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VOL. 19

1943

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Judge Advocate General's Department

BOARD OF REVIEW

Holdings, Opinions and Reviews

Volume XIX

including

CM 232161 to CM 233461

(1943)

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Washington : 1944

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WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General.
Washington, D.C.

SPJGH
CM 232161

APR 10 1943

U N I T E D S T A T E S	)	THIRD ARMORED DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Indiantown Gap Military Reserva-
Privates EUGENE R. FRIEDRICHS	)	tion, Pennsylvania, February 12,
(37096291), and RALPH J.	)	1943. As to each: Dishonorable
LIPPERT (36397092), both of	)	discharge and confinement for
Company D, 23rd Armored Engineer	)	five (5) years. Federal Reforma-
Battalion.	)	tory, Chillicothe, Ohio.

HOLDING by the BOARD OF REVIEW
HILL, LYON and DRIVER, Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Pvt. Eugene R. Friedrichs, Company D, Twenty-Third Armored Engineer Battalion and Private Ralph J. Lippert, Company D, Twenty-Third Armored Engineer Battalion, acting jointly and in pursuance of a common intent, did, at Camp Pickett, Virginia, on or about December 31, 1942, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection one with the other in that Private Lippert's penis was in the mouth of Private Friedrichs.

Each accused pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction of accused Friedrichs of absence without leave, in violation of Article of War 61. Each accused was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years. The reviewing authority approved the sentence, designated the United States Reformatory, Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution is as follows:

At Camp Pickett, Virginia, on the night of December 31, 1942, between 12:30 and 1 o'clock a.m., Privates Clement L. McCormick and Marvin A. Stevens, both of Company D, 23rd Armored Engineer Battalion, saw the automobile of accused Lippert parked by the Post Exchange. McCormick and Stevens walked over to the car. One of them opened the door and snapped on the light. The two accused were on the back seat of the car. McCormick stated that Friedrichs' face was in Lippert's lap, and Lippert's trousers were unbuttoned and his penis was out. Stevens stated that Lippert's penis was about two inches from Friedrich's face. When the door of the car was opened, Friedrichs "leaped up" or "sat up in the car". Both accused then got out of the car. McCormick and Stevens said nothing, and after standing there a little while, walked away. When about 50 feet from the car they were halted by a guard, who wanted to know what was "going on", and McCormick and Stevens told the guard what they had seen. McCormick "would not say" that either of the accused was drunk. Stevens knew "by their actions" that both accused had been drinking. In cross-examination, McCormick and Stevens admitted that they had been drinking. McCormick testified that he did not see Friedrichs' face until Friedrichs "leaped up"; that he (McCormick) opened the door of the car with his right hand and turned the light on with his left hand. The light was by the door. McCormick also stated that they went to the car because "There was some whiskey came in that automobile and we looked to see if there was any more left". Stevens said that he opened the door to the car; that Lippert jumped out of the car and started buttoning his pants; and Friedrichs leaned out and started vomiting. Stevens could not say whether or not Lippert's penis was wet, but when asked if Lippert had an erection, said it was "about half and half" (R. 7-12).

4. For the defense, three witnesses testified to the good character of accused Lippert. Thomas F. McManus, Warrant Officer, 23rd Armored Engineer Battalion, formerly Chairman of his Selective Service Board in Chicago, stated that he had known Lippert since 1940,

and that his character was good. Private Patrick J. McManus, Headquarters Company, 23rd Armored Engineer Battalion, stated that he had known accused in Chicago approximately two years. "He seemed pretty well thought of around the neighborhood". Corporal John F. Dunning, Company B, 23rd Armored Engineer Battalion, had known Lippert 16 months. They lived in the same community before entering the service. His opinion of Lippert was "The highest" (R. 12-14).

Both accused testified under oath. Lippert stated that on the evening of December 31, 1942, he and Friedrichs had a little celebration, with dinner in town. On returning to camp they had a few drinks. Later they went to the Post Exchange, where they had more drinks with Mr. Smith, the manager of the Post Exchange. Lippert did not know how late it was when they left the Post Exchange, but stated that they went from the Post Exchange to the barracks. He saw McCormick and Stevens early that evening. They had asked him to take them to town for some liquor, but he refused them. They seemed "put out and didn't like it very much". He had never been "very cordial with them". On cross-examination, he stated that he and Friedrichs, with several others, had been in the car earlier that evening, but that he was not aware of being in the car after midnight, and that while in the car he did not see either McCormick or Stevens. He knew nothing of the accusation against him. He would not say that McCormick and Stevens were "out to get him", however, they had had a "few words", and had just "agreed to disagree".

Friedrichs testified that he and Lippert had supper together in the early evening, and on their return to camp, parked the car until about 10:30 by Post Exchange No. 7, where Friedrichs worked. Then he and Lippert and a "bunch of boys" rode around. Later the two accused returned to the Post Exchange to see Mr. Smith, the manager. They stayed there, drinking and talking from 10:45 until about 2 o'clock a.m. On leaving the Post Exchange they went to the barracks. Friedrichs stated that he was not drunk; that he remembered all that happened; that he was not in the car with Lippert after 11 o'clock p.m. Friedrichs also stated that McCormick and Stevens were not on friendly terms with him. On cross-examination, he admitted making a previous statement that around the time the offense is alleged to have been committed he was drinking and did not remember what he was doing (R. 15-22).

Private John R. Sykes, Company E, 23rd Armored Engineer Battalion, was on guard the night of December 31, 1942. He knew nothing about the case except that about 12:30 or 12:45 a.m., he

halted Privates McCormick and Stevens, and asked them "what was going on". Over the objection of the defense, the witness was permitted to answer, in response to the question of the prosecution "What did they say" - "They told me they saw one of these boys, Friedrichs and Lippert, sucking the other off". Private Sykes stated that the car was parked across the street from Post Exchange No. 7, in the usual place for parking cars. When he asked "what was going on", he had no reference to the car, "It was New Year's Eve and there was quite a lot of commotion going on. Boys were coming from the Service Club and things like that". He did not see either of the accused, but it was possible for them to go to their barracks without passing his post (R. 23-25).

It was stipulated that if Mr. Morgan S. Smith were present he would testify as follows:

> "I am the manager of Post Exchange No. 7, Camp Pickett, Va. I was well acquainted with the accused, T/5 Eugene R. Friedrichs. On New Year's Eve, December 31, 1942, the Post Exchange closed at 10 o'clock. I remember that T/5 Eugene R. Friedrichs and Pvt Ralph J. Lippert, the accused, were in the Post Exchange around midnight. I don't know the exact times, but I saw them from time to time in the Post Exchange between around 10:30 PM to 12:30 AM that night" (Ex. A).

5. To establish the crime of sodomy, as charged, it was necessary to prove an actual penetration of the mouth of accused Friedrichs as alleged. It is well established that penetration may be proved by circumstantial evidence, but that strict proof is required (Dig. Ops. JAG, 1912-30, sec. 1590, CM 206242, Stone). Mere conjecture or suspicion is not enough.

The evidence for the prosecution discloses that the accused, in the night time, were sitting in the back seat of a car, owned by one of the accused. When the door to the car was opened and the light switched on, the accused were in an attitude, and their reaction was, of such character as would strongly indicate an intent or preparation on their part to commit the offense charged. But what they actually did or intended doing is chimerical, conjectural, and speculative. "Guilt", says the court in the case of State v. Massey (86 N.C., 660), "is not to be inferred because the facts are consistent with guilt, but they must be inconsistent with innocence". To the same effect is

CM 193705 (1931), in which case The Judge Advocate General held:

> "Where circumstances are relied on entirely to justify conviction, they must not only be consistent with guilt but inconsistent with innocence".

The following has heretofore been quoted by the Board of Review as pertinent in cases of this character:

> "There is no direct evidence that the specific crime charged, copulation per os, was committed. The conviction rests solely upon the fact that when they were with difficulty aroused, the head of the accused was resting upon the stomach of Shaffer, and that he held the penis of Shaffer in his hand. That this creates a strong suspicion is unquestionably true, but this is all of the incriminating evidence, for the other circumstances related do not tend to show guilt or in any wise strengthen this incriminating evidence. There is nothing else to discredit the denial of the accused, supported as it is by proof of his good reputation.
>
> "Under this evidence the court erred in giving the instruction and in sustaining the conviction which so manifestly rests only upon suspicion. Evidence of penetration is necessary to establish this revolting crime, and, while this may be and generally can only be shown by circumstantial evidence, such evidence must be convincing to a moral certainty and sufficient to exclude every reasonable doubt (Hudson v. Commonwealth, 127 S.W. (Virginia Supreme Court of Appeals) 89". (CM 209651, Palmer and Morrell.)

6. The testimony of the guard, Private John R. Sykes, upon cross-examination by the prosecution, as to what McCormick and Stevens told him on the night of the alleged occurrence, to wit, that "they saw one of these boys, * * *, sucking the other off", admitted over the objection of the defense, was incompetent as hearsay, and may well have been highly prejudicial to the substantial rights of the accused. In some jurisdictions it is competent to corroborate the testimony of a witness who has been impeached, by proof that the witness on a previous occasion made similar statements to others. The majority of the courts take a contrary view (Wharton's Criminal Evidence, vol. 3, sec. 1410). All the courts admitting such evidence are agreed that it is only competent as affecting the credibility of the witness and

is never used as substantive or independent supporting testimony. The rule has never been expanded to permit the introduction of previous inconsistent statements (State v. Exum, 138 N.C., 599, 50 S.E. 285). In the case under consideration, the two statements are not similar. McCormick and Stevens, in their testimony before the court, made no statement such as was attributed to them by the witness Sykes. In no aspect of the law of evidence can contradictory evidence be introduced as corroborative evidence (State v. Lassiter, 191 N.C. 210, 131 S.E. 577). The Board of Review, accordingly is of the opinion that the testimony of Sykes as it relates to what McCormick and Stevens told him was incompetent and prejudicial to the substantial rights of the accused.

7. For the reasons stated, the Board of Review hold the record of trial legally insufficient to support the findings of guilty, and the sentences.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGH
CM 232161

1st Ind.

War Department, J.A.G.O., APR 13 1943 - To the Commanding General, Third Armored Division, APO 253, Indiantown Gap Military Reservation, Pennsylvania.

1. In the case of Privates Eugene R. Friedrichs (37096291), and Ralph J. Lippert (36397092), both of Company D, 23rd Armored Engineer Battalion, I concur in the holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentences. I recommend that the findings and sentence as to each accused be disapproved.

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

(CM 232161).

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

Hq. 3rd Armd Div. 150940 APR 23

APR 15 1943

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WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGN
CM 232171

APR 23 1943

UNITED STATES	)	ARMY AIR FORCES, SOUTHEAST TRAINING CENTER.
v.	)	
First Lieutenant RICHARD A. KONEN (0-1287900), Air Corps.	)	Trial by G. C. M., convened at Army Air Forces Pilot Transition School, Smyrna, Tennessee, February 22, 1943. Dismissal.

OPINION of the BOARD of REVIEW
CRESSON, LIPSCOMB and SLEEPER, Judge Advocates.

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

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

CHARGE I: Violation of the 95th Article of War.
(Finding of not guilty)

Specification 1: (Finding of not guilty)

Specification 2: (Finding of not guilty)

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

Specification: In that 1st Lieutenant Richard A. Konen, 313th Base Headquarters and Air Base Squadron, Army Air Forces Combat Crew School, Smyrna, Tennessee, did, without proper leave, absent himself from his station at Army Air Forces Combat Crew School, Smyrna, Tennessee, from about 23 January 1943, to about 1 February 1943.

The accused pleaded not guilty to the Charges and Specifications. He was found not guilty of Charge I and both Specifications thereunder, and guilty of Charge II and the Specification thereunder. Evidence of one previous conviction by general court-martial for absence without leave for thirteen days in violation of Article of War 61 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. The evidence for the prosecution concerning the Specification, Charge II, shows that the accused absented himself without authority from his station at Army Air Forces Combat Crew School, Smyrna, Tennessee, on January 23, 1943, and that he remained absent therefrom until his voluntary return on February 1, 1943. The duly authenticated extract copy of the morning report of the organization to which the accused was assigned, disclosing his unauthorized absence for the period alleged, is corroborated by the testimony of the post adjutant, the provost marshal, the officer of the day on the date of the departure of the accused, his squadron adjutant, and two other witnesses. (Ex. A; R. 6-13)

4. The defense introduced no evidence but the accused, after being duly advised of his rights, made an unsworn statement. That portion of the statement relative to Charge II, and the Specification thereunder states that the accused had been drinking heavily, prior to his unauthorized departure and that while he was intoxicated, he went to Atlanta to retrieve a valuable watch and coat. The accused stated that he thought he could get back unmolested. He returned of his own volition a week later. (R. 24)

5. The Specification, Charge II, the only Specification of which the accused was found guilty, alleges that the accused did, without proper leave, absent himself from his station at Army Air Forces Combat Crew School, Smyrna, Tennessee, from about January 23, 1943, to about February 1, 1943. The defense introduced no testimony but the accused made an unsworn statement admitting the unauthorized absence alleged, and failed to present any reason or justification for such absence. The uncontradicted evidence clearly establishes beyond any reasonable doubt every element of the offense alleged, and fully sustains the findings of guilty.

6. The accused is 36 years of age. The records of the Office of The Adjutant General show that he enlisted in the National Guard, at San Francisco, California, on November 19, 1940, and was inducted into Federal Service on March 3, 1941. He was released from active duty on October 10, 1941, and recalled on February 5, 1942. Upon graduation from the Infantry School, Fort Benning, Georgia, on July 16, 1942, he was appointed a second lieutenant, Infantry, Army of the United States, and was promoted to first lieutenant on November 26, 1942.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. A sentence of dismissal is authorized upon conviction of a violation of Article of War 61.

