approximately 2115 hours, 20 February 1951, as accused was returning from Changhowan-ni, he stopped his jeep at a traffic control post located half a mile south of Changhowan-ni. The jeep accused was driving had no top, and had a white board below the windshield on which was painted "Military Police" in red letters. Accused asked the guard at the traffic control post what time it was. Upon receiving the desired information accused told the guard that he had to get back to his organization at 2330 hours and drove off in the direction of Chungju (R 59-62).

That night, Tae Sun Han, a Korean female about 14 or 15 years of age, and her father and two brothers were at the home of Han Che Chun, one of the brothers, which is located approximately 15 miles south of Changhowan-ni. According to Han Che Chun, an American soldier wearing a black arm band with white letters entered the room and ordered the three men to lie down. At the soldier's order one of the brothers tied the hands of the other two men behind their backs. Tae Sun Han was in bed "under the cover." When the soldier heard her voice he removed the cover from her and took her from the bed. She was fully dressed in Korean clothing. The soldier took Tae Sun Han out of the house, returning in about twenty minutes with a Korean man who lived next door. At this time, Tae Sun Han was wearing "some kind of GI clothes." The soldier ordered Tae Sun Han to tie the hands of the Korean man, but she was so frightened that she could not do so and the soldier tied them himself. The soldier then took Tae Sun Han out of the house at the point of a pistol and forced her into the jeep that he was driving. Han Che Chun saw that the jeep had a white board beneath the windshield with some lettering on it. Tae Sun Han had no "American boy friends" and had never been with an American before this incident (R 63-68,70,74-75).

At approximately 2230 or 2300 hours, 20 February 1951, Lee Soon Yong, who lived across the street from the house in which Tae Sun Han's body subsequently was found, heard "a female's voice calling for help," "a beating noise around the house," and then "one gunshot." He looked out and saw a jeep without a top leave the house and proceed toward Chungju. In about thirty minutes the jeep came back to the house and again left in the direction of Chungju (R 77). Accused arrived at his organization in Chungju at about 0045 hours, 21 February (R 58).

The following morning, 21 February 1951, at an abandoned house about four miles south of his home, Han Che Chun found the nude dead body of his sister, Tae Sun Han, lying face downward, with her hands tied with wire behind her back. He untied her hands, turned her over on her back, and notified the Korean police (R 68-70).

At approximately 1300 hours, 21 February 1951, First Lieutenaht Theodore R. Zimmerman, 728th Military Police Battalion, and Master Sergeant Elmer E. Lanier, Agent for the 19th Criminal Investigation Detachment, accompanied by Agent James Gunning and a Korean interpreter, arrived at a house located "about two miles northwest of Yodo-Nae" where the girl's body was found. Han Che Chun was there when they arrived. In a small room in the house they found the body of Tae Sun Han lying on a straw mat, a small piece of wire, and a coil of wire. Sergeant Lanier had the body of the girl removed to the porch of the house and, at his direction and in his presence, Agent Gunning took several photographs of the body, which were admitted in evidence over objection by the defense. An expended cartridge was found embedded in the floor "in the general area" from where the body had been removed. A thorough search of the room and the surroundings revealed a thirty caliber cartridge case outside the door. None of Tae Sun Han's clothing was found in the house or surrounding area. Sergeant Lanier accompanied Han Che Chun to his home and was shown Tae Sun Han's clothing, which were in good condition and showed no evidence of tears or bloodstains. The clothes had been found by Tae Sun Han's father in a room "next to [the] house" from which Tae Sun Han had been taken by the soldier. A leather glove and two wool inserts, found by Han Che Chun after the soldier had taken Tae Sun Han from their home, were turned over to Sergeant Lanier. Lieutenant Zimmerman and Sergeant Lanier accompanied the body of Tae Sun Han to the 8076th Mobile Army Surgical Hospital at Chungju (R 9-13,24-27,46-48,69; Pros Exs 1-4).

At 1500 hours, 21 February 1951, at the hospital, Captain Robert M. Lawrence, Medical Corps, performed an autopsy on the dead body of Tae Sun Han. His examination revealed a gunshot wound "over the right shoulder" approximately eight-tenths of a centimeter in diameter as "the wound of entrance," and "the wound of exit over the right side of the chest

four inches above the lower edge of the rib cage, one centimeter in size" caused by a bullet "larger than a twenty two or twenty five caliber" and "smaller than a forty five caliber." On her face were "five or six contusions and black and blue areas about the chin and both angles of the jaw," and a "one centimeter *** laceration cut of the left side of the head *** which extended down through all layers of the scalp to the bone *** apparently made with a sharp object." There was blood on both sides of her head and a "considerable amount of blood matted in her hair," blood clots about both eyes and a "conjunctional hemorrhage of the left eye on the lateral side." The head wounds were probably incurred prior to the gunshot wound because of the amount of bleeding. There was a "six by six centimeter contusion over the right middle thigh with a moderate amount of bleeding," a "five-tenths centimeter tear of the left side at the base of the vagina, with evidence of bleeding in this area," and "a small to moderate amount of clotted blood around the vagina." There was also a "one centimeter tear of the left clitoral prepuce with evidence of acute bleeding and clotted blood." These tears around the external genitalia and entrance of the vagina indicated a "heavy, severe trauma" to that area. There were no scratches, fingernail marks, or other signs of trauma at this area, upper inner thighs or lower abdomen. The tears could have been caused by an attempt to penetrate, an actual small penetration, or by external digital manipulation. The size of the vaginal orifice was such that entrance "would be made with difficulty." Smears taken from the "external genitalia," "vaginal entrance" and "vaginal vault" showed no evidence of spermatozoa. There were two "circular rings" or marks of irritation around each wrist apparently caused by a rope or a similar object. The marks of irritation probably occurred prior to death because "after death irritation would not have been present to the degree it was." The cause of death was the "gunshot wound" causing "hemorrhage into the lung, and bronchial hemorrhage." In the opinion of the medical officer, death occurred "within a period of perhaps five or six respirations after the gunshot wound" (R 14-21).

After delivering the body of Tae Sun Han to the hospital, Lieutenant Zimmerman and Sergeant Lanier went to Company C, 728th Military Police Battalion, where they spoke to accused at about 1530 hours, 21 February. Sergeant Lanier advised him of his rights under the 24th Article of War, and accused stated that he understood them. Accused related that he had been on the road between Chungju and Changhowan-ni between 2200 and 2400 hours, 20 February 1951, and that he had fired his carbine that night. Asked if he could identify the glove found by Han Che Chun, he stated he had lost it on the night of 20 February. Accused agreed to permit Sergeant Lanier to examine his private parts. "Lesions" were observed on his penis and accused stated that this condition had appeared several days before but he "didn't know what it was." Upon being informed that

he was under investigation for rape and murder, accused said, "It wasn't rape but it was murder." Accused stated that he would make a written statement if someone would write it for him because his right wrist was sprained and swollen. The accused then dictated a statement to a stenographer. The statement was admitted in evidence as Prosecution Exhibit 6 over objection of the defense (R 29-31,34-35,48-55).

In his statement accused related that at approximately 2050 hours, 20 February 1951, he stopped his jeep at a check-point, asked the guard what time it was, and told him that it would be 2350 hours before he got back to his company. After he had proceeded approximately 15 or 20 miles the lights on the jeep went out and when he got out to fix them he was fired upon by two or more persons. He "shot back" a few times, jumped into the jeep, and drove off without lights. About a mile or a mile and a half down the road he saw some Koreans running across a field. He turned off the road to investigate and entered a house where he found three men. After a futile attempt to find any firearms he ordered one of the men to tie the hands of the other two and accused tied the third man's hands. While searching for other occupants he stumbled over a sleeping 12 or 13 year old girl. He awakened her and told her to proceed in front of him as he checked the rest of the house. In another room he found "another younger man and two elder people." The young man was taken back to the room and told to lie down with the other three men. He put the girl in the jeep and took her with him. Shortly thereafter he stopped at a house at "the junction of the Green Diamond" and attempted to leave her there. The girl "made motions" that she wanted accused to "have sexual intercourse" with her and he declined. The girl did not understand and "got mad and started yelling," whereupon he "hit her a couple of times and everything turned black." He next remembered starting to get in the jeep. He "wanted to find out where the girl was" and went back to the house where he saw the girl lying on the floor. "Her hands were tied and blood was running from her head. I got sick. I went back to my jeep, picked up my carbine and shot her." He returned to his organization, reported that his jeep had no lights, had coffee, spoke to "some of the boys at the hospital" and went to bed (Pros Ex 6).

That night, after the accused had completed his written statement he was taken to the 8076th Hospital and a "short-arm inspection" was made by Lieutenant Junior Grade Edward B. Twitchell, an officer of the Naval Reserve Medical Corps. The examination revealed a "patchy redness over the head of the penis and the adjacent portion of the foreskin, a band approximately one inch in width which appeared to have some irritation or rather inflammation around it and I took it to be what is called the result of trauma or the result of irritation, rather than a contusion, such as traumatic irritation." It was his opinion the condition occurred "not later than 24 hours before I examined him" (R 37-39).

b. For the Defense

After being advised of his rights as a witness, the accused elected to remain silent (R 79).

Sergeant First Class Robert W. Smith, 55th Military Police Battalion, testified that he had known accused for four years, and that he had performed his duties as a military policeman in an excellent manner (R 72, 73).

An extract copy of accused's service record showing no previous convictions by courts-martial was admitted in evidence as Defense Exhibit A (R 78).

4. Discussion

a. Specification 1

The uncontradicted evidence established the corpus delicti whereby Tae Sun Han, a Korean girl of 14 or 15 years of age, was found dead as a result of a gunshot wound in a deserted house in the vicinity of Yodo-Nae, Korea. The evidence further showed that, at the time the alleged offense was committed, accused, a military policeman, was driving a military police jeep on the road, which passed the home of the victim and the house where her dead body was found, and arrived at his company area, with a sprained and swollen right hand, approximately 1-1/4 hours after he should have arrived. A glove, admitted by accused to be his, was found where the victim was abducted in a jeep, on which was a painted sign similar to a Military Police sign, by an American soldier wearing an arm brassard. At about the time when accused and Tae Sun Han were presumably in the house where her dead body was subsequently found, a Korean, who lived across the street from the house, heard a female voice calling for help, sounds of beating, and a gunshot, and saw a jeep similar to the one hereinabove described leave the scene. The medical testimony revealed that the cause of death was a gunshot wound from which death resulted almost immediately. This evidence, together with accused's voluntary oral and written pretrial statements that he shot and killed Tae Sun Han at the time and place alleged, conclusively established that accused unlawfully killed her (MCM 1949, par 127a). That the act was committed with premeditation and with malice aforethought was proven by the fact that accused sadistically mistreated her, cruelly beat her, bound her with wire, and then obtained his carbine and deliberately shot and killed her. All of the elements of premeditated murder as alleged are conclusively proven by the evidence in the record of trial (CM 344821, Werkowski, 1951; CM 329500, Durden, 78 BR 75,80).

b. Specification 2

Under this specification the accused is charged with forcibly and feloniously, and against her will, having carnal knowledge of Tae Sun Han on or about 20 February 1951.

The Manual for Courts-Martial, United States Army, 1949, paragraph 179b, provides:

> "Rape is the unlawful carnal knowledge of a woman by force and without her consent.
>
> "Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not.
>
> "The offense may be committed on a female of any age.
>
> "Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient if there is no consent."

The elements of proof of the offense of rape are:

> "(a) That the accused had carnal knowledge of a certain female, as alleged, and (b) that the act was done by force and without her consent." (MCM, 1949, supra)

The credible evidence established that on the night of 20 February 1951 Tae Sun Han was forced, at the point of a gun, to accompany accused in the jeep that he was driving. She was taken to an abandoned house where accused severely beat her, raped her, bound her with wire, and shot her with his carbine. Her dead body was found the next morning completely nude with her hands tied behind her back. The commission of the act of rape and the proof that the accused was the perpetrator rest upon circumstantial evidence. Circumstantial evidence in order to convict must exclude all other rational hypotheses except that of guilt (CM 279398, Randolph, 52 BR 193,197).

The general rule as to circumstantial evidence has been stated as follows:

> "Circumstantial evidence need not be such that no possible theory other than guilt can stand, but the theory of guilt must be beyond a reasonable doubt, i.e., the circumstances must not be consistent with innocence within a reasonable doubt. They must be inconsistent with, or such as to exclude, every reasonable hypothesis or theory of innocence. ***
>
> "It is not necessary that each particular fact should be proved beyond a reasonable doubt if enough facts are proved to

satisfy the jury, beyond a reasonable doubt, of all the facts necessary to constitute the crime charged. In other words, the rule does not require the jury to be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt, nor does it require that the evidence should produce absolute certainty in the minds of the jurors. It is sufficient if the evidence produces a moral certainty to the exclusion of every reasonable doubt." (CM 284006, Wells, 55 BR 207,217, quoting from Wharton's Criminal Evidence, 11th Ed., Sec. 922)

"***Proof of penetration, beyond every reasonable doubt, is, of course, essential; but such proof need not be direct nor is it necessary that it be shown by testimony of the outraged female. Proof of this element of the offense by circumstantial evidence may be made and it is sufficient if facts be proven from which penetration may be inferred." (CM 322565, Osburn, 71 BR 285,286)

The chain of credible evidence occurring on the night of the crime points inexoribly to the conclusion that accused is the rapist. Accused took Tae Sun Han from her home by force and took her to an abandoned house. Accused's assertion that she indicated by motions that she wanted him to engage in sexual relations, which he refused, is unworthy of belief. On the contrary, it is indicative of the nefarious state of mind of accused. He could have had no other reason for abducting an immature and presumably innocent girl by force at about midnight and taking her to an abandoned house. Accused's glove and the victim's clothes, which showed no evidence of bloodstains or tears, were found where accused had abducted her and would indicate that she had been disrobed prior to the time she and accused left the house. That night a Korean witness heard cries for help, sounds of beating and a gunshot in the house where the victim's body was later found, which was corroborated by accused and the medical testimony. The condition of Tae Sun Han's genitalia and the area around her genitalia, particularly at the entrance to her vagina, showed that penetration of her private parts had been made. That it was not done by fingers is shown by the fact that scratches and fingernail marks were absent. That it was caused by accused's penis is shown by the fact that this portion of accused's body revealed irritation or inflammation which had been sustained within the period when the accused was with Tae Sun Han. Accused's assertion that this condition had been there for several days and that he could not explain its presence is contrary to the medical evidence and the physical facts. It may be assumed that the act of accused in killing his ravaged victim was for the purpose of forever sealing her lips, thus preventing her from revealing the identity of her attacker. All the facts and

circumstances of the case lead to the inescapable conclusion that accused had carnal knowledge of Tae Sun Han as alleged. That he did so prior to killing her is evidenced by the substantial bleeding of Tae Sun Han in and around the area of her genitalia which could not have occurred after death.

The Board of Review, therefore, concludes that the evidence is legally sufficient to sustain the finding of the court as to this specification.

c. Pretrial Statements of Accused

The defense objected to the admission of accused's pretrial statements as involuntary. Sergeant Lanier, an investigator, testified without contradiction that, prior to the interrogation, he advised accused of his rights under Article of War 24, after which accused stated that he understood his rights thereunder. That accused was on military police duty is further indicative of his knowledge of his rights in this regard. The fact that a confession or admission otherwise admissible was made to an investigator during an investigation of charges does not make the confession or admission inadmissible (MCM 1949, par 127a). From all the circumstances, it is the opinion of the Board of Review that the pretrial statements of accused were in fact voluntary and are therefore admissible.

5. Accused is 22 years of age. His current tour of duty extends from 29 May 1950 with three years prior service. His character and efficiency ratings as of 28 February 1951 are shown as "Excellent."

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.

Arthur J. Bauer, J.A.G.C.

Samuel S. Cowen, J.A.G.C.

Sumner A. Brown, J.A.G.C.

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DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

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

In the foregoing case of Corporal Robert James Dolon, RA 19278753, Company "C", 728th Military Police Battalion, APO 301, 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.

C. B. Mickelwait, Brig Gen, JAGC

Edward H. Young, Colonel, JAGC

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

26 May 1951

I concur in the foregoing action.

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

28 May, 1951

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

JAGH CM 346132

MAY 2 5 1951

U N I T E D S T A T E S	)	SEVENTH ARMY
v.	)	Trial by G. C. M., convened at Stuttgart, Germany, 4 April 1951. Dismissal.
First Lieutenant JOSEPH H. KELLY (O-1685542), Headquarters and Headquarters Company, 7767 USAREUR Tank Training Center, APO 114	)	

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

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 under the provisions of Article of War 50(d).

The accused was tried upon the following Charges and Specifications:

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

Specification: In that First Lieutenant Joseph H. Kelly, 7767 USAREUR Tank Training Center, APO 114, US Army, did, at Vilseck, Germany, on or about 8 March 1951, with intent to deceive Colonel Rothwell H. Brown, Commandant, 7767 USAREUR Tank Training Center, APO 114, US Army, officially state to the said Colonel Rothwell H. Brown, that he had taken the 9 o'clock bus to Grafenwohr Sub-Post, that he had gone to the Post Exchange, the American Express, and then returned to Vilseck on the 11 o'clock bus, which report was known by the said First Lieutenant Joseph H. Kelly, to be untrue.

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

Specification: In that First Lieutenant Joseph H. Kelly, 7767 USAREUR Tank Training Center, APO 114, US Army, did at Vilseck, Germany, on or about 8 March 1951, in an affidavit make under oath a statement in substance as follows: "I got on the bus at about 0900 hours, 8 March 1951, at Vilseck to go to Grafenwohr. At Grafenwohr I went to the American Express on personal business and then I boarded a bus at the PX to return to Vilseck at about 1000 hours, 8 March 1951. At the American Express I attempted to get some personal information about a loan. I talked to a clerk at the American Express regarding a possible loan", which statement he did not then believe to be true.

He pleaded guilty to the Specification of Charge I and not guilty to Charge I, but guilty of a violation of Article of War 96; and guilty to the Specification of Charge II and Charge II. He was found guilty of the Specification of Charge I, not guilty of Charge I, but guilty of a violation of Article of War 96, and guilty of the Specification of Charge II and Charge II. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence but recommended that it be commuted to forfeiture of $100 per month for six months; and a reprimand, and forwarded the record of trial for action under Article of War 48.

The record of trial discloses that at approximately 0900 hours, 8 March 1951, at Vilseck, Germany, Colonel Rothwell H. Brown, Commandant, 7767th USAREUR Tank Training Center, directed his adjutant to have the accused report to his office. The accused could not be located. Between 1115 and 1130 hours the same day the accused reported to Colonel Brown and when the latter asked him where he had been that morning, the accused replied he had gone to Grafenwohr, on the 9 o'clock bus, visited the Post Exchange, did business with the American Express where he discussed the possibility of a loan and returned to Vilseck on the 11 o'clock bus. Colonel Brown told Captain Richard Edmark, the Adjutant, "I'd like to have you take a statement in writing from Lieutenant Kelly, and have him swear to the statement, and then I want you to check on the statement ***". After having been advised of his rights under Article of War 24 the accused stated, "I know my rights", and signed a typewritten statement which was, in substance, to the same effect as his oral remarks to Colonel Brown. This statement was subscribed and sworn to by the accused before the Adjutant. It was then delivered to Colonel Brown who instructed the Adjutant to investigate the truth of the statements contained therein. The latter accompanied by the accused went to Grafenwohr and made contacts with the driver of the bus referred to by the accused and the manager of the American Express Company. Each of these persons denied having seen or having had any dealings with the accused that morning. Other employees of the American Express Company did not recall having seen him. Furthermore, an American civilian, Patricia Meisner, who had gone to Grafenwohr on board the bus referred to by the accused, stated that during the entire trip she was the

only American on the bus. When the accused and Captain Edmark returned to Vilseck, the accused went to Colonel Brown and said "I am very sorry I lied to you this morning. I was nervous and said the first thing that came to my mind".

After his rights as a witness were explained to him by the law member, the accused elected to testify under oath and stated in substance that in November 1950 he was assigned to the 7767th Tank Training Center and detailed as Club, Bank, Mess and Billeting Officer. When he assumed his duties, he was informed that the club was $1200 in debt. However, during the period that he was in charge, he paid the debt and increased the net worth of the club to over $6,000. In February 1951, the local Commissary Officer reported to the accused's Commanding Officer that the Officers' Club had purchased a greater quantity of coffee then it could possibly have used. Investigation revealed that over $174 worth of coffee was missing. The Club Mess Sergeant admitted that he had "taken" the coffee. On a day when the club personnel were not at work, a hurried audit of the club's books was made, and in addition to the missing coffee it was disclosed that there was a $140 shortage. When the accused's commanding officer was informed about the shortages, he told the accused that he intended to court-martial him. However, a subsequent examination of the club record revealed that the audit was in error as to the $140 shortage. On 7 March 1951, when the accused learned that he had been cleared of the auditing errors and that the sergeant was to be made chargeable for the coffee theft, the news so pleased him that he spent that night drinking with friends in the nearby town of Sulzbach. The following morning he arose at about 0800 hours but was unable to get a taxi and so did not arrive at Vilseck until after 1000 hours. After he received the Adjutant's message to report to Colonel Brown, he did so and made the oral statement above mentioned. He then returned to the Adjutant's office where he signed the written statement set out in the Specification of Charge II. Accused admitted that the written statement above mentioned was false. He attributed his actions to fear of his commanding officer, testifying that he "said the first thing that came to (his) mind." He "tried to bluff it out not thinking that the statement would be checked. (He) later realized (his) error". At approximately 1500 hours he returned to Colonel Brown's office and said, "I'm very sorry I lied to you this morning". When he was questioned in court as to why he had lied to the Colonel, accused said that he had been drinking all night, was afraid and was sure that if he had told the Colonel that he "had not been at work", he would have been court-martialed.

He added that during his approximately 8½ years service he has had no record of courts-martial or punishment under the 104th Article of War. He was given two honorable discharges as an enlisted man. He has had no prior experience in accounting for non-appropriated funds. He asserted that he had reimbursed the Officers' Club in the sum of $174.48 for the shortage caused by the sergeant's theft of the coffee.

Based upon his observation and on the general reputation of the accused as to performance of his duties, it was the opinion of Captain Edmark, the Adjutant, that accused "has a salvageable value to the Army as a commissioned officer".

The accused was given a commendation by Colonel Oscar W. Koch for outstanding performance of duties as mess officer from 17 to 19 January 1949 aboard the US Army Transport General Maurice Rose. He was given a school certificate from the 7767th Tank Training Unit, Vilseck, Germany, dated 18 November 1949, showing the completion by the accused of the Officers' Basic Tank Course with a rating "superior".

According to Major William D. Thorne who had the accused under his direct control for a period of from 8 months to a year with the Third Battalion, 6th Armored Cavalry, the accused's performance of duty as an officer and his reputation as a tank man were such as to cause Major Thorne to recommend the accused for promotion from second to first lieutenant. Major Thorne had "nothing derogatory to say" about the accused's work as a special service officer. According to reputation, the accused is very proficient and above average in a technical nature as a tank platoon officer, "but on some occasions (he) didn't have quite the drive necessary for running his particular platoon". In Major Thorne's opinion the accused as an officer "will be of service to the Army".

After being fully advised of the consequences, the accused pleaded guilty to the offenses of false official statement and false swearing in violation of Article of War 96. Such pleas are in themselves a conviction. 1/

The offense of making a false official statement with intent to deceive 2/ and the offense of false swearing 3/ are violations of Article of War 96.

The record of trial discloses that, upon arraignment, accused pleaded guilty to the first offense (false official statement) as violative of Article of War 96 and not Article of War 95, as charged, whereupon the law member erroneously informed accused thatthe maximum punishment for that

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1/ Kercheval v. United States, 274 U.S. 220, 223 (1927).

2/ CM 278249, Waldman, 51 BR 347, 358; CM 339494, Clifford, 5 BR-JC 131, 138-139.

3/ CM 283124, Phillips, 55 BR 31, 34; CM 342627, Webster, 8 BR-JC 121, 134.

offense included confinement at hard labor for six months.[4] However, in view of the fact that the sentence adjudged by the court was dismissal only, the erroneous instruction was not materially prejudicial.[5]

The following information pertaining to the officer above named was obtained from the records of the Department of the Army:

The accused is 28½ years of age and is single. His father died in 1936. His mother is living. He has four sisters. He has completed 3½ years of high school. His former occupation was an employee of the Hartford Times, Hartford, Connecticut at $20 per week. There is no record of civilian offenses. His military record shows that he enlisted in the Army on 7 January 1943, served with the 3701 AAFBU and was honorably discharged on 11 December 1945. He reenlisted on 1 May 1946, served with an AAC regiment and was honorably discharged on 30 August 1948. He attended aviation cadet school for five months, pre-flight school for 5 weeks, and the flight engineering school for five months. He was commissioned Second Lieutenant on 30 August 1948, and in January 1949 he was transferred to the European Command. He was promoted to First Lieutenant on 4 August 1950. He has no record of previous convictions or punishment under the 104th Article of War. His AGCT score is 127.

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. The sentence is legal and its confirmation is warranted.

Allan R. Browne J.A.G.C

William J. Hyam J.A.G.C

Arthur P. Scaland J.A.G.C

4/ Subparagraph 78b, p. 76, of the Manual for Courts-Martial, U.S. Army, 1949; CM 224286, Hightower, 14 BR 97, 105; CM 232592, Law, 19 BR 117, 127; CM 242082, Reid, 26 BR 391, 399; CM 281669, Midgett, 54 BR 199, 202.

5/ CM 302193, Stanley et al, 21 BR (ETO) 175, 182; Cf. Subparagraph 87b p. 91, of the Manual for Courts-Martial, U. S. Army, 1949; CM 232160 McCloudy, 18 BR 389, 396; CM 312773, Johnston, 62 BR 289, 292; CM 319591, Pogue, 68 BR 385, 396.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

(332)

THE JUDICIAL COUNCIL

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

In the foregoing case of First Lieutenant Joseph H. Kelly, 01685542, Headquarters and Headquarters Company, 7767th USAREUR Tank Training Center, APO 114, 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.