Edward Dressson, Judge Advocate
Abner E. Lipscomb, Judge Advocate
Benjamin R. Sleeper, Judge Advocate

1st Ind.

War Department, J.A.G.O., MAY 1 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Richard A. Konen (0-1287900), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation thereof. The evidence shows that the accused absented himself without leave for nine days. This offense was a repetition of similar reprehensible conduct for which the accused was given a lenient sentence to three months' restriction and forfeitures only three days prior to his second unauthorized departure. Such repetition of irresponsible conduct shows his unsatisfactory reaction to the leniency extended on his first offense, and indicates unworthiness and unfitness for the responsibilities of an officer. I recommend, therefore, that the sentence be confirmed and carried into execution.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation should it meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls
Incl 1 - Record of trial
Incl 2 - Draft of ltr for sig. Sec. of War
Incl 3 - Form of Executive action

(Sentence confirmed. G.C.M.O. 129, 29 Jun 1943)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGN
CM 232190

MAY 4 - 1943

UNITED STATES v. Second Lieutenant WILLIAM R. LESTER (0-251794), 713th Military Police Battalion.	)	FOURTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M. convened at Fort Moultrie, South Carolina, February 16, 1943. Restriction to limits of post for three (3) months, and forfeiture of fifty dollars ($50) per month for three (3) months.

OPINION of the BOARD OF REVIEW
CRESSON, LIPSCOMB and SLEEPER, Judge Advocates

---

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Second Lieutenant WILLIAM R. LESTER, Company B, 713th Military Police Battalion, Fort Moultrie, South Carolina, was at Moultrieville, South Carolina, on or about January 17, 1943, drunk and disorderly in uniform in a public place, to wit: Ruth's Lunch, Moultrieville, South Carolina.

The accused pleaded not guilty to the Specification and the Charge. He was found guilty of the Specification except the words "was ... drunk and disorderly in uniform", substituting therefor the words "did ... conduct himself in a manner to bring discredit upon the military service", of the excepted words, not guilty, and of the substituted words guilty, and guilty of the Charge. He was sentenced to be restricted to the limits of his post for three months,

The reviewing authority approved the sentence, ordered it executed, and published the result of the trial in General Court-Martial Orders No. 335, Headquarters Fourth Service Command, March 3, 1943.

3. The evidence shows that on January 17, 1943, at Ruth's Lunch, a public restaurant in Moultrieville, South Carolina, the accused who was there drinking beer, approached Military Police Corporal Aloysius J. Conde, who was on duty, and said, "take that goddamn club out of your pocket." The corporal explained that his orders were to carry the club in his pocket when he did not have a string around it, and that he did not have a string. The accused remarked, "Bull shit!" He also inquired of another military policeman who was present, "Who in the goddamn hell gave you any such orders to carry a club in your pocket?". The remarks were overheard by a number of soldiers and civilians, including the proprietress and her daughter, all of whom were in the restaurant at that time (R. 6-7, 9, 11, 18).

The accused admitted that he had been drinking and might have told Corporal Conde to "Take the goddamn club out of your pocket", but denied he was intoxicated and explained that he was simply undertaking, pursuant to what he considered part of his duty as an officer, to correct the military policemen by showing them how ridiculous they looked with their clubs sticking out of their pockets (R. 42).

4. As a result of the substitutions and exceptions made by the court, the Specification of which the accused was found guilty reads as follows:

> "In that Second Lieutenant William R. Lester, Company B, 713th Military Police Battalion, Fort Moultrie, South Carolina, did at Moultrieville, South Carolina, on or about January 17, 1943, conduct himself in a manner to bring discredit upon the military service in a public place, to wit: Ruth's Lunch, Moultrieville, South Carolina."

All allegations expressed in the original Specification by the use of the excepted words, "was *** drunk and disorderly in uniform", and all reasonable implications therefrom, have been eliminated. "An accused is acquitted of all material allegations which are excepted by a court in its findings" (Dig. Ops. JAG, 1912-40, sec. 454 (6), p. 348). By exception, then, the court has acquitted the accused of being drunk <u>or</u> disorderly, either in uniform or in a public place.

Moreover, the substitution completely fails to supply any allegations of specific facts and circumstances relied upon to constitute the offense charged.

> "The specification should include *** A statement in simple and concise language of the facts constituting the offense. The facts so stated and those reasonably implied therefrom should include all the elements of the offense sought to be charged". (par. 29, p. 18, M.C.M., 1928)
>
> "**** The office of the charge *** is to designate the specific military offence, made punishable by an Article of War or other statute, which is attributed to the accused: that of the specification is to set forth the acts or omissions of the accused claimed to constitute the offence named in the charge." (par. 188, p. 132, Winthrop's Military Law and Precedents, 2nd Ed.) (Underscoring supplied.)

Here, the exception deletes every material allegation of the original Specification attributing to the accused any act or omission which might constitute a basis for the charge or, by reasonable implication, any lesser included offense; and the substitution sets forth no act or omission whatsoever, but merely a conclusion as to the effect of undescribed conduct on the part of the accused, the nature of which conduct is not even intimated.

> "**** If so much has been excepted as not to leave enough to constitute the specific offense alleged, (or a minor offence legally included in it,) or if the effect of the exception has been to cause the specification to describe another and quite distinct offence from that designated by the charge, -- a finding of guilty upon the charge can not be sustained. ****" (par. 578, p. 380, Winthrop's Military Law and Precedents, 2nd Ed.).

The court, in this instance, has by its exceptions and substitutions, so emasculated the original Specification as to make of it a mere restatement of the Charge. It has become a paraphrase and nothing more. The finding of guilty of the revised Specification is, therefore, a mere duplication of the finding of guilty of the Charge. As such, it cannot be sustained.

If, however, it be conceded that the Specification, as devitalized and diluted by the court's exceptions and substitutions, might, though defective for vagueness, sustain a finding of guilty in the absence of a

motion to make more definite and certain or other appropriate special plea calling the court's attention to the defect, the findings of guilty in this instance cannot properly be approved, because the conduct referred to therein (whatever the court may have intended) must, in view of the exceptions acquitting the accused of the particular acts ascribed to him by the deleted language and all reasonable inferences therefrom, be deemed to consist of acts distinct in character from those alleged in the original Specification. The acts (whatever they were) of which, by its amended Specification, the court found the accused guilty, being distinct from those originally charged, cannot, therefore, constitute any lesser offense included, by inference or otherwise, within the meaning of the excepted words "was *** drunk and disorderly in uniform."

5. The accused is 36 years of age. The records of the Office of The Adjutant General show enlisted service from December 13, 1940, to May 25, 1942, when he was honorably discharged for the convenience of the Government. He was appointed a second lieutenant, Army of the United States, effective May 26, 1942.

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

Silas B. Bresson, Judge Advocate.
Abner E. Lipscomb, Judge Advocate.
Benjamin R. Sleeper, Judge Advocate.

1st Ind.

War Department, J.A.G.O., MAY 4 1943 - To the Secretary of War.

1. Herewith transmitted for your action under Article of War 50½ as amended, is the record of trial in the case of Second Lieutenant William R. Lester (0-251794), 713th Military Police Battalion, together with the foregoing opinion of the Board of Review.

2. I concur in the said opinion of the Board of Review and recommend that the findings of guilty and the sentence be vacated, and that all rights, privileges and property of which the accused has been deprived by virtue of the findings and sentence so vacated be restored.

3. Inclosed herewith is a form of action designed to carry into effect the recommendation hereinabove made, should it meet with your approval.

Myron C. Cramer.

Myron C. Cramer,
Major General,
The Judge Advocate General.

2 Incls
Incl 1 - Record of trial
Incl 2 - Form of action

(Findings of guilty and sentence vacated, by order of the Secretary of War. G.C.M.O. 113, 20 May 1943)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGN
CM 232227

APR 22 1943

UNITED STATES	)	CAMP ROBERTS, CALIFORNIA
	)	
v.	)	Trial by G.C.M., convened
	)	at Camp Roberts, California,
Sergeant LEROY HUDSON	)	February 17, 1943. Dishonorable
(37016988), Cannon Company,	)	discharge, total forfeitures and
148th Infantry.	)	confinement for twenty (20) years.
	)	Federal Correctional Institution.

REVIEW by the BOARD OF REVIEW
CRESSON, LIPSCOMB and SLEEPER, Judge Advocates

---

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 93rd Article of War.

Specification: In that Sergeant LeRoy Hudson, Cannon Company, 148th Infantry, Camp Roberts, California, did, at Atascadero, California, on or about January 24, 1943, with intent to commit rape upon a female person, to-wit: Fredonia Bernadine Wing, commit an assault upon said Fredonia Bernadine Wing, by willfully and feloniously throwing her to the ground, tearing off her underclothing and beating her about the face with his fists.

The accused pleaded not guilty to the Charge and to the Specification. He was found guilty of both, and sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for twenty years. The reviewing authority approved the sentence, designated the Federal Correctional Institution, Englewood, Colorado, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that about 3 o'clock on the afternoon of January 24, 1943, Mrs. Fredonia Bernadine Wing, aged twenty-two, was returning on foot from Atascadero, California, to her home, a mile and a half south of the town. Crossing a bridge, she encountered the accused, a total stranger, who asked her how far it was to Paso Robles. She told him, "Ten miles", and started to walk off. He grabbed her plaid coat and asked to try it on. She jerked it back, and continued on her way. (R. 12-15)

After she had walked about half a mile, the accused again approached her, this time walking toward her on the opposite side of the highway. He crossed, when he came abreast of her, and inquired if she were hitch-hiking. She walked past without replying, whereupon he grabbed her and dragged her down a six-foot embankment, on the east side of the road. There he threw her to the ground remarking, "I am going to have a piece of your ass". Her dress rose up around her waist as she fell. She was not wearing stockings, but had on a slip and drawers. These latter, the accused tore off. As Mrs. Wing struggled, the accused said to her, "Do you want to be dead?" He told her that if she would let him do what he wanted to, he would not hurt her, to which she replied that he would probably kill her anyway. While they were struggling, cars passed on the highway above them. Each time a car passed, Mrs. Wing screamed; each time she screamed, the accused hit her and pressed his hand over her mouth. (R. 16-18) Her screams were heard by Mrs. Anna Nicholson Powell, aged seventy-six, who lived east of the highway 150 or 200 yards from the scene of the attack. Mrs. Powell was leaving her home to visit a neighbor. Looking in the direction of the screams, she saw that the accused had the prosecutrix in his arms and off the highway. The screams were repeated. Sensing the need for immediate action, Mrs. Powell rushed into the house and reported to her son, Darrell Nicholson, what mischief was afoot. Darrell looked out the door and beheld the accused struggling with the prosecutrix, whose legs only were visible. "I immediately saw", Darrell testified, "there was no time to waste". While he went for

his car, Mrs. Powell watched through the window, where she could see plainly all that occurred. "The struggle continued all the time," she testified. Darrell hastened to town and picked up Deputy Sheriff Hilton, whom he drove to the embankment on the highway, behind which the assault was in progress. (R. 25-30)

In the meantime, the accused, with his pants down, had gotten on top of Mrs. Wing, who was lying on her back, fighting and screaming. She felt his erect penis against her body, and there was no doubt in her mind as to what he was trying to do. (R. 18-19)

Just then, Deputy Sheriff Hilton appeared on the scene. From the top of the embankment, he saw the accused attacking Mrs. Wing. She was on her back and the accused was on top of her. His hand was over her mouth and she turned her head sideways, crying, "Help!". Three times the deputy's fist smashed the accused's jaw. Darrell Nicholson, hastening to join the deputy, saw the blows knock the accused off the prosecutrix, who immediately jumped up. The accused's trousers and drawers were halfway to his knees and he was all exposed. His penis was still erect, according to Nicholson, but the deputy, asked whether the accused was then having an erection, testified, "Well, I couldn't swear to that, it looked like he was but when I hit him —". Mrs. Wing's drawers were lying on the ground. They were picked up either by Nicholson or the deputy, and exhibited on the trial. (R. 19-20, 24, 27, 30, 33, 35-37; Ex. A)

Mrs. Wing was covered with mud. Her hair was all hanging down and ruffled up and she looked like she had been "struggling considerable". She was hysterical. There was a scratch on her leg, her left cheek was bruised, her right eye was black, and the left side of her chin was red or bruised. (R. 33-34, 37-38)

The accused appeared only slightly intoxicated. He said, as the deputy was driving him up town, "You might as well shoot me. That is what a bottle of liquor will do". (R. 38)

4. The accused, having been duly advised of his rights, elected to take the stand, under oath. He testified in substance that he had been married since May 4, 1939, and was the step-father of a six-year-old child. Before breakfast on Sunday, January 24, 1943, he started drinking whiskey in the hotel in Atascadero, where he had spent Saturday night. After breakfast, he went to the beer joint under the hotel and was there

quite a while, drinking beer. Then he went to a bar where, after a number of drinks of whiskey, he became intoxicated, and has no further recollection of the events which occurred that day, until he was back in Atascadero in the police car, when he remembers seeing Mrs. Wing for the first time. (R. 44-47)

On cross examination, the accused testified that on various occasions he had gotten so drunk that he did not know what he was doing or "where he was at * * *". He loses his memory when he gets "clear drunk", but he does not make a habit of it. That, however, is the usual effect; knowing which, he nevertheless got drunk on Sunday, January 24th. (R. 47-48)

5. The Specification alleges that the accused, with intent to commit rape, assaulted Mrs. Fredonia Bernadine Wing, by willfully and feloniously throwing her to the ground, tearing off her underclothing and beating her about the face with his fists. Not only the uncontradicted testimony of the prosecutrix, but that of three disinterested witnesses, to wit, Mrs. Powell, Deputy Sheriff Hilton, and Darrell Nicholson, establishes beyond a reasonable doubt every element of the offense. The accused, although he testified under oath, denied no word or action attributed to him by the prosecution's witnesses, claiming only that he was too drunk to remember any part of what occurred. The intent alleged was overwhelmingly established by the words and actions of the accused as well as by the significant manifestation of physical readiness on his part, attested by three witnesses. Moreover, the accused neither walked, spoke, nor acted in a drunken manner. As a matter of fact, the evidence clearly shows that, if he was intoxicated at all, it was only to a very slight degree; and that he was, in no case, incapacitated.

6. The accused is 23 years of age. He was inducted December 11, 1941, at Fort Leavenworth, Kansas. His record shows no prior service.

7. The court was legally constituted. 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. A sentence of confinement for twenty years is authorized upon conviction of an assault with intent to commit rape, in violation of Article of War 93.

Edwin L. Gresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGK
CM 232229

MAY 17 1943

UNITED STATES)	94TH INFANTRY DIVISION
)	
v.)	Trial by G.C.M., convened at Camp Phillips, Kansas, February 2 and 16, 1943. Dismissal.
)	
Second Lieutenant LEWIS E. PARKS (0-1289955), 301st Infantry.)	

OPINION of the BOARD OF REVIEW
COPP, HILL and ANDREWS, Judge Advocates.

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

2. Accused was tried upon the following Charges and Specifications:

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

Specification: In that 2nd Lieutenant Lewis E. Parks, 301st Infantry, having been duly placed in arrest at Fort Custer, Michigan, on or about October 9, 1942, did, at Camp Phillips, Kansas, on or about December 6, 1942, break his said arrest before he was set at liberty by proper authority.

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

Specification 1: In that 2nd Lieutenant Lewis E. Parks, 301st Infantry, did, at Salina, Kansas, on or about January 7, 1943, behave in a manner unbecoming an officer and gentleman by being drunk and disorderly in a public place, to wit: Bar B Cafe, Salina, Kansas, and at City of Salina, Police Headquarters, Salina, Kansas.

Specification 2: In that 2nd Lieutenant Lewis E. Parks, 301st Infantry, did, at Salina, Kansas, on or about December 6, 1942, behave in a manner unbecoming an officer and gentleman by being drunk in a public place, to wit: Bus Station, Salina, Kansas.

Specification 3: In that 2nd Lieutenant Lewis E. Parks, 301st Infantry, did, at Salina, Kansas, on or about December 15, 1942, behave in a manner unbecoming an officer and gentleman by being drunk in a public place, to wit: Bus Station, Salina, Kansas.

Specification 4: (Motion for finding of not guilty sustained).

CHARGE III: Violation of the 96th Article of War. (Motion for finding of not guilty sustained.)

He pleaded not guilty to the Charges and Specifications. The court sustained a motion for findings of not guilty of Specification 4, Charge II, and of Charge III and its Specification (R.22). Accused was found guilty of Charge I and its Specification, Charge II and Specifications 2 and 3 thereunder, and Specification 1, Charge II, except the words "Bar B Cafe, Salina, Kansas". 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. The evidence shows:

With respect to the Specification of Charge I

That on the 9th day of October, 1942, accused was placed in arrest by Colonel Roy N. Hagerty, 301st Infantry, his regimental commander, under the terms of which he was restricted to his quarters, the latrine, and the mess hall (R.6,7). He was set at liberty by order of Colonel Hagerty on December 29, 1942. During the period from October 9 to December 29, 1942, the terms and conditions of the arrest and restrictions were not changed (R.6).

On December 6, 1942, accused while still in arrest was at the Casa Bonita Cafe, which was a part of the Union bus depot in Salina, Kansas, and outside the limits of the arrest and restriction as fixed by the order of Colonel Hagerty (R.13).

With respect to Specification 1, Charge II

About 9:30 A.M. on January 7, 1943, Private John R. Carmody, Military Police Detachment, Camp Phillips, saw accused in Salina and he was "all right" (R.18). Dennis K. Fitch, Chief of Police, Salina, saw

him about the same time in a cafe. He testified that accused was not drunk (R.8). At about 1:45 P.M. accused entered the Salina police station, in the company of a woman who was under arrest (R.9,10,11). W. L. Bueche, a police officer of Salina, testified that upon accused's arrival at the police station he appeared to be under the influence of liquor but was not drunk (R.10). Witness stated, however, that while accused remained at the police station his condition became worse and that eventually he became drunk (R.10). Witness testified further:

> "The lady was placed under arrest and asked to wait there at the station until the Chief got back from lunch and the Lieutenant asked whether he might go over there and sit down by her and keep her company and I told him that he might. He asked how long it would be before the Chief got back and I told him about twenty minutes or more. Then I went back to my desk and after twenty minutes had elapsed he came over to my desk and spoke to me and asked me if the twenty minutes were up and I told him: 'Yes, sir'. Then he asked me for the Chief's telephone number and I told him that it wouldn't expedite things any. But I told him that I couldn't keep him from calling or looking up the number. Then he proceeded to ask me what kind of a damn lousy Police Department we had there. And I noticed that the heat was getting him so I asked him to leave. He told me that he didn't have to and I told him that it would be much better if he did. Then he said again that he didn't have to and I told him that if he didn't I would have to lock him up. But he was abusive, so I turned him over to the Military Police." (R.10)

The headquarters of the Military Police were part of the police headquarters of the City of Salina (R.18). Respecting accused's condition at that time, witness testified:

> "I think that the temperature of the room added to that condition greatly."
>
> "* * * his articulation was poor and he was flushed in the face and the manner in which he conducted himself indicated that he was not entirely normal." (R.10)

Witness described the general appearance of accused:

> "He had on a uniform which I thought at first, until I looked a little closer, that he had nicked himself or something and that he had blood on his uniform and then I noticed that it was lipstick. And he had a hole burned in his sleeve." (R.11)

Shortly after accused had been turned over to the military police one of the military policemen brought the accused back with him and inquired what the accused's correct name was. Accused gave his name as "Lieutenant Williams" (R.12,17) and refused to show his identification card (R.12). Mrs. Egbert, the woman companion, said that she had known accused about five weeks and his name was Lieutenant Parks. Accused still insisted that his name was Williams and that he did not carry and was not obliged to carry his identification card (R.12). Accused staggered around the desk, picked up the telephone and tried to call Camp Custer. When a member of the Military Police suggested that perhaps accused wanted Camp Phillips, accused replied, "'God Damn it, yes'" (R.12). Privates Kenneth Baldwin, Carmody, and William Wilson, Corps of Military Police, Camp Phillips, each testified that accused was drunk (R.14,17,18). Carmody testified that accused, who was ordinarily respectful to the military police, was not so on this occasion (R.18,19). Wilson stated that accused could not speak "correctly" and seemed "all confused" (R.17). His uniform was untidy (R.17,18). His belt was not pulled up tight, his hat was cocked on one side of his head (R.15), and there were holes burned in the front of his coat (R.14,18). He admitted having urinated in his trousers (R.17,18) and it was "all down the front, clear to his knees" and carried an odor (R.15). He "passed out and went to sleep" and when Wilson and Carmody came after him they were unable to arouse him and "had to pick him up and almost carry him out" (R.15).

With respect to Specification 2, Charge II

Police Officer Buechе testified that his attention was directed to accused on December 6, 1942, shortly after midnight, by a soldier interested in obtaining the name of accused. Witness testified:

> "So far as deportment is concerned, I couldn't say that his deportment was out of order, although I could see that he had been drinking. He wasn't drunk, but he had been using liquor." (R.13)

Corporal Joseph C. Shiver, 3rd Armored Field Artillery Battalion, Fort Riley, Kansas, testified by deposition that on December 6, 1942, he met an officer in the men's rest room of the Trailways Bus Depot at Salina, Kansas, to whom he gave a drink out of his bottle. The officer was neatly dressed and did not appear to be drunk. Corporal Shiver did not actually identify accused as the officer (Ex. A).

With respect to Specification 3, Charge II

Private Baldwin testified respecting accused's conduct in Salina, Kansas, on December 15, 1942, about 1 o'clock in the morning (R.16):

"Well, on December 15th he was - well he came in the Union Bus Depot and he was very drunk then. He couldn't walk straight and he sat down for approximately 30 minutes and then he went back to sleep and he tried to wake - I mean we tried to wake him up and shook him and we couldn't wake him up. So my buddy and I got him up and took him over to the MP station in the City Hall and turned him over to a corporal there and he sat there about 2 or 3 hours and sobered up and we woke him up and he came back to Camp." (R.14)

Witness testified that there were about 25 soldiers and civilians present in the bus station on the occasion testified to (R.16). With respect to the same incident Carmody testified that on December 15, 1942, in the early morning accused "couldn't make it under his own power" (R.19). He testified that two men had to carry him into the office:

"He was drunk sir.

* * *

" * * * he had lipstick on him, and the way that he talked when he woke up.

* * *

"* * * He rested in our office after a couple of hours, sir. He went under his own power after he went downstairs and bucked up." (R.19)

4. The accused on being advised of his rights as a witness elected to make an unsworn statement as follows:

"My name is Lewis E. Parks. Ever since I was first placed under arrest October 9, 1942 I have been under a nervous strain. It did not grow less as the days went by. Soon after my trouble at Fort Custer I had to tell my father about it and this worried me considerably, because I knew how he felt. After we arrived here in Kansas the arrest continued and I found that I was near the breaking point. My nerves were all shot. I found it difficult to sleep at night and I drank alone and more than I ever had before. I went to town several times for a drink and to try and forget the whole thing. I found that by drinking I could manage to forget; and there was little else to do in the barracks during what seemed to me to be a long day." (R.22)

Defense counsel produced Captain Ian P. Rak, Medical Corps, a witness for the defense, who testified that he was Chief of Neuropsychiatry at the Station Hospital and had observed accused at the Station Hospital, Camp Phillips, Kansas (R.25). He testified that the arrest of accused on

October 9 and on days following resulted in "considerable stress and strain" upon accused, to which he reacted by resorting to drinking to escape from his problems (R.23). Witness stated that in his opinion the strain would not affect accused's ability to discriminate between right and wrong (R.24).

5. The competent evidence establishes without contradiction that at the time and place alleged in the Specification of Charge I accused broke his arrest before he was set at liberty by proper authority. An arrest is presumed legal (par. 139a, M.C.M.) and does not become illegal by the mere passage of time. As a matter of fact the arrest continued because of the conviction of accused of a prior offense and the pendency of proceedings in review in that case (CM 228,975, Parks).

The evidence relating to Specification 1, Charge II, shows beyond doubt, that, as found by the court, accused was drunk and disorderly at the City of Salina Police Headquarters at the time alleged. Although not in bad shape upon arrival, he became progressively worse. His conduct was most unseemly, disgusting, and conspicuously disorderly. His language was profane and his attitude towards the police officers disrespectful, abusive, and defiant. He was confused, he staggered, urinated in his trousers, and finally "passed out". In consequence of his offensive and disorderly conduct on that occasion he was turned over to the military police. The various military police, on duty at military police headquarters, described his general appearance as being unkempt and filthy. His clothing showed holes burned with cigarettes and marks of lipstick on the front. He had fouled his own clothing and had unsuccessfully attempted to conceal the odor of his filth by the application of perfume. He continued his abusive and profane language and disorderly conduct at military police headquarters. On this occasion his drunkenness was gross and his disorderly conduct conspicuous.

On December 15, 1942, at the Union bus depot at about 1 o'clock in the morning he was so drunk that he could not "walk on his own power", but had to be practically carried by members of the military police, this in the presence of about 25 persons who were waiting in the depot. On that occasion he had lipstick marks on his clothing. After being taken to military police headquarters he slept for two or three hours until he had practically sobered up and was then released. On this occasion his intoxication was characterized as "very drunk, could not walk straight", and his drunken sleep was so deep that soldiers of the military police had difficulty arousing him.

In the opinion of the Board of Review the conduct of the accused on the 7th day of January, 1943, and on the 15th day of December, 1942, at the times and places alleged in Specifications 1 and 3, Charge II, was unbecoming an officer and a gentlemen within the meaning of Article of War 95.

There is no competent evidence that at the time and place alleged in Specification 2, Charge II, accused was drunk; in fact police officer W.L. Bueche testified that accused gave the appearance of having been drinking, but of not being drunk. The Board of Review is of the opinion that the evidence is legally insufficient to support the finding of guilty of Specification 2, Charge II.

6. The first indorsement on the Charge Sheet discloses that the charges were referred for trial by command of Colonel Maximilian Clay, 376th Infantry, who sat as president of the court. Major General Harry J. Malony, Infantry, was in command of the 94th Infantry Division and was the appointing and reviewing authority in the case. However, it appears that on January 22, 1943, the day upon which the charges were referred for trial, Colonel Clay was acting division commander.

The trial judge advocate requested that any member of the court announce any fact which might constitute a ground for challenge by either side against himself or any other member. No grounds for challenge were announced. The accused, through counsel, declined to challenge any member for cause, challenged one of the other members peremptorily, and thereupon stated that he did not object to any member of the court as then constituted (R.2). The Charge Sheet was served upon accused on January 22, 1943, the same day upon which the charges were referred for trial (R.3). It is clear that Colonel Clay was not ineligible under Article of War 8 to sit as a member of the court, as he was neither the accuser nor a witness for the prosecution. And it has been held that the presence on the court of an officer who has investigated or forwarded the charges recommending trial by general court-martial is not ipso facto prejudicial error (CM 200328, Boutiller; CM 210612, Maddox, and cases there cited). The test is whether, looking to the record as a whole, it appears that the substantial rights of accused have been injuriously affected. In the present case, as in the cases cited, the papers showing the reference for trial were available to the defense; in fact, a copy of the Charge Sheet, which contained the indorsement, was served upon accused. Accused was given an opportunity to exercise his rights of challenge, did not challenge Colonel Clay, and announced his satisfaction with the court as constituted. As in the Maddox case, the facts were simple and free from doubt, and the sentence to dismissal was mandatory. In the opinion of the Board of Review the presence of Colonel Clay as president of the court did not injuriously affect the substantial rights of accused.