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

Absent on leave
Edward H. Young, Colonel, JAGC

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

25 May 1951

I concur in the foregoing action.

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

25 May, 1951

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

JAGH CM 346364

MAY 2 8 1951

UNITED STATES	25TH INFANTRY DIVISION
v.	Trial by G.C.M., convened at APO 25, 10 April 1951. Dishonorable discharge, total forfeitures after promulgation, and confinement at hard labor for life.
Private NATHANIEL ROEBUCK BEATTY (RA-15409337), Service Battery, 159th Field Artillery Battalion, APO 25.	

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

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.

The accused was tried upon the following Charges and Specifications:

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

Specification: In that Private Nathaniel R. Beatty, Service Battery, 159th Field Artillery Battalion, did, at Konju, Korea, on or about 13 January 1951, with intent to do him bodily harm, commit an assault upon a Korean National (Kim Hong Yori), by shooting him in the leg, with a dangerous weapon, to wit: a carbine.

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

Specification: In that Private Nathaniel R. Beatty, Service Battery, 159th Field Artillery Battalion, did, at Konju, Korea, on or about 13 January 1951, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill Ko Yong Kun a human being by shooting him with a carbine.

The accused pleaded not guilty to, but was found guilty of the Charges and Specifications. 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 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.

The record of trial discloses that at about 1430 hours on 13 January 1951 Hong Mong Suk was standing at the gate of his house in Konju, Korea (R 10, 16). The accused, who had no permission to leave his battery area (R 24, 30, 36) came into the yard, entered the house and searched the two rooms. He then approached Hong at the gate, searched him and examined his government pass. At that time Ko Yong Kun (R 16) approached and tried to pass through the gate but when he saw the accused standing there, he turned and walked away. The accused returned the pass to Hong, said something apparently to himself in English, took his carbine from his shoulder, and shot Ko in the back (R 10). Ko was about six meters from the accused when the shot was fired (R 10). The latter then turned and walked away (R 10). There were bullet holes in Ko's back and chest (R 16-18). He died about an hour later (R 17) and was buried the next day (R 18).

At about 1700 hours on 13 January 1951, at Konju, Korea, accused entered the house of Kim Hong Yori who was eating his supper. The accused looked around, walked out of the room and into the kitchen where he began talking to Kim's sister-in-law. She became frightened and ran out of the back door (R 20). She escaped over the fence whereupon the accused came back and went through the front gate followed by Kim. When Kim saw the accused walking away, Kim began to walk back to the house (R 21). As he did so, he turned his head to look at the accused (R 21, 23). The latter raised his carbine to his shoulder, aimed it and fired three times at Kim, wounding him in the left leg above the knee cap (R 21, 22). The accused then ran away (R 23).

The accused having been advised as to his rights by defense counsel and the law member (R 25, 26) elected to be sworn as a witness (R 27) and testified in substance, as follows:

After being given permission by his assistant chief of section to leave the battery area to get a haircut the accused walked toward town (R 27). He encountered several Koreans and a military policeman and asked them where he could find a barber shop, to no avail. He started back toward the battery area and met some more Koreans who asked him whether he wanted any whiskey or women. He answered in the negative

and asked the location of a barber shop. One of the Koreans pointed down the road. The accused proceeded in that direction past the battery area and turned down a road to the right until he arrived at a building from which many Koreans were coming. They looked at the accused, returned to the building and closed the gate door. The accused thought that this was "kind of funny", so he opened the door and went into the yard of this building to find out why the Koreans were running (R 28). The accused looked around and called to one of the Koreans to "come here". The accused then went to a hole in the "door" and attempted to crawl inside the hole where about eight Koreans were. He took his rifle from his shoulder and held it in both hands. Just then a couple of Koreans brushed against him as they ran past, causing his weapon to go off. The accused went to the back yard, intending to return to his area. While he was in the back yard, some one said "Drop that gun, soldier". The accused turned around and saw two "soldiers" facing him. One of them had his weapon pointed at the accused. The latter was told again to drop his "gun". A discussion ensued between the accused and the two "soldiers" concerning laying down his weapon. Finally, the accused and the two "soldiers" laid down their weapons. The accused observed an "MP" brassard on one of the "soldiers". One of them moved toward the accused, identified himself as a lieutenant and told the accused that there was a report at the "MP" station that "there was some GI out killing". The accused said that he knew nothing about it but that his weapon had been accidently discharged (R 29). A Korean nearby spoke to the interpreter and then the latter said to the lieutenant "This is the one, sir". The accused accompanied the lieutenant and the others down the road. When the lieutenant asked the accused whether he was "in the Engineers", the latter replied in the affirmative. The group including the accused proceeded to the house where there was a dead Korean. The lieutenant asked the accused whether he had ever seen the dead man before and the accused replied in the negative. About an hour later a witness to the shooting of the dead man arrived and identified the accused. The lieutenant then asked the accused why he had not shot the only witness (R 30). The accused gave his name, rank, serial number, organization and the name of his battalion commander to the lieutenant. Then the accused accompanied the lieutenant to "the other Korean's house" about two or three blocks away where they went inside the house. A man was lying on a bed. The light was not good but the Korean identified the accused as the man who had shot him. On the way back to the battery the lieutenant said to the accused, "Now don't you worry about it, Beatty. Don't you worry too much about it. If you didn't kill that man, just don't worry because you know how these Koreans are: When they don't know who did it, the first person they drag in to look at, they always say he did it whether he did it or not. They just don't know, so don't worry about it. The first GI they see, they all say that he is the same one that did it. So, just don't worry about it and we will try to straighten it out." The battery commander placed the accused under arrest (R 31).

According to the accused, when the military policemen picked him up, he was about 200 yards away from the dead man's house and about 400 or 450 yards from the injured man's house (R 34). The accused denied firing his carbine more than once that afternoon (R 35). He admitted that on that afternoon no one threatened or assaulted him, physically or verbally, and no one gave him any cause or reason to shoot "them". He admitted that he had no authority to search anyone's house or enter his premises on that afternoon but denied searching anyone's house. He also denied molesting any Koreans in any manner. He asserted that he was apprehended by the military police about one minute after he accidentally fired his weapon (R 35).

Murder is the unlawful killing of a human being with malice aforethought. 1/ Malice may consist of an intention to cause death or grievous bodily harm 2/ and may be presumed when a homicide is caused without legal excuse by the use of a deadly weapon in a manner likely to result in death. 3/ A deadly weapon is anything with which death may be easily and readily produced. 4/ Murder does not require premeditation, but if premeditated, it is a more serious offense and may be punished by death. 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. 5/ It is not indispensable to establish that a particular motive for taking a life be shown. 6/

1/ Subparagraph 179a, p. 230, of the Manual for Courts-Martial, U.S. Army, 1949.

2/ Subparagraph 179a, p. 231, of the Manual for Courts-Martial, U.S. Army, 1949.

3/ Subparagraph 125a, p. 151, of the Manual for Courts-Martial, U.S. Army, 1949; Vacaro v. Collier, 38 F.2d 862, 869, hn 19 (DC Md. 1930).

4/ Acers v. United States, 164 U.S. 388, 391 (1896).

5/ Subparagraph 179a, p. 231 of the Manual for Courts-Martial, U.S. Army, 1949; CM 337089, Aikins and Seevers, 5 BR-JC 331, 375, 390 and authorities therein cited; CM 339254, Barnes et al, 8 BR-JC 219, 249, 263; CM 344372, Davis, BR-JC, (page 5 of Opinion) April 1951; Bostic v. United States, 94 F.2d 636, 638, 639, hns 2-5 (App. DC 1937).

6/ Pointer v. United States, 151 U.S. 396, 413, 414, hn 8 (1894); Ciullo, MO-JAGA 355, 357; Cockrell, MO-JAGA, 361, 364.

The evidence detailed above establishes that after the accused had entered the premises of Hong Mong Suk and searched the two rooms, he approached Hong, who was standing at the gate, searched him and examined his government pass. At this time Ko Yong Kun approached and tried to pass through the gate but, when he saw the accused standing there, he turned and walked away. The accused returned the pass to Hong, said something in English, took his carbine from his shoulder and for no apparent reason shot Ko in the back at a distance of about six meters. Ko died from the wounds later in the afternoon and was buried the next day. A more cold-blooded slaying can scarcely be imagined since no words passed between Ko and the accused and, in so far as can be determined from the record, the deceased gave the accused no possible provocation. The facts support the conclusion that the homicide was "consciously conceived and deliberately executed". 7/

No medical evidence as to the cause of Ko's death was introduced but there was testimony that he fell on the ground with "blood --- streaming out of his back" (R 10); that there were "bullet holes on the chest and on his back" (R 16); that one bullet hole was in the "left side shoulder" (R 17) about "4 inches below the shoulder blade" (R 18) and a bullet hole "about 4 inches left from the center of the chest and four inches down from the shoulder on the left front side of the chest" (R 18-19). While the wounds were being treated, "all of a sudden, his movements stopped, his hands went to his sides, he closed his eyes and didn't move" (R 18). The evidence discloses that the wounds were of a nature which in the common experience of mankind would be considered as a type calculated to endanger and destroy life, and as such that they would be the immediate cause of Ko's death. Therefore, in the absence of a showing by the accused that these wounds did not result in Ko's decease 8/ it must be concluded that the bullet entry produced the fatal outcome charged; thereby criminal responsibility is imposed upon the accused. 9/ No evidence was offered to negate this conclusion.

Accused admitted in his sworn testimony that he was about 200 yards from the "dead man's" house when he was apprehended and he also testified that his carbine was fired once that afternoon. The accused was clearly identified.

7/ CM 345284, Walker, BR-JC, April 1951 (Board of Review Opinion, p. 2).

8/ CM 314402, Heffner, 64 BR 119, 125.

9/ CM 339254, Barnes et al, supra, 248, 265; CM 345284, Walker, BR-JC, April 1951, (Board of Review Opinion, p. 3).

It was the 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 of the specifications and charges. 10/ Those findings are entitled to considerable weight by reason of the superior position the court enjoyed in observing the witnesses and hearing them testify. 11/ The Board of Review in exercising a similar function upon appellate review, pursuant to the provisions of Article of War 50(g), concludes that the competent evidence in the record of trial justified the court's findings of guilty as to Charge II and its Specification and that they should not be disturbed. 12/

In view of the overwhelming proof of guilt of the murder charged, and since the sentence adjudged is appropriate upon conviction thereof, it would serve no useful purpose 13/ to discuss the evidence as to the offense of assault with intent to do bodily harm with a dangerous weapon (Charge I and its Specification), other than to remark that the findings in that respect were amply supported by the evidence.

According to Department of Army records, the accused is 21 years of age and single. He may have been married at one time as he has a son. He graduated from high school in 1948. He enlisted on 8 June 1948 for a period of three years and joined his present organization in November 1950. He has a record of one previous conviction by summary court-martial on 5 May 1950 for absenting himself without proper leave from guard.

10/ Subparagraph 139a, p. 184 of the Manual for Courts-Martial, U. S. Army, 1949; CM 325457, McKinster, 74 BR 233, 241.

11/ CM 323161, Lacewell et al., 72 BR 105, 109.

12/ CM 335526, Tooze, 3 BR-JC 313, 340-341; CM 338993, Pelkey, 6 BR-JC 289, 308, 309; CM 343793, Cruikshank, BR-JC, 8 March 1951, (Board of Review Opinion, p. 12).

13/ Whitfield v. State of Ohio, 297 U. S. 431, 438, hn 3 (1936); Claassen v. United States, 142 U.S. 140, 146, hn 2 (1891); Jordan, MO-JAGA 365, 369.

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 and to warrant confirmation of the sentence. A sentence to death or imprisonment for life is mandatory upon conviction of premeditated murder in violation of Article of War 92.

Allan R. Browne J.A.G.C

William J. Flynn J.A.G.C

Arthur S. Ingland J.A.G.C

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

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

In the foregoing case of Private Nathaniel R. Beatty RA 15409337, Service Battery, 159th Field Artillery Battalion, APO 25, 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.

C. B. Mickelwait, Brig Gen, JAGC

Edward H. Young, Colonel, JAGC

MAY 30 1951

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

30 May, 1951

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

JAGH CM 346409

MAY 28 1951

U N I T E D S T A T E S	) EIGHTH UNITED STATES ARMY KOREA (EUSAK)
v.	) Trial by G.C.M., convened at Taegu, Korea, 2 May 1951. Dishonorable discharge, total forfeitures after promulgation, and confinement at hard labor for life.
Private BILLY T. HINES (RA 14316939), 54th Engineer Maintenance Company, APO 301.	)

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

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.

The accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Billy T Hines, 54th Engineer Maintenance Company, did at Taegu, Korea, on or about 30 March 1951, with malice aforethought, willfully, feloniously, and unlawfully kill Private First Class Elbert D Vangundy, a human being, by shooting him with a carbine.

He pleaded not guilty to, but was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. Accused was sentenced 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. The reviewing authority approved the sentence and forwarded the record of trial for further review.

The substantial evidence in the record of trial discloses that at approximately 2200 hours, 30 March 1951, four enlisted men, including Private Barber and Private First Class Vangundy (known as "Gundy") were in Room 13 of the 54th Engineer Maintenance Company barracks at Taegu, Korea, when the accused, Private Billy T. Hines, entered the room (R 10, 13, 16). The latter immediately charged Vangundy with taking and failing to return his flashlight and pistol belt (R 10, 16). Vangundy denied the accusation but when accused reiterated the charge, Vangundy became angry and told accused that he would "whip" him if he again made this accusation (R 10, 11, 16). Accused turned away and walked across the room, saying something which was not intelligible to the witnesses (R 12). "Gundy" made a remark to the effect that he did not care if accused had been in the First Marine Division (R 12, 16).

At this juncture, accused unslung his carbine, "racked the bolt back" and fired (R 12, 15). "Gundy" buckled up and "grabbed" Private Barber, who was standing next to him, around the waist and they both fell to the floor (R 12, 15, 16). Accused took about four steps toward his victim and fired a second shot which went through Barber's jacket (12, 16). As Barber was trying to drag "Gundy" behind the bed, the accused fired a third time (R 12, 16). The accused then walked over to his own bed, sat down, and said something which sounded like "I should kill him" (R 17). Barber was talking to him all the time and eventually accused threw his carbine into the middle of the floor, lay down on the bed and lit a cigarette (R 17). Vangundy was observed to have a hole "through his middle" (R 17).

The victim was taken to the Fourth Field Hospital in Taegu (R 20), where Captain Nelson, M.C., examined him at 2230 hours that same night, and found that he "had expired sometime before with cause of death being a gun shot wound, entrance upper right quadrant, exit below and lateral to right scapula" (R 9, Pros Ex 1). It was stipulated that the person referred to by the witnesses as "Gundy" and "Vangundy" and the victim, Private First Class Elbert D. Vangundy, are one and the same person (R 19).

The defense introduced evidence to the effect that the accused was a good soldier and worker (R 21, 23, 26) and that there had been no complaints about his ability to get along with the other men in the organization (R 22, 24, 25, 26).

The accused, after having been informed of his rights by the law member (R 27), elected to make an unsworn statement through his defense counsel (R 27). Counsel stated, in substance, that when accused entered

the Army, he secured a waiver "because of amnesia that he suffered as a result of his service in the Marine Corps" and that, on the night of the incident, he had been drinking and did not recall anything that happened that night (R 27).

Murder is the unlawful killing of a human being with malice aforethought. 1/ Malice may consist of an intention to cause death or grievous bodily harm, 2/ and may be presumed when a homicide is directly caused by the use of a deadly weapon, without legal excuse, in a manner likely to result in death. 3/ A deadly weapon is anything with which death may be easily and readily produced. 4/

The threats of the victim which were purely verbal and in which action was made conditional upon a further accusation by the accused certainly do not form any basis for a plea of self-defense. 5/ As the original aggressor, he is further barred from urging self-defense. 6/ Nor do the threats constitute provocation of such nature as would properly permit a finding of manslaughter. 7/ The question of accused's sanity was not raised at the trial and none otherwise appears; in the psychiatric report which accompanies the record the accused is characterized as mentally responsible.

The lack of sobriety claimed by the accused finds no corroboration in the testimony of the witnesses who were present. Furthermore, his actions militate against the conclusion that his condition was such as to prevent him from entertaining the requisite mental intent. 8/

1/ Page 230, subparagraph 179a, of the Manual for Courts-Martial, U.S. Army, 1949.

2/ Ibid, p. 231, subparagraph 179a.

3/ Ibid, p. 151, subparagraph 125a; Vaccaro v. Collier, 38 F.2d 862, 869, hn 19 (DC D Md. 1930); Cockrell, MO-JAGA, 361, 364.

4/ Acers v. United States, 164 U.S. 388, 391 (1896).

5/ Page 230, subparagraph 179a, of the Manual for Courts-Martial, U.S. Army, 1949; CM 339357, Wright, 5 BR-JC 49, 68; Cf. Cockrell, supra, 364; CM 331849, Estrada, 80 BR 183, 192, 193.

6/ Laney v. United States, 294 F 412, 415, hn 6 (App DC 1923); CM 339357, Wright, supra; Farrell, MO-JAGA, 146, 149.

7/ Ibid, p. 233, subparagraph 180a, CM 322487, Dinkins, 71 BR 185, 199 and cases cited therein; CM 325492, Mosely, 74 BR 263, 270.

8/ Page 188, subparagraph 140a, of the Manual for Courts-Martial, U.S. Army, 1949; CM 302897, Hicswa, 59 BR 167, 186; CM 307003, Hamilton, 59 BR 387, 400; CM 324348, Turner, 73 BR 161, 169.

The deliberate nature of the accused's actions in turning, arming his weapon and firing at his victim, not only the fatal round, but two additional ones after the victim had fallen; his remark, while his victim lay prostrate, "I should kill him"; his actions in lighting a cigarette, and retiring to his bunk, taking no heed of the needs of his mortally wounded enemy are established facts which allow no conclusion other than that the accused was, at the least, guilty of unpremeditated murder as charged. 9/

It is noted that the stipulated testimony of the doctor as to the cause of death includes an incorrect serial number for deceased. However, in view of the fact that this testimony contained the same name, organization, approximate time and date of receipt in hospital, location and cause of wound as those which pertained to accused's victim, there can be no reasonable doubt that the deceased individual described was the one referred to in the specification. 10/ Additionally, the evidence discloses that the wounds were of a nature which in the common experience of mankind would be considered of a type calculated to endanger and destroy life and as such that they would be the immediate cause of Vangundy's death. Therefore, in the absence of a showing by the accused that these wounds did not result in Vangundy's decease, it must be concluded that the bullet entry produced the fatal outcome charged. No evidence was offered to negative this conclusion. 11/

The reviewing authority designated a place of confinement. In the instant case, the confirming authority, the Judicial Council, acting with the concurrence of The Judge Advocate General, is the proper agency to designate the place of confinement. 12/

9/ CM 336405, Jonson, 3 BR-JC 69, 74; CM 283682, Laws, 55 BR 117, 121; CM 314876, Rollinson, 64 BR 233, 238-239; CM 323197, Abney 72 BR 149, 153.

10/ CM 237641, Brackins, 24 BR 71, 77; CM 329968, Mowell, 78 BR 205, 208; CM 331601, Brill, 80 BR 75, 82; CM 334570, Morales, 1 BR-JC 197, 206; See also, Wharton, Criminal Evidence, Vol. 2, 11th Ed. p. 1835 et seq.

11/ CM 339254, Barnes et al, 8 BR-JC 219, 248, 265; CM 345284, Walker, BR-JC April, 1951 (Board of Review Opinion, p. 3).

12/ Page 97, subparagraph 87b of the Manual for Courts-Martial, U. S. Army, 1949; Article of War 48(c)(2), 10 U.S.C. (Supp. III) 1519; CM 343793, Cruikshank, BR-JC, 8 March 1951, (Board of Review Opinion, p. 14).

The accused is 29 years of age and unmarried. His parents were separated when he was twelve. He enlisted for 6 years at Madsden, Alabama, on 5 May 1949. The accused had five years, five months and seventeen days of prior service in the Marine Corps. The psychiatric report remarks that there is a history of excessive indulgence in alcohol over a long period of time; in civilian life the accused was arrested at least three times (stealing, "hoboing", being caught at a still); he has been reduced in rank both in the Marine Corps and in the Army; and he received company punishment on two or three occasions in the Marine Corps and once was court-martialed, as a Marine, for discharging his weapon. The character of his service has been designated as "Good".

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.

Allan R. Browne J.A.G.C

William J. Hyman J.A.G.C

Arthur P. Ireland J.A.G.C

(346)

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

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

In the foregoing case of Private Billy T. Hines, RA 14316939, 54th Engineer Maintenance Company, APO 301, 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.

C. B. Mickelwait, Brig Gen, JAGC

Edward H. Young, Colonel, JAGC

MAY 30 1951

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

30 May 1951

15112

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

JAGK CM 346420

MAY 2 9 1951

UNITED STATES v. Corporal JAMES R. HULSEY (RA 24499703) and Corporal ROBERT CASTRO (RA 18349941), both of Company I, 17th Infantry Regiment, and Private First Class NORMAN H. BENNETT (RA 15278673), Company H, 17th Infantry Regiment, APO 7.	7TH INFANTRY DIVISION Trial by G.C.M., convened at APO 7, 20 April 1951. CASTRO and BENNETT: Dishonorable discharge, total forfeitures after promulgation, and confinement for life. HULSEY: Dishonorable discharge, total forfeitures after promulgation, and confinement for forty (40) years. EACH: A Federal Institution.

OPINION of the BOARD OF REVIEW
BARKIN, WOLF and BROWN
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 soldiers named above, and, as to Castro and Bennett, submits this, its opinion, to the Judicial Council and The Judge Advocate General. (By separate holding the Board of Review has held the record of trial legally sufficient to support the findings of guilty and the sentence as to the accused Hulsey.)

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

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

Specification: In that Corporal Robert Castro, Company I, 17th Infantry, APO 7, and Private First Class Norman H. Bennett, Company H, 17th Infantry, APO 7, and Corporal James R. Hulsey, Company I, 17th Infantry, APO 7, acting jointly, and in pursuance of a common interest, did in the vicinity of Chechon, South Korea on or about 20 March 1951, forcibly and feloniously, against her will have carnal knowledge of Kim Kyong Taik, a female Korean National.

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

Specification: In that Corporal Robert Castro, Company I,

17th Infantry, APO 7, and Private First Class Norman H. Bennett, Company H, 17th Infantry, APO 7, and Corporal James R. Hulsey, Company I, 17th Infantry, APO 7, acting jointly, and in pursuance of a common intent, did in the vicinity of Chechon, South Korea on or about 20 March 1951, with intent to do him bodily harm, commit an assault upon Private Alphonse Veugelers, (Netherlands National), by feloniously and willfully threatening the said Private Alphonse Veugelers with a dangerous weapon to wit: an M1 rifle, Cal 30.

Each accused pleaded not guilty to and was found guilty of both charges and specifications. No evidence of previous convictions was introduced as to accused Castro or Hulsey, and evidence of one previous conviction was introduced as to accused Bennett. Accused Castro and Bennett were each 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. Accused Hulsey 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 forty years. The reviewing authority approved the sentences,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 50(e).

3. Evidence

a. For the Prosecution

On the afternoon of 20 March 1951, Kim Kyong Taik, a South Korean housewife, was in her home in Chechon City, South Korea, with her husband, her father-in-law, and a neighbor, Choi Mun Kyu. Private Alphonse Veugelers of the Netherlands Detachment, United Nations Forces, and another Dutch soldier were also present. The three accused, Corporal Robert Castro, Corporal James R. Hulsey and Private First Class Norman H. Bennett, entered unarmed. Veugelers asked them what they wanted. One of the accused remarked to his companions that Kim Kyong Taik was a good prospect for sexual intercourse. Castro said to Kim Kyong Taik's father-in-law, "Shibi, Shibi, Okay?" (meaning sexual intercourse) and when the father-in-law protested Castro kicked him (R 7,8,12-16).

Being frightened at their proposed intention, Kim Kyong Taik ran to the kitchen and the three accused followed her. Kim Kyong Taik's husband told Veugelers that he was afraid the Americans would have sexual

intercourse with his wife and Veugelers said, "Don't be afraid, when I stay here the Americans do you nothing." Kim Kyong Taik and her husband hurried to Choi Mun Kyu's house and locked themselves in and the three accused left (R 8,11,12-14,18).

A short time later, the three accused returned, each armed with an M1 rifle. They approached Choi Mun Kyu's house, knocked and entered. Kim Kyong Taik was there with her father-in-law, her husband, Veugelers and another Dutch soldier. Kim Kyong Taik's husband left the house, called her to him and instructed her to hide in an air raid shelter, which she did (R 8,13-16).

About twenty minutes after Kim Kyong Taik arrived at the air raid shelter, Castro, Bennett and a third soldier came there. Kim Kyong Taik tried to leave the shelter but was prevented from doing so by one of the soldiers. She again started out of the shelter, crying "Help! Help!" at which point a fourth soldier appeared. Castro and Bennett grabbed her hands, and with the help of a third soldier pushing her from behind, forced Kim Kyong Taik to go from the shelter to a room of her house. There "one of the soldiers who had an M1 rifle stood at the porch" (R 8-9).

Hearing her cries for help, Veugelers and Kim Kyong Taik's husband went to investigate. Veugelers heard a "click from /a/ rifle," and looking in the direction of the sound saw Hulsey pointing a rifle at him. Hulsey "put a round in /his/ rifle" and said, "We can do with the Korean what we want." As Veugelers ran away, Hulsey put the safety on the rifle and put it on his shoulder. While this was going on, Bennett, Castro and another soldier were inside the house with Kim (R 17).

There while Bennett held her hands, Castro took off her clothes and the third soldier present held his hand over her mouth. Despite her resistance, they forced her to the floor. Castro took his penis from his trousers. Kim Kyong Taik continued to resist and was kicking with her legs when one of the soldiers struck her thigh with the butt of an M1 rifle. Castro then "started the act" and accomplished penetration into her private parts with his penis. Kim Kyong Taik continued to kick and Castro stood up. Then Bennett "took a turn" and, as Kim Kyong Taik stated, he "came on top of me and in spite of I was kicking with my leg and had sexual intercourse in approximately two minutes" (R 9-11).