7. The records of this office (CM 228975, Parks), show that accused was tried by a general court-martial convened at Fort Custer, Michigan, on October 30, 1942, convicted of engaging in a fight and brawl with an

enlisted man at Battle Creek, Michigan, on October 9, 1942, in violation of Article of War 95, and sentenced to be dismissed the service. The sentence was approved and confirmed but commuted to a reprimand, which was administered by the Commanding General, 94th Infantry Division. The reprimand contained the following paragraph:

> "It is hoped that the commutation of your sentence will provide a means whereby you may be able to redeem yourself and that by your future actions you will endeavor to remove from the uniform you wear, the disgrace you have brought upon it."

8. War Department records show that accused is 22 years of age and a graduate of high school. He enlisted on March 5, 1940, and served as an enlisted man until, upon completion of a course at the Infantry Officers' Candidate School, Fort Benning, Georgia, he was appointed a second lieutenant, Army of the United States, on August 12, 1942. When recommending accused for appointment to the Officers' Candidate School, his company commander stated that accused had demonstrated outstanding qualities of leadership and that his character was excellent.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally insufficient to support the finding of guilty of Specification 2, Charge II, but legally sufficient to support the findings of guilty of Charge I and the Specification thereunder and of Charge II and Specifications 1 and 3 thereunder and the sentence, and to warrant confirmation thereof. Dismissal is mandatory upon conviction of violation of Article of War 95 and is authorized upon conviction of violation of Article of War 69.

Andrew J. Galpin Jr., Judge Advocate.
Thos Wannenthell, Judge Advocate.
Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., MAY 23 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Lewis E. Parks (0-1289955), 301st Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the finding of guilty of Specification 2, Charge II, but legally sufficient to support the findings of guilty of Charge I and the Specification thereunder and of Charge II and Specifications 1 and 3 thereunder and the sentence, and to warrant confirmation thereof. I recommend that the sentence to dismissal be confirmed and carried into execution.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl. 1 - Record of trial.
Incl. 2 - Draft of let. to President.
Incl. 3 - Form of action.

(Finding of guilty of Specification 2, Charge II, disapproved. Sentence confirmed. G.C.M.O. 133, 1 Jul 1943)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGH
CM 232264

APR 16 1943

UNITED STATES	)	92nd INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Camp Joseph T. Robinson,
Second Lieutenant JOSEPH W.	)	Arkansas, February 24, 1943.
LYLES (0-1303360), 371st	)	Dismissal and total forfeitures.
Infantry.	)	

OPINION of the BOARD OF REVIEW
HILL, LYON and DRIVER, Judge Advocates

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

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Joseph W. Lyles, 371st Infantry, did, without proper leave, absent himself from his post and station at Camp Joseph T. Robinson, Arkansas, from about December 21, 1942 to about January 16, 1943.

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

Specification: In that Second Lieutenant Joseph W. Lyles, 371st Infantry, did, without proper leave, absent himself from his ward at Station Hospital, Camp Joseph T. Robinson, Arkansas from about 2300, February 4, 1943 to about 1030, February 6, 1943.

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

Specification: In that Second Lieutenant Joseph W. Lyles, 371st Infantry, was at Station Hospital Camp Joseph T. Robinson, Arkansas, on or about February 6, 1943, drunk in said hospital.

He pleaded not guilty to and was found guilty of all Specifications and Charges. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution is substantially as follows:

a. Charge:

The accused was, by paragraph 8, Special Orders No. 299, Headquarters, The Infantry School, Fort Benning, Georgia, December 10, 1942, assigned to the 92nd Infantry Division (371st Infantry), Camp Robinson, Arkansas, and directed to proceed to that station for duty with the Infantry. A delay of ten days was authorized in addition to authorized travel time (R. 30; Ex. 5).

There was received in evidence an official letter written in the name of his regimental commander and signed and identified by First Lieutenant James P. Carter, Personnel Officer, 371st Infantry, to the Rail Transportation Officer, Camp Robinson, requesting a statement of the estimated travel time and the maximum travel time by rail from Fort Benning, Georgia, to Camp Robinson, and first indorsement thereon, stating the average length of the journey as 18 hours, and the maximum travel time as 36 hours if all connections were missed. Under the provisions of his orders, the accused was entitled to twelve days detached service and should have reported to Headquarters, 371st Infantry, on December 21, 1942 (R. 30-31; Ex. 6).

Lieutenant Carter, Personnel Officer, 371st Infantry, identified, as from the files of his office, a teletype message dated January 19, 1943, received from the Commandant, The Infantry School, Fort Benning, in reply to his request, stating that accused left Fort Benning at 2 p.m., December 10, 1942 (Ex. 7). He also identified, as from the files of his office, an official letter written in the name of his regimental commander and signed by Lieutenant Carter to the Commanding Officer, Fort Devens, Massachusetts, requesting information

whether accused had reported there, and a second indorsement from the Commanding Officer, 366th Infantry, Fort Devens, January 20, 1943, stating that there was no record that accused had reported there (Ex. 8). No request from accused for leave had come to the attention of Lieutenant Carter, and it would not be possible for a delay or leave to be granted by the Commanding Officer, 371st Infantry, without coming to the attention of Lieutenant Carter (R. 29-34; Exs. 7, 8).

Captain Maurice R. Taus, Adjutant, 371st Infantry, identified the officers' register kept in his custody at Headquarters, 371st Infantry, and read to the court that portion pertaining to the accused. An extract copy thereof received in evidence marked "Prosecution's Exhibit 4", for identification, reads as follows:

"OFFICERS' REGISTER

DATE AND HOUR OF ARRIVAL OR DEPARTURE		NAME, GRADE AND ARM OR SERVICE (PRINT PLAINLY)	AUTHORITY (PARAGRAPH AND SPECIAL ORDER NUMBERS, HEADQUARTERS AND DATE)	ARRIVAL		DEPARTURE	MODE. OF TRAVEL
DATE	HOUR			DATE OF DEPARTURE FROM LAST STATION	LAST PERMANENT STATION	DESTINATION: OFFICERS DEPARTING ON LEAVE OF ABSENCE WILL INDICATE ADDRESS WHILE ON LEAVE	AUTO - RAIL
1/16/43	2115	Joseph W. Lyles	Par. 8 S O 299 Hq T I S: 10 Dec. 42	1/10/42	Ft. Benning, Ga.	Dec. 10/42	Rail

"I, Captain Maurice R. Taus, hereby certify that as Adjutant of the 371st Infantry I am the legal custodian of the Officers' Register of that regiment, that said Register is required to be kept at the Headquarters of said regiment by regulation and custom, and that the above is a true and correct extract from said Officers' Register. Signed at Headquarters, 371st Infantry, Camp Joseph T. Robinson, Arkansas, this 24th day of February, 1943.

(sgd.) Maurice R. Taus,
MAURICE R. TAUS,
Captain, 371st Infantry
Adjutant".

(R.22-23, 53; Ex.4).

Captain Taus received, at 1800, December 26, 1942, a telegram from accused, stating "Sick lost bill-fold and ticket transportation to Ft Devens leaving immediately". No request for delay or for leave

was received from accused, and no delay or leave was granted him by the 371st Infantry. Captain Taus did not see accused until accused reported on January 16, 1943. No entry with respect to accused appears in the officers' register prior to January 16, 1943 (R. 23-28).

b. Additional Charge I:

The accused was issued a patient's pass from the Station Hospital, Camp Joseph T. Robinson, from 11 a.m., February 3, 1943, to 11 p.m., February 4, 1943, with permission to visit Little Rock, Arkansas. The Adjutant, Station Hospital, did not subsequently issue any pass granting the accused additional leave privileges, nor was an emergency pass issued by the administrative officer of the day (R. 12-14; Ex. 2).

Captain Frederic B. Davies, Medical Corps Ward Officer, Wards 5000 and 5001, Station Hospital, Camp Joseph T. Robinson, identified a certificate of entries with respect to accused in the patients' pass book and report book, of which he was the custodian. The certificate was admitted in evidence with the affirmative statement of "no objections" by the accused. The pass book shows a pass at 12:30, February 3, 1943; the morning report, February 3, 1943, shows accused on overnight pass; the night report, February 4 and 5, 1943, shows accused not in ward at 6 a.m.; the day report, February 5, 1943, shows accused AWOL; the morning report, February 6, 1943, shows that accused did not return; and the day report, February 6, 1943, shows the accused returned. The accused was not present in Ward 5000 or 5001 from about 11 p.m., February 4 to about 10:30 a.m., February 6, 1943 (R. 7-8, 10-11; Ex. 1).

c. Additional Charge II:

Captain Davies, Medical Corps Ward Officer, saw the accused in the room of accused in Ward 5000 at about 10:30 on the morning of February 6, 1943. The accused was conscious, "apparently somewhat stuperious, somewhat discoordinated". At times he had difficulty in speaking, and did not complete simple problems accurately. His neurological condition - reflexes and coordination - was not normal. In the opinion of Captain Davies, he was definitely under the influence of alcohol and drunk (R. 8-11).

The laboratory report upon a blood alcohol test taken upon the return of accused to the hospital, February 6, 1943, showed the blood alcohol level as 275 milligrams per 100 centimeters. A level of 100 milligrams is considered consistent with decent behavior, 200 is considered to be slightly drunk or visible signs of drunkenness,

and a higher level indicates more definite drunkenness (R. 15-18; Ex. 3).

Captain E. H. Trowbridge, Medical Corps, Chief, Neuropsychiatric Service, Station Hospital, Camp Joseph T. Robinson, examined accused on February 6, 1943, in Ward 5000. There was an aroma of alcohol on the breath of accused; his answers were slow; his ability to think rapidly and clearly was slowed; his motor movements were slow and poorly coordinated. In the opinion of Captain Trowbridge, the accused was drunk (R. 19-21).

When the prosecution presented First Lieutenant J. E. Greutter, Jr., as a witness, to prove that the accused was drunk, the court directed that no further testimony as to drunkenness would be introduced (R. 21).

4. The defense presented an abstract over the signature of the registrar of the clinical records of the Station Hospital as to accused, covering the period January 26, 1943, to February 24, 1943, which was, by stipulation, admitted in evidence. The records included a final diagnosis of chronic arthritis, and of alcoholism acute, and a statement that accused returned to the ward on February 6, 1943, after 48 hours' absence without leave, "evidently intoxicated", and "Blood alcohol - 275 mgm%" (R. 35-36; Ex. 1).

The accused testified that he enlisted in the Army, October 29, 1940, and became company clerk of Company C, 366th Infantry. Prior to the time he went to Fort Benning on September 10, 1942, he drank somewhat freely. He did not drink during the period September 10 to December 10, 1942, while attending the Officer Candidate School. He was graduated from the school on December 10, 1942. He was granted what he understood to be a ten days' leave plus one day's travel time, effective December 10, 1942. He left Fort Benning and went to Worcester, Massachusetts. He started drinking quite a bit on the trip, and upset his stomach and his bowels so that he did not want to eat. When he did eat, his nausea and vomiting returned. He was being treated at the infirmary for a cold and a sore throat when he left Fort Benning, and it continued to bother him. He did not go to a doctor in Worcester, but treated himself. At the expiration of his leave he was supposed to report to the 371st Infantry at Camp Joseph T. Robinson, but did not do so because he was sick and because he lost his billfold and his return railroad ticket from Worcester to Atlanta. He first noticed his loss on December 18, but was unable to find the billfold. He then tried, without success, to borrow enough money to buy a ticket. He went to Fort Devens on December 20, to get help from friends in the 366th Infantry, and finally to the finance office where he received a partial payment on December 24. He returned to Worcester,

sent a telegram that he was leaving immediately, then went home, suffered a relapse of nausea, and felt too ill to travel (R. 37-45).

He was in the hospital at the time of which witness spoke, because of his right knee and leg, which he first hurt playing football in 1938. Drinking seemed to help him, because it reduced the pain. He was conscious of being in the hospital, but he did not cause any disturbance there (R. 45-46).

Upon cross-examination and examination by the court, he testified that in a telegram to the Commanding Officer, 371st Infantry, sent from Worcester on December 20, 1942, he explained that he was sick, explained the loss of his billfold and ticket, and asked for an extension of leave. He sent a second telegram on December 24. The telegram "in evidence" was the first one he sent. He received no reply, nor did he receive any extension of leave or delay from any source. He did not report to any other Army station, hospital, or infirmary, or have a physician after his arrival in Worcester on December 13. He did not leave Worcester immediately after sending the telegram which Captain Taus stated was received on December 26, because he was sick from December 24, 1942, until around January 18, 1943. He reported for duty at Camp Joseph T. Robinson on January 16, 1943. In the second telegram he sent he gave 32 Canal Street, Worcester, as the return address. During his illness he was at the address which he had placed on his classification card at Fort Benning (R. 46-48, 50-53).

5. For the prosecution in rebuttal, First Lieutenant George E. Lynch, Medical Corps, examined accused in conjunction with Captain Rosario J. Maggio, on the morning of January 19, 1943. His findings were negative except that accused complained of some pain in a knee because of an old injury. The accused gave a history of three weeks' vomiting, a sore throat, and diarrhea. In the opinion of Lieutenant Lynch the accused was fit for duty at that time. He knew that the accused was in the hospital later because of his knee disturbance (R. 56-60).