At about this time, Hulsey, who was standing outside the room in which Kim Kyong Taik was being thus assaulted, warned Castro and Bennett that the Military Police were coming. All three accused and the other soldier present hurriedly left. Choi Mun Kyu, Kim Kyong Taik's father-in-law, her husband, and Veugelers then approached the house, as Kim

Kyong Taik emerged crying. She was nude below the waist and was putting on her "underwear." The Military Police appeared about ten minutes thereafter and Veugelers reported the incident to them (R 9, 11,14,16-18).

Mr. Joseph R. Brennan and Mr. John F. Shepherd, Agents of the 19th Criminal Investigation Detachment, testified that the three accused, Castro, Bennett and Hulsey, were individually questioned at the Criminal Investigation Detachment office in Chechon, Korea, on 21 March 1951, and each accused made a statement on that date. Before any of the accused made a statement, Agent Brennan in the presence of Agent Shepherd read and explained the 24th Article of War to each accused. Agent Brennan also advised each accused that he did not have to make a statement and that if he did make a statement it could be used against him at a court-martial. No promises of immunity were made, no force or duress was used, no violence was offered, and no inducements of other kinds were offered to any of the accused. Thereafter each accused made and signed individual voluntary written statements which were admitted in evidence. The defense made no objection to the admissibility of the statements of Castro or Hulsey, but objected to the admissibility of Bennett's statement as having been involuntarily made. The only evidence of possible coercion or undue influence was the testimony of Bennett that when the 24th Article of War was explained to him, one of the Criminal Investigation Division agents said, "It may help you out if you make a statement." Bennett understood this remark to mean that he "might get off easier" if he made a statement and that he made his statement upon this "implied" promise (R 18-28).

In his statement, Bennett related that at about 1330 hours, 20 March 1951, he and a friend proceeded from the 17th Regimental Combat Team Rest Camp at Chechon to the home of a Korean woman. Bennett stayed there about an hour and a half during which his friend asked if the girl present would engage in sexual intercourse. The girl declined. At this time, a "Dutchman" present said, "The hell with it, I'll take her." He and "another Dutchman" then went into another room with the girl and locked the door. Bennett and his companion then walked away and returned in about a half hour. They met a "cook from Second Division" and all of them dragged and pushed the Korean girl from an air raid shelter into a house. The cook beat her severely and she cried. She "was already on the floor." Bennett and one of the other men removed her pants and the girl "helped a little." The cook continued striking her, and he and another soldier attempted to have sexual intercourse with her. Bennett did not have sexual intercourse with her (Pros Ex 1).

In his statement, Castro related that at about 1300 hours, 20 March 1951, he left the Rest Camp of the 17th Infantry Regiment in Chechon and went to the home of a Korean woman. The woman ran out of the house and

hid. Castro learned that the woman had gone into an air raid shelter behind her house. He and several other soldiers went after her, and one of them found her there. As she emerged from the air raid shelter, Castro and the others grabbed her by the arms and dragged her screaming into the house. Castro and another soldier held her on the floor. Castro was unsuccessful in attempting to have sexual intercourse with her, but he held her arms as another soldier struck her and engaged in sexual intercourse with her. At this time, a person standing outside warned them that the Military Police were coming, so they returned to the Rest Camp. Later the woman with whom he had attempted to have intercourse picked Castro out of a "lineup" (Pros Ex 3).

In his statement, Hulsey related that at about 1400 or 1430 hours, 20 March 1951, he left a Rest Camp in Chechon with other soldiers. Hulsey went to a Korean house where a Korean woman was solicited for sexual intercourse. Later one of the soldiers stated that the Korean woman was hiding. They found her and pushed her to the house. Hulsey stayed up on the bank but said to Castro, "Go ahead and fuck her thats what your hunting." The woman started to come out of the hole and to make outcries which Hulsey did not like. He then walked over to two Koreans who were cutting wood and asked for whiskey, talking to them for a few minutes. Hulsey then walked back to see what was happening to the Korean woman and saw her pushed into the room of a house. Hulsey "stayed on the bank." A "Dutch guy" and a Korean called "papa-san," and "a young Korean guy" approached. Hulsey held them back with his rifle. The "Dutch guy" asked him, "What is it," to which Hulsey replied, "There is a GI down there fucking a woman." The Dutchman and one Korean then "went for the MPs." Hulsey went to the window in the back of the house and informed his companions there that the Military Police were coming. He moved off across the rice paddies. Shortly after this, Hulsey was joined by companions with whom he returned to the Rest Camp (Pros Ex 2).

b. For the Defense

The accused, after being apprised of their rights as witnesses, elected to remain silent (R 29).

4. Discussion

a. Charge I and its Specification

The credible evidence clearly established that, at the time and place alleged, accused Castro and Bennett forcibly, feloniously, and against her will, had carnal knowledge of Kim Kyong Taik, a female Korean national, while accused Hulsey, armed with an M-1 rifle, maintained a vigil outside the house where the rape was being perpetrated, for the purpose of

preventing anyone from interfering therein.

As to Castro and Bennett, all elements of the offense of rape are established beyond any reasonable doubt by the direct testimony of the prosecutrix and other credible evidence of record. As there is no proof that Hulsey personally raped Kim Kyong Taik, his responsibility therefor must be predicated upon his being an aider and abettor to the rape committed by Bennett and Castro. In this connection, it is stated that: "Anyone who commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal *** and is punishable as such" (MCM 1949, par 27, p 21). To determine that Hulsey was an aider and abettor it must be established either that he, knowing before hand that Castro and Bennett were going to accomplish sexual intercourse by force and without consent if necessary, consented to and, pursuant to such consent, did facilitate that unlawful purpose by preventing others to aid and rescue the unwilling victim, or that knowing that Castro and Bennett were going to violate the person of Kim Kyong Taik lent encouragement to Castro and Bennett in that unlawful purpose by holding at gunpoint those persons who might prevent the consummation of the unlawful act (CM 342559, Vennie et al, 8 BR-JC 95,105-106).

The weight of the evidence including his own statement uncontrovertably shows that Hulsey was aware that the purpose of the visit of the three accused to Kim Kyong Taik's house was to satisfy their sexual desires; that he was present when an importunate demand for sexual intercourse with Kim Kyong Taik was made by Castro to her; that the three accused followed her to the kitchen of the house; that Kim Kyong Taik and her husband sought refuge at the home of a neighbor, Choi Mun Kyu, where they locked themselves in; that the three accused left and returned shortly thereafter armed with rifles; that Hulsey joined Castro and Bennett outside the air raid shelter where they and another soldier forced Kim Kyong Taik out of the shelter into a room of her house; that Hulsey was present in the immediate vicinity of the house where Castro, Bennett and another soldier were accomplishing the rape of Kim Kyong Taik; that when Kim Kyong Taik's husband, father-in-law and Veugelers attempted to enter the house to thwart the avowed purpose Hulsey not only ordered them away but pointed his loaded rifle at Veugelers in a threatening manner, causing him to run away; that when Hulsey heard that the Military Police had been called he warned his companions Castro and Bennett, and ran away with them. Thus the evidence, coupled with his own statement, conclusively shows that Hulsey, serving as a confederate, did aid and abet Castro and Bennett in their violation of Kim Kyong Taik's person and that he is equally guilty with them of the rape as found (CM 342559, Vennie et al, supra).

b. Charge II and its Specification

The evidence as hereinbefore stated clearly establishes that Hulsey is guilty of this charge and specification. Hulsey, serving as a confederate with, and acting as a lookout for, Castro and Bennett, who were in a house engaged in the rape of Kim Kyong Taik, pointed his loaded M1 rifle at Private Alphonse Veugelers in a threatening manner, thereby preventing Veugelers from entering the house and thwarting the accomplishment of their nefarious purpose.

An assault is an attempt or offer with unlawful force or violence to do a corporal hurt to another. It may be either an actual attempt to commit a battery upon the person of another or a putting of the other in reasonable fear of immediate bodily harm. There must be an intent, actual or apparent, to inflict corporal hurt on another. If there be a demonstration of violence, coupled with an apparent ability to inflict the injury, so as to cause the person at whom it is directed reasonably to fear the injury unless he retreats to safety, and under the circumstances he is compelled to retreat to avoid any impending danger, the assault is complete (MCM 1949, par 180k, pp 244,245).

Although Castro and Bennett were inside the house where the rape occurred, it was established that Hulsey assaulted Veugelers in furtherance of their joint venture.

The general rule is well settled that, where several parties combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance of any prosecution of the common design for which they combine. In contemplation of law the act of one is the act of all. It is immaterial, as affecting the question of co-equal responsibility, that the act charged may not have been arranged for. Each is responsible for everything done by his confederates, which follows incidentally in the execution of the common design as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan (CM 334790, Cruz et al, 1 BR-JC 277,295,296; CM 307097, Mellinger, 60 BR 199,224).

As to the pretrial statements, Agents Brennan and Shepherd testified that each accused was thoroughly informed of his rights pursuant to Article of War 24 prior to his being questioned, and that no threats or force were employed or promises of reward or immunity offered or made. As to Bennett, both Brennan and Shepherd testified that, prior to making his statement, Bennett was explained the 24th Article of War, that he did not have to make any statement, that any statement he might make could be used against him in a trial by court-martial, and that no

form of duress or force was used or threats or promises of any kind offered or made.

After being properly informed of his rights as a witness in this regard, Bennett testified that Shepherd showed him Castro's statement implicating Bennett, and that one of the agents had told him, "It may help you out if you make a statement," which Bennett understood to mean that there was a possible chance that he might "get off easier" if he made a statement, which induced him to make it. He admitted, however, that the 24th Article of War was read to him, that he was informed that he did not have to make a statement, and that no violence or threats were employed therein. Both agents denied Bennett's assertion.

It is undisputed that accused was fully advised of his rights under Article of War 24 prior to making the statement, and that no physical force or threats were made to induce Bennett to make a statement. Bennett's assertions that one of the agents showed him Castro's statement and that he was told that it would help if he made a statement, were specifically denied by the agents. Thus an issue of fact was presented to the court wherein, implicit in its findings, it was held that Bennett's pretrial statement was voluntary. The sum of all the testimony adduced upon the issue of the voluntary character of Bennett's pretrial statement justifies this conclusion (CM 334745, Higgs, 4 BR-JC 377,396).

The Board of Review is therefore of the opinion that Castro, Bennett and Hulsey are guilty of the Specification of Charge I and of Charge I, and of the Specification of Charge II and of Charge II.

5. Although the reviewing authority forwarded the record of trial for action under Article of War 50e, the record is before the Board of Review pursuant to the terms of Article of War 48c(2) and 50d(2) as to the accused Castro and Bennett. In the instant case, as to accused Castro and Bennett, pursuant to the provisions of Article of War 48(c)(2), the confirming authority is the Judicial Council, acting with the concurrence of The Judge Advocate General.

The reviewing authority also designated a United States penitentiary, reformatory, or other such institution as the place of confinement. Paragraph 87b, Manual for Courts-Martial, 1949, provides, inter alia,

> "If the sentence of a general court-martial as ordered executed provides for confinement, the place of confinement will be designated. In cases involving imprisonment for life, dismissal and confinement of officers, and the dismissal and confinement of cadets, the confirming authority will designate the place of confinement."

In the instant case, as to accused Castro and Bennett, pursuant to the provisions of Article of War 48(c)(2), the confirming authority is the Judicial Council, acting with the concurrence of The Judge Advocate General (CM 336706, Pomada, 3 BR-JC 209).

6. The accused Castro is 20 years of age and single. He enlisted on 28 April 1950 for three years and his service has been characterized as satisfactory. He has no prior service.

The accused Bennett is 21 years of age and single. He enlisted on 22 August 1949 for three years and his service has been characterized as satisfactory. He has no prior service. There is evidence of one previous conviction by court-martial.

The accused Hulsey is 19 years of age and single. He entered the service with the National Guard in April 1948 and enlisted in the Army for three years on 30 August 1949 and his service has been characterized as satisfactory.

7. The court was legally constituted and had jurisdiction over the persons 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 sentences and to warrant confirmation of the sentences, as to accused Castro and Bennett. 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.

Albert Baum, J.A.G.C.

Samuel S. Crosby, J.A.G.C.

Sumner A. Brown, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

JAGU CM 346420

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

In the foregoing case of Corporal Robert Castro RA 18349941, Company I, and Private First Class Norman H. Bennett RA 15278673, Company H, both of 17th Infantry Regiment, APO 7, 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.

C. B. Mickelwait, Brig Gen, JAGC

Edward H. Young, Colonel, JAGC

JUN 1 1951

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

4 June, 1951

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

MAY 2 9 1951

JAGH CM 346485

U N I T E D S T A T E S	)	24TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Wongton, Korea, 13 April 1951. Dishonorable discharge, total forfeitures after promulgation and confinement at hard labor for life.
Private First Class BILLIE A. DAVIS (RA 14352827), Headquarters and Headquarters Company, 5th Infantry Regiment, APO 301.	)	

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

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.

The accused was tried upon the following Charge and Specification:

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

Specification: In that Private First Class Billie A. Davis, Headquarters and Headquarters Company, 5th Infantry Regiment, did, at Chapyon-ni, Korea, on or about 18 January 1951, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Il Sung Lee.

CHARGE II: Violation of the 93rd Article of War (Nolle Prosequi prior to arraignment).

Specification: (Nolle Prosequi prior to arraignment).

The accused pleaded not guilty to, but was found guilty of, Charge I and its Specification. No evidence of previous convictions was introduced. The accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due after the date of the order directing execution of the sentence, and to be confined at hard labor for life. The reviewing authority approved the sentence and forwarded the record of trial for further appellate review.

There is substantial evidence in the record of trial to the following effect:

On 18 January 1951, while Il Sung Lee, the complaining witness, a Korean woman 64 years of age, was visiting a relative in Clapyon-ni, Korea (R 8), the accused entered the house without invitation (R 9). He proceeded to a storeroom where rice sacks were stored, pointed to the rice sacks and said "Chop, Chop" (R 8). To this, the woman replied that she had enough rice and desired no more (R 8). Accused then pulled out an Army .45 caliber pistol, pointed it at the woman, opened her jacket, fondled her breasts and motioned that she should remove her underclothing. Instead, she held her skirt. Thereupon, accused struck her on the chest, knocked her down, pulled down her skirt and "pants", and exposed and inserted his genitals in hers (R 8-10). Coition continued for approximately a minute until interrupted by the arrival of two soldiers (R 9).

During this encounter accused slapped his victim on the left cheek when she screamed for help to a woman 99 years old, who was in a different room (R 9). The victim attempted to frustrate his design by "rolling around", moving her legs and crying out throughout the period of intercourse (R 9-10). She was not a prostitute, received no money from the accused and was in grave fear during the entire episode (R 10). She identified the accused as her attacker, in open court (R 8).

The apprehension of the accused occurred in the following manner:

Corporal Greenberg was digging a fox hole on a hill nearby when a Korean man shouted "one GI shibe - shibe" (slang or Korean for intercourse) (R 11). The corporal investigated and found a woman in a courtyard weeping and pointing toward the storeroom in the house (R 11). When he opened the door, he discovered accused rising "from what could have been a prone position" and a Korean woman on the floor "curled up in a ball" (R 12). The sexual organ of the accused was visible and the woman's dress was above her waist. The corporal explained to the accused that he had "to take him in", to which the accused replied "I know you have" (R 12).

A written pre-trial statement of the accused was admitted into evidence without objection (R 14-15). In it, he stated, in substance, that he had intercourse on the day in question with a Korean woman. He admitted that he had a pistol in his right hand and that intercourse had been interrupted by the arrival of Corporal Greenberg (Pros Ex 1).

The defense did not offer any evidence (R 15). The accused, after having been advised of his rights by the law member, elected to remain silent (R 16).

Rape is defined as "the unlawful carnal knowledge of a woman by force and without her consent." 1/ Sexual penetration, force and want of consent are the indispensable elements which must be established to sustain guilt. 2/ The offense may be committed upon a female of any age. 3/ Penetration, however slight, of a woman's genitals is sufficient carnal knowledge regardless of emission and the force involved in the act is sufficient, absent consent. 4/

In the instant case, not only did the woman concerned testify to the necessary elements (corroborated adequately) but additionally accused admitted that intercourse had been accomplished. The resistance to be expected from the victim is relative and naturally will vary with the force displayed by the attacker. 5/ Therefore, where sufficient force has been demonstrated, accompanied by the apparent intention to utilize it if need be, a showing of lack of active resistance does not defeat a charge of rape. 6/ In the light of the facts in evidence, the conclusion

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1/ Page 232, subparagraph 179b of the Manual for Courts-Martial, U.S. Army, 1949.

2/ Ibid., page 233, subparagraph 179b.

3/ Ibid., page 232, subparagraph 179b.

4/ Ibid., page 232, 233, subparagraph 179b; DeWar, MO-JAGA 543, 547; Scott, MO-JAGA 210, 212; CM 329971, Hallett, 78 BR 211, 217; Holmes v. United States, 171 F.2d 1022, 1023, hn 2 (App D.C, 1948).

5/ CM 323161, Lacewell et al, 72 BR 105, 111; CM 328884, Hale, 77 BR 269, 284.

6/ CM 333860, Haynes, 81 BR 375, 384-385; CM 340989, Banks, 6 BR-JC 225, 232; CM 338668, O'Daniels et al, 6 BR-JC 243, 255; CM 342559, Vennie, 8 BR-JC 95, 105.

is inescapable that the resistance of the aging victim was commensurate with her ability to defend herself, as measured by the degree of force displayed by the armed and determined assailant. 7/

The question of the accused's sanity was not raised at the trial and the psychiatric report, which accompanies the record, establishes that accused was mentally responsible at the time the offense was committed. It is noted that individual counsel, assisted by the regularly appointed defense counsel, a qualified member of the Judge Advocate General's Corps, elected not to cross-examine the victim. In the light of her clear, unequivocal and corroborated testimony implicating the accused, taken with his admissions, and in the absence of the slightest indication of any impeaching evidence, it is manifest that counsel's trial tactics in avoiding emphasis of unfavorable testimony by repetition and in minimizing the natural sympathy which a woman victim of venerable age excites, were sound and sagacious. Experienced jurists and trial lawyers accept and heed this admonition of a New York judge:

> "Do not cross-examine if you haven't any point that you are trying to make. Do not cross-examine. I cannot stress that too strongly. I thought there was some point in that when I was at the Bar, but as I have sat for ten years trying cases, I am more firmly convinced than ever that in at least five cases harm is done to the party cross-examining, to one case in which he gets the slightest advantage." 8/

The reviewing authority designated a place of confinement. In the instant case, the confirming authority, the Judicial Council, acting with the concurrence of The Judge Advocate General, is the proper agency to designate the place of confinement. 9/

7/ CM 307121, Strauss et al, 60 BR 313, 319; CM 319719, Dixon, 69 BR 31, 38; CM 337734, Humphrey, 4 BR-JC 101, 105-106.

8/ Berlin, MO-JAGA 655, citing from Tracy, The Successful Practice of Law, (Prentice-Hall, Inc., 1947), pp. 280-282.

9/ Page 97, subparagraph 87b, of the Manual for Courts-Martial, U.S. Army, 1949; Article of War 48 (c)(2), 10 USC (Supp III) 1519; CM 343793, Cruikshank, BR-JC, 8 March 1951 (Board of Review Opinion, p. 14).

The accused is 18 years of age and enlisted 18 September 1949 for three years at Jacksonville, Florida. His company commander rated his character as "fair" and his efficiency as "unsatisfactory". There is no evidence of any previous convictions.

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 trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the finding of guilty and the sentence and to warrant confirmation of the sentence.

Allan R. Browne J.A.G.C

William J. Flynn J.A.G.C

Arthur P. Ireland J.A.G.C

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

(362)

THE JUDICIAL COUNCIL

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

In the foregoing case of Private First Class Billie A. Davis, RA 14352827, Headquarters and Headquarters Company, 5th Infantry Regiment, APO 301, 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.

C. B. Mickelwait, Brig Gen, JAGC Edward H. Young, Colonel, JAGC

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

MAY 30 1951

I concur in the foregoing action.

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

30 May 1951

15112

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

JAGK - CM 346510

MAY 3 0 1951

UNITED STATES	7TH INFANTRY DIVISION
v.	Trial by G.C.M., convened at APO 7, 23 April 1951. Dishonorable discharge, total forfeitures after promulgation, and confinement for life. A Federal Institution.
Sergeant JOHN SOBON (RA 42153544), Battery B, 49th Field Artillery Battalion, APO 7	

OPINION of the BOARD OF REVIEW
BARKIN, WOLF and BROWN
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 charges and specifications:

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

Specification: In that Sergeant John Sobon, B Battery, 49th Field Artillery Battalion, in conjunction with Corporal Albert L. Basco, B Battery, 49th Field Artillery Battalion, and Private First Class Earl Manwarren, Junior, A Battery, 15th Anti-aircraft Artillery Automatic Weapons (Self Propelled) Battalion, then attached to B Battery, 49th Field Artillery Battalion, did, in the vicinity of Songbong-dong, Korea, on or about 17 March 1951, forcibly, and feloniously, against her will, have carnal knowledge of Cho Sun Nim.

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

Specification 1: In that Sergeant John Sobon, B Battery, 49th Field Artillery Battalion, did, in the vicinity of Songbong-dong, Korea, on or about 17 March 1951, wrongfully and unlawfully have carnal knowledge of Cho Sun Nim, Korean National, a female child under the age of 16 years, such conduct being of a nature to bring discredit upon the military service.

Specification 2: Withdrawn prior to trial.

Specification 3: In that Sergeant John Sobon, B Battery, 49th Field Artillery Battalion, did, in the vicinity of Songbong-dong, Korea, on or about 17 March 1951, wrongfully and unlawfully commit indecent acts with Cho Sun Nim, a Korean National female, under 16 years of age, by placing his private parts on her private parts with intent to gratify the sexual desires of said Sergeant John Sobon.

Specification 4: Withdrawn prior to trial.

Upon accused standing mute, the court entered a plea of not guilty to all charges and specifications. He was found guilty of all charges and specifications. 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, 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 50(e).

3. Evidence

a. For the Prosecution

On the afternoon of 17 March 1951, accused Sergeant John Sobon, together with Corporal Albert Basco and Private First Class Earl Manwarren, Junior, all of B Battery, 49th Field Artillery Battalion, entered a house located in Songbong-dong, Korea, and saw Cha Sun Nim, a Korean female about 12 years old who had a neighbor's baby, which she was taking care of, strapped to her back. One of them removed the baby from her back. They forced her to the floor and while accused and Manwarren held her arms and legs Basco got on top of her, inserted his penis into her private parts and had sexual intercourse with her. After he got up, Cha Sun Nim tried to crawl away along the floor to the door but accused caught her, got on top of her, inserted his penis into her private parts, and had sexual intercourse with her for five or ten minutes. During the entire operation, the girl screamed in pain and tried unsuccessfully to get away. The victim identified her attackers as the Trial Judge Advocate, the individual defense counsel and a spectator in the courtroom, but Corporals Carl L. Boomer and Joseph F. Brinkerhoff, both of accused's organization, who witnessed the incident, identified accused and Basco as the persons who raped Cha Sun Nim at that time and place. They also identified Cha Sun Nim as the victim and Manwarren as an accomplice. (R 10-13,16,20-27,29-36).

Cha Youn Ha, Cha Sun Nim's mother, testified that her family name is Cha and that the girl, whose "official" name is Cha Sun Ju, is "normally" called Cha Sun Nim by the family. Cha Sun Nim was born 19 June 1939. On the afternoon of 17 March 1951 "just before supper" Cha Youn Ha saw her daughter, Cha Sun Nim, naked below the waist, and "stained" with blood. Cha Youn Ha examined her and found that her private parts were badly torn and "blood was coming out." Cha Youn Ha then reported the matter to the "United Nations forces." Shortly thereafter, Cha Sun Nim was taken to the hospital (R 14-15).

First Lieutenant John Joseph Riley, Surgeon, 49th Field Artillery Battalion, testified that at about 1000 hours, 19 March 1951, he examined Cha Sun Nim. He saw that she had no pubic hair or "breast development." Her skin was cold and clammy, her pulse fast and "thready," and her blood pressure was below normal, indicating that she was in a state of shock. In examining her external genitalia, he observed tears to the labia minora, below the labia majora which cover the vaginal orifice. These tears had caused much bleeding. In his opinion the tears were caused by the insertion of a "hard, blunt instrument *** with some force in order to tear" (R 17-19).

Agents William E. Dameron and Malcolm B. O'Melia, 19th Criminal Investigation Detachment, testified that, on 20 March 1951, he saw accused and read him the 24th Article of War. Dameron asked accused if he understood it and accused stated that he did. Dameron further explained that he did not have to make a statement but that any statement he might make could be used against him in a court-martial. No threats, promises of immunity or force or duress was used. Accused thereafter made a written statement which was admitted into evidence without objection (R 37-41). In the statement, accused related that, on the afternoon of 17 March 1951, he entered a house near Songbong-dong, Korea, and observed Basco having sexual relations "with this Korean girl." After Basco "finished," he said to accused, "John, you're next." Accused saw that the girl was "bleeding excessively" at her private parts and stated: "My penus actually touched her private parts, but there was no penetration." While trying to have sexual intercourse with her she was groaning. He became sick at his stomach and his "penus went down." He arose and returned to camp. He stated that prior to the incident he had not been "drinking" (Pros Ex 1).

4. <u>Discussion</u>

Accused has been found guilty of forcibly and feloniously, against her will, having carnal knowledge of Cho Sun Nim at Yongbong-dong, Korea, on or about 17 March 1951, under Article of War 92, and of two other

offenses arising under the same act in violation of Article of War 96.

The evidence shows that, at the time and place alleged, accused, together with Corporal Albert Basco and Private First Class Earl Manwarren, joined in the rape of Cha Sun Min. First Basco raped her with the assistance of accused and Manwarren and then accused raped her with Manwarren's assistance.

The unsatisfactory evidence of the prosecuting witness relative to the identity of accused is rectified by witnesses of accused's immediate organization who positively identified accused, Basco and Manwarren as the perpetrators of the rape, and Cha Sun Nim as their victim. In addition, in his pretrial statement, accused admitted participation in the incident, although he denied penetration. However the testimony of the victim and witnesses Boomer and Brinkerhoff is to the contrary and amply justifies the finding of the court in that regard (CM 325571, James, 74 BR 337,342).

The specifications allege the victim as Cho Sun Nim. The evidence establishes her correct name as Cha Sun Nim. The variance is immaterial and accused was not misled thereby. There was no objection by accused to such misnomer. The doctrine of idem sonans is applicable (CM 331601, Brill et al, 80 BR 75,82).

Accused was found guilty of three specifications arising out of substantially one transaction. However, accused was in no wise prejudiced since it is clear that he stands punished for his crime only in its most important aspect (CM 321915, McCarson, 70 BR 411,419).

5. Although the reviewing authority forwarded the record of trial for action under Article of War 50e, the record is before the Board of Review pursuant to the terms of Article of War 48c(2) and 50d(2). Pursuant to the provisions of Article of War 48(c)(2), the confirming authority is the Judicial Council, acting with the concurrence of The Judge Advocate General.

The reviewing authority also designated a United States penitentiary, reformatory, or other such institution as the place of confinement. Paragraph 87b, Manual for Courts-Martial, 1949, provides, inter alia,

> "If the sentence of a general court-martial as ordered executed provides for confinement, the place of confinement will be designated. In cases involving imprisonment for life, dismissal and confinement of officers, and the dismissal and confinement of cadets, the confirming authority will designate the place of confinement."

In the instant case, pursuant to the provisions of Article of War

48(c)(2), the confirming authority is the Judicial Council, acting with the concurrence of The Judge Advocate General (CM 336706, Pomada, 3 BR-JC 209).

6. Accused is 28 years of age, married, and the father of two children. He had 1-1/2 years of active duty as an enlisted man prior to 1 September 1948 when he reenlisted for three years. His efficiency and character ratings are characterized as satisfactory and poor, respectively.

7. The court was legally constituted and had jurisdiction over 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 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.

Lennert Barnes, J.A.G.C.

Samuel S. Wolf, J.A.G.C.

Sumner A. Brown, J.A.G.C.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

(368) THE JUDICIAL COUNCIL

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

In the foregoing case of Sergeant JOHN SOBON RA 42153544, Battery B, 49th Field Artillery Battalion, APO 7, 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.

C. B. Mickelwait, Brig Gen, JAGC

Edward H. Young, Colonel, JAGC

JUN 4 1951

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

5 June, 1951

15112

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

(369)

MAR 27 1951

JAGQ - CM 344936

UNITED STATES v. Private First Class HARRY J. CARPENTER (RA 32081439), Headquarters and Service Company, 862nd Engineer Aviation Battalion, APO 57, USAF.	)	FRANKFURT MILITARY POST Trial by GCM, convened at Frankfurt-am-Main, Germany, 30 January 1951. Dishonorable discharge (suspended), total forfeitures after promulgation and confinement for one (1) year. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
TIBBS, SITNEK and SLADE
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 upon the following Charges and Specifications:

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

Specification: In that Private First Class Harry J. Carpenter, Headquarters and Service Company, 862nd Engineer Aviation Battalion, did, at Ebersdorf, Germany, on or about 26 December 1950, attempt to desert the service of the United States by attempting to cross into the Russian zone of Occupied Germany with intent permanently to absent himself without proper leave from his post and proper duties.

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

Specification: In that Private First Class Harry J. Carpenter, Headquarters and Service Company, 862nd Engineer Aviation Battalion, did, at Ebersdorf, Germany, on or about 26 December 1950, wrongfully and unlawfully wear civilian clothing in violation of Par 3 Special Order No 214 Hqs 862nd Engineer Aviation Battalion, dated 11 December 1950, and paragraph 8d, Circular 185, US Army Europe, dated 4 August 1950.

Accused pleaded not guilty to Charge I and its Specification and guilty to Charge II and its Specification. He was found guilty of all Charges and Specifications. 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 fifteen (15) months. The reviewing authority approved the sentence, reduced the period of confinement to one (1) year, and ordered the same executed, but the execution of that portion of the sentence adjudging dishonorable discharge was suspended until the soldier's release from confinement. The Branch United States Disciplinary Barracks, New Cumberland, Pennsylvania, or elsewhere as the Secretary of the Army may direct, but not in a penitentiary, was designated as the place of confinement. The result of trial was promulgated in General Court-Martial Orders No. 6, Headquarters Frankfurt Military Post, APO 757, US Army, 5 February 1951.

3. The accused's conviction of the offense alleged in Charge II and its Specification is amply supported by his judicial confession as well as by the evidence and will not be discussed, except to determine the maximum punishment authorized therefor. The principal question presented by this case is whether the evidence is legally sufficient to support the findings of guilty of Charge I and its Specification and to support that portion of the sentence which is in excess of that authorized upon conviction of Charge II and its Specification.

4. Evidence.

a. For the Prosecution.

The court took judicial notice of pertinent portions of Circular No. 185, Headquarters U. S. Army, Europe, dated 4 August 1950, prohibiting the wearing of civilian clothes by male military personnel "within or outside the US areas of responsibility in Germany," with exceptions not here applicable (Pros Ex 1).

First Lieutenant Robert B. Bass, Headquarters and Service Company, 862nd Engineer Service Battalion, testified that the accused was a member of that company, an Army unit stationed at Rhine Main Air Base, Germany (R 9); that proper leave orders (par 3, S.O. 214, Hq 862d Engr Avn Bn, 1950) granted the accused seventeen days ordinary leave beginning on or about 20 December 1950, authorized him to visit nonrestricted cities in the United States Zone of Germany and prescribed that he wear the uniform (R 9, 10, Pros Ex 2). No member of

that company has ever been authorized to wear civilian clothes in Germany (R 11). Each enlisted member of accused's company was issued an identification card containing the individual's photograph, identification tags, and a Post Exchange card (R 11). The accused departed pursuant to his leave orders (R 9) and was in a leave status at all times involved herein (R 11-12).

Corporal Russell L. Edwards, Troop C, 15th Constabulary Squadron, testified that on 26 December 1950, he and the [German] border police were checking the identification of persons in one of the guest houses (R 20) in Ebersdorf, a small town in the U. S. Zone of Occupation, Germany, located approximately 150 miles from Rhine Main Air Base, about 500 meters from the boundary line of the Russian Zone of Occupation, Germany (R 12-13), exactly on the border (R 25) and about one kilometer from Neustadt, Germany (R 14). While so engaged they entered a small bedroom on the ground floor of a small guest house and found it occupied by the accused and his girl friend (R 13, 15). The accused was then wearing "a light green turtle-neck sweater ***, a pair of dark blue or black trousers, a pair of heavy grey socks, and a pair of heavy shoes with the trousers tucked down in the top of the socks and shoes", all of which appeared to resemble German civilian clothes (R 13). When Corporal Edwards asked the accused for identification, he immediately showed a copy of his leave orders; when asked for other identification, "he said it was all he had"; and when asked for his name, "he told me 'Private Carpenter' and showed me his name on the [leave orders]" (R 13, 16). He did nothing to conceal his identity (R 16). When he asked the accused "if it was possible that he was in an off-limits town", "he [accused] said he didn't know it was off limits and he came there to spend a nice quiet leave" (R 16-17). A search of the room disclosed nothing "military", "like a uniform or anything" (R 14). In order to get to Ebersdorf from Coberg one has to travel on the main road which goes through Neustadt (R 14) or by other roads which an automobile "can hardly get over" (R 19). On the main road from Coberg to Neustadt, just outside Neustadt, is a large sign stating, in English: "This town is off limits to all U.S. military and civilian personnel" (R 14), which refers only to Neustadt and not to Ebersdorf (R 15). Ebersdorf consists of about twelve or thirteen houses, but is not a resort town and is not in a resort area (R 18, 19). The guest house in which the accused was seen was filthy, lacked bath tubs, had dirty floors and was not "the sort of hotel that one would go to for a vacation" (R 18).

Master Sergeant Philip A. Frazer, 427th CIC Detachment, Coberg, Germany, testified that he saw the accused at Coberg at about 1900 hours 26 December 1950 and, after advising the accused of his rights under Article of War 24, the accused stated:

"* * * he understood that he didn't have to talk if he didn't want to, however, he was tired of the 'run around', as his words were, and wanted to bring it in the open and get it off his chest." (R 21).

Over defense objection that the accused "was in such a state of mental confusion that he didn't know what the devil he was saying or what he said or did" (R 22) and that no corpus delicti had been established (R 23), the witness further testified that the accused then made an oral statement, in pertinent part, as follows:

"Received a furlough from his organization with the purpose of leaving the Rhine Main and Frankfurt area and trying to get to the Russian Zone of Germany, where he intended to go across, marry this girl that he was with, and live there. Carpenter also stated that prior to leaving he had given his uniform to the landlady where his girl friend was living; he had destroyed every bit of identification that he normally carried, with the exception of one copy of his furlough orders, and they had proceeded to Ebersdorf, Germany. There they had attempted to contact a guide who would take them across to the Russian Zone. The guides were contacted on the 24th of December...." (R 23).

"* * * two men—guides—were contacted [on 24 Dec 50] and they would take Carpenter and his girl friend across around 2400 hours. In the meantime, Carpenter's girl friend talked him out of the notion of leaving that night because she didn't believe the two guides could be trusted. Carpenter told his girl friend that he would give her approximately three days to make her mind up. Prior to the expiration of those three days, Carpenter was picked up on the border.

* * * *

"* * * he had been in Ebersdorf since the 24th until he was picked up on the evening of the 26th.

* * * *

"* * * they left Rhine Main—that is, Frankfurt— by train and proceeded to Lichtenfels, Germany. There they took a taxi and proceeded to Coberg. Talking to the taxi driver, he was informed where he could pick up another taxi who

would take him all the rest of the way, and at Coberg they changed cabs and went through Neustadt, and from Neustadt into Ebersdorf." (R 24).

"* * * He said he was teed off with everybody. **** Disgusted ****" (R 26).

"* * * the 'go-around' was the hard time he was getting in his organization from his First Sergeant and other members of the organization, who were having a lot of derogatory remarks to say against his girl friend, telling him that the best thing that could happen to him would be for him to go AWOL and get himself discharged from the Army." (R 27).

At the time of making this statement the accused was very quiet, answered every question clearly and distinctly (R 24), gave a straightforward story, appeared to be sober and in full possession of his faculties (R 25), and was not nervous (R 26). The accused and the girl as well as their clothing were very dirty (R 24-A). Neustadt is the official allied crossing point for Germans and for allied international travelers in that area. There has been a lot of illegal border crossing at Ebersdorf, which is not an official crossing point (R 25). There is nothing wrong with a soldier's being in Ebersdorf when he is on leave, even though he wrongfully went through Neustadt, an off-limits town (R 26).

b. For the Defense.

Lyana Brandt, a German national resident at Frankfurt, Germany, testified that she was thirty-five years old and that she had known and gone with the accused since 18 April 1949 and had been engaged to him since November 1949 (R 31, 32, 33). The accused was all mixed up as a result of "the terrible difficulties we had in connection with our marriage and then the [accused's] trouble in the company and that I lost my child — the baby —" when four months pregnant (R 32). He had spoken to her about going away with him to other countries, and "may be later on to Switzerland". He never directly stated that she should go to the Russian zone with him: "I wasn't able to find out what he wanted. Once he wanted this and next time he wanted that." (R 34). Once he did say "we should go to the Russian Zone" but she did not take him seriously (R 36). When the accused left Frankfurt she accompanied him "in order not to leave my fiance alone so he wouldn't commit anything stupid" (R 34). "His condition and his morale were so low that I was always afraid in the past few months * * * that he would

do something silly" (R 37). During the trip, she did not leave him alone for even one minute, being "afraid somebody could influence him" (R 35). She did not go to Ebersdorf with the "idea in mind of crossing the border into the Russian Zone", but only to bring him back to Frankfurt (R 32). She had saved 600 Deutsche Marks for their wedding, but after they "found out that the wedding couldn't take place", she took that money on the trip, for the accused had none (R 37). They left Frankfurt at 2300 hours, 23 December 1950, traveling by train to Lichtenfels "and there we went to a gasthous and a taxi driver took us to Ebersdorf and Harry, my fiance, was so confused and mixed up and down with his nerves that he didn't know what he was doing and I continued because of his nerves. I couldn't look into his mind what he intended to do" (R 32). She spoke to the taxi driver there, saying: "We want to get to the border * * * We wanted to go there to see how the people lived there and how they go across the border and how they come back" (R 34). When the taxi driver suggested that Ebersdorf would be such a place (R 37) and that he could drive them to Coberg and tell them where to get another taxi which would take them to Ebersdorf (R 24), they both decided to go there (R 36). At Coberg they changed taxicabs and went through Neustadt into Ebersdorf (R 24), arriving there on 24 December 1950 (R 24) between 1330 and 1400 (between 1300 and 1500) o'clock (R 32, 37). While in Ebersdorf he spoke to nobody except her (R 33). They immediately secured a room in a guest house (R 32), after which they went to a small restaurant (R 34). There "he just told me that I should find out what is going on there * * * Maybe he meant that I should find out how much the prices [were] for getting across [the border] or maybe he just meant how the life is there [in the Russian Zone], I don't know" (R 35). At that time they were unaware of the fact, but later were informed, that this restaurant was known in Ebersdorf as a rendezvous for those who hoped to cross the border and that all strangers who entered the restaurant were approached by guides (R 33). Upon that occasion two guides approached the girl (she was then alone (R 35)) and asked if she wanted to get across the zone border (R 33, 34). "I told them that we wanted to go" (R 36) and "asked them how much they would charge for it" (R 35). "They told me they come back at about 2400 hours" (R 36). "I told [the accused] 'I don't trust the two men. They would probably leave us standing there at the zone border and that wouldn't be good!'" (R 33). "I had to gain time so to explain it to my fiance that it doesn't make any sense — that it is nonsense". When the men returned at 2400 hours she told them "We don't go" (R 36). The accused then gave her three days to arrange a crossing of the border failing which they would return to Frankfurt (R 36). She made no <u>serious</u> effort to secure any guides to get across the border (R 33). He said that if he were not able to get across the border within three days he would return to Frankfurt. "I would have

prevented it [crossing the border] at any rate" (R 35). Neither she nor the accused made any effort to cross the border (R 36).

The stipulated testimony of Major Arthur W. Brown, Chief, Neuropsychiatric Section, 97th General Hospital, EUCOM (Def. Ex. A), a qualified psychiatrist (R 38) in pertinent part, states:

> "*** [The accused] Joined Army by draft March 1941. Was in Army to 20 December 1945 serving in States two and a half years and remainder in Australia, New Guinea, and New Zealand. No actual combat. After discharge, worked as mechinist for about one year. Reenlisted 2 February 1948. Came to Eucom in September 1948, and has been here since. Has had no hospitalizations, operations, or injuries.
>
> * * * *
>
> "*** He has a history of inadequate response to emotional situations, but reveals such naivete that he has had no courts - martial in over six years service and only two punishments under AW 104. Repression of emotions with restriction of all outlet has been present for the two years three months he has been in his present unit. The affection he feels for his girl friend is sincere and genuine and he had been subjected to extreme psychic trauma in the remarks of his company NCO's and which - because of the simplicity of his ideation - he was not able to relieve in any form of expression. He attempts no justification for his alleged desertion attempt but it is obvious that he had exceeded his emotional tolerance threshold. It remains as a distinct act of impulsive bad judgment which was motivated by emotional duress rather than as a behavior defect. I offer the
>
> "Diagnosis # 1: Situational maladjustment, acute, severe, manifested by extreme emotional repression and its bizarre expression in a physical escape attempt.
>
> "Diagnosis # 2: Passive dependency reaction, severe, manifested by parental dependency later transferred to a girl friend, helplessness, and indecisiveness in face of stress." (Def Ex A).

Accused after being apprised of his rights elected to testify in his own behalf and his testimony is summarized as follows:

His life with his parents lacked love and companionship (R 41). He had known Lyana Brandt for about twenty-one months, is her fiance and intends to marry her. He is in love with her and "she's the best woman you can get" (R 40). He "made every possible effort under the sun" to marry this girl (R 41). Regulations then in effect in the accused's command pertaining to marriage of United States military personnel and German nationals authorized military personnel to submit a request for permission to marry a German National only during a specified latter portion of the soldier's tour of duty in that command (R 44). He prepared a request for permission to marry, "but I was never allowed to turn it in because my rotation date was moved back" (R 41).

"Q Well, did anybody approve your efforts?
A Well, officially I couldn't say anything, but unofficially I can say that there is quite a lot of opposition — a great deal more than there should be.

* * * *

"Q How do you get along with the men in your unit?
A Not very well. About half of them I couldn't even try to get along with.

"Q Why not?
A They're the type of people that think that because a man goes with a German girl — that maybe some of them have proved to have been not what they should be so they automatically think they're all wrong — no good. In other words, the Americans won the war and this is their opinion: They feel that the Germans are nothing but Krauts and anybody that associates with them is a fool. The Krauts are just low-level, or something.

* * * *

"Q *** You heard the statement here made by, I believe, Sergeant Frazer when he stated that you told him that your First Sergeant said, 'Why don't you go AWOL'.
A I can tell you the exact words he said and prove it. One time they wanted to send me to machine shop school and my trade is machinist. I am not a tool maker, but I am an average machinist and I have done pretty damn good work. At the time I made application to marry, or about that time they wanted to send me to machine shop school, but the obvious intent was to break us up. I saw Lieutenant Bass and I spoke to him and I said, 'Sir, even if

I don't go with this girl there's no sense in my going to school because they'll teach me the basic fundamentals all over again,' and I told them, 'I don't think it's right. It would accomplish nothing,' and the next day, for some reason, at noontime Sergeant Borcherding was talking to us and he obviously meant me because I was the only man in the company that missed that school quota, he said, 'You're no good. We don't want men like you in this company. Why don't you get out and go AWOL or do something to get yourself out of the service if you don't like it.' Those were his exact words I swear to God.

"Q Did you ever do anything to put that thought into execution — to go AWOL?

A No, a week later, I think, there was another remark he said. 'All you men,' he said — and this was in Barracks 463 on a Friday night at 7 o'clock — he said, 'All you men that like your shack women' — that is the equivalent of calling a woman a prostitute — 'All you men that like your shack women better than going to school better be ready to go the next time a quota comes up.' Well, I foolishly went down and told my girl what he said and for some reason — because of nervous tension or something — she dropped her child. She was four and a half months pregnant and she told me she could prove with a paper that the private doctor that treated her in a hospital in Frankfurt claimed the only reason she could have lost the child was because of some kind of nervous tension.

"Q Did you tell her what this fellow said?

A Yes.

"Q And she lost the child?

A Yes.

* * * *

"Q **** Did that have any affect on you when she lost this baby? Did you worry about it?

A I worried about it a great deal. I did want to have a child because I think my affection for the woman was natural and when she dropped the child — I don't know — I just wasn't the same no more.

* * * *

"A All I know is that for 21 months everybody said everything to me that they could and I kept it inside — every kind of

a remark under the sun and a lot I could never mention here. Some were absolutely filthy and I kept it in for 21 months and after 21 months it just got to be too damn much and I had to do something — I don't know.— I just couldn't stand it no more.

"Q Well now, you are up here on the Russian border. Why couldn't that just as well have been a town 20 miles South of Munich?
A I just wanted to get out and get away and get away from something. I don't know what I wanted to do. I don't remember half the things I done from the time I got on that train.

"Q Were you drunk?
A No, I don't drink.

"Q Did you ever drink?
A I drank up until the time I left Lansburg. My girl made me give up drinking.

* * * *

"Q When did she make you give up drinking?
A Two or three weeks after I knew her.

"Q And you haven't touched a drop since?
A Nothing.

* * * *

"Q Take your time. Is there anything now that you care to tell the court about this matter that I may have neglected to ask you?
A Well, sir, I feel that what I done, or why I was, or what I was doing, I sure don't know. All I know is I got on the train. I don't remember half the things or half the places I stopped. I don't think I honestly knew what the hell I was doing and to hold something in — to build up tension for 21 months, it had to come out sometime someway and I feel that is the reason that I went out to get away to do what I wanted to do. What it was, I don't know yet, but I did not make a statement to Sergeant Frazer that if we did not contact a guide I will come back to Frankfurt. We was not up there for the express purpose of contacting a guide or anybody else. I went up there — I just blew up and went up there to get away from it all. I put on my civilian clothes because, frankly, I just wanted to relax and get out and do what I pleased.

* * * *

"Q Did you destroy your personal Identification Card, dog tag, or PX Card on or about the 23rd of December 1950?

A I don't know where my I.D. Card is, sir. I know that the only card I destroyed was my driving license for my motor bike and I don't remember what I done with the I.D. Card, PX Card or anything else. The only card I destroyed was my driving license for my civilian motor bike.

"Q Did you give away your uniform to your girl friend's landlady on or about December 22nd?

A No, sir, I did nothing of the kind. I can prove it by the woman downstairs. I only have two uniforms and they was in a basket in the house." (R 41-45).

"A *** As to how it would be possible for anybody to cross the line, I'd rather say myself. Sir, I know from my experience in that house that the line can be crossed by people alone and unaided; that I had many many opportunities to cross the line in them three days. When the border police were changed the man is not in the street. There is a street right behind the house and as soon as the police is not there, you can run right across completely undetected. There is no possible way the police can be there. What the guide is needed for is for contacts, the Russian pass like the German kenn karte, and to be settled down in a hotel or someplace where you will not be detected. The actual crossing of the line you can do or anybody can do. I have seen people come and go. I have seen old women come and go. I seen one with a child in them three days — I seen three or four incidents. I could have crossed the line many, many times but I had no intention to do so whatsoever.

* * * *

"A I'd be crazy. [to consider going into the Russian Zone]

* * * *

"A I wouldn't last in the Russian Zone for five minutes. For one thing I had no guide and I made no attempt to get passes or nothing. If I didn't have these and the first Russian who would come and question me — I couldn't last 20 minutes." (R 39-40).

"A *** that day when the two young guides from the Russian Zone come over and approached my girl. *** I was in the room watching them when we were eating. They come up to her after we were about to finish supper and they asked her something in German, so I don't understand German and I ask her what they said. She said they want us to go over into the Russian Zone. They would take us all the way over and she mentioned the price of 25 or 50 marks — between 25 and 50 marks. *** And she told me, 'They are crazy,' and I told her, 'Honey, this is all foolish. We are going back to Frankfurt and get the hell out of here.' *** It was foolish being in a place like that." (R 43).

The accused admitted that, following an additional explanation of his rights at Bamberg, Germany, on 27 December 1950, he voluntarily made a written statement to "CID Agent Kidd" (R 45-46). He was "awfully balled up" when he made this statement (R 46). His interrogation, in pertinent part, was as follows:

"Q When you were talking with CID Agent Kidd after you had been warned, did you say anything to him to the effect that you deserted the service of the United States willingly of your own free will because you were driven to the point of distraction?

A The statement that I made is on the paper, but how could I possibly have deserted the service? As I told the officers of the court, I had a chance to go over the line. I can go up and prove that. I know how to go over. The only thing I possibly don't know is detection.

"Q Did you at that same time tell Agent Kidd that your girl friend was in no way responsible for what you had done and that in all honesty you can say that you alone are responsible for all of your troubles?

A Yes, sir, I did. How can my girl be responsible for what I do.

"Q That, in your opinion, she did not aid or abet you to desert.

A No, sir.

"Q And at the time of your apprehension that you agreed if one more night passed and you hadn't contacted a guide to take you over the border that you would return to Frankfurt.

A That is not correct. In a sense, on the date that we were apprehended, I told her, as I told you before, 'Honey,

this is crazy. We are going back to Frankfurt.' And I realized, sir, I come to my senses, that I didn't belong in that crazy place. With what was going on complications could have happened, I don't know, but I told her, 'We're going back to Frankfurt. I didn't state I had a desire to contact any guide. My girl was approached two times by guides. She refused the first time and she was approached another time. The morning before — about noontime, she refused and come in the room and told me that she had been approached. Two times she refused. She didn't want to go with them. I told her what I told you before, sir, and I wanted to come back to Frankfurt to continue out my furlough. I destroyed no uniforms and made no attempt to desert. I can very easily cross the border line without detection.

* * * *

"Q 'At the time of our apprehension we agreed that if one more night passed and we couldn't contact a guide to take us over the border then we were to return to Frankfurt and I'd wait until the end of my furlough and return to camp.'

A That is in the statement, but I don't remember what I did. While signing that statement, they put a pencil in my hand and told me to sign it, nobody bothered me. I did not try to contact any guide. That is the truth. No guides were attempted to be contacted.

"Q Did you say you signed it with pencil?

A I don't know.

"Q You are not sure.

A No." (R 46-47).

5. Discussion.

Specification of Charge I and Charge I

The accused has been convicted of attempting to desert by attempting to cross into the Russian Zone of Occupied Germany, with intent to remain permanently absent, in violation of Article of War 58. The evidence establishes that, during the 21 months immediately preceding December 1950, the accused, then being ineligible to marry a German girl

several years his senior, had become increasingly disturbed, troubled and mentally confused as a result of a real or imagined opposition among his fellow soldiers and the noncommissioned officers of his unit to his desire to marry this girl. He became even more upset in November 1950 when his paramour had a miscarriage which, he was convinced, was a further result of this opposition. The accused, a simple and naive individual, did not know how to reply to his tormentors or what to do about the situation. In his distraught mental state he conceived the idea of escaping from these unpleasant surroundings by traveling with his girl friend to some place beyond United States control where they could marry and "live happily ever after". His girl friend became increasingly concerned about the accused and did everything possible to dissuade him but was unsuccessful in her efforts. In order to effectuate his idea the accused obtained 17 days leave of absence with authority to visit the nonrestricted cities in the United States Zone of Germany; he changed into civilian clothing, leaving his uniforms with his landlady (whether for disposal, destruction or storage is not clear); he lost or disposed of or, at any rate, is unable to explain the disappearance of authorized identification tags, identification card containing his picture and his post exchange card; and he retained only one copy of his leave orders. Being unable to prevent the accused from pursuing his idea, his girl friend accompanied him on the trip "so he wouldn't commit anything stupid" and to prevent his crossing into the Russian Zone. As a result of information obtained en route they decided that Ebersdorf, a small nonrestricted town in the United States Zone, about 150 miles from accused's station at Frankfurt, and only a few hundred meters from the Russian Zone, would be a good place to make a reconnaissance for entering and living undetected in the Russian Zone. He concluded that the mere physical entry into the Russian Zone of Occupied Germany was easy, but that forged papers, "contacts", and expert advice were indispensable to avoid detection after entry. Inasmuch as the accused did not speak German, his girl friend, at his direction, inquired about these matters. On at least two occasions she talked with "guides" whose principal function was the furnishing of such false papers, information and advice. Upon each occasion she told the accused that she distrusted the guides and, accordingly, they refused the guides' proferred services. After two days in Ebersdorf it was agreed that they would return to Frankfurt if one more night passed without making satisfactory arrangements and crossing into the Russian Zone. Such was the state of affairs when they were apprehended. At this time the accused still had at least ten days' leave remaining. At no time did the accused or his girl friend cross into the Russian Zone, nor did the accused ever deny his identity.