6. a. With respect to the Charge, the evidence shows that by orders of December 10, 1942, Headquarters, The Infantry School, Fort Benning, Georgia, the accused was assigned to and directed to proceed to the 371st Infantry, 92nd Infantry Division, Camp Robinson, Arkansas, and was authorized to delay ten days in addition to authorized travel time. The accused left Fort Benning on December 10, 1942, for Worcester, Massachusetts, and did not report to Camp Robinson until January 16, 1943. Under his orders he should have reported about December 21, 1942.

The accused admitted that he did not report at Camp Joseph T. Robinson until January 16, 1943. He started drinking on the trip to Boston, became sick, and on December 18, lost his billfold containing his return railroad ticket. He sent a telegram December 20, explaining his sickness and loss, and asking for an extension of leave. He attempted to borrow money, secured a partial payment on December 24, from the Finance Office, Fort Devens, Massachusetts, and then sent a telegram that he was leaving immediately. Upon returning to Worcester he became ill, unable to travel, and was sick for three weeks. He did not receive any medical treatment during his absence. He did not receive a reply to either telegram. The only telegram from accused to the 371st Infantry was received on December 26, 1942, stating that he was sick, had lost his billfold and ticket, and was leaving immediately.

Exhibit 6 - the letter with respect to travel time from Fort Benning to Camp Joseph T. Robinson; Exhibit 7 - the teletype message stating dated accused left Fort Benning; and Exhibit 8 - the second indorsement, Fort Devens, that accused had not reported there, were hearsay evidence, and should have been excluded. Their receipt did not prejudice any substantial right of the accused, as the necessary elements of the offense were otherwise established by competent evidence.

In the opinion of the Board, the excuses offered by accused as to his admitted absence without leave are not worthy of credence, and the record supports the findings of guilty of the absence without leave for the period December 21, 1942, to January 16, 1943.

b. Additional Charge I:

The accused was granted a patient's pass from the Station Hospital, Camp Joseph T. Robinson, Arkansas, from 11 a.m., February 3, to 11 p.m., February 4, 1943. No further pass or leave was granted him. Accused was not again present until about 10:30 a.m., February 6, 1943.

c. Additional Charge II:

Upon the return of accused to Ward 5000 at about 10:30 a.m., February 6, 1943, he was examined in bed by Captain Davies, Ward Officer, and by Captain Trowbridge, Chief of the Neuropsychiatric

Service. The accused was somewhat "stuperious", had an aroma of alcohol, his ability to think rapidly and clearly was slowed, his answers were slow, his motor movements slow, and his reflexes and coordination were not normal. In the opinion of those officers, the accused was definitely under the influence of alcohol and drunk.

The laboratory report upon a blood alcohol test taken upon his return on February 6, 1943, showed the blood alcohol level as 275 milligrams per 100 centimeters of blood. A level of 100 milligrams is considered consistent with decent behavior, 200 to be slightly drunk or visible signs of drunkenness, and a higher level indicating more definite drunkenness.

In the opinion of the Board, the accused was drunk in the Station Hospital on February 6, 1943, as alleged in the Specification, Additional Charge II.

7. The motion of the defense at the close of the case of the prosecution for findings of not guilty upon the Charge and upon Additional Charge I and the Specification under each, was properly denied. The contention of the defense that the prosecution had failed to present facts showing the guilt of accused was not well founded. There was substantial evidence establishing the essential elements of each offense.

8. The accused is 24½ years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from October 30, 1940; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty, December 10, 1942.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of 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 of all Specifications and Charges, legally sufficient to support the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 61st or the 96th Article of War.

Arthur Hecht, Judge Advocate.

Percy E. Gore, Judge Advocate.

Samuel M. Driver, Judge Advocate.

SPJGH
CM 232264 1st Ind.

War Department, J.A.G.O., APR 23 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Bpard of Review in the case of Second Lieutenant Joseph W. Lyles (0-1303360), 371st Infantry.

2. I concur in the opinion of the Board of Review 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 accused absented himself without leave for 26 days and again for 2 days, in violation of the 61st Article of War, and was drunk in the station hospital, in violation of the 96th Article of War. The first absence followed immediately after his graduation from Officer Candidate School. I recommend that the sentence be confirmed but the forfeitures be remitted and the sentence as thus modified carried into execution.

3. Inclosed herewith are the draft of a letter for your signature, transmitting the record to the President, and a form of Executive action carrying into execution that recommendation.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1- Record of trial.
Incl.2- Dft.ltr.for sig. Sec.of War.
Incl.3- Form of Executive action.

(Sentence confirmed but forfeitures remitted. G.C.M.O. 114, 20 May 1943)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGN
CM 232267

APR 8 1943

UNITED STATES v. Second Lieutenant JOSEPH G. PARADISE (01014081), Company C, 44th Armored Regiment.	TWELFTH ARMORED DIVISION Trial by G.C.M., convened at Camp Campbell, Kentucky, March 2, 1943. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW,
CRESSON, LIPSCOMB and SLEEPER, Judge Advocates.

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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 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 Second Lieutenant Joseph G. Paradise, Forty-fourth Armored Regiment, did, at Camp Campbell, Kentucky, on or about February 15, 1943 and February 16, 1943, fail to repair at the fixed time to the properly appointed place for the performance of his duties as Administrative Assistant and Supply Officer.

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

Specification 1: In that Second Lieutenant Joseph G. Paradise, Forty-fourth Armored Regiment, a commissioned officer, did, at Camp Campbell, Kentucky, on or about 1300 February 16, 1943 drink intoxicating liquor with Private George D. Thompson, Company A, Forty-fourth Armored Regiment, an enlisted man then on duty, this to the prejudice of good order and military discipline.

Specification 2: (Finding of not guilty)

Specification 3: In that Second Lieutenant Joseph G. Paradise, Forty-fourth Armored Regiment, having received a lawful order from Captain George W. Ridenour, Forty-fourth Armored Regiment, to report to him immediately, the said Captain George W. Ridenour being in the execution of his office, did, at Camp Campbell, Kentucky, on or about February 16, 1943, fail to obey the same.

He pleaded not guilty to all Charges and Specifications. He was found guilty of the Specification, Charge I, and of Charge I, and of Specifications 1 and 3, Charge II, and of Charge II, but not guilty of Specification 2, Charge II. He was sentenced to forfeit all pay and allowances due and to become due and 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. The evidence for the prosecution shows that accused was administrative, supply, athletic and camouflage officer of Company C, 44th Armored Regiment, 12th Armored Division, Camp Campbell, Kentucky. His duties required his presence with the company from 8 o'clock each morning until he was dismissed at 5 or 5:30 o'clock each afternoon (R. 5, 9, 24; Ex. A). On February 15, 1943, he failed to report for duty until 2 or 2:30 p.m., missing a motor march in which he was supposed to participate as a company officer (R. 5-6). The next morning he had again failed to report, when, at about 9:30 o'clock his company commander, Captain Ridenour, sent Second Lieutenant Prentiss to tell accused to report to his company commander. Upon receipt of this message, accused accompanied Lieutenant Prentiss to the orderly room where First Sergeant Meighen told him Captain Ridenour was out on the driving range (R. 6, 17-18, 11).

Accused waited fifteen or twenty minutes in the orderly room, left for a few minutes, returned, and remained ten or fifteen minutes longer, during which time he asked and received permission to borrow Sergeant Meighen's car. He then proceeded to the Company A supply room where he met Private Thompson, who was then on duty as day room orderly, and who accepted accused's invitation to accompany him to his quarters where both had a drink of accused's whiskey (R. 10-12). Accused and Private Thompson then drove, in the First Sergeant's car, to a beer emporium near the camp, where they had a bottle of beer apiece. From there they went to Hopkinsville, where Private Thompson purchased a quart of whiskey, and poured some of it from his bottle into one belonging to the accused, after which they drove from Hopkinsville to accused's quarters, where they had another drink together, and where Captain Ridenour later found the accused. (R. 13, 6).

4. The accused, to whom defense counsel stated he had explained his rights, elected to take the stand in his own behalf (R. 19-33). The accused testified that since his transfer from Company A to Company C he had helped other officers with their instruction of enlisted men, but that he was not really assigned to any duties, "just kind of followed the leader." Accused was supposed to be present with the company from 8 o'clock in the morning until approximately 5 or 5:30 o'clock in the afternoon. (R. 19-21).

On February 15 accused did not report to the company until about 1:30 or 2 o'clock in the afternoon, although he testified that he was feeling fine. Again, on the following morning, he had not reported at 9:30, when Lieutenant Prentiss came to his quarters and told him the captain wanted to see him. He went to the orderly room but Captain Ridenour was not there, so he left about 10 o'clock, going up to Company A, which is directly back of Company C, to see if there were any officers there, and to "kill a few minutes" before returning to see if the captain was in. At Company A, he met Private Thompson, whom he had previously known as one of the men in that company,and told him he would give him a drink,after which he went back to Company C, borrowed Sergeant Meighen's car, took Private Thompson to his quarters in it, and gave him a drink. They then got back in the car and drove to Hopkinsville, stopping for a drink of beer on the way. At Hopkinsville, Private Thompson bought a bottle of liquor, after which they returned to the camp where they had one more drink together, and the accused then told Private Thompson to return Sergeant Meighen's car.(R. 21-22).

On examination by the court, the accused testified that he was not assigned any particular duties with Company C, but from time to time would say to his captain, "Do you want me to string along with Lieutenant so and so or stay with you," and his captain would say, "Stay with me," or "go with one of the other officers," assigning accused duties from day to day. The accused knew that he had to be around from 8 o'clock until 5, but denied seeing a copy of a company order dated February 2, 1943, introduced in evidence by the prosecution, assigning him company duties as supply, athletic and camouflage officer (R. 23, 24; Ex. A).

5. In rebuttal, Captain Ridenour testified that, before he had the order assigning duties to the accused written, he had the officers, including the accused, in the orderly room, and told them what their jobs would be; that after the order was written, he told the first sergeant to give a copy to each of the officers; and that the accused had knowledge of it before it was published (R. 25).

6. The Specification, Charge I, alleges that the accused, on or about February 15, 1943, and February 16, 1943, failed to repair

at the fixed time to the properly appointed place for the performance of his duties as administrative assistant and supply officer. The evidence is uncontroverted as to the fixed time and the failure to repair. As to the duties to be performed, Captain Ridenour testified that the accused was administrative officer of his company, and, as both administrative and supply officer, handled all supply matters and checked on all other administrative matters that came to the captain's notice, looking up figures and facts as required. Accused was not a platoon leader and did not have an actual command, but used to accompany the captain, and, if things occurred, the captain would give him jobs. Furthermore, it was standard operating procedure that officers be present in the company by 8 o'clock in the morning. This testimony of Captain Ridenour appears ample to substantiate the finding that accused failed to repair "for the performance of his duties as administrative assistant and supply officer" at the time prescribed. Moreover, accused admitted knowledge that he was required to perform whatever duties his company commander assigned to him, which would, of course, include those in the categories specified, and to be present with the company from 8 each morning until 5 or 5:30 each afternoon.

Specification 1, Charge II, alleges that accused, a commissioned, officer, did, on February 16, 1943, drink intoxicating liquor with Private George D. Thompson, an enlisted man then on duty, to the prejudice of good order and military discipline. Private Thompson and the accused both testified unequivocally to the commission of this offense. The accused's account of the circumstances that first prompted him to share his wiskey with Private Thompson falls far short of extenuation. This account is comprised in the following excerpts from the accused's testimony:

> "* * * he [Private Thompson] said he had gone out on a hike or something and fainted and felt pretty bad that day and his Company Commander had him stay in the barracks to perform light duties. I don't know whether he mentioned something about wanting a drink or not, but I told him I would give him one.
>
> * * *
>
> "I told him to come along * * * I asked Sergeant Meighan to borrow his car and I took him to the barracks and gave him a drink" (R. 22).

The uncontradicted evidence clearly establishes every element of the offense alleged, and fully substantiates the Court's finding of the accused's guilt under Specification 1, Charge II, in violation of Article of War 96.

Specification 3, Charge II, alleges that accused, having received a lawful order from Captain George W. Ridenour, to report to him immediately, did, on or about February 16, 1943, fail to obey the same. Captain Ridenour testified that about 9:30, on February 16 he sent Lieutenant Prentiss over to accused's quarters to see if he could find him and bring him back, and that accused did not report. Lieutenant Prentiss testified that Captain Ridenour told him to go over and see if he could find accused, and to have accused report to his company commander; that he found accused listening to the radio in the day room of his quarters, told him Captain Ridenour wanted him to report, and accompanied him to the company orderly room. Accused testified that about 9:30 on February 16 Lieutenant Prentiss came up to the quarters and told him the captain wanted to see him; he went with Lieutenant Prentiss to the orderly room and stood around a while but the captain was not there and he left. Sergeant Meighan testified he told accused, in response to accused's inquiry, that the captain was out on the driving range. The evidence is uncontroverted that accused made no further effort to find the captain, and that he never did report.

> "The form of an order is immaterial, as is the method by which it is transmitted to the accused, but the communication must amount to an order and the accused must know it is from his superior officer; * * *" (par. 134b, p. 149, M.C.M., 1928).

The proof is ample that the order was given, that it was properly transmitted to and understood by the accused, and that accused failed to obey it.

7. The accused is 24 years of age. The records of the Office of The Adjutant General show that he served as an enlisted man from June 7, 1938, to November 20, 1942. Upon graduation from Officer Candidate School, Armored Force, Fort Knox, Kentucky, on November 21, 1942, he was appointed a second lieutenant in the Army of the United States.

8. The court was legally constituted. 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. Dismissal is authorized upon conviction of violation of Article of War 61 or 96.

Charles Bresson, Judge Advocate.

Abner E. Lefscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

1st Ind.