The elements of proof of the offense alleged in the Specification of Charge I are:

> "(a) That the accused made the attempt by doing the overt act or acts alleged; (b) that he intended to desert at the time of doing such act or acts; that is, he then entertained the intent not to return *** as alleged; (c) that the attempt was made under the circumstances alleged." (MCM 1949, par 146b, p 201).

Considering the evidence as a whole it appears clear that the accused intended to desert (that is, he then entertained the intent not to return) at the time he departed from Frankfurt on 23 December 1950, and that he continued to entertain the intent not to return for at least several days thereafter. The Board is not convinced beyond a reasonable doubt, however, that the evidence supports the allegation that the accused attempted to cross into the Russian Zone of Occupied Germany, nor are we convinced beyond a reasonable doubt that the acts performed by the accused constituted anything more than mere preparation towards accomplishing his purpose to desert. Notwithstanding the dearth of reported cases pertaining to the offense of attempting to desert, it appears that the Board of Review in CM 190611, Maszeski, 1 BR 211, was confronted with an analagous case. The pertinent facts and law of the Maszeski case are summarized in Dig Op JAG 1912-40, Sec 416 (1), page 265, as follows:

> "Accused was charged with and convicted by general court-martial of attempting to desert 'by falsely representing himself under an alias as a civilian to O, quarantine officer, requesting the assistance of said O in establishing a false identity and securing a permit of entry into the Republic of Panama under said false identity, with intent permanently to absent him without proper leave from his post and proper duties.' The evidence sustained the allegation as to the false representations. Held, That the specification charged and the evidence showed nothing more than mere preparation and intent to desert without alleging any overt act necessary to execution of the plan to desert, and that the record was legally insufficient to support the findings of guilty."

In the instant case the accused did not intend to cross into the Russian Zone unless he could first make firm arrangements to obtain false identification papers and advice which would permit him and his paramour to marry and live undetected in the Russian Zone of Occupied Germany.

His efforts, including the efforts of his paramour undertaken by her at his direction, never progressed beyond the stage of preliminary negotiations. The principle of the Maszeski case is considered controlling with respect to Charge I and its Specification.

Specification of Charge II and Charge II.

The Specification of Charge II alleges that the accused did "wrongfully and unlawfully wear civilian clothing in violation of" referenced directives to the contrary. It is clear that the accused with knowledge of the orders did wear, that is, appear in, civilian clothing without authority. The maximum punishment for appearing in civilian clothing without authority is forfeiture of pay for ten days (MCM, 1949, par 117c, p. 138). This office has previously rendered an opinion with respect to the same question as is here presented. In his opinion The Judge Advocate General discussed the maximum punishment authorized upon conviction of the offense of appearing in civilian clothing without authority, which act was prohibited by army regulations and by general orders of the Panama Canal Department. The opinion states, in pertinent part:

> "*** The punishment for the offense for which the accused was tried and convicted is specifically provided for in the Executive Order of December 10, 1920, without regard to whether it is an army regulation or a standing order which has been violated, and is thereby limited to forfeiture of pay for not to exceed 10 days.
>
> "The Executive Order contemplates the issue or existence of regulations or general orders regulating the times when and the places where civilian clothing may be worn, if the same be permitted at all. Such general orders or regulations can not enlarge the offense, punishment for which is prescribed in the Executive Order.
>
> "3. In view of the foregoing it is the opinion of this office that the sentence in question exceeds the maximum limits of punishment provided in the Executive Order of December 10, 1920, for the offense charged, which is forfeiture of not to exceed 10 days' pay ***". (JAG 250.479, 12 Dec 1923).

The cited United States Army, Europe, Circular prohibiting the wearing of civilian clothes, as applicable to the accused is considered as nothing more than an announcement that appearing in civilian clothes is unauthorized. The statement in accused's leave orders prescribing that the uniform be worn while on leave is similarly considered to be merely a reminder of such policy. The above quoted opinion is considered controlling as to the offense alleged in this case (cf. CM (ETO) 1057, Redmond, 3 BR (ETO) 349, 359 and SP CM 2461, Linscott, 7 BR-JC 319, 9 Bull JAG 153 (1950)).

6. For the foregoing reasons, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge II and the Specification thereof, legally insufficient to support the findings of guilty of Charge I and the Specification thereof, and legally sufficient to support only so much of the sentence as provides for forfeiture of the accused's pay for ten days.

Michael L. Gibbs, JAGC

William G. Sitnek, JAGC

Arthur R. Slade Jr., JAGC

(386)

JAGQ CM 344936 1st Ind

JAGO, Dept of the Army, Washington 25, D. C. APR 26 1951

TO: Commanding General, Frankfurt Military Post, APO 757, c/o Postmaster, New York, New York

1. In the case of Private First Class Harry J. Carpenter (RA 32081439), Headquarters and Service Company, 862nd Engineer Aviation Battalion, APO 57, USAF, I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Charge II and the Specification thereof, legally insufficient to support the findings of guilty of Charge I and the Specification thereof, and legally sufficient to support only so much of the sentence as provides for forfeiture of the accused's pay for ten days. Under Article of War 50e this holding and my concurrence vacate the findings of guilty of Charge I and its Specification and so much of the sentence as is in excess of forfeiture of the accused's pay for ten days.

2. It is requested that you publish a general court-martial order in accordance with said holding and this indorsement, restoring all rights, privileges and property of which the accused has been deprived by virtue of the findings and that portion of the sentence so vacated. A draft of a general court-martial order designed to carry into effect the foregoing recommendation is attached.

3. 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 344936).

Franklin P. Shaw

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

2 Incls
1-Record of Trial
2-Draft GCMO

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

JAGH CM 344995

APR 1 7 1951

UNITED STATES	)	SIXTH ARMY
v.	)	Trial by G.C.M., convened at Presidio of San Francisco, California, 13-28 November 1950. Dismissal, total forfeitures after promulgation and confinement at hard labor for three (3) years.
First Lieutenant ELLIOTT R. ASHFORD (0-2008170), 6003 Area Service Unit, Fort Ord, California.	)	

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

Specification 1: (Nolle Prosequi)

Specification 2: In that First Lieutenant Elliott R. Ashford, 6003 Area Service Unit, then an Assistant Club Officer, Presidio Officers' Club, Presidio of San Francisco, California, did, at Presidio of San Francisco, California, on or about 13 June 1950, with intent to defraud, falsely alter a certain document, to wit: a machine shortage sheet of the Presidio Officers' Club, dated 13 June 1950, by inserting the following words and figures, to wit: "M. J. Hos" "05" "17" "FVE" "35.00", which said machine shortage sheet was a writing of a private nature, which might operate to the prejudice of another.

Specification 3: (Finding of not guilty)

Specification 4: In that First Lieutenant Elliott R. Ashford, 6003 Area Service Unit, then an Assistant Club Officer, Presidio Officers' Club, Presidio of San Francisco, California, did, at Presidio of San

Francisco, California, on or about 23 June 1950, feloniously steal about $230.00, lawful monies of the United States, the property of the Presidio Officers' Club, Presidio of San Francisco, California.

Specification 5. In that First Lieutenant Elliott R. Ashford, 6003 Area Service Unit, then an Assistant Club Officer, Presidio Officers' Club, Presidio of San Francisco, California, did, at Presidio of San Francisco, California, on or about 15 February 1950, with intent to deceive his superior officers, falsely sign the fictitious name "C.E. Moss" on a Presidio Officers' Club Machine Shortage Sheet, dated 15 February 1950, in acknowledgement of the payment of $50.00, lawful monies of the United States, which entry was known by the said First Lieutenant Elliott R. Ashford to be untrue, in that he, First Lieutenant Elliott R. Ashford, did, in fact. receive the said payment.

Specifications 6 and 7: (Findings of not Guilty)

Specification 8: In that First Lieutenant Elliott R. Ashford, 6003 Area Service Unit, then an Assistant Club Officer, Presidio Officers' Club, Presidio of San Francisco, California, did, at Presidio of San Francisco, California, on or about 13 May 1950, with the intent to deceive his superior officers, falsely sign the fictitious names, "E.J. Miller, Col, Inf." and "E. J. Miller, Col, Inf." on a Presidio Officers' Club Machine Shortage Sheet, dated 13 May 1950, in acknowledgment of the payment of $4.50 and $1.25, respectively, lawful monies of the United States, which entries were known by the said First Lieutenant Elliott R. Ashford to be untrue, in that he, the said First Lieutenant Elliott R. Ashford, did, in fact, receive each of the said payments.

Specification 9: In that First Lieutenant Elliott R. Ashford, 6003 Area Service Unit, then an Assistant Club Officer, Presidio Officers' Club, Presidio of San Francisco, California, did, at Presidio of San Francisco, California, on or about 15 May 1950, with the intent to deceive his superior officers, falsely sign the fictitious names, "E.J. Miller, 1st Lt.," and "E.J. Miller, 1st Lt." on a Presidio Officers' Club Machine Shortage Sheet, dated 15 May 1950, in acknowledgment of the payment of $5.75 and $6.00, respectively, lawful monies of the United States, which entry was known by the said First Lieutenant Elliott R. Ashford to be untrue, in that he, the said First Lieutenant Elliott R. Ashford, did, in fact, receive each of the said payments.

Specification 10: In that First Lieutenant Elliott R. Ashford, 6003 Area Service Unit, then an Assistant Club Officer, Presidio Officers' Club, Presidio of San Francisco, California, did, at Presidio of San Francisco, California, on or about 20 May 1950, with the intent to deceive his superior officers, falsely sign the fictitious name "E.J. Miller," on a Presidio Officers' Club Machine Shortage Sheet, dated 20 May 1950, in

acknowledgment of the payment of $50.00, lawful monies of the United States, which entry was known by the said First Lieutenant Elliott R. Ashford to be untrue, in that he, the said First Lieutenant Elliott R. Ashford, did, in fact, receive the said payment.

Specification 11: In that First Lieutenant Elliott R. Ashford, 6003 Area Service Unit, then an Assistant Club Officer, Presidio Officers' Club, Presidio of San Francisco, California, did, at Presidio of San Francisco, California, on or about 21 May 1950, with the intent to deceive his superior officers, falsely sign the fictitious name "E.J.Miller", on a Presidio Officers' Club Machine Shortage Sheet, dated 21 May 1950, in acknowledgment of the payment of $11.50, lawful monies of the United States, which entry was known by the said First Lieutenant Elliott R. Ashford to be untrue, in that he, the said First Lieutenant Elliott R. Ashford, did, in fact, receive the said payment.

Specification 12: In that First Lieutenant Elliott R. Ashford, 6003 Area Service Unit, then an Assistant Club Officer, Presidio Officers' Club Presidio of San Francisco, California, did, at Presidio of San Francisco, California, on or about 9 June 1950, with the intent to deceive his superior officers, falsely sign the fictitious names, "H. J. Kent" and "P.I. Hunt, Lt. Col." on a Presidio Officers' Club Machine Shortage Sheet, dated 9 June 1950, in acknowledgment of the payment of $50.00 and $50.00, respectively, lawful monies of the United States, which entries were known by the said First Lieutenant Elliott R. Ashford to be untrue in that he, the said First Lieutenant Elliott R. Ashford, did, in fact, receive each of the said payments.

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

Specification 1: In that First Lieutenant Elliott R. Ashford, 6003 Area Service Unit, then an Assistant Club Officer, Presidio Officers' Club, Presidio of San Francisco, California, did, at Presidio of San Francisco, California, on or about 13 June 1950, with intent to defraud, falsely alter a certain document, to wit: a machine shortage sheet of the Presidio Officers' Club, dated 13 June 1950, by inserting the following words and figures, to wit: "M.J. Hos" "05" "17" "FVE" "35.00", which said machine shortage sheet was a writing of a private nature, which might operate to the prejudice of another.

Specification 2: (Finding of not Guilty)

Specification 3: In that First Lieutenant Elliott R. Ashford, 6003 Area Service Unit, then an Assistant Club Officer, Presidio Officers' Club, Presidio of San Francisco, California, did, at Presidio of San Francisco, California, on or about 23 June 1950, feloniously steal about $230.00, lawful monies of the United States, the property of the Presidio Officers' Club, Presidio of San Francisco, California.

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

Specification 1: (Nolle Brosequi)

Specification 2: In that First Lieutenant Elliott R. Ashford, 6003 Area Service Unit, then an Assistant Club Officer, Presidio Officers' Club, Presidio of San Francisco, California, did, at Presidio of San Francisco, California, on or about 15 February 1950, with intent to deceive, falsely sign the fictitious name "C. E. Moss" on a Presidio Officers' Club Machine Shortage Sheet, dated 15 February 1950, in acknowledgment of the payment of $50.00, lawful monies of the United States, which entry was known by the said First Lieutenant Elliott R. Ashford to be untrue in that he, First Lieutenant Elliott R. Ashford, did, in fact, receive the said payment.

Specifications 3 and 4: (Findings of not Guilty)

Specification 5: In that First Lieutenant Elliott R. Ashford, 6003 Area Service Unit, then an Assistant Club Officer, Presidio Officers' Club, Presidio of San Francisco, California, did, at Presidio of San Francisco, California, on or about 13 May 1950, with the intent to deceive, falsely sign the fictitious names, "E.J. Miller, Col, Inf." and "E.J. Miller, Col, Inf." on a Presidio Officers' Club Machine Shortage Sheet, dated 13 May 1950, in acknowledgment of the payment of $4.50 and $1.25 respectively, lawful monies of the United States, which entries were known by the said First Lieutenant Elliott R. Ashford to be untrue, in that he, the said First Lieutenant Elliott R. Ashford, did, in fact, receive each of the said payments.

Specification 6: In that First Lieutenant Elliott R. Ashford, 6003 Area Service Unit, then an Assistant Club Officer, Presidio Officers' Club, Presidio of San Francisco, California, did, at Presidio of San Francisco, California, on or about 15 May 1950, with the intent to deceive, falsely sign the fictitious names, "E.J. Miller, 1st Lt." and "E.J. Miller, 1st Lt." on a Presidio Officers' Club Machine Shortage Sheet, dated 15 May 1950, in acknowledgment of the payment of $5.75 and $6.00, respectively, lawful monies of the United States, which entry was known by the said First Lieutenant Elliott R. Ashford to be untrue, in that he, the said First Lieutenant Elliott R. Ashford, did, in fact, receive each of the said payments.

Specification 7: In that First Lieutenant Elliott R. Ashford, 6003 Area Service Unit, then an Assistant Club Officer, Presidio Officers' Club, Presidio of San Francisco, California, did, at Presidio of San Francisco, California, on or about 20 May 1950, with the intent to deceive, falsely sign the fictitious name "E.J. Miller," on a Presidio Officers' Club Machine Shortage Sheet, dated 20 May 1950,

in acknowledgment of the payment of $50.00, lawful monies of the United States, which entry was known by the said First Lieutenant Elliott R. Ashford to be untrue in that he, the said First Lieutenant Elliott R. Ashford, did, in fact, receive the said payment.

Specification 8: In that First Lieutenant Elliott R. Ashford, 6003 Area Service Unit, then an Assistant Club Officer, Presidio Officers' Club, Presidio of San Francisco, California, did, at Presidio of San Francisco, California, on or about 21 May 1950, with the intent to deceive, falsely sign the fictitious name, "E. J. Miller" on a Presidio Officers' Club Machine Shortage Sheet, dated 21 May 1950, in acknowledgment of the payment of $11.50, lawful monies of the United States, which entry was known by the said First Lieutenant Elliott R. Ashford to be untrue, in that he, the said First Lieutenant Elliott R. Ashford, did, in fact, receive the said payment.

Specification 9: In that First Lieutenant Elliott R. Ashford, 6003 Area Service Unit, then an Assistant Club Officer, Presidio Officers' Club, Presidio of San Francisco, California, did, at Presidio of San Francisco, California, on or about 9 June 1950, with the intent to deceive, falsely sign the fictitious names, "H. J. Kent" and "P.I. Hunt, Lt. Col." on a Presidio Officers' Club Machine Shortage Sheet, dated 9 June 1950, in acknowledgment of the payment of $50.00 and $50.00, respectively, lawful monies of the United States, which entries were known by the said First Lieutenant Elliott R. Ashford to be untrue in that he, the said First Lieutenant Elliott R. Ashford, did, in fact, receive each of the said payments.

ADDITIONAL CHARGE I: Violation of the 95th Article of War.

Specification 1: In that First Lieutenant Elliott R. Ashford, 6003 Area Service Unit, then an assistant club officer, Presidio Officers' Club, Presidio of San Francisco, California, did at Presidio of San Francisco, California, on or about 26 June 1950, with the intent to deceive, falsely sign the fictitious name "A. P. Lamb, Lt. Col." on a Presidio Officers' Club Machine Shortage Sheet dated 26 June 1950, in acknowledgment of the payment of $50.00, lawful monies of the United States, which entry was known by the said First Lieutenant Elliott R. Ashford to be false and untrue in that he, the said First Lieutenant Elliott R. Ashford, did, in fact, receive the said payment.

Specifications 2 and 3: (Findings of not Guilty)

Specification 4: In that First Lieutenant Elliott R. Ashford, 6003 Area Service Unit, then an assistant club officer, Presidio Officers' Club, Presidio of San Francisco, California, did at Presidio of San Francisco, California, on or about 13 June 1950, with the intent to deceive, falsely sign the fictitious name "J. C. Waters" on a

Presidio Officers' Club Machine Shortage Sheet dated 13 June 1950, in acknowledgment of the payment of $10.00, lawful monies of the United States, which entry was known by the said First Lieutenant Elliott R. Ashford to be false and untrue in that he, the said First Lieutenant Elliott R. Ashford, did, in fact, receive the said payment.

Specification 5: In that First Lieutenant Elliott R. Ashford, 6003 Area Service Unit, then an assistant club officer, Presidio Officers' Club, Presidio of San Francisco, California, did at Presidio of San Francisco, California, on or about 10 June 1950, with the intent to deceive, falsely sign the fictitious name "H.P. Kent" on a Presidio Officers' Club Machine Shortage Sheet dated 10 June 1950, in acknowledgment of the payment of $6.25, lawful monies of the United States, which entry was known by the said First Lieutenant Elliott R. Ashford to be false and untrue in that he, the said First Lieutenant Elliott R. Ashford, did, in fact, receive the said payment.

Specifications 6 thru 8: (Findings of not Guilty)

Specification 9: In that First Lieutenant Elliott R. Ashford, 6003 Area Service Unit, then an assistant club officer, Presidio Officers' Club, Presidio of San Francisco, California, did at Presidio of San Francisco, California, on or about 20 May 1950, with the intent to deceive, falsely sign the fictitious names "E.J. Miller", "E.J. Miller", "E.J. Miller", "E.J. Miller", "E.J. Miller", "E.J. Miller" and "E.J. Miller" on a Presidio Officers' Club Machine Shortage Sheet dated 20 May 1950, in acknowledgment of the payment of $5.75, $9.00, $8.00, $5.25, $5.50, $7.50 and $11.00, respectively, lawful monies of the United States, which entries were known by the said First Lieutenant Elliott R. Ashford to be untrue in that he, the said First Lieutenant Elliott R. Ashford, did, in fact, receive each of the said payments.

Specification 10: In that First Lieutenant Elliott R. Ashford, 6003 Area Service Unit, then an assistant club officer, Presidio Officers' Club, Presidio of San Francisco, California, did at Presidio of San Francisco, California, on or about 15 May 1950, with the intent to deceive, falsely sign the fictitious name "E.J. Miller" on a Presidio Officers' Club Machine Shortage Sheet dated 15 May 1950, in acknowledgment of the payment of $20.00, lawful monies of the United States, which entry was known by the said First Lieutenant Elliott R. Ashford to be false and untrue in that he, the said First Lieutenant Elliott R. Ashford, did, in fact, receive the said payment.

Specification 11: In that First Lieutenant Elliott R. Ashford, 6003 Area Service Unit, then an assistant club officer, Presidio Officers' Club, Presidio of San Francisco, California, did at Presidio of San Francisco, California, on or about 14 May 1950, with the intent to deceive, falsely sign the fictitious name "E.J. Miller" on a Presidio Officers' Club Machine Shortage Sheet dated 14 May 1950, in acknowledgment of the payment of $4.00, lawful monies of the United States, which entry was known by the said First Lieutenant Elliott R. Ashford to be false and untrue in that he, the said First Lieutenant Elliott R. Ashford, did, in fact, receive the said payment.

Specification 12: In that First Lieutenant Elliott R. Ashford, 6003 Area Service Unit, then an assistant club officer, Presidio Officers' Club, Presidio of San Francisco, California, did at Presidio of San Francisco, California, on or about 13 May 1950, with the intent to deceive, falsely sign the fictitious name "E.J. Miller" on a Presidio Officers' Club Machine Shortage Sheet dated 13 May 1950, in acknowledgment of the payment of $4.00, lawful monies of the United States, which entry was known by the said First Lieutenant Elliott R. Ashford to be false and untrue in that he, the said First Lieutenant Elliott R. Ashford, did, in fact, receive the said payment.

Specification 13: In that First Lieutenant Elliott R. Ashford, 6003 Area Service Unit, then an assistant club officer, Presidio Officers' Club, Presidio of San Francisco, California, did at Presidio of San Francisco, California, on or about 4 May 1950, with intent to deceive, falsely sign the fictitious names "M.S. Miller", "M.S. Miller", and "M.S. Miller" on a Presidio Officers' Club Machine Shortage Sheet dated 4 May 1950, in acknowledgment of the payment of $4.50, $3.50 and $6.00, respectively, lawful monies of the United States, which entries were known by the said First Lieutenant Elliott R. Ashford to be untrue in that he, the said First Lieutenant Elliott R. Ashford, did, in fact, receive each of the said payments.

Specification 14: In that First Lieutenant Elliott R. Ashford, 6003 Area Service Unit, then an assistant club officer, Presidio Officers' Club, Presidio of San Francisco, California, did at Presidio of San Francisco, California, on or about 30 April 1950, with the intent to deceive, falsely sign the fictitious names "J.M. Miller", "J.M. Miller" and "J.M. Miller" on a Presidio Officers' Club Machine Shortage Sheet dated 30 April 1950, in acknowledgment of the payment of $4.50, $3.50, and $4.50, respectively, lawful monies of the United States, which entries were known by the said First Lieutenant Elliott R. Ashford to be untrue in that he, the said First Lieutenant Elliott R. Ashford, did, in fact, receive each of the said payments.

Specifications 15 through 22: (Findings of not Guilty)

A Nolle Prosequi was entered by direction of the appointing authority to Specification 1, Charge I and to Specification 1, Charge III. The accused pleaded not guilty to all Specifications and Charges. He was found guilty of Specifications 2, 5, and 8 through 12, of Charge I, guilty of Specification 4 of Charge I, except the figures "$230.00", substituting therefor the figures "$113.00"; of the excepted words: Not Guilty; of the substituted words: Guilty, and guilty of Charge I. He was found guilty of Specification 1 of Charge II and Specification 3 of Charge II, except the figures "$230.00", substituting therefor the figures "$113.00"; of the excepted figures: Not Guilty, of the substituted figures: Guilty, and guilty of Charge II. He was found guilty of Specifications 2 and 5 through 9 of Charge III and guilty of Charge III. He was also found guilty of Specifications 1, 4, 5, and 9 through 14 of Additional Charge I and guilty of Additional Charge I. The accused was found not guilty of Specifications 3, 6 and 7 of Charge I, Specification 2 of Charge II, Specifications 3 and 4 of Charge III and Specifications 2, 3, 6, 7, 8, and 15 through 22 of Additional Charge I. 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. In General.

(1) For the Prosecution.

The accused, First Lieutenant Elliott R. Ashford, was a member of the 6003 Area Service Unit, Fort Ord, California, at the time he was tried by court-martial (Pros Ex 14; R 929). From about 16 June 1948 through about 30 June 1950, the accused was assigned to duty either as the club officer or the assistant club officer at the Officers' Club, Presidio of San Francisco, California (Pros Ex 11, 14; R 939).

The offenses alleged against the accused fall into two categories as to their origin: First, those connected with the shortage of money asserted to be part of the proceeds of "Monte Carlo Night", an entertainment held at the Officers' Club, 23 June 1950, which shortage gave rise to charges of stealing against the accused in violation of Articles of War 93 and 95; and, second, a number of offenses charged against the accused based upon false entries, forgeries, and the use of fictitious names in collecting jack pot payments and "machine shortages" in connection with the accused's playing of slot machines at the Presidio Officers' Club

which offenses are alleged to be in violation of Articles of War 93, 95 and 96.

The evidence relating to these offenses is digested only as to the Specifications and Charges in which there resulted findings of guilty by the court.

b. Specification 4, Charge I, and Specification 3, Charge II.

On the evening of 23 June 1950, the Officers' Club, Presidio of San Francisco, California, held a so-called "Monte Carlo Night." On this occasion, the ballroom and banquet rooms of the club were converted into a mock gambling hall, and some fourteen "games of chance" were operated for the entertainment of the members, if not as a source of profit and income for the club. The games included "blackjack", "roulette", "craps", "race horse" and "numbers" wheels, "chuckaluck" and "bingo".