War Department, J.A.G.O., APR 21 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Joseph G. Paradise (0-1014081), 44th Armored Regiment.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. The conduct of the accused, an officer with prior service as an enlisted man from June 7, 1938, to November 20, 1942, in failing to repair to an appointed place for the performance of his duties as administrative assistant and supply officer, in drinking intoxicating liquors with an enlisted man while the latter was on duty, and in failing to obey a lawful order of his company commander to report to him immediately, reveals three serious military offenses. These offenses in turn reveal instability of character and the inaptitude of the accused for the duties and responsibilities of an officer. I recommend, therefore, that the sentence be confirmed. I further recommend, however, in view of the undue hardship imposed by that part of the sentence providing for the forfeiture of all pay and allowances due or to become due, that such forfeiture provision of the sentence be remitted.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation should it meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls
Incl 1 - Record of trial
Incl 2 - Draft of ltr for sig. Sec. of War
Incl 3 - Form of Executive action

(Sentence confirmed but forfeiture of all pay and allowances due or to become due remitted. G.C.M.O. 120, 17 Jun 1943)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGN
CM 232342

APR 26 1943

UNITED STATES	)	45TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Pickett, Virginia, March 2, 1943. Dishonorable discharge (suspended) and confinement for five (5) years. Detention and Rehabilitation Center, Third Service Command, Camp Pickett, Virginia.
Private THOMAS W. WALKUP (38017260), Company D, 180th Infantry.	)	

OPINION of the BOARD OF REVIEW
CRESSON, LIPSCOMB and SLEEPER, Judge Advocates

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Thomas W. Walkup, Company D, 180th Infantry, did at Camp Edwards, Mass., on or about July 18, 1942, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty and important service, to wit: service outside of the United States, and did remain absent in desertion until he was apprehended at Big Spring, Texas, on or about January 15, 1943.

The accused pleaded to the Specification guilty, except the words "desert" and "in desertion", substituting therefor respectively the words "absent himself without leave from" and "without leave", of the excepted words not guilty, of the substituted words guilty, and not guilty of the Charge, but guilty of a violation of the 61st Article of War, and was found guilty as charged. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct for a period of five years. Evidence of one previous conviction by summary court-

martial for absence without leave, in violation of Article of War 61, was introduced. The reviewing authority approved the sentence and ordered it executed but suspended the dishonorable discharge until the soldier's release from confinement, and designated the Detention and Rehabilitation Center, Third Service Command, Camp Pickett, Virginia, as the place of confinement. The result of trial was published in General Court-Martial Orders No. 19, APO 45, Camp Pickett, Virginia, March 9, 1943.

3. The evidence for the prosecution shows that on July 18, 1942, the accused absented himself without authority from his organization at Camp Edwards, Massachusetts. Further, it was shown by a stipulation by and between the prosecution and the defense, that if Lieutenant Sam Isaacs, Investigating Officer, were present at the trial he would testify that he knows the accused, and that the accused is subject to military law; that the accused, after being duly warned, admitted to Lieutenant Isaacs that he, the accused, was apprehended at Big Spring, Texas, on January 15, 1943; that when apprehended he was wearing civilian clothes, and was engaged in a civilian occupation; that the accused denied that "he deserted the army for fear of going across or avoiding hazardous duty, and that he denied using a fictitious name to hide his real identity". (R. 5-6; Pros. Ex. 1)

4. The defense did not introduce any evidence, and the accused after being fully informed of his rights elected to remain silent.

5. The accused pleaded not guilty to the Charge of violating the 58th Article of War but guilty of violating the 61st Article of War. In pleading to the Specification the accused pleaded, guilty, except the words, "desert", and "in desertion", substituting therefor respectively the words "absent himself without leave from" and "without leave". By a literal interpretation of this partial substitution, the accused may be said to have pleaded guilty to that part of the Specification which he did not except, namely "* * * absent himself without leave from his organization with intent to avoid hazardous duty and important service * * * ". On the one hand, such a plea, in effect admits the elements of a desertion to avoid hazardous service as described in Article of War 28, and on the other hand, denies desertion by especially excepting the word "desertion". Furthermore, such a literal interpretation of the plea to the Specification is inconsistent with the plea of not guilty to the Charge. Obviously, this carelessly phrased plea to the Specification was intended by the accused as a plea of not guilty of desertion. Article of War 21 provides that:

> "When an accused arraigned before a court-martial fails or refuses to plead, or answers foreign to the purpose, or after a plea of guilty makes a statement inconsistent with the plea, or when it appears to the court that he entered a plea of guilty improvidently or through lack of understanding of its meaning and effect, the court shall proceed to trial and judgment as if he had pleaded not guilty."

In view, therefore, of the provisions of the Article of War cited above, as well as the dictates of simple justice, the plea of the accused to the Specification must be interpreted as a plea of not guilty to desertion.

6. In order to sustain the findings of guilty in this case, it is necessary that the evidence support the conclusion that the accused deserted the service by absenting himself from his organization with the intent to avoid hazardous duty and important service (par. 130a, p. 142, M.C.M., 1928). An analysis of the evidence fails to produce such support. There is no evidence to show that at the time the accused left his organization he was to be assigned, in the near future, to any hazardous duty and to important service, or service outside of the United States, or that the accused had been informed or believed that he was to be assigned to such service. Moreover, the stipulation introduced by the prosecution, distinctly denies that the accused "deserted the army for fear of going across or avoiding hazardous duty", and the accused's plea of guilty of absence without leave, in violation of the 61st Article of War, denies desertion.

Furthermore, it should be observed that under the authority of CM 224765, Butler, when a specification alleges that the accused deserted in order to avoid hazardous duty, the justiciable issues of the specification are restricted to the one type of desertion alleged. In the Butler case the Board of Review asserted that if the proof shows no intent to avoid hazardous duty, "* * * but rather an intent not to return to the service, there is a fatal variance between the allegata and the probata, and a finding of guilty of desertion based on such proof cannot be approved". It follows, therefore, that evidence which may tend to show an intent on the part of the accused not to return to the service can not support the finding of guilty in this case.

7. For the reasons stated, the Board of Review is of the opinion

that the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and its Specification as involve findings that the accused, at the place alleged, absented himself without leave from his organization on July 18, 1942, and remained absent without leave from his organization until he was apprehended on January 15, 1943, at the place alleged, in violation of Article of War 61, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for six months.

Chas. L. Dressor, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

1st Ind.

War Department, J.A.G.O., MAY 3 1943 - To the Secretary of War.

1. Herewith transmitted for your action under Article of War 50½, as amended, is the record of trial in the case of Private Thomas M. Walkup (38017260), Company D, 180th Infantry, together with the foregoing opinion of the Board of Review.

2. I concur in the said opinion of the Board of Review and recommend that so much of the findings of guilty be vacated as involves findings of guilty of an offense by accused other than absence without leave from his organization at Camp Edwards, Massachusetts, on July 18, 1942, continuing until he was apprehended at Big Spring, Texas, on January 15, 1943, in violation of Article of War 61; that so much of the sentence be vacated as is in excess of dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months; and that all rights, privileges, and property of which the accused has been deprived by virtue of those portions of the findings and sentence so vacated be restored.

3. Inclosed herewith is a form of action designed to carry into effect the recommendation hereinabove made should it meet with your approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

2 Incls
Incl 1 - Record of trial
Incl 2 - Form of action

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. So much of the sentence vacated as in excess of dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for six months. By order of the Secretary of War. G.C.M.O. 110, 15 May 1943)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGK
CM 232346

MAY 25 1943

UNITED STATES v. Captain JEREMIAH G. STAPLES (O-297889), Adjutant General's Department.	NORTHERN CALIFORNIA SECTOR WESTERN DEFENSE COMMAND Trial by G.C.M., convened at Fort Winfield Scott, Presidio of San Francisco, California, January 29 and 30, 1943. Dismissal.

OPINION of the BOARD OF REVIEW
COPP, HILL and ANDREWS, Judge Advocates.

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

2. Accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Captain Jeremiah G. Staples, A.G.D., Headquarters, Western Defense Command and Fourth Army, did, at San Francisco, California, on or about December 16, 1942, in his testimony before Lieutenant Colonel Francis B. Linehan, I.G.D., an officer conducting an official investigation, testify under oath, in substance, that he, the said Captain Staples, had not had prepared and mailed to the Officer in Charge, Machine Records Unit, Western Defense Command and Fourth Army, Los Angeles, California, duplicate copies of a letter dated September 22, 1942, signed "J.G. Staples, Capt., A.G.D.", subject, "Postage Stamps", referring to the shipment to and receipt of postage stamps by the Los Angeles Machine Records Unit, Western Defense Command and Fourth Army, which testimony by the said Captain Staples was false and untrue, in that he, the said Captain Staples, well knew that he had had prepared and mailed copies of said letter to the Officer in Charge, Machine Records Unit, Western Defense Command and Fourth Army, Los Angeles, California.

Specification 2: In that Captain Jeremiah G. Staples, A.G.D., Headquarters Western Defense Command and Fourth Army, did, at San Francisco, California, on or about December 16, 1942, in his testimony before Lieutenant Colonel Francis B. Linehan, I.G.D., an officer conducting an official investigation, testify under oath, in substance, that he, the said Captain Staples, had never requested Corporal Albert W.F. Otten and Private Clair C. Peters not to mention the preparation and mailing of duplicate copies of a letter dated September 22, 1942, signed "J.G.Staples, Capt.,A.G.D.", subject, "Postage Stamps", referring to the shipment to and receipt of postage stamps by the Los Angeles Machine Records Unit, Western Defense Command and Fourth Army, which testimony by the said Captain Staples was false and untrue, in that he, the said Captain Staples, well knew that he had so requested the said Corporal Otten and the said Private Peters not to mention the preparation and mailing of said letter.

Specification 3: (Finding of not guilty).

He pleaded not guilty to the Charge and Specifications. Accused was found not guilty of Specification 3 and guilty of the Charge and Specifications 1 and 2 thereunder. 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. The evidence shows that accused was in charge of the Machine Record Division of the Adjutant General's Section, Headquarters Western Defense Command and Fourth Army, comprising, among others, machine records units at San Francisco and Los Angeles (Def. Ex. 7). Accused was also commanding officer of the San Francisco unit. Major Ben M. Mayers, whom accused succeeded as commanding officer of the San Francisco unit, was assigned as coordinator for the purpose of coordinating machine records activities of all machine records and subsidiary units within the Western Defense Command, in addition to his duties as War Department inspector (R.149,155; Def. Ex. 7). He was not an immediate commanding officer of accused nor authorized to give accused direct orders in connection with his official capacity (R.148). Colonel Burton Y. Read, the Adjutant General, was accused's immediate commanding officer and authorized to give him direct orders in connection with his official capacity (R.148, 156).

On September 22, 1942, as directed by accused, a package of United States stamps, together with a covering letter of transmittal,

was sent by registered mail from the San Francisco unit to the Los Angeles sub-unit (R.25,26,27,36,37,39,48,56; Pros. Ex. 3; Def. Ex. 1). The registration receipt acknowledging receipt of the registered package at Los Angeles, California, September 23, 1942, purporting to be signed by "Officer in Charge M.R.U. Sgt. Dropkowski", then authorized mail clerk of the Los Angeles sub-unit, was returned to and received by the San Francisco unit in due course of mail (R.39,40,58; Def. Ex. 1). No trace of the registered package and contents was thereafter found (R.55,56,58; Pros. Ex. 7, p. 2,6,7). The second carbon (green) copy of the letter was placed in the postage stamps suspense file awaiting acknowledgment of receipt (R.4,5; Pros. Ex. 8). Witness entered the transmittal of the stamps in a record of miscellaneous postage stamps disbursements (R.29), a record kept by him under accused's directions (R.30).

Not having received an acknowledgment of receipt of the stamps by indorsement on the inclosed carbon copy of the letter of transmittal or otherwise, except by the registry receipt, accused, on Sunday, September 27, 1942, telephoned from the San Francisco unit to the Los Angeles sub-unit and had a conversation with Warrant Officer Irving Cohen of the Los Angeles sub-unit (Pros. Ex. 7). Accused inquired whether the stamps had been received and was advised that a search would be made and results communicated. Captain Richardson reported to accused that the stamps could not be found. Accused stated he would forward a duplicate receipt for the stamps and requested Captain Richardson to sign and return it (R.59; Pros. Ex. 7, p.1,6). About September 30, 1942, accused was informed by Captain Richardson that the stamps mailed on September 22, 1942, could not be found (Pros. Ex. 7, p. 5). He then told Captain Richardson that he would send him by air mail a duplicate copy of the letter of transmittal so that a receipt for the package of stamps could be endorsed on it and the stamps records of the San Francisco unit cleared (Pros. Ex. 7, p. 2). At about the same time accused instructed Technician 5th Grade Otten to prepare a duplicate of the original letter of transmittal (R.26; Pros. Ex. 3) and send it by air mail to the officer in charge of the Los Angeles sub-unit for the purpose of obtaining an indorsed receipt of the package of stamps (R.26,27,28). Accordingly, on or about September 30, 1942, Otten prepared the duplicate letter of transmittal in triplicate, the original on heavy bond white paper, the first carbon on white (R.27,38). He dated the duplicate September 22, 1942, typed accused's initials and his own on the upper right hand corner, inserted a line at the foot of the column of figures under the caption "total value" and thereunder inserted the figures "392.00".

He had omitted the line and figures "392.00" from the original letter of transmittal but had inserted them by pencil in his own handwriting on the retained carbon copy (R.25,28,39; Pros. Ex. 3,4). He presented the original of the duplicate letter to accused and saw him sign it, then he inclosed the signed original and first carbon of the duplicate letter in an envelope addressed to the officer in charge of the Los Angeles sub-unit, sealed it, placed air mail postage and "air mail" thereon, and caused it to be sent by air mail (R.28). Otten then entered in the Security Section record of miscellaneous postage stamps disbursements made through the section the fact of mailing the duplicate letter of transmittal (R.28; Pros. Ex. 6), and filed in the Section's correspondence files the second carbon (green) copy of the duplicate letter of transmittal (R.34).

Warrant Officer Junior Grade Irving Cohen, the personnel adjutant, assistant officer in charge (R.45,154), and custodian of stamps (R.57), of the Los Angeles sub-unit, testified that he first saw the duplicate transmittal letter, original and first carbon (white) copy at the Los Angeles sub-unit office on or about October 21, 1942 (R.47, 53). He caused the clerk to prepare the first indorsement for his signature. He testified:

> "The original indorsement was made and prepared for Captain Richardson's signature, which was signed at the same time; the date which was indicated on that first indorsement was dated, I believe, October 21st or October 23rd, which was the current date at the time, and that date was changed to September 23, therefore, necessitating a new first indorsement, and since the Commanding Officer, who was Captain Richardson, was away at the time, this first indorsement was prepared for my signature * * * and the other indorsement was cut from the original communication" (R.47,48,56).

Warrant Officer Cohen, pursuant to instructions given to him by Captain Richardson (R.57), signed the first indorsement so prepared for his signature after it had been attached by pasting to the duplicate transmittal communication, and returned it by mail to the San Francisco unit (R.47,54). The change in date and indorsement were made on the recommendation of witness (R.55) and with the approval of accused expressed in a conversation with witness held at the Los Angeles sub-unit office between October 21 and 23, 1942 (R.48,49,53,55). The original first indorsement that had been prepared for Captain Richardson's signature and had been signed by him was destroyed (R.57; Pros. Ex. 7, p. 3).

The first carbon (white) copy of the duplicate transmittal letter was filed at the Los Angeles sub-unit (Pros. Ex. 7, p. 4), together with the first indorsement signed by Warrant Officer Cohen. Captain Richardson testified that the procedure of transmitting and receipting for stamps followed in this instance was the same as that customarily followed in the four or five previous stamp transmittal transactions between the San Francisco unit and the Los Angeles sub-unit (R.37; Pros. Ex. 7, p. 8), and that the signing of the receipt was routine and not unusual even though the stamps had not been received (Pros. Ex. 7, p. 8). On October 11, 1942, accused in writing notified the Adjutant General, Headquarters Western Defense Command and Fourth Army, of the shortage of United States postage stamps, and requested that an investigation be made (R.110,133; Pros. Ex. 8).

Corporal Otten testified that on or about October 20, 1942, accused:

(a) Removed from the files and records of the San Francisco unit the original entry page that contained an entry to the effect that on September 30, 1942, postage in the amount of six cents had been used on the duplicate transmittal letter in reference to "postage stamp transmittal" (R.31) and did not thereafter restore it to the records or files of the San Francisco unit (R.30,31,37,39);

(b) Required Corporal Otten to reproduce the entry page, except to omit therefrom the entry referring to the use on September 30, 1942, of postage in the amount of six cents on the duplicate transmittal letter in reference to "postage stamp transmittal" (R.31; Pros. Ex. 6), and placed it in the records and files of the San Francisco unit in lieu of the original that had been removed therefrom and retained by accused (R.30,31,37,39; Pros. Ex. 6);

(c) Took, retained and neglected to file the original of the duplicate transmittal letter and first indorsement thereon upon its receipt by the San Francisco unit from the Los Angeles sub-unit (R.33,34,39);

(d) Removed from the files and records of the San Francisco unit and retained the second carbon (green) copy of the duplicate transmittal letter (R.34,39,40);

(e) As a consequence of a,b,c, and d, hereinabove, removed from the files and records of the San Francisco unit every entry,

writing, and record that referred to the preparation, transmittal and subject matter of the duplicate letter of transmittal (R.39);

(f) Gave peremptory instructions to witness and Private Peters "that we should not say anything about this duplicate transmittal because it might mean trouble" (R.36,39).

Private Peters testified that on or about October 20, 1942 (R.43, 44), in the Security Section of the San Francisco unit accused said to witness and Corporal Otten "a duplicate transmittal had been sent to L.A.; that Captain Richardson had mentioned that to the Inspector and I think that an investigation was going to be held. He also said that the duplicate transmittal would have to be destroyed. After that he said 'I don't want you to say anything to anybody about the duplicate transmittal'" (R.43). The witness further testified that he had seen the second carbon (green) copy of the transmittal letter in the suspense file and had overheard a conversation between accused and Corporal Otten , about October 15, 1942, in which accused referred to it (R.43).

Lieutenant Colonel Francis C. Linehan, Inspector General's Department, Headquarters Western Defense Command and Fourth Army (R. 1,2), testified that he was designated by the Commanding General, Western Defense Command and Fourth Army, to investigate certain irregularities in the Machine Records units of the Western Defense Command and Fourth Army. He commenced the investigation on November 12, 1942 (R.2,19), and concluded it on December 22, 1942 (R.19). In the course of that investigation and in connection with it between 0845 and 1100 on December 16, 1942, after the oath as a witness had been administered to accused and his rights under the 24th Article of War read and fully explained to him, the witness propounded certain questions to accused and received from him his voluntary answers thereto (R.4). Accused was asked concerning duplicate copies (Pros. Ex. 4) of a transmittal letter dated September 22, 1942 (Pros. Ex. 3), and the accused in substance testified in said investigation on said date as follows:

That he had not prepared, caused to be prepared, signed, mailed or caused to be mailed to the officer in charge, Los Angeles sub-unit, seen, heard of, known about, received, heard of the receipt of, destroyed, or otherwise disposed of, or ordered the destruction or other disposition of, discussed or otherwise dealt with duplicate copies of a transmittal letter dated September 22, 1942, signed "J. G. Staples, Capt. A.G.D.", subject "Postage Stamps", referring to the shipment to and receipt of postage stamps valued at $392 by the Los

Angeles sub-unit (R.9,10,11,12,13,14,15,16,17); that he had not had a conversation with Corporal Otten in the presence and hearing of Private Peters on or about October 20, 1942, at 1745 at the office of the San Francisco unit, in which accused told Corporal Otten that the duplicate transmittal letter and receipt would have to be destroyed (R.13); and that he had not requested or ordered Corporal Otten and Private Peters or either of them to refrain from mentioning or revealing to any person whomsoever the preparation or return of the duplicate transmittal letter and set of receipts (R.16,17).

In the course of the same investigation and while accused was still under oath and testifying on December 16, 1942, between the period of 1808 and 1821 accused stated that on September 27, 1942, he had requested Captain Richardson to execute duplicate receipts for the stamps "so that I could clear the records in the San Francisco Machine Records Unit". He obtained Captain Richardson's consent to do so. He stated further that on or about September 29, 1942, he prepared a duplicate transmittal letter in connection with the postage stamps shipment and forwarded it to the Los Angeles sub-unit (R.85); and that when in Los Angeles on October 6 or 7 he picked up the original duplicate transmittal letter with the receipt of the stamps, signed by Warrant Officer Cohen attached thereto, and carried it back to the San Francisco unit. He testified further that later he burned the original duplicate transmittal letter and receipts (R.86,87). He requested Corporal Otten and Private Peters "not to say anything to any one about the preparation of this duplicate receipt" (R.86). He stated that he knew that his previous statement under oath on the same subject matter was false (R.86,92).

Lieutenant Colonel Sumner P. Tufts, General Staff Corps, Assistant G-3, Northern California Sector, testified that he was the investigating officer in this case appointed by the Commanding General, Northern California Sector, and conducted an investigation pursuant to the order of his appointment (R.94). During the course of the investigation accused submitted an unsworn written statement dated January 13, 1943, signed by him, which, being identified by the witness, was received in evidence without objection and marked Prosecution's Exhibit 8. In this statement accused stated:

> "1. On or about September 22, 1942 I forwarded $393.00 worth of United States postage stamps to the Officer in Charge of the 96th Machine Records Unit, Los Angeles, California. Approximately a week or ten days after these stamps were transmitted to Los Angeles, I found that formal receipts had not been returned to my organization. I then contacted Captain E.M.

Richardson, Jr., Officer in Charge of the 96th Machine Records Unit, Los Angeles, on this non-receipt of formal transmittals which normally acknowledged receipt of items such as this. Captain Richardson informed me that he did not receive the stamps and immediately started an investigation to determine what happened to the stamps in question.

"2. * * * Major Mayers stated that to clear my records properly I should prepare a duplicate receipt and forward same to Los Angeles. I then had Corporal Albert W. Otten prepare this duplicate receipt, as per Major Mayers' instructions. When this duplicate receipt was received in my organization from the Los Angeles Machine Records Unit, I showed same to Major Mayers. We discussed it, and he said this was not the proper way to clear our books, and that the duplicate receipt should be destroyed. This I did. Major Mayers also told me at this time that I should inform any one who had anything to do with the preparation of the duplicate receipt not to say anything about it, if any questions were asked. So from these instructions of Major Mayers I told Corporal Otten and Private Clair C. Peters not to discuss or tell any one that duplicate receipts had been prepared.

* * *

"5. * * * Major Mayers often discussed with me * * * the preparation of the duplicate receipt."

5. Accused was sworn as a witness and testified that on September 22, 1942, he transmitted to the Los Angeles sub-unit $392 worth of postage stamps, and included therewith a letter of transmittal (R.109,116; Pros. Ex. 3). He did not receive back the formal acknowledgment of receipt, but did receive the post office return receipt. About September 27, 1942, accused telephoned the Los Angeles sub-unit and inquired what had happened and whether the formal acknowledgment of the receipt of the package of stamps had been sent. Two or three days later Captain Richardson called back and reported that the stamps could not be found (R.109). Witness immediately reported the loss of the stamps to Major Mayers, and the omission of a receipt for them (R.110), and was directed by him to prepare a duplicate receipt as the "proper way to clear my books" and to instruct any one who had anything to do with the preparation of the receipt "to say nothing to any one" (R.110). Witness on October 1, 1942, caused such duplicate receipt to be prepared and transmitted it to the Officer in Charge of the Los Angeles sub-unit (R.111, 118). The receipt was returned to San Francisco and brought to witness' attention on or about October 10, 1942. Witness informed Major Mayers of its receipt and under his orders destroyed it (R.111,112,113,122),

and instructed Corporal Otten and Private Peters to say nothing to any one about its preparation (R.115,128). On October 10, 1942, before being informed of an official investigation he made a formal written report to Colonel Read concerning the loss of the stamps (R.113; Pros. Ex. 8).

On December 16, 1942, witness stated to Colonel Linehan in the course of the official investigation started by the Inspector General of the Fourth Army (R.113) that he "had not had prepared and mailed duplicate copies of the original letter of transmittal of the stamps" (R. 114,115,117) and "had not requested Corporal Otten and Private Peters not to mention the preparation and mailing of the duplicate copy" (R. 115,117), and on the same day in the course of the same investigation witness changed his statement and stated that he had had copies of the duplicate receipt prepared and had instructed Corporal Otten and Private Peters to say nothing about it (R.115,124). The corrected statements were true, and in all other respects his statements to Colonel Linehan were true (R.115). He did not at any time instruct Corporal Otten to change any entry in the disbursement of postage stamps in the Machine Records Unit Book (R.116,126,127). When making the statements to Colonel Linehan he realized that he was making false statements in the course of an official investigation (R.117,118), but did so under instructions of Major Mayers (R.115,120). "It was just that I didn't like to see Captain Richardson get stuck" (R.124). He testified that he changed his official statements when confronted by Colonel Linehan with certain conflicting testimony (R.123). "I realized during the course of these conversations with him (Colonel Linehan) during the day that the preparation of duplicate receipts seemed to be quite important, and actually realized, at a later stage of the investigation, my duty to the Army and the Government regardless of who was concerned with it. I told him the whole story" (R.115). He received no benefit from the preparation of the duplicate receipt (R.116).

Major Eugene T. Adler, Executive Officer to the Adjutant General, Western Defense Command and Fourth Army, testified that he had known accused since February, 1942, and had had daily contact with him since April, 1942; that accused's reputation "is only of the highest integrity and loyalty". He is "the highest type officer that I know in the Army" (R.146). He built up the San Francisco unit "into one of the best organizations of its kind in the service today". Witness identified accused's general classification card in which accused was rated as "superior" in respect to "manner of Performance of Duty" (R.147).

Lieutenant Colonel Ward C. Schweezer, Coast Artillery, Headquarters Western Defense Command and Fourth Army; Lieutenant Colonel Lynn D. Smith, General Staff Corps, Headquarters Western Defense Command

and Fourth Army (by stipulation), and Lieutenant Colonel Lewis D. Morgan, Quartermaster Corps, Northern California Sector, testified that accused bore an excellent reputation for integrity and character, possessed professional ability as a Reserve officer in the Coast Artillery and had a highly satisfactory previous military record (R.151,152,153,154).

5. In rebuttal Major Ben M. Mayers, Adjutant General's Department, formerly War Department Inspector for Machine Records and Western Defense Command, Machine Records Coordinator, testified that he acted in an advisory capacity to Colonel Read; was not accused's immediate commanding officer (R.156,157); never saw Prosecution's Exhibit 4, nor its original; never discussed with accused the matter of a letter of transmittal relating to the shipment of stamps; never ordered accused to prepare a duplicate letter of dismissal relating to that shipment of stamps; and never ordered accused to request or order certain enlisted men in the San Francisco unit to deny that they had any knowledge concerning the preparation and mailing of a duplicate letter of transmittal relating to shipment of postage stamps (R.157).