Major John S. Muir was the club officer of the Presidio Officers' Club, but at the time of Monte Carlo Night he was sick in the hospital and absent from the club. It, therefore, became the duty of the accused, as assistant club officer, to assume the duties of the club officer in addition to his ordinary duties. It was necessary to supply a certain amount of change for use as working capital in operating the various games of chance. To do this, the Officers' Club cashed a check at the bank for $2,000 and issued this to the operators in amounts as needed. This money is also referred to as "stake" or "table money". Before the tables were opened for play, the operators had a meeting at which they received their instructions.

Major Arthur P. Brody was chairman, and Lieutenant John E. Gilroy was assistant chairman of the entertainment, and they presided at the briefing meeting. However, the instructions issued seemed to have covered primarily the operation of the features of the games without any specific instructions being issued as to the method of turning back the money from the various operators at the end of the evening. Several of the operators did not attend the instructional meeting at all, and at least one arrived late (Long, R 95; Hagarty, R 229; Herriot, R 324; Squire, R 339; Bradley, R 373-374).

The money originally drawn for "stake" money was contained in cloth canvas bags or sacks, and was issued in amounts ranging from $50.00 to $140.00. Each operator receiving this stake money signed his name as a "hand receipt", acknowledging the amount and denominations received (Pros Ex 1).

In general, at the conclusion of the evening each operator turned back his original amount plus any profit. Some sacks contained the name of the person returning the sack, either by a slip of paper on the inside

of the sack or by writing on the tag attached to the outside, and in some instances a return was made without any name or notation. In some instances the notation included the amount turned in, and in others this was entirely lacking. The testimony of the various operators may be summarized as follows:

Captain Tommy L. Long.

Captain Long arrived at the club around 6:00 or 6:30 in the evening (R 81). He did not attend the instructional meeting and no one gave him instructions as to the turn-in (R 95, 97). He drew his stake money in a white canvas bag with the tag attached marked "blackjack table" (R 87, 92). He signed a receipt for $50.00 (R 83; Pros Ex 1). His duty was to run one of the blackjack tables (R 82). At the end of the evening he had $101.00 which he counted and tabulated on the outside tag and made his turn-in to the accused (R 85) but, he stated, there were "no precise or written instructions"; "any operator at the end of the game would be expected to turn the money in" (R 96). Captain Long said he made a fast turn-in because there was a "devil of an argument going on" in the club office and he wanted to have "as little to do with it as possible" (R 98). He did not expect a receipt for his turn-in, but he was reasonably sure that his name was crossed off for the $50.00 stake money he had previously received (R 102; Pros Ex 1).

Captain Pedro Ramos.

Captain Ramos attended the preliminary meeting for instructions, which he thought was held by "Major Ivey and Lieutenant Gilroy and some professional gambler", (R 109). He did not receive instructions at that meeting about accounting or receipting for the turn-in of his money (R 109-110, 121). He drew $50.00 stake money from the accused, and signed for its receipt (R 110; Pros Ex 1). He then went to the blackjack table assigned to him, and verified that he had, in fact, received $50.00 (R 110-111). He was relieved twice during the evening by Captain Boardman without any accounting or a check of the table money as between them (R 111). At the end of the evening he and Captain Boardman counted their money and noted the total on the slip of paper as well as the denominations, and put the slip of paper in the bag (R 113-114). Captain Ramos then took it to the office of the accused. The accused did not actually take possession of the money; "he was busy at the time" (R 116). The office was "jammed with people", and the safe was standing open so that you could put the money in it (R 116). Captain Ramos put his own money in the safe, and saw others do the same (R 116-117). Asked if "some one could have taken it out and you might not have observed it", he answered, "I don't know" (R 117). He first said he turned in $79.00 (R 108). Later he stated that he was not positive of the amount of his turn-in, but felt sure it was as much as $70.00 (R 117-118). He saw the accused scratch his name off of the stake list (R 120; Pros Ex 1), but he got no receipt (R 121). He reiterated that at the preliminary meeting he received no instructions as to the turn-in of money (R 121).

Captain James J. Boyle.

Captain Boyle arrived at the club at about 7:00 p.m. He attended the briefing meeting conducted by Lieutenant Gilroy (R 144). He received instructions and was assigned to the operation of a blackjack table (R 144, 145). In accordance with his instructions, he reported to the club office and drew $50.00 table money from the accused (R 145) and signed a receipt for the money (Pros Ex 1). He did not stay at his table all evening; "we were rotated around several tables providing relief for the blackjack players" (R 147). He came back to the original table about three-quarters of an hour before closing (R 147). At closing time he counted the money at his table, wrote a "breakdown of the money" on a slip of paper, signed his name and put it in the canvas bag originally issued to him (R 147). Asked how much money he turned in, he stated, "I can't testify to the exact amount. I know it was over a hundred dollars" (R 147-148). He then took the sack of money to the club office and turned it in to the accused (R 148). On instructions of the accused, he then put his money sack in the safe (R 152). He stated the accused did not touch or handle the bag at all (R 152). While in the club office, at Lieutenant Hagarty's request, he helped count the money turned in by Lieutenant Gilroy (R 148, 151). He did not remember the exact amount of this count, but believed that the total for Lieutenant Gilroy's money came to "around a hundred seven dollars" (R 149). Later in his testimony he stated that Lieutenant Hagarty added it, but he didn't check his addition; the amount was "a hundred seventy something" (R 153, 154). Asked if he was certain, he replied, "No, it -- I would say it was a hundred seventy some odd dollars. I don't know whether it was a hundred seventy five or a hundred seventy one, but it was in the hundred seventy field" (R 154). After they finished the count of Lieutenant Gilroy's money, "Hagarty put it in the safe" (R 154). Captain Boyle knew from the conduct of the accused and various other persons in the club office that there had been a heated argument between the accused and Lieutenant Gilroy (R 160-161).

First Lieutenant John E. Gilroy.

Lieutenant Gilroy was co-chairman with Major Brody for Monte Carlo Night (R 165, 175). He stated that he conducted a briefing meeting for the purpose of giving instructions to the game operators (R 167). A professional gambler was present at the meeting and gave specific instructions as to the rules and mode of operation of various games (R 177-178). Because on a previous Monte Carlo Night the operators had been detained until about 4:30 a.m. in accounting for their money and making their turn-in, it had definitely been decided that the operators would not be required to make such accounting of money prior to the turn-in (R 181). He stated, "We decided rather than keep the operators there, why some one connected with the internal operation of the Club would roll the money the next day" (R 181). He thought he might have instructed the operators to put a slip in each money sack to show the amount of money they had drawn and the amount turned in (R 182), but he also stated, "I don't know if I instructed them

to sign it (the paper slip) or put some notation on there so that the Club Officer would know which table it was from" (R 183). Some of the officers who had promised to work as operators failed to show up so Lieutenant Gilroy filled in at one of the crap tables (R 168). He drew $140.00 from the accused (R 169). Major John Ivey and Warrant Officer Junior Grade Charles Rosa helped at his table and when he was relieved, probably two times, they operated the table (R 169). When the table closed, Lieutenant Gilroy put the money in the sack without counting it and took it to the club office (R 170). As he entered the club office he heard the accused make a remark which Lieutenant Gilroy testified was a "reflection on my ancestry" (R 170, 189). This remark of the accused was the aftermath of a quarrel which started between the accused and Lieutenant Gilroy over the closing of Gilroy's table (R 189). Gilroy refused to close his table until the player with the dice "finished shooting" (R 189). At the club office, Lieutenant Gilroy tried to hit the accused, but was "restrained" by other officers (R 190). The accused did nothing (R 190). Lieutenant Gilroy put the money sack down on a desk at which the accused was not sitting and then left the club office (R 190, 191). He thought Captain Boyle and Lieutenant Hagarty took his money sack (R 191). About 10 or 15 minutes later, the accused came to Lieutenant Gilroy at the bar and said he wanted to see him outside (R 193). Lieutenant Gilroy went out the back door with the accused and Gilroy testified "he made an apology to me for the incident and we agreed to forget the whole thing. It was all over with and we went back to the bar and had a drink" (R 193). Later the accused, Lieutenant Gilroy, and others went to a downtown restaurant and stayed until about 2:00 a.m. (R 193). Next morning about 8:00 or 8:30 o'clock Lieutenant Gilroy saw the accused at the club office and they had coffee together (R 194-195). The accused told him the "profit" total for the Monte Carlo Night (R 197). It was some figure with a "6 in there, and I'm sure of a 4 - $436 or $476", but he admitted it could have been "$346," or "even $643, for that matter" (R 198). The accused told Gilroy he had received only 13 money sacks and that he believed "that we were short one bag last night" (R 215). The accused also said, "Well, I'm not sure; you don't have to say anything to anyone about this, but I just thought we were one bag missing" (R 215). Lieutenant Gilroy stated that "Bill", a slot machine mechanic and one of the employees of the Krause brothers, was present but did not enter into his conversation with the accused (R 216).

First Lieutenant John J. Hagarty.

Lieutenant Hagarty was first assigned duty at the Presidio Officers' Club as Mess Officer about January 1949 and, about October 1949, he was made Assistant Club Officer (R 226). He was not officially on duty on Monte Carlo Night, 23 June 1950, but he attended and helped in an unofficial capacity (R 227-229). He did not get to the Club until around 8 o'clock (R 229). He was in the club office when the accused was accepting the turn-in of money by the officers operating the various Monte Carlo games (R 230). He counted one "bag of money" (R 230).

"Lt. Gilroy brought his money into the office and dropped it on the table" (R 231). Lieutenant Gilroy was engaged in an argument with the accused and the witness suggested to Captain Boyle that they count Lieutenant Gilroy's money (R 231). Their count showed that Lieutenant Gilroy's sack contained $172.00 (R 231). Later, the witness was asked, "Who, if anyone, asked you to count the money that Gilroy had brought in?", and he replied, "Well, I don't know whether he -- whether I was asked to count it or whether I just said, 'Let's count your money, Gilroy'" (R 236). On cross examination, Lieutenant Hagarty said he told Lieutenant Gilroy, "You better count your money", whereupon Gilroy replied, "I have no intention of counting it" (R 242). Lieutenant Hagarty said, "-- he /Gilroy/ dropped it on the desk ---- then he went for Lt. Ashford" (R 236). After Gilroy left, he and Captain Boyle counted Lieutenant Gilroy's money (R 237). Lieutenant Hagarty said, "I must have had a total and it sticks in my memory" (R 238). It took "probably five -- ten minutes" to count the money (R 238). Lieutenant Hagarty personally "just dropped it in the safe where the rest of the bags were" (R 239). Asked if he put a slip in the sack showing the amount of his and Captain Boyle's count, he stated "I would just have to suppose that I did"; "Q. But you don't remember that?", "A. No, sir" (R 239). Afterwards, "a matter of probably five minutes", "We were all talking at the bar when Lt. Ashford came" (R 240). In the witness' opinion, Lieutenant Gilroy was not drunk, he was "just angry" (R 240). Lieutenant Hagarty told the accused "that Gilroy's money was in the safe" (R 241). Later the entire party left the bar and went down to the "Marina", a downtown restaurant (R 241). On the next morning, 24 June 1950, Lieutenant Hagarty saw the accused at the Club about 11 o'clock (R 242). Asked what the "take or profit" from Monte Carlo Night amounted to, the accused replied, "I think $370" (R 243). Lieutenant Hagarty did not know "whether any expenses had to come out" of this figure (R 244).

Chief Warrant Officer Edward M. Golladay.

Chief Warrant Officer Golladay went to the Officers' Club about 6 o'clock to get his instructions for Monte Carlo Night (R 260). "They" gave him his duties although he could not remember who instructed him. It "could have been Lt. Gilroy" (R 260). He drew $50 from accused, signed for the money (Pros Ex 1), and ran a blackjack game (R 260). He was relieved after about two hours of operation and did not return until shortly before closing time (R 262). After closing, he counted the money at his table and found he had "approximately $40" (R 262). He put it in his money sack and "set it on the desk in the office of the Officers' Club" (R 262). There was no count of his money as between Golladay and the officer who relieved him (R 264). He did not actually count his money but recalled he had "$20.00, $10.00 and some change" (R 266). When he went in the Club Office "there was an argument in the room" (R 266). He believed it was between the accused and Lieutenant Hagarty (R 267). Asked to whom he delivered his money turn-in, he said, "I set it on the table, I think,

in front of Lt. Ashford" (R 266). When the witness left, it was "still on the desk" (R 267). He made no written notation of the amount (R 266). He got his name "crossed off" before he left (R 267).

Captain Preston P. Parsons.

Captain Parsons received his instructions for the operation of a blackjack game from Lieutenant Gilroy (R 271). He drew $50 from the accused and went to his table in the Anza room (R 272). He stayed there all evening, but relieved an operator at another table for a few minutes (R 272). At closing he had "approximately $110.00" (R 272); he remembered it was "over $100" and "under $120" (R 273). Some one told him to put the silver in rolls for his turn-in although he could not remember who it was (R 274). He put the total on a slip of paper and to his "best recollection" signed it and put it in the bag (R 276). Somebody gave him instructions of how to turn in "while the game was going on" (R 277). He believed the accused put the money bag in the office safe (R 278, 279).

Major John C. Ivey.

Major Ivey arrived at the Officers' Club the evening of 23 June 1950 about 1900 hours (R 281). He attended the briefing meeting which, as he recalled, was conducted by the accused, Lieutenant Hagarty and Major Brody (R 281). He drew $140 "from the club office" to operate the crap table to which he was assigned (R 282, 283). At the close of the play he counted the money at his table, put it in a canvas bag, put a slip in the bag with the amount of money written on it, and turned it in at the club office (R 284-285). He put his money bag "on the desk, at which accused was sitting to the best of his recollection" (R 285). Major Ivey stayed at his assigned table only about two hours (R 288). Four officers, including Ivey, worked at his table during the time he was there (R 288). After he left his own table, Major Ivey "took over" Lieutenant Gilroy's table which "had gone broke and had to get additional funds at that time" (R 289). Major Ivey was given $100 additional money to operate Lieutenant Gilroy's table, for which he did not sign a receipt (R 289). Major Ivey stayed at Lieutenant Gilroy's table "between three and four hours" and only returned to his own table at closing time (R 290). He did not count, or assist in counting the money at the Gilroy table at the close of play (R 290). He got the money from his own table from Captain Heriot, counted it, and turned it in (R 291). Major Ivey did not remember how he got his turn-in instructions (R 292). He knew the amount of his turn-in only from seeing a "certificate" which he was required to make " a little less than a month" after Monte Carlo Night and which he had again seen "yesterday" (R 292). He thought his total turn-in was "a little over $200" (R 285, 295). But he said it could have been different and "I didn't remember it exactly" (R 295). He did not remember to whom he had turned in the money other than to "some Club Officer in the Club Office" (R 295). In his "certificate" Major Ivey reported having received $150 stake money for his own table, which seems an error since he receipted for $140.00 (R 294; Pros Ex 1).

Captain Julian C. Heriot.

When Captain Heriot arrived at the Officers' Club, on the evening of 23 June 1950, Major Brody assigned him to the Chuck-a-luck table (R 324). The only instructions he received were as to drawing change for use as table money (R 324). He drew $50 from the accused and signed his name receipting for it (R 324-325; Pros Ex 1). Captain Heriot took the money to the Chuck-a-luck table, counted it, and turned it over to Warrant Officer Thomas, who was assisting at the same table (R 325). He did not operate the table but turned it over to Warrant Officer Thomas (R 325, 326). He left the money and never had anything more to do with it (R 326). Asked if his name was "ever removed from a list or credited with $50," he replied, "To my knowledge, no" (R 326).

Warrant Officer Junior Grade Francis J. Thomas.

On Monte Carlo Night, in June 1950, Warrant Officer Thomas attended the meeting at the Officers' Club and "received instructions with the group as a whole as to how things would be carried on that night" (R 328). He took possession of the table money Captain Heriot had drawn and operated the Chuck-a-luck table all evening (R 329). When the table closed, he counted the money, put the silver in paper containers, and put it all in the money bag (R 329-330). He had not been instructed what to do with the money (R 331). So, he went to Captain Heriot to find out what to do (R 329, 331). After talking to Heriot, he took the bag of money to the club office and handed it to the accused (R 329). The bag had a slip with the denominations of coins and totals originally drawn by Captain Heriot and he used this to note the total of his turn-in (R 332-335). The slip had no person's name on it (R 335). He turned in "$70.00 and some odd cents" (R 330). He saw Lieutenant Ashford mark "Capt. Heriot's name off the list of names he had there" (R 329). He did not receive a receipt for the money (R 336).

Captain Max E. Squire.

Captain Squire was requested by Lieutenant Gilroy to run the Bingo game for Monte Carlo Night, 23 June 1950 (R 338). He drew $50 from the accused (R 339). At the end of the evening, Captain Squire hunted out the accused to turn in his money (R 341). Lieutenant Ashford asked Captain Squire to write on a slip of paper the amount of money he had and put it in the bag (R 341). This Captain Squire did, as requested, and then gave the accused the money bag (R 341). He had not received any other instructions as to the turn-in, but he said "I had done it that way at the previous Monte Carlo Night" (R 345). The reference was to the "January" or "early 1950 Monte Carlo Night" (R 346). Captain Squire seemed uncertain about the bingo "gross profit" (R 350). He stated it "was pretty small" and when asked, "Fifteen or sixteen Dollars?", he answered, "Yes, sir" (R 350). The last Monte Carlo Night had "smaller play all around" and smaller profits than the one in January (R 351).

Captain George A. Berlin.

By stipulation, the Prosecution, the Defense and the accused agreed that the deposition of Captain Berlin could be taken without regard to notice or other formalities (R 122; Pros Ex 2). The deposition was admitted into evidence without objection (R 122, 123; Pros Ex 3). Captain Berlin was the operator of the "numbers wheel" at the June 1950 Monte Carlo Night at Presidio Officers' Club (Pros Ex 3, p. 4). He was "oriented" by Lieutenant Gilroy but he received no instructions at that time, about turning in his money (Pros Ex 3, pp. 4, 18). He drew $50 from the accused and turned in about $110 or perhaps $111.35 (Pros Ex. 3, pp. 5, 6, 7). Captain Berlin remembered the amount "only from my memory" (Pros Ex 3, p. 7). He and a Lieutenant Hickman counted the money together and the total was based on the assumption that each had accurately counted his portion (Pros Ex 3, p. 7). Lieutenant Hickman was assigned and also operated the "numbers wheel" with Captain Berlin (Pros Ex 3, p. 5). At Lieutenant Ashford's suggestion, he wrote the total count on a slip of paper and put it in the money bag and gave the "whole bag" to the accused (Pros Ex 3, pp. 8-9). Captain Berlin testified that Major Brody stated to a group of officers that "the system of turning the money in was haphazard", but "Major Brody definitely stated that there wasn't any policy set" for the turn-in of the operators' money (Pros Ex 3, p. 23). Asked if either Major Brody or Lieutenant Gilroy set any policy for turn-ins in the preliminary instructions given the operators, Captain Berlin said, "They absolutely did not" (Pros Ex 3, p. 24). He did not remember anything about the denomination of the coins or what his total was; he only remembered the combined total of Lieutenant Hickman's count and his own count (Pros Ex 3, pp. 36-37). Both he and Hickman had "about two glasses of beer" (Pros Ex 3, p. 37).

First Lieutenant Maynard E. Hickman.

Lieutenant Hickman verified that he helped Captain Berlin operate the "Giant Wheel of Fortune" at Monte Carlo Night, 23 June 1950 (R 128-129). He received no instructions as to the operation (R 129). He saw Captain Berlin turn in the money to the accused (R 131). Captain Berlin "set it on the desk" to Lieutenant Ashford's right (R 131). The turn-in bag had a paper in it with the total amount of money (R 130, 131). Lieutenant Ashford made out this piece of paper (R 132). But Lieutenant Ashford did not then count the money (R 134). People were "milling around" and "other people entered and left" (R 136). He noticed the safe was open (R 135).

First Lieutenant Mac P. Kesler.

Lieutenant Kesler's depositions were received in evidence. He was assigned to operate the roulette wheel on Monte Carlo Night, 23 June 1950 (Pros Ex 4). He drew $100 from the accused at the club office to use for

table money (Pros Ex 4, pp. 2,3). At the end of the evening, he turned in $166 to Lieutenant Ashford (Pros Ex 4, p. 5). He was asked "From whom, if anyone, did you receive instructions in respect to the manner of turning in and accounting at the conclusion of the evening for money taken in from the operation of the roulette wheel?" His answer was, "No one, but at the close of the evening's participation I counted the money on hand, placed it in a cloth bag and took it to Major Brodie [Brody], and informed him of the amount contained in the bag and he wrote the amount down on a piece of paper and instructed that I take it [the bag] to the club officer's office." The "it" evidently refers to the bag because Lieutenant Kesler later stated no written accounting was made (Pros Ex 4-A, p. 2). The roulette table was operated by a "civilian professional operator" but Lieutenant Kesler did not know the professional's name (Pros Ex 4, p. 3; Pros Ex 4-A, p. 4).

Captain Edward J. Boardman.

Captain Boardman ran one of the "wheels of fortune" on Monte Carlo Night, 23 June 1950 (R 299). He drew $50 from the accused and signed a receipt (R 299; Pros Ex 1). At the end of the evening he counted the money at his table and "it was approximately $80" (R 301). He turned in his money sack to the accused at the club office (R 301). He stated, "there was a crowd in there *** when I turned it in, I don't remember whether I laid it on the desk, but he took it - but the discussion was, 'Just leave your bag there and we'll count it in the morning or count it later'" (R 301). On cross-examination, Captain Boardman stated Captain Morrissey assisted and took over operation of the wheel on two occasions when Boardman left his own table to act as a relief at the blackjack tables (R 303-304). Captain Boardman said that because he was a Finance Officer he used the Finance style to count his table money - that is, he showed his count by denominations and totals to the right (R 309). He left his money sack "on the desk" in the club office (R 311). He did not remember whether Lieutenant Ashford actually took possession of the money (R 311). He did not get a receipt, nor did he expect one (R 312).

Captain Richard J. Bradley.

Captain Bradley was supposed to operate a blackjack table but he arrived at the Presidio Officers' Club late and the only assignment open was the crap table (R 373). He drew $140 from the accused (R 374). At the close of the evening he counted $215 and turned in his money sack to the accused (R 375). This amount did not include the money Major Brody "borrowed" from the table (R 375). Captain Bradley was not sure what instructions he got as to the turn-in or who gave him the instructions (R 378). He wrote the total on the tag attached to his money sack (R 379). He saw Lieutenant Ashford put the sack in the office safe (R 376, 380).

First Lieutenant Zane V. Kortum.

Lieutenant Kortum testified by deposition. He operated a blackjack

game on Monte Carlo Night on or about 20 June 1950 (Pros Ex 5, p. 2). He drew $50 from the accused at the Officers' Club office and signed a hand receipt (Pros Ex 5, p. 3). At about 2245 hours he closed his table and counted his money. He had between $70 and $75 (Pros Ex 5, p. 5). He testified that he turned in the entire amount to Major Brody, the committeeman (Pros Ex 5, p. 5). This statement Major Brody denied (R 360). Lieutenant Kortum was not given any instructions as to the manner of turn-in (Pros Ex 5-A, p. 2).

Major Arthur P. Brody.

Major Brody was committee chairman for the Officers' Club on Monte Carlo Night, 23 June 1950 (R 356). He did not recall Lieutenant Kortum giving him any money to turn in (R 360). Major Brody remembered getting $50 from Captain Bradley's station for which he gave no receipt (R 359, 364). On cross-examination Major Brody testified:

"Q. Could the amount of money which you took from Bradley's table to supply Lieutenant Gilroy's table have been a hundred dollars?

"A. If I only took the money once, I distinctly remember taking $50 from Bradley.

"Q. But it is possible that you took another amount of money a second time?

"A. It is possible.

"Q. Or more times?

"A. No, twice would be the maximum, sir. I'm certain of that. ***" (R 363-364).

Major Brody stated that he did not have any set "S.O.P" or pattern of instructions for operators to follow in making a turn-in of their money on closing (R 369). He did not instruct them to roll or package silver coins (R 369). Lieutenant Kortum's table was the first one closed. Major Brody did not note what disposition was made of the money he had at that time (R 370). Again he stated, "I don't remember [Lieutenant Kortum] giving me any money" (R 371).

SUMMARY

A summary of the significant parts of the foregoing testimony of the operators appears upon the two tables which follow:

Table 1

SUMMARY OF MONTE CARLO NIGHT TURN-IN

TYPE OF GAME	STAKE Pros Ex 1	TURN-IN (Direct Exam)	TURN-IN (Cross Exam)	OFFICERS
1. Blackjack	$50.00 (R-260)	$ 40.00 (R-262)	$ 30.00 (R-269)	CWO Golladay
2. Blackjack	50.00 (R-145)	100.00 (R-148)	100.00 (R-224-5)	Boyle
3. Blackjack	50.00 (R-106)	79.00 (R-108)	70.00 (R-123-4)	Ramos
4. Blackjack	50.00 (Pros Ex 5,p.3)	*75.00 (Pros Ex 5, p.5)	00.00 (R-374,360)	Kortum (R-354) (See Note 1, below)
5. Blackjack	50.00 (R-271)	110.00 (R-272)	100.00 (R-279)	Parsons
6. Blackjack	50.00 (R-85)	101.00 (R-85)	101.00 (R-85)	Long
7. Crap Table	140.00 (R-374)	215.00 (R-375)	215.00 (R-384)	Bradley
8. Crap Table	140.00 (R-283)	204.00 (R-285)	194.00 (R-297)	Ivey (R-279)
9. Crap Table	140.00 (R-169)	172.00 (R-231)	either 170.00 (R-258) or 107.00 (R-149)	Gilroy (R-169); Hagarty (R-231)
10. Roulette	100.00 (Pros Ex 4,p.3)	166.00 (Pros Ex 4a,p.5)	166.00 (R-355)	Kesler
11. Wheel (Race Horse)	50.00 (Pros Ex 3,p.5)	111.00 (Pros Ex 3, p.6)	110.00 (R-142)	Berlin
12. Wheel (Numbers)	50.00 (R-299)	80.00 (R-301)	80.00 (R-322)	Boardman
13. Chuck-a-Luck	50.00 (R-324)	70.00 (R-330)	70.00 (R-337)	Heriot (R-324); Thomas (R-330).
14. Bingo	50.00 (R-339)	66.00 (R-353)	65.00 (R-353)	Squire
TOTALS	$1,020.00	$1,589.00	$1,471.00	
Less Stake		1,020.00	1,020.00 (Pros Ex 1)	
Gross Profit Reported by Operators		$ 569.00	$ 451.00	
Gross Profit Reported by Accused		337.40	337.40 (Pros Ex 6 (R-457); entry of Acct 105, "Entertainment", on Daily Cash & Sales Report for 23 June 1950, signed by Accused.)	
Discrepancy		# $ 231.60	either # $ 113.60 or 50.60 (R-149,258)	

*NOTE 1: Lieutenant Kortum testified he turned over bag with $70.00 to $75.00 to Major Brody (Pros Ex 5, p. 5); Major Brody testified he did not recall receiving any money from Lt. Kortum or turning in any money to Lt. Ashford (R-360).

#NOTE 2: Specification charged larceny of $230.00; Court found accused guilty of larceny of $113.00 only.

TABLE 2

OPERATOR	MANNER OF TURN-IN	WHO HANDLED MONEY SACK?	MARKINGS, LABELS, TAGS, ETC.
Golladay	Left sack on office desk (R 266).	Doesn't remember to whom he delivered money sack (R 267).	Made no count; no markings, but he got his name crossed off (R 267).
Boyle	Handled it himself (R 152).	Put it in the safe. Accused did not touch sack (R 152)	Slip with name and amount (R 147).
Ramos	Gave it to the accused (R 108).	Put it in the safe. Accused did not handle it (R 116).	Slip inside with name and amount (R 111, 114).
Kortum	Turned it in to Major Brody (Pros Ex 5, p. 4).	Major Brody denies receiving Kortum's money (R 360).	None
Parsons	Gave it to the accused (R 272).	Accused put it in the safe (R 278-279).	Slip with amount and name (R 276).
Long	Gave it to the accused (R 93).	Could not recall (R 93, 94).	Slip with amount and name (R 92-93).
Bradley	Gave it to the accused (R 375)	Accused put it in safe (R 376,380).	Put amount on tag on outside (R 379).
Ivey	Put it on the desk (R 285).	Put it on the desk in the club office (R 285).	Slip inside with amount only (R 284-285).
Gilroy	Put sack on desk (R 170).	Hagarty and Boyle counted money and dropped sack in safe (R 231).	None
Hagarty	Counted for Gilroy (R 237)	Hagarty put sack in safe (R 231)	Didn't remember (R 237,239)
Kesler	Major Brody told him to take it to club office (Pros Ex.4,p.5;Pros Ex4A,p.2)	Gave it to accused. Didn't notice disposition (Pros Ex 4A, p. 3).	None (Pros Ex 4A, p. 3,5).
Berlin	Gave it to accused (Pros Ex 3, p. 8)	Didn't indicate disposition by accused	Put slip inside with amount, and name (Pros Ex 3,p.21,22).
Boardman	Turned it in to the club office (R 309-311)	Left it on desk (R 311).	Slip with amount and tab (R 308, 309).
Heriot	Drew $50 originally but made no turn-in (R 323-326).	Made no turn-in (R 323-326).	None.
Thomas	Turned in for Capt. Heriot to accused (R 329).	Left it on desk of accused (R 336)	Made slip with name and amount but did not give it to accused (R 325).
Squire	Turned in to accused (R 341).	Accused took it to club office (R 341).	Slip in the bag (R 341).

Summarized in a different manner, the operators' evidence may be stated as follows:

Six operators stated they left their money sacks on the desk of the club officer: Golladay (R 267); Gilroy (R 190); Berlin (R 131); Boardman (R 311); Ivey (R 285) and Thomas (R 336).

Three operators testified that they put their money bags in the safe: Hagarty (R 239, 241); Boyle (R 152) and Ramos (R 116, 117).

Two operators testified the accused put their bags in the safe: Parsons (R 278, 279) and Bradley (R 376, 380).

Kortum turned in his money to Major Brody (Pros Ex 5, p. 5). This is flatly denied by Brody (R 360).

Gilroy abandoned his sack, which was counted by Hagarty and Boyle (R 170, 231).

Heriot drew $50 from the accused but made no turn-in.

Six operators didn't know, or failed to state, the final disposition of their turn-in: Kesler (Pros Ex 4A, p. 3); Berlin (Pros Ex 3, p. 8); Squire (R 149); Long (R 93, 94); Brody, as to Kortum's money (R 360) and Golladay (R 267).

(2) For the Defense.

After being advised of his rights as a witness, the accused elected to testify under oath. He stated that at the close of the evening's play, as the money bags were turned in by the various operators, he checked off their names on his list (R 972). At any rate, his list as introduced at the trial shows all names scratched off with a notation "OK" and the accused's initials "ERA" as to each operator (Pros Ex 1; R 972). The accused made no count at the time of the turn-in, and placed in the safe all money sacks without any check of their contents (R 972). He stated that there was confusion in the office because of his quarrel with Lieutenant Gilroy and the general milling around of persons in the office, and that he checked all 14 operators off of his table money list because he assumed "all bags had been turned in" (R 996). On the following morning the accused had an appointment to meet "Bill Van" (Robert W. Van Scoyt) for the purpose of returning the extra slot machines obtained for Monte Carlo Night and to make a count of the slot machine money (R 982, 983). After the slot machines had been disposed of, he opened the safe and took out all the money, but found only 13 bags instead of the 14 supposed to be there (R 986). Bill Van then sat down at the table and helped him count the money from these bags (R 985). The total money counted by the accused and Bill Van, less the money issued as table money, showed a gross

profit of $337.40 (R 946). The amount of $337.40 was the full amount of the money turned in over that issued the operators (R 993, 995). He turned in this figure as the net proceeds of Monte Carlo Night and had it entered in the Daily Cash and Sales Report of 23 June 1950 under Account 105 "Entertainment" in the amount of $337.40 (R 993; Pros Ex 6). Accused told Lieutenant Gilroy, who was co-chairman of the Committee, that he thought one bag was missing in the safe (R 1000). He did not mention the missing bag when he visited Major Muir, Club Officer, at the hospital (R 995). The accused stated he personally closed the office safe about 12:30 o'clock or a little later (R 976). The next morning the accused opened the safe with Bill Van present and removed the bags for counting (R 985). Both the accused and Bill Van counted and rolled loose silver (R 986). There were only 13 sacks (R 986). Some bags showed no accounting slips or other notation. As the accused stated, "In some of the sacks there were slips with names on them and the amounts on them, and some sacks, there were no slips and some sacks, there were slips with just the amount and no name" (R 986). The accused stated that the count of the money in those sacks containing slips checked closely with the amount shown on the slip (R 987). He ran his and Bill Van's totals on an adding machine. The two checked the tape slip and from these figures he arrived at the $337.40 gross profit he reported (R 988, 990). The stake money and the "gross profit" was not physically divided, but all of the money was put back into the safe and no separation was made until the money was taken for deposit to the bank on Monday morning (R 990, 991). He either left the slips or tags on the desk or threw them in the waste basket (R 1115). Testifying about his search for the missing money bag, the 14th sack, he said:

"Q. Did you ever find the fourteenth sack?

"A. No sir, I did not.

"Q. Did you make a report of that matter to anyone?

"A. Well, after I -- we had counted the money and had reached the total, I made a figure of -- well, I subtracted the amount that I had issued out, from the amount it -- the total amount that I had arrived at, which gave me the gross profit for the night of Monte Carlo. I made that listing on a piece of paper or a calendar pad which was on my desk so I would know how much to give Mrs. Skewes (one of the secretaries of the Club) (R 243) when she came in that morning ***" (R 990).

***** ***** *****

"Q. Did you make a report to him (Major Muir) about the missing money bag?

"A. I did not, sir.

"Q. Why didn't you?

"A. Due to the fact, sir, that I was not certain that a sack was not turned in, and I had no proof that a sack wasn't turned in, and under the circumstances of the night before sir -- I mean, I just hate to say -- take fourteen officers and say one of your officers is crooked. I had no way to prove, due to the fact that these bags did not contain some names. They did not contain slips, so how was I to prove or how could I - how was I going to prove, sir, who had not turned the slip or bag or money in" (R 995).

*** *** ***

"Q. When they (the sacks) were turned in the night before, did you check them off as they were turned in?

"A. I started checking them off, yes sir, but in the confusion and everything, sir, after I had assumed all the bags was turned in, I went down the receipt column, assuming that they had been turned in, and scratched them off, sir" (R 996).

In the last answer, the "confusion" mentioned by the accused refers to the difficulty he had with Lieutenant Gilroy (R 966-968), which is also referred to in the testimony of other witnesses: Ramos (R 118, 119), Boyle (R 156), Gilroy (R 170, 189, 190), and Golladay (R 266, 267). Because Gilroy wanted to fight and would have struck the accused but for other officers holding Gilroy back, the accused stated he thought it necessary to call the Officer of the Day (R 968). Later the accused apologized to Lieutenant Gilroy and they patched up their difficulty by having a drink at the bar and later going to the restaurant for a midnight snack (R 977, 979).

Major Muir, Club Officer for Presidio Officers' Club, was sick in the hospital on the night of 23 June 1950 and for some weeks thereafter (R 621, 850). The accused reported to Major Muir that Monte Carlo Night had resulted in some profit, but Major Muir could not "recall the exact amount" (R 852). He thought the accused reported "slightly over $300" (R 854).

c. Specification 2, Charge I, and Specification 1, Charge II.

Sergeant Francis V. Erickson was a bartender at the Presidio Officers' Club. His duties included not only serving drinks behind the bar, but also paying for jackpots or shortages on the slot machines (R 465). If a person "hit a jackpot" he notified the bartender and turned in the token which came out of the machine. Some of the machines did not pay off in tokens, in which case the bartender ordinarily looked at the machine, noted the fact that the pay-off was due, and paid the person involved the amount he was entitled to receive (R 465). The payee was required to sign the

shortage sheet in acknowledgment of payment and the bartenders then "initialed the shortage sheet when we paid him off" (R 465). The purpose of the shortage sheet was to account for amounts paid out of cash; therefore, the shortage sheet operated as a voucher (R 466). In other words, Sergeant Erickson had to have either the cash in his till or a shortage sheet bearing the signatures of the persons who had received payment, otherwise, he would be personally responsible for the amount of any money shortage (R 466). Sergeant Erickson's shortage sheet for 13 June 1950 (Pros Ex 15) shows on the last handwritten line: "M. J. Hos 05 -- 17 -- FVE -- 35.00". Sergeant Erickson further testified that no part of this line is in his handwriting (R 467) and that he did not give anyone permission to put his (Sergeant Erickson's) initials on the slot machine shortage sheet (R 480).

A handwriting expert, Doctor Paul L. Kirk (R 623-624), testified that he had examined the last line of handwriting on Prosecution Exhibit 15 (R 625) and that the figures and initials when compared with other exemplars (Pros Ex 62 to 69, 70-A to 70-E, both inclusive), known to be in the handwriting of the accused, were in his opinion, the handwriting of the same person (Pros Ex 15, 74, 76, 77; R. 625, 630, 634-636, 640, 649-652). He concluded, upon examination of the "J's" (R 634), "M's" and "J's" (R 636), and "H's" (R 640) and noting similarities of slant and direction, that the suspected handwriting had been written by the same writer as the Ashford exemplars (R 640). The accused testified that "I put Erickson's initials down myself, sir, and the amount of $35.00" (R 1017). He admitted that he took $35.00 out of the box and gave it to "M. J. Hos", but he did not remember how "Hos" was dressed, whether he was a civilian; nor did he know "Hos" by "face" or "name" (R 1017-1018). He was asked, "What was the point in this instance of putting Sergeant Erickson's initials?" His explanation was, "Due to the fact that it came out of his money box. It was his sheet" (R 1159). Sergeant Erickson was asked, "What relationship, if any, does the machine shortage sheet have to your cash?", and he answered, "Well, it's the same as cash on hand, sir" (R 466). The accused stated that "there was a rule in effect that if a bartender checked over $2.00 short, he'd be making it up", and he affirmed that this result would follow "In spite of the fact that you [accused] had made one [a pay-out] on the pay-out sheet" (R 1159).

d. Specifications 5, 8, 9, 10, 11, 12, Charge I; Specifications 2, 5, 6, 7, 8, 9, Charge III; and Specifications 1, 4, 5, 9, 10, 11, 12, 13, 14, Additional Charge I.

The specifications referred to in this section involve allegations that the accused falsely signed, with intent to deceive, certain fictitious names on Presidio Officers' Club machine shortage sheets for specified dates in acknowledgment of payments of money which he, in fact, had received. The accused was charged with and found guilty of six such offenses in violation of Article of War 95 (Charge I) and also in violation of Article

of War 96 (Charge III). Additionally, he was charged with and found guilty of nine other offenses of the same character in violation of Article of War 95 (Additional Charge I).

Initially, a general description of the procedure relating to the use of machine shortage sheets in the management of the Presidio Officers' Club will be helpful. There were about 20 slot machines regularly in operation in the bar of the Club; in addition, four or five special machines were leased for special entertainments, such as Monte Carlo Night. Dirty or defective coins sometimes caused mechanical difficulties resulting in shortages of pay-offs. Some of the machines delivered tokens or chits to indicate the jackpot, while others did not. It was the duty of bartenders to cash the tokens when presented at the bar or take notice of shortages in pay-offs by the machines. The bartenders on duty, after verifying that the winner had not been paid the correct amount by the slot machine, paid the player in cash from his cash box and secured his signature on the machine shortage sheet, acknowledging payment. The bartender completed the entry on the machine shortage sheet by entering in the appropriate column the coin denomination, machine number, his initials, and the amount of the pay-off for stoppages or jackpots. At the end of the day the bartender turned in to the officer in charge his cash box together with the machine shortage sheet, which became a cash voucher for his pay-outs.

To facilitate consideration of the several specifications involving the signing of fictitious names with intent to deceive, there are tabulated below the number of the specification, date of offense, purported signature and amount of payment received:

CHARGE I (AW 95)	CHARGE III (AW 96)	Date of Offense	Name and Amount Involved
Spec. 5	Spec. 2	15 Feb. 1950	"C.E. Moss" ($50.00)
Spec. 8	Spec. 5	13 May 1950	"E.J. Miller Col. Inf." ($4.50; $1.25)
Spec. 9	Spec. 6	15 May 1950	"E.J. Miller, 1st Lt." ($5.75; $6.00)
Spec. 10	Spec. 7	20 May 1950	"E.J.Miller" ($50.00)
Spec. 11	Spec. 8	21 May 1950	"E.J. Miller" ($11.50)
Spec. 12	Spec. 9	9 June 1950	"H.J. Kent" and "P.I. Hunt, Lt. Col." ($50.00 each)

ADDITIONAL CHARGE I (AW 95)	Date of Offense	Name and Amount Involved
Spec. 1	26 June 1950	"A.P. Lamb, Lt. Col." ($50.00)
Spec. 4	13 June 1950	"J.C. Waters" ($10.00)
Spec. 5	10 June 1950	"H.P. Kent" ($6.25)
Spec. 9	20 May 1950	"E.J. Miller" ($5.75; $9.00; $8.00; $5.25; $5.50; $7.50; $11.00)
Spec. 10	15 May 1950	"E.J. Miller" ($20.00)
Spec. 11	14 May 1950	"E.J. Miller" ($4.00)
Spec. 12	13 May 1950	"E.J. Miller" ($4.00)
Spec. 13	4 May 1950	"M.S. Miller" ($4.50; $3.50; $6.00)
Spec. 14	30 April 1950	"J.M. Miller" ($4.50; $3.50; $4.50)

Dr. Paul L. Kirk was qualified as a handwriting expert and testified at length and in great detail concerning the comparison he made between known exemplars, admitted to be in accused's handwriting (Pros Ex 62 to 69, 70A to 70E, both inclusive), and the questioned signatures upon the machine shortage sheets. In his opinion the following signatures were written by the author of the Ashford exemplars:

"E.J. Miller" (Pros Ex 18, 18-A (see Ex 58), 21, 33 (see Ex 34), 43 (see 42), 59 (see Ex 58), 71, 74, 77; R 625, 626, 627, 628, 630, 631-633, 635, 639),

"M.S. Miller" (Pros Ex 19, 74, 77; R 626, 630, 631, 635, 639),

"J.M. Miller" (Pros Ex 20, 74, 77; R 626, 630, 631, 635, 639),

"C.E. Moss" (Pros Ex 29, 72, 77; R 627, 630, 634, 635, 642),

"H.J. Kent" (Pros Ex 17 (see Ex 26), 73, 74, 77; R 625, 630, 632, 637, 638, 639),

"P.I. Hunt" (Pros Ex 17 (see Ex 26), 73, 74, 77; R 625, 630, 632, 635, 638, 639),

"A.P. Lamb" (Pros Ex 35 (see Ex 36), 74, 77; R 627-628, 630, 635, 636, 639, 640),

"J.C. Waters" (Pros Ex 38-F, 74, 77; R 628, 630, 634, 637, 638, 639),

and "H.P. Kent" (Pros Ex 22 (see Ex 26), 73, 74, 77; R 626, 630, 631, 632, 635-636, 639).

In a pretrial statement accused admitted that he signed the names "E.J. Miller", "M.S. Miller", "J. M. Miller" and "H. P. Kent" on the shortage sheets for the dates shown therein and received the payments indicated (Pros Ex 70A to 70E). The same names, dates and amounts appeared on the machine shortage sheets introduced as Prosecution Exhibits 18, 18a, 19, 20 and 22 and were included in fifteen specifications (Specifications 8 through 11, Charge I; Specifications through 8, Charge III; and Specifications 5 and 9 through 14, Additional Charge I). In his testimony to the court, accused also admitted that he signed the names "E. J. Miller" (R 1036, 1040-1041, 1043, 1044-1046, 1073), "M.S. Miller" (R 1075-1077) and "J. M. Miller" (R 1079), but he "wouldn't deny or admit writing H. P. Kent" (R 1060). With reference to the signatures, "H. J. Kent" and "P.I. Hunt", appearing on the shortage sheet of 9 June 1950 as receipt for payments of $50.00 each (Pros Ex 17 (see Ex 26)) (see Specification 12, Charge I, and Specification 9, Charge III), accused, in his pretrial statement, said, "I am not admitting nor denying the fact that I did or did not sign the above names. I do not remember the occasion but if I did I must have been intoxicated at the time" (Pros Ex 70C) and, in court, testified, "That appears to be my writing" and "I would say, yes sir, they are [my signature]" (R 1165). As to the remaining signatures under consideration, accused testified that he did not sign the names "C. E. Moss" (R 1028) (see Pros Ex 29; Specification 5, Charge I, and Specification 2, Charge III), "A.P. Lamb" (R 1053) (see Pros Ex 35; Specification 1, Additional Charge I), and "J. C. Waters" (R 1058-1059) (see Pros Ex 38-F; Specification 4, Additional Charge I). However, relative to "C.E. Moss" and "A.P. Lamb, Lt. Colonel", he could not "connect the name with the face" (R 1028 , 1053). As to "J. C. Waters", he stated that the initials "P.D." in column 5 of the machine shortage sheet (Pros Ex 38-F) were those of a Filipino bartender (R 1059), but this bartender was not called as a witness by either side.

The accused signed some of the fictitious names in the presence of the bartender on duty who made payment to the accused and usually entered his own initials on the machine shortage sheet, viz; certain "E. J. Miller" signatures (Sergeant Womack, R 538D, 538E, 542, 559, Pros Ex 18, 18A, 21; Sergeant Lyders, R 501, Pros Ex 18); "M. S. Miller" (Sergeant Helbach, R 528-529, read by witness as "E.S. or E.J. Miller", Pros Ex 19, R 532); "J.M. Miller" (Sergeant Helbach, R 530-531; Pros Ex 20); "H. J. Kent" and "P. I. Hunt" (Sergeant Lyders, R 498-499, Pros Ex 17); and "H. P. Kent" (Sergeant Womack, R 540, Pros Ex 22).

c. Accused's general reputation.

Either upon direct examination or during cross-examination, the defense elicited testimony from several witnesses concerning accused's reputation for truth and honesty. Captain Berlin testified that accused's reputation in the military community, during the witness' two year period of acquaintance with the accused, was very good for honesty and integrity (Pros Ex 3, p. 29). Lieutenant Gilroy had known accused for about two years.

He testified that it was the consensus of many people in the community that accused was very honest and truthful (R 217) and that his "Character was above reproach" (R 218). Lieutenant Hagarty had known accused for a similar period and believed accused had a good reputation as a truthful and honest person (R 250). Based upon an acquaintance of six months, Captain Bradley testified that accused's general reputation for honesty and truthfulness was good (R 383). Arthur Krause, one of the owners of the slot machines placed in the Club, visited the Club almost daily to inspect and repair the machines during the two year period the accused was connected with the Club management (R 793, 794). In Mr. Krause's opinion the accused had a good reputation for honesty and truthfulness (R 819). Major Muir, who served as Club Officer during a thirteen month period that accused was assigned as his assistant, testified that "So far as I was concerned, he was /a/ thoroughly reliable and honest man"; and that accused's reputation for honesty and truthfulness was good (R 867, 868). Chaplain (Lieutenant Colonel) Brown, having known accused for over two years, testified that accused's reputation for honesty and truthfulness was good (R 877). Lieutenant Colonel Eichmann had known accused for about twenty-one months and testified that accused's general reputation for truth and honesty was very good (R 889-890). Miss Small and Miss Holloway, secretary and bookkeeper, respectively, of the Presidio Officers' Club, testified that accused's general reputation for honesty and truthfulness was good (R 897, 898). Master Sergeant Warner served with the accused at Fort Ord, California, and at the Presidio during two periods totalling in excess of two years and stated that accused's reputation for honesty and truthfulness at both stations was "the best" (R 906). Lieutenant Colonel Ruby E. Herman, a member of G-1 Section, Headquarters, Sixth Army, had known accused while he was on duty at the Presidio. She testified that his reputation was good for honesty and truthfulness. Colonel Humphries, Chairman of the Board of Officers supervising the Presidio Officers' Club, had almost daily contact with the accused and testified that accused had a good reputation for honesty and truthfulness (R 934, 935). John E. Miller, formerly on duty as an officer at the Presidio, stated that accused's reputation for honesty was good and that his reputation for truthfulness was exemplary (R 932).

4. Discussion.

a. Specification 4, Charge I; Specification 3, Charge II.

These two specifications, identical in form and wording, charge the accused with larceny or stealing. One specification alleges a violation of the 95th Article of War and the other a violation of the 93rd Article of War. The court found the accused guilty of both specifications, but by exceptions and substitutions reduced the amount of money alleged to be stolen from $230 to $113. Larceny or stealing is defined as:

"*** the unlawful appropriation of personal property which the thief knows to belong either generally or specially to another, with intent to deprive the owner permanently of his property therein." (MCM, 1949, par. 180g, p. 239)

The Manual for Courts-Martial sets forth the elements of proof which constitute the offenses as:

"(a) The appropriation by the accused of the property as alleged; (b) that such property belonged to a certain 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, pp. 240-241)

A careful study of the evidence and an analysis of the conflicting and uncertain testimony of the witnesses convince the Board of Review that these elements are not proved beyond a reasonable doubt. In the first place, the Board is not convinced that the Club ever received through the accused or any other representative of the Club any more than the $337.40 gross receipts reported by the accused. There is an abundance of evidence in the record to show that there was no real plan or organization either for accounting for the money at each of the gaming tables or for the turn-in to be made by the operators thereof. While Major Brody and Lieutenant Gilroy, as chairman and co-chairman, were fully authorized to act for the Officers' Club and to inaugurate any system they thought necessary, it is evident that they did not choose to institute a definite arrangement and that the operators of the various tables were given no instructions at the beginning and only insufficient instructions, if any at all, as an afterthought at the end of the evening. Because of dissatisfaction, as expressed by the managers and operators, with the previous Monte Carlo Night it had been agreed that no one would be required to stay after the entertainment to count the turn-in money. In fact, the chairman expressly promised the operators that they would not be required to count the money at all and that they would not be detained after closing time.

The evidence discloses that neither the chairman nor his co-chairman supervised anything but the play at the tables. Neither participated in the turn-in and both, by their actions, helped confuse the moneys and prevent a real accounting. Major Brody admits that he took $50 at least two times from Captain Bradley's table, which money he claimed was "borrowed". Lieutenant Kortum unequivocally states that he turned over the entire amount from his table to Major Brody, which statement Major Brody stoutly denied. Whatever the facts may be as to this matter, Major Brody is emphatic in his insistence that he never turned in any money given him by Lieutenant Kortum and by this he verifies and substantiates the statements of the accused that one bag was

missing. The co-chairman, Lieutenant Gilroy, distinguished himself by getting angry at the accused, by attempting to strike him and start a fist fight in the Club office during the turn-in, by throwing his money bag on the table and abandoning it, with the statement that he didn't intend to have any more to do with the Club affair. With this kind of management on the part of the chairman and co-chairman it is not surprising that the entire check and turn-in became confused and inaccurate. The operators themselves are uncertain not only as to what they did but also as to exactly what happened to the money. They do not agree in their testimony as to the person to whom they gave their money turn-in and they are vague as to what final disposition was made of such money, if, in fact, it involved the accused at all.

Six operators stated that they left their money sacks on the desk of the Club office; three operators testified that the accused put their money bags in the safe; Lieutenant Kortum said that he turned in to Major Brody, which fact Brody denies; Gilroy abandoned his sack, which was counted by Hagarty and Boyle; Heriot drew $50 which he turned over to Thomas, thereafter dismissed all responsibility and never again saw any part of the money. Six operators apparently had no idea what was the disposition of the money, but either abandoned all responsibility or left it to the judgment of others. Some of the operators made a count of their turn-in; others made none. Some included slips in their bags, showing some information as to amount, operator or table; others included nothing. Ramos testified that he was not positive as to the amount of his turn-in. Boyle stated that he could not testify as to the exact amount, but knew it was "over $100". Golladay guessed at the amount by claiming to remember that he "had a twenty, a ten and very little left". Ivey did not remember exactly and Berlin knew "only from memory" and implied that he was more than uncertain.

The court conceded that the proof did not sustain findings of stealing $230, as alleged, and reduced the amount to $113, based on the minimum turn-ins estimated by the operators. However, it is the Board's opinion that the evidence is so uncertain, speculative and conflicting that there is no convincing proof that the Club ever received the lesser amount either.

In the second place, the evidence falls short of showing that the accused took any property as alleged. He claims that he opened the safe the morning after Monte Carlo Night and made an honest count along with Bill Van (Mr. Robert W. Van Scoyt). In this, he is corroborated by the testimony of Mr. Van Scoyt, who says that he helped the accused make a count although he cannot recollect at the time of the trial the total amount involved. In view of this statement coupled with the testimony of other witnesses, who likewise saw Van Scoyt present at the Club on the morning in question, there is no valid basis for doubting the accused's story in this regard. The accused stated that he made a computation by adding machine to determine the gross profit from the evening's entertainment and that he reported this amount to the office clerk and had it entered on

the Daily Cash and Sales Report of 23 June 1950. The accused told Lieutenant Gilroy the same morning that one bag was missing and in this, he is fully borne out by the testimony of Major Brody and Lieutenant Kortum, considered together. The Board attaches little significance to the fact that the accused, in effect, cancelled all the hand receipts of the operators by placing "OK" and his initials on the receipts, which together constitute Prosecution Exhibit 1. No operator was expected to make good the loss of the table money issued to him providing the money was lost in legitimate play at the gaming table. Once the accused had assured himself that the total table money issued was more than covered by the gross receipts, which fact seems to have been common knowledge, it is only natural that he would cancel all the hand receipts without any particular regard as to the exact turn-in of each operator. If such procedure was not proper or intended, the management of the affair should have so announced and given instructions to the accused in advance. As it was, he was permitted to exercise his own judgment and this Board cannot say that under these circumstances accused, by cancellation of the receipts, abused the privilege. Moreover, the Board attaches no importance to the fact that accused did not report a missing bag to Major Muir, the Club Officer, because from the very circumstances of the Lieutenant Kortum-Major Brody controversy he had no conclusive proof that the bag had not been turned in.

From the state of the record it is impossible to determine with reasonable certainty that the accused appropriated any of the Club's money. He is not shown to be in possession of money not his and there are no facts in the record which in anywise prevent a reasonable person from believing the accused's explanation of the Monte Carlo Night transactions. Consequently, we conclude that the proof does not exclude any fair and reasonable hypothesis except that of guilt (MCM, 1949, par. 78a, p. 74). We are aware of the fact that "considerable weight must be accorded the court's findings 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 and cases there cited). On the other hand it is our duty to reach our own conclusions with regard to the weight of the evidence (AW 50(g); CM 335526, Tooze, 3 BR-JC 313, 340; CM 336706, Pomada, 3 BR-JC 209, 216; CM 342722, Waggoner, 8 BR-JC 149, 157). We have done so in the instant case and are unable to agree with the court that the evidence of record is sufficient to prove beyond a reasonable doubt the guilt of the accused as to Specification 4, Charge I, and Specification 3, Charge II.

b. Specification 2, Charge I; Specification 1, Charge II.

Under identical specifications as to wording and form, the accused is charged with and found guilty of forgery in violation of Article of War 93 and Article of War 95.

"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).

To establish the offense of forgery it is necessary to prove that a certain writing was falsely made or altered as alleged; that the writing was of a nature which would, if genuine, apparently impose a legal liability on another, or change his legal liability to his prejudice; that it was the accused who so falsely made or altered such paper; and facts and circumstances indicating the intent of the accused thereby to defraud or prejudice a right of another person (MCM, 1949, par. 180i, p, 244).

The evidence discloses that the entries on the sixth line of the Presidio Officers' Club machine shortage sheet for 13 June 1950 (Pros Ex 15) were made without the knowledge or consent of Sergeant Erickson, the bartender on duty and the person whose purported initials appeared thereon indicating responsibility for the propriety of the payment. The accused admits that he, himself, wrote Sergeant Erickson's initials "FVE", "35.00" and the other entries thereon except the name "M. J. Hos". Little credence can be given to accused's assertion that there was such a person as "M. J. Hos" and that he, accused, did not sign that name also in view of his inability to describe or identify the person and the testimony of the handwriting expert that all of the writing appearing on the sixth line of the shortage sheet is similar to and consistent with the Ashford exemplars. There is no doubt that the entries mentioned were falsely made by the accused.

The machine shortage sheets were an integral part of the bookkeeping system of the Presidio Officers' Club. They were, in effect, vouchers maintained by the bartenders on duty to account for amounts paid out of cash. Failure to record pay-outs on the machine shortage sheet or inaccurate entries made therein would result in a cash shortage at the end of the day for which the bartender on duty was financially responsible. Clearly, any unauthorized entry on one of these sheets would change the legal liability of the bartender responsible therefor to his prejudice. In the instant case, Sergeant Erickson was apparently responsible for the validity of the $35.00 pay-out until it was shown that the entries on the sixth line of Prosecution Exhibit 15 were a forgery made without his knowledge or consent. Sergeant Erickson's assertion that he did not give anyone permission to use his initials on the machine shortage sheet is uncontroverted (See CM 342392, London, 8 BR-JC 57, 64-65). From all the facts and circumstances appearing in the record, it is clear that the accused intended by his acts to prejudice the rights of another (CM 233611, Eckman, 20 BR 29, 33; CM 341865, Dully, 7 BR-JC 209, 222-224; CM 343172, Wilder, BR-JC, November 1950).

The Board of Review is of the opinion that the evidence establishes beyond a reasonable doubt that the accused is guilty of forgery not only as a violation of Article of War 93, but also as a violation of Article of War 95 (CM 338479, Marooney, 4BR-JC 261, 279; CM 334097, Anderson, 4 BR-JC 347, 358; CM 339548, Green, 5 BR-JC 155, 164).

c. Specifications 5, 8, 9, 10, 11, 12, Charge I; Specifications 2, 5, 6, 7, 8, 9, Charge III; and Specifications 1, 4, 5, 9, 10, 11, 12, 13, 14, Additional Charge I.

In these specifications the accused is charged with and found guilty of falsely signing, with intent to deceive, fictitious names on machine shortage sheets of the Presidio Officers' Club for the dates alleged in acknowledgment of payment of monies which accused, in fact, received. The specifications allege conduct violative of Articles of War 95 and 96 and sufficiently apprise the accused of the facts and circumstances constituting the offenses charged.

The specifications of which the accused was found guilty involve the signatures, "E. J. Miller", "M.S. Miller", "J.M. Miller", "H. J. Kent", "H. P. Kent", "P. I. Hunt", "C. E. Moss", "A. P. Lamb", and "J. C. Waters". The evidence discloses that these were fictitious signatures signed by the accused. The handwriting expert, Dr. Kirk, after a comparison of the questioned signatures with accused's admitted handwriting specimens, was of the opinion that they were written by the accused. Furthermore, accused, either in his pretrial statement or in his testimony, admitted that all of the above signatures except those of "C. E. Moss", "A. P. Lamb", and "J.C. Waters" were in his handwriting. In addition to such testimony, there was before the court for its own comparison the admitted handwriting specimens of the accused and the disputed signatures. In the exercise of its function and duty the court could compare the former with the latter and could conclude as a matter of fact that accused signed each of the disputed signatures (MCM, 1949, par. 129b, p. 164; CM 336607, Hosick, 3 BR-JC 151, 156; CM 341865, Dully, supra at p. 224; and see In re Goldberg, 91 F 2d 996, 997 (CCA 2, 1937)). That the court resolved this controverted question of fact against the accused in all the above specifications is inherent in its findings of guilty and the Board of Review finds no reason to disturb those findings. Moreover, the record of trial reveals that in all instances wherein the court entertained a doubt as to the authorship of a signature the court acquitted the accused as to that specification.

Nor do we entertain any doubt that accused received the payments alleged in the specifications. Accused admitted that in all cases wherein he signed a fictitious name on the machine shortage sheet he received payment of the amount for which the signature was an acknowledgment thereof. Since it has been determined that accused was the author of the fictitious names in all specifications of which he was found guilty, we further conclude from accused's course of conduct that he received the payments alleged therein.

From the facts and circumstances attendant the use of fictitious names can be inferred the accused's intent to deceive. He deliberately and knowingly made false entries on the machine shortage sheets to conceal from his superiors the extent of his play of the slot machines which he admitted was frequent if not almost constant. He was aware from his past experience as a club

officer in the Presidio Officers' Club and elsewhere that his play of the machines was subject to criticism and censure and he knew that similar conduct on the part of a club employee was forbidden. But the offenses here alleged are not predicated upon accused's play of the slot machines but upon his use of fictitious names to conceal his play thereof and receipt of payments therefrom. The testimony of the bartenders, accused's subordinates, in whose presence accused signed some of the fictitious names on the shortage sheets for which they were personally responsible as to the validity of the payments reflected thereon, discloses that accused attempted to explain his actions by patently admitting to them that he did not want the records to reveal to the Inspector General the extent of his play of the slot machines. Furthermore, accused admitted in his pretrial statement and to the court that he did not want his own name to appear too frequently on the shortage sheets because of questions which might arise as to the propriety of his conduct during inspections by auditors and the Inspector General. There was evidence that monthly inspections of the Club's accounts were made by an auditor and that periodic inspections were made by the Inspector General for the Commanding General of the Presidio. It is prescribed in paragraph 7b, Army Regulations 210-50, 8 March 1949, Change 2, 9 May 1950, pertaining to nonappropriated funds, that "*** Inspectors General will make such inspection of the fund records, verifications, and confirmations as are deemed necessary to establish with reasonable certainty the financial status of the fund, accuracy of the record, and propriety of expenditures. ***" (underscoring supplied).

The purpose of the accused's deceitful conduct was to conceal from higher authority through subterfuge his improper activities and the effect thereof was to corrupt enlisted men under his supervision by soliciting their acquiescence in his falsifications and to prevent an accurate check of the Club's accounting records by higher authority through the use of false entries on the machine shortage records. It is apparent that no auditor or inspector general could properly establish the propriety of expenditures on these shortage sheets where a fictitious name was entered to indicate the recipient of a "pay-off". Certainly the acts of the accused, if committed by any person subject to military law, would constitute 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 and, when committed by an officer, would so compromise his character and standing as a gentleman and his position as an officer as to constitute conduct unbecoming an officer and a gentleman in violation of Article of War 95 (see CM 321309, Tisdall, 70 BR 301, 309; CM 337318, Shearman, 4 BR-JC 23, 38-39; CM 339004, Shea, 5 BR-JC 1, 17-18). Although the offenses alleged in Specifications 2, 5, 6, 7, 8, 9, of Charge III in violation of Article of War 96 are practically identical with those alleged in Specifications 5, 8, 9, 10, 11, 12, of Charge I in violation of Article of War 95, this manner of pleading finds sanction in military law and is not an illegal multiplication of charges even though the separate offenses stem from the same set of facts (CM 338479,

Marooney, supra at p. 279 and cases there cited; CM 339004, Shea, supra at p. 20). The Board of Review concludes that the evidence is sufficient to prove beyond a reasonable doubt the offenses alleged in Specifications 5 and 8 through 12, Charge I, Specifications 2 and 5 through 9, Charge III, and Specifications 1, 4, 5, and 9 through 14, Additional Charge I, and concurs with the court's findings of guilty therein in violation of Articles of War 95 and 96.

5. Personal History.

The accused was born 8 July 1920, at Union, South Carolina. He went four years to Union High School, Union, South Carolina, and was graduated in 1939. From 1938 through 1940 he worked in a drugstore as a sales clerk at an undisclosed wage. He has been married three times; is presently married; and has two children, a child by each of his first and second wives. He has no known civilian criminal record. The accused enlisted in the Army on 3 February 1940, and by 1945 had become a master sergeant. He became an officer by direct commission in the Medical Administrative Corps 22 February 1945. He served in several administrative capacities as an officer, and prior to the present charges had had seven assignments as a club officer. He served overseas in Hawaii from 4 April 1940 to 18 September 1942; in Africa and Europe from 29 April 1943 to 12 September 1945; and through the Central Pacific, Southern France, Rhineland and Central European campaigns. The last overall efficiency ratings are 075, 084, 066, 126, 120 and 123 in the order named. There is no evidence of previous military convictions or other disciplinary actions. About November 1945 he received a commendation for efficiency from Colonel Paul Goode. Colonel Goode has also presented his view on the accused's case, and has made a request for clemency.

6. The court was legally constituted and had jurisdiction 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 insufficient to support the findings of guilty of Specification 4, Charge I, and Specification 3, Charge II, but legally sufficient to support all other findings of guilty and the sentence and to warrant confirmation of the sentence. A sentence to dismissal is mandatory upon conviction of the violation of Article of War 95. A sentence to dismissal, total forfeitures after promulgation and confinement at hard labor for three years is authorized upon conviction of an officer for 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.

DEPARTMENT OF THE ARMY
Office of The Judge Advocate General

THE JUDICIAL COUNCIL

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

In the foregoing case of First Lieutenant ELLIOTT R. ASHFORD, 0-2008170, 6003 Area Service Unit, Fort Ord, California, upon the concurrence of The Judge Advocate General, the findings of guilty of Specification 4 of Charge I and Specification 3 of Charge II are disapproved 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.

C. B. Mickelwait, Brig Gen, JAGC

Edward H. Young, Colonel, JAGC

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

JUN 8 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 two years.

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

13 June, 1951

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

Board of Review

SpCM 3208

APR 6 1951

UNITED STATES	2D ARMORED DIVISION
v.	Trial by SpCM, convened at Fort Hood, Texas, 9 March 1951. Bad conduct discharge, forfeiture of $49 pay per month for six (6) months and confinement for six (6) months. Post Stockade.
Private GALE R. COOK (RA 19374156), Company B, 66th Medium Tank Battalion, Fort Hood, Texas.	

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 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.

Chas. G. Young, J.A.G.C.
Regan G. Mickel, J.A.G.C.
Lee E. Moberley, J.A.G.C.

JAGE SpCM 3208 1st Ind

JAGO, SS USA, Washington 25, D. C. MAY 8 1951

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

In the foregoing case of Private Gale R. Cook (RA 19374156), Company B, 66th Medium Tank Battalion, Fort Hood, Texas, The Judge Advocate General has not concurred in the holding by the Board of Review that the record of

JAGE SpCM 3208

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.

1 Incl
Record of Trial

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

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

JAGU Sp CM 3208

UNITED STATES	)	2D ARMORED DIVISION
	)	
v.	)	Trial by Sp.C. M., convened
	)	at Fort Hood, Texas, 9 March 1951.
Private GALE R. COOK, RA	)	Bad conduct discharge, forfeiture
19374156, Company B, 66th	)	of $49 per month for six months
Medium Tank Battalion,	)	and confinement for six months.
Fort Hood, 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 making under oath testimonial statements, at the trial by general court-martial of Corporal Melvin Hampton, at Fort Hood, Texas, on or about 18 January 1951, to the effect that in a written statement given to Agent Joe D. Schunks of a Criminal Investigation Detachment he did not say, "Yes, I agreed and at approximately 1830 hours I drove Hampton down Central Avenue where he directed me to go and stopped beside messhall on south side of Central Avenue where Hampton got out of the car and went into the mess hall and came out carrying two boxes which he put in the trunk of the car" and that in such written statement he did not use the words "boxes," which testimonial statements he did not then believe to be true, in violation of Article of War 96. Evidence of two previous convictions by summary court-martial was introduced. He was sentenced to be discharged from the service with a bad conduct discharge, to forfeit forty-nine dollars per month for six months and to be confined at hard labor for six months. The reviewing authority approved the sentence, designated the Post Stockade, Fort Hood, Texas, 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. The Judge Advocate General has not concurred in the Board's holding.

3. The evidence establishes that on 18 January 1951 the accused was sworn as a witness and testified during the trial by general court-martial of Corporal Melvin Hampton (see CM 345027, Hampton, BR-JC, decided by the Judicial Council this day). Over objection by the defense, pages 51-59 inclusive, and pages 72-84 inclusive, of the record of trial of Corporal Hampton, consisting of the entire testimony of the accused as a witness, was introduced into evidence as Prosecution Exhibit 2. Major William T. Logan and Captain William F. Burgess, law member and trial judge advocate, respectively, at the Hampton trial, each testified that the exhibit accurately reflected what transpired at the trial. The exhibit showed that the accused denied making the pretrial statements alleged in the instant specification and that subsequently he admitted making such statements.

The exhibit further showed that prior to the change in his testimony the accused was recalled as a witness by the court; was explained the penalties for perjury by the court; was given the specific example of a soldier who received five years for perjury; was ridiculed by being asked whether anyone as absent minded as himself could have anything to do with a tank; was questioned as to why he went absent without leave; was asked when and why he returned to camp; was inferentially accused of absenting himself without leave to avoid testifying against Hampton; was asked if he had heard about going through channels if he wanted a transfer; was asked whether he wanted to make a "clean slate" of "it" with the alternative that the member would do something about "it;" was accused of having "lied and lied;" was accused of being caught in five lies; was told he had "better" tell the truth; was told "you just sit there and lie, lie, lie."; was told he was defending and covering up for somebody, that "If I were you, I would start taking care of Pvt Cook," and was told by the trial judge advocate "I am going to be here until tomorrow night if I have to get the truth out of you." In addition, he was told by the law member "You are lying and lying under oath. There is no offense which I consider more despicable and more rotten then lying under oath, and if I myself have to prefer charges and put you in the stockade, I will do it;" heard the law member say, "I know. I will keep him in it," when advised by another member of the court that the witness was presently in confinement; and heard the president of the court state "I want charges preferred against this man."

The written statement, consisting of the questions asked by Agent Joe D. Schunks of the 43d Criminal Investigation Detachment and the answers given by the accused in an interrogation prior to the Hampton trial, was introduced into evidence without objection as Prosecution Exhibit 4. Agent Schunks testified that this statement was voluntary and represented all that was said to him.

The accused after being advised of his rights as a witness elected to remain silent.

4. Prosecution Exhibit 2 consisted of 22 pages of the record of trial by general court-martial of Corporal Hampton and covered the entire testimony by the instant accused in that case. It comprised the comments made by the members of the court during the period of that testimony, all questions asked by the members of the court and the trial judge advocate and the accused's answers thereto. A consideration of this evidence reveals accusations and threats of such a serious nature as would be likely to induce one to make an indicated statement. This is especially true where the subject is an enlisted man and his inquisitors are officers composing a general court-martial.

In CM 307221, Tripp, 34 BR (ETO) 333, the accused's pretrial confession was received in evidence. It was established that this was the second statement of the accused and was taken because two agents of the Criminal Investigation Division felt that the first one was false. On the occasion of the second interrogation the accused was told by one of the agents that the first statement was false, that it was "a lie," that unless he changed it he would be court-martialed for committing perjury, and that the penalty was very severe. The Board of Review in its opinion in that case stated in part as follows:

> "The uncontradicted evidence shows that the confession was extracted from accused by threats of punishment. His inquisitors posed to accused the alternative of making a second statement to their liking or facing a trial on a perjury charge. In no real sense can accused's response, in the form of a confession, to this dilemma be said to have been a voluntary act. It follows that the confession was improperly received in evidence (CM ETO 13279, Tielemans et al; CM ETO 17665, Miller)."

We have little difficulty in concluding that the accused's change in testimony resulted directly from the coercion by means of the threats made by the members of the court and was not voluntarily made. Thus, in receiving Prosecution Exhibit 2 in evidence, the court received and considered involuntary admissions of guilt in clear violation of the mandates of Article of War 24 and paragraph 127a, page 157, Manual for Courts-Martial, 1949.

In addition to the necessity of establishing certain other required elements of proof of the offense alleged, it was incumbent upon the prosecution to establish that the statement was false (MCM 1949, par 183c, p 260). The prosecution sought to accomplish this by introducing in evidence the written statement given by the accused prior to the Hampton trial and introducing in evidence his ultimate admission (Pros Ex 2) of the fact that he had made such statement. Although the court might have found the accused guilty of the offense alleged had the involuntary admission not been received in evidence, the Judicial Council cannot,

under the circumstances, conclude that the admission did not influence the findings, or that its influence was slight. On the contrary, we are compelled to conclude that the findings of guilty in this case were substantially swayed, if not controlled, by this inadmissible evidence. In view of such conclusion, we are of the opinion that the erroneous admission in evidence of the involuntary admission constituted error which injuriously affected the substantial rights of the accused and the conviction must be set aside (Kotteakos v. United States (1946), 328 U.S. 750; CM 335123, Green, 2 BR-JC 53; CM 345027, Hampton, BR-JC, decided this day).

5. 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, Brig Gen, JAGC

C. B. Mickelwait, Brig Gen, JAGC

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

DEPARTMENT OF THE ARMY
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THE JUDICIAL COUNCIL

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

In the foregoing case of Private Gale R. Cook, RA 19374156, Company B, 66th Medium Tank Battalion, Fort Hood, Texas, upon the concurrence of The Judge Advocate General the findings of guilty and the sentence are disapproved.

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

14 May, 1951

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

JAGI SP CM 3400

U N I T E D S T A T E S	)	FORT LEWIS, WASHINGTON
	)	
v.	)	Trial by SpCM, convened at Fort Lewis,
	)	Washington, 2 May 1951. Bad conduct
Private RICHARD SIMS	)	discharge (suspended), forfeiture of
(RA 34 272 257), Battery	)	$65 pay per month for six (6) months,
"D", 30th AAA AW Bn.	)	and confinement for six (6) months.
(Mobile)	)	The Post Stockade.

HOLDING By the BOARD OF REVIEW
JOSEPH, HYNES and SPRINGSTON
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 and submits this, its holding, to The Judge Advocate General under the provisions of Article of War 50e.

2. Upon trial by special court-martial convened by the Commanding Officer, 250th Antiaircraft Artillery Automatic Weapons Battalion (Mobile), Fort Lewis, Washington, on 13 April 1951, the accused was tried upon the following charge and specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that Private (E-2) Richard Sims, Battery "D", 30th Antiaircraft Artillery Automatic Weapons Battalion (Mobile), did, without proper leave, absent himself from his organization at Fort Custer, Michigan from about 5 February 1951 to about 11 April 1951.

The accused pleaded not guilty to and was found guilty of the charge and specification and was sentenced to be discharged from the service with a bad

conduct discharge, to forfeit sixty-five ($65.00) dollars pay per month for six months and to be confined at hard labor for six (6) months. Four previous convictions were considered by the court. The convening authority approved the sentence and forwarded the record of trial for action under Article of War 47d. The officer exercising general court-martial jurisdiction, the Commanding General, Fort Lewis, Washington, approved the sentence, but suspended the execution of the bad conduct discharge until the accused's release from confinement or until completion of appellate review, whichever is the later date. The result of trial was published in Special Court-Martial Orders Number 6, Headquarters, Fort Lewis, Washington, 18 May 1951.

3. The record of trial is legally sufficient to support the findings of guilty and that part of the sentence which provides for a bad conduct discharge and confinement at hard labor for six months. The only question presented for consideration is whether the amount of forfeiture, as approved, is legal.

4. Article of War 13 provides that a special court-martial shall not have authority to adjudge forfeiture of more than two-thirds of a soldier's pay per month for a period of six months. It therefore becomes necessary in the instant case to compute the base pay of the accused at the grade to which he was reduced as a result of the sentence adjudged by the court, in order to calculate the maximum legal amount of the forfeiture.

The face of the charge sheet shows the service of accused prior to the current enlistment as three years, ten months and three days, and the date of his current enlistment as 23 December 1947. The charge sheet shows the base pay of accused in the grade of Private (E-2), his enlisted grade at the time of trial, as $105.00. In the case of an enlisted person other than the lowest grade, however, a sentence which as ordered executed or as suspended includes a bad conduct discharge, whether or not suspended until release from confinement, or hard labor with or without confinement, immediately reduces such enlisted person to the lowest grade (Par. 116d, MCM, 1949). The base pay of accused resulting from the sentence of the court must therefore be calculated on the basis of the rate of pay for the lowest enlisted grade at the rate of pay to which he is entitled by reason of service.

Accused absented himself from about 5 February 1951 to 11 April 1951, and his current service which may be computed for pay purposes when added to his prior service of three years, ten months and three days amounts to over six years service. Section 201, Career Compensation Act of 1949 (63 Stat. 807; 37 U.S.C. 232) provides that the basic pay of an enlisted man of the lowest grade, having over six years service is $95.00 per month. Thus the maximum legal forfeiture per month in the instant case if $63.33.

5. For the reasons stated, the Board of Review holds the record of trial to be legally sufficient to support the findings of guilty, and legally sufficient to support only so much of the sentence as provides for a discharge from the service with a bad conduct discharge, confinement at hard labor for six months and forfeiture of $63.33 of his pay per month for six months.

Robert E. Joyce, J. A. G. C.

John J. Hynes, J. A. G. C.

George B. Springstee, J. A. G. C.

JAGI SP CM 3400 1st Ind Mar. 30, 1951

JAGO, Department of the Army, Washington 25, D.C.

TO: Commanding General, Fort Lewis, Washington

1. In the case of Private (E-2) Richard Sims (RA 34 272 257), Battery "D", 30th Antiaircraft Artillery Automatic Weapons Battalion (Mobile) I concur in the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of the specification and the charge and legally sufficient to support only so much of the sentence as provides for discharge from the service with a bad conduct discharge, confinement at hard labor for six months and forfeiture of $63.33 of his pay per month for six months. Under Article of War 50e this holding and my concurrence vacate so much of the sentence relating to forfeiture as is in excess of forfeiture of $63.33 per month for six months.

2. It is requested that you publish a special court-martial order in accordance with said holding and this indorsement restoring all rights, privileges and property of which the accused has been deprived by virtue of that portion of the sentence so vacated.

3. When copies of the newly 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:

(SP CM 3400)

(Signed)

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

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