6. It is clearly established without conflict that at the times and places alleged in Specifications 1 and 2 accused testified under oath before Lieutenant Colonel Francis B. Linehan, Inspector General's Department, an officer conducting an official investigation, substantially as alleged therein; that such testimony was at the times alleged false and untrue, known by accused to be untrue, and given deliberately by him with intent to deceive, fully realizing that it was in the course of an official investigation ordered by his superior commanding general. The falsity of his statements is abundantly supported by the testimony of various witnesses and by his own admissions, statements, and testimony given (a) on December 16, 1942, in the course of an official investigation to Colonel Linehan; (b) on January 13, 1943, to Lieutenant Colonel Sumner P. Tufts (Pros. Ex. 8), in the course of an official investigation; (c) and on January 30, 1943, before the general court-martial during the trial of accused.

Knowingly making a false official statement is an offense of a nature long recognized as a violation of the 95th Article of War (par. 151, M.C.M., Dig. Op. JAG 1912-30, pp. 140,141, sec. 1496, Dig. Op. JAG 1912-40, sec. 453 (18)).

Accused's contention that he was justified in making the false official statements because he was under orders to do so by Major Mayers, whom he regarded as his immediate superior officer, is wholly lacking in

merit. Obedience to orders of a military superior is in general a good defense at military law (Winthrop's Military Law and Precedents, 2nd ed., 296). To constitute a defense of this nature the order must be a legal one and "emanate from a proper officer, a superior authorized to give it, and it must command a thing not in itself unlawful or prohibited by law" (Idem, 296). Making a false official statement, a military offense in violation of Article of War 95, is not relieved of its odium because it was pursuant to the direction of a superior officer. In this case Major Mayers denied that he was accused's superior officer, and that he had given accused any orders requiring him to make any false official statement to Colonel Linehan in the course of an official investigation. The court was fully justified in resolving this conflict against the contention of the accused. The findings of guilty are amply supported by the evidence in the record.

7. Attached to the record of trial are two recommendations for clemency, one signed by the three defense counsel and the other by the trial judge advocate and his assistant.

8. War Department records disclose that accused is 37 years of age and a graduate of high school. For two years he studied applied electrical engineering at the Chicago Engineering Works. He was appointed first lieutenant, Officers' Reserve Corps, September 24, 1935, and entered extended active duty January 15, 1941.

9. The court was legally constituted and had jurisdiction of the person and the subject matter. 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 mandatory upon conviction of violation of Article of War 95.

Andrew S. Lappen Jr., Judge Advocate.

Wm Rosenthal, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., JUN 10 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Captain Jeremiah G. Staples (0-297889), Adjutant General's Department.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but commuted to a reprimand to be administered by the reviewing authority and that the sentence as thus modified be carried into execution.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Record of trial.
Incl.2-Draft of let.for sig. Sec. of War.
Incl.3-Form of action.

(Sentence confirmed but commuted to reprimand. G.C.M.O. 154, 21 Jul 1943)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGH
CM 232400

APR 27 1943

UNITED STATES	)	6TH SERVICE COMMAND
v.	)	Trial by G.C.M., convened at Fort Brady, Michigan, February 2 and 3, 1943. Dishonorable discharge and confinement for life. Penitentiary.
Private EMANUEL THOMAS (34223024), Battery K, 100th Coast Artillery (Antiaircraft).	)	

REVIEW by the BOARD OF REVIEW
HILL, LYON and DRIVER, Judge Advocates

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

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

CHARGE : Violation of the 92nd Article of War.

Specification: In that Private Emanuel Thomas, Battery K, 100th Coast Artillery (Antiaircraft), did, at Sault Sainte Marie, Ontario, Canada, on or about January 8, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Charles M. Corder, Battery K, 100th Coast Artillery (Antiaircraft), a human being by shooting him with a United States Rifle Caliber .30 M1.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. All members of the court present concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution is substantially as follows:

On the morning of January 8, 1943, Privates Dennis Walker, Charles H. Burns and Charles M. Corder, all of Battery K, 100th Coast Artillery, then stationed at Sault Sainte Marie, Ontario, Canada, were in the day room of K Battery. Corder was the day room orderly. There was to be an inspection that morning and Walker and Burns were on a detail to help Corder get the room in order. Walker and Burns began playing darts at the front end of the day room - on the left side of the entrance. While the game was in progress, Emanuel Thomas, the accused, also of Battery K, entered the day room. Corder asked the accused for the key to the tool box. The accused said "he was in charge of that key and * * * he was not going to let him have it". Corder said, "Give me the key, man, * * * we got to have the dayroom cleaned up so we can have inspection here today". (R. 41) Accused would not let Corder have the key. Corder "looked like he got a little angry" and:

> "* * * made the attempt like he was going to hit him and they just ran to each other, hooked up like that, and after a while Corder says: 'Man, you better go ahead, I got to get this place cleaned up'. * * * they turned each other loose, and Corder goes out the dayroom. Before he go out he says: 'I will see Lieutenant Nicholson * * * and see if I can get the key.'" (R. 41, 42)

Two or three minutes later the accused left. Shortly thereafter Corder returned and began straightening up the books in a bookcase (R. 38-43). Walker and Burns continued their game of darts. Seven or eight minutes later, Walker saw a hand reach around the inside of the day room door and said: "Who's that?", and before he could get to the door, the accused "jumps inside". "As he came in he jumped over to the right", threw up an M-1 rifle and pointed it in the direction of the bookstand.

Walker, then about three or four paces from accused, threw up his hands and said: "Don't, don't do that * * *. Well, he fired; he fired so quick until I don't know — I just couldn't do nothing". (R. 43-46) Walker was not looking towards Corder when the rifle was fired, but while grappling with accused to take the rifle from him, he looked back and saw Corder getting up from the floor "right by the bookstand". As Walker was trying to get the gun, Corder passed, walking rapidly and as he went out called Walker's nickname - saying "Hold him, Gulah". When Walker had succeeded in taking the rifle from the accused, accused ran out the back door. Walker gave the rifle to Sergeant Widby (R. 47-50). On cross-examination Walker stated that he and Corder had been good friends since August, 1940. He and accused were on good terms, but he was not as friendly with accused as he had been with Corder. Walker had never known of accused or Corder being involved in any quarrel with other men or with each other. (R. 67) Private Burns heard no "angry exchange of words" between accused and Corder, and did not see any "scuffle". He was not paying any attention to that. He heard accused refuse to give Corder the key, and saw Corder leave the day room. Later the accused left. A few minutes after Corder returned Burns heard Walker ask: "Who was that at the door?" No one answered. He thought Walker was speaking to him. Then Walker said: "'No', something" and as Burns turned and looked towards the door the gun fired.

> "* * * I thought * * * somebody shot Walker * * *. He was leaning over and I started toward him and at that time Corder he went out holding his side, so I turned around and went out behind him."

As Corder went by he said: "I am shot". Burns did not see the accused enter the door and did not see Walker wrestling with him - but he saw Walker going toward the accused - "* * * holding his hands that way, telling him not to do that". At this time the accused had a rifle in his hand. (R. 67-73)

About 8 o'clock on the morning of January 8, 1943, Sergeant Harvey L. White, Battery K, 100th Coast Artillery, had detailed the accused to do certain work and in furtherance thereof took accused to Barrack No. 19. While the sergeant was explaining the work to be done, the accused stepped out of the back door. As accused went out Corder came to the front door and called accused. Shortly thereafter, the sergeant heard accused and Corder talking outside the barracks. He heard Corder say: "God-damn it",

and heard accused say: "Oh, go on, man", but could not understand all that was said.

Ten or twelve minutes later, Sergeant White saw Corder running out of the day room, holding his left side with his right hand. "I called him and said 'What's the matter, Corder?' * * *. He said: 'I am shot, man'. * * *. I said: 'Who shot you?'" and Corder said: "Emanuel Thomas". "I said: 'Where were you?'" and Corder replied: "In the day room". By this time Sergeant White had Corder by the arm, and eased him to the ground. Corder said "That's all right. I'm all right". The sergeant called for help. In a few minutes two first aid men came from a nearby dispensary. The injured soldier was covered with blankets and placed in an ambulance. The first sergeant told Sergeant White to get a detail and go after the accused. The accused was located on the road near the gas house about one hundred yards from the day room of K Battery. He was taken into custody and turned over to Captain Henry A. Spangler, 100th Coast Artillery. Sergeant White did not know of any "bad blood" between the accused and Corder. (R. 77-84) On cross-examination, Sergeant White stated that the conversation between accused and Corder outside of Barrack No. 19, referred to in his direct examination, sounded "like an argument". When the accused was found he offered no resistance. (R. 85-86)

About 9:20 on the morning of January 8, 1943, as Second Lieutenant Fred Z. Nichols, Battery K, 100th Coast Artillery, was coming up the road in front of Battery K, he saw, about 50 yards away, a man lying on the ground in front of the mess hall. Several persons were congregated there. When the lieutenant arrived he recognized the injured soldier as Private Charles Corder. His face was smeared with blood and blood was trickling from his mouth. Lieutenant Nichols assisted in making the soldier comfortable and ordered that he be placed in an ambulance as quickly as possible. Corder did not say anything and the lieutenant could not say whether he was conscious or not. In the meantime, and in the presence of the lieutenant, Private Dennis Walker handed Sergeant Widby a rifle which Widby in turn gave to the lieutenant. The rifle was inspected and was found to contain cartridges, and to have the odor of a rifle which had been recently fired. After the injured soldier was placed in an ambulance, Lieutenant Nichols dispatched a searching party for the accused, took the rifle to the battery office and gave it to First Lieutenant George D. Taylor. Lieutenant Nichols remained in the office about two minutes and then walked to the place where Corder had been lying on the ground. From this spot he followed a trail of blood to the north entrance of the day room

of Battery K - a distance of 248 feet. As he reached the day room, the searching party returned with the accused. They were ordered to take the accused to the battery office and report to Captain Spangler. The front door of the day room was open. Blood was on the floor of the storm entrance and the trail of blood extended along the left side of the day room 45 or 50 feet. After noticing how everything looked, Lieutenant Nichols went to the battery office and about five minutes later returned to the day room with Lieutenant Colonel Parnin, Commander of the 3rd Battalion, 100th Coast Artillery. At this time particular attention was paid to the arrangement of the furniture and other equipment in the day room. Lieutenant Nichols identified a pencil sketch of the day room of K Battery which he had drawn to scale and stated that it reflected the arrangement of the day room and the furniture and other equipment therein on the morning of January 8, 1943. (Ex. 1)

Using the sketch in explaining his testimony, Lieutenant Nichols pointed out the trail of blood from the front door to a point where it ended between a small table and the bookcase on the east side of the day room. An expended cartridge was found in the northern end of the day room about three feet in front of the telephone booth. This was given to Captain Spangler. Some of the books in the bookcase were disarranged. On examination, one book was found to have a hole through it.

> "And then by looking and following the hole through the top of the bookcase, we moved the bookcase out, and I noticed that the back of the bookcase which was covered by a piece of Celotex had a hole through it. Then we looked through the hole and noticed that the hole lined up with the hole in the book and the back of the bookcase which had a hole in it. Then we noticed that behind the bookcase there was a hole in the side of the wall, and on lining up the three we saw that all three of them matched up together". (R. 30, 31)

Finding no hole through the outside wall a search was made between the inside and outside walls and there was found what was identified as "* * * a bullet from a .30 caliber cartridge, distorted on the end, the point being slightly bent". (Pros. Ex. 3) The book which had the hole in it was on the lower shelf of the bookcase. The hole in the back of

the bookcase and the hole through the inside wall of the day room was 22½ inches from the floor level. The distance from Battery K day room door to the door of the barracks in which accused at that time was quartered is 108 feet (R. 17-34, 37).

First Lieutenant Taylor, Executive Officer of K Battery, 100th Coast Artillery, identified a .30 caliber M-1 rifle, No. 498615, as one brought to his office on January 8, 1943, by Lieutenant Nichols. Lieutenant Taylor stated that he unloaded six rounds of ammunition from the rifle in the presence of Lieutenant Nichols and gave the ammunition and the clip to Captain Spangler. The clip holds eight rounds. The number of the rifle was checked with the rifle roster in the battery supply room and corresponded with the rifle issued to the accused. (R. 87-91)

First Lieutenant Harvey White, Medical Corps, 1604th Service Unit, Fort Brady Hospital, Fort Brady, Michigan, testified that he saw Charles Corder when he was brought to the hospital on a stretcher about 10 a.m., January 8, 1943. He was first placed on the table in the plaster room where he was initially treated by Major Raymond E. Davies, Medical Corps, Chief of the Surgical Service. Following first aid he was transferred to Ward 3 and was thereafter under the care, treatment and supervision of Lieutenant White, in conjunction with Major Davies. The injured soldier was in a state of profound shock. He had marked difficulty in breathing. He was "cold and clammy" and his blood pressure was low. On examination of his chest wall, it was found that he had a perforated injury in his back, about the size of a pea, located about two inches to the right of the spine and near the seventh rib. There was also a large laceration on the anterior chest wall in the region of the fifth intercostal space. He had previously been sutured by Major Davies. On account of the direction of the wound and the amount of hemorrhage, it was concluded that the lung was involved. The laceration of the lung "exposed the bronchia of the lung, and in the course of his breathing, blood and mucous and other material were aspirated into the bronchia and so caused the aspiratory pneumonia". The patient was under the constant care of Lieutenant White until his death at approximately 11:55 p.m., January 9, 1943. The diagnosis at time of death was "gunshot wound, severe, to the right chest wall involving tissues such as muscle, bone, skin and lung, associated with hemorrhage". (R. 7-13) On cross-examination, Lieutenant White stated that when the injured soldier entered the hospital he had most of his clothes on and the lieutenant could not recall whether or not the wound had been previously dressed. It was apparent from the condition of

his clothing that he had lost a considerable amount of blood, but on account of the nature of the wound and the source of the bleeding, the application of dressings would not necessarily have decreased the loss of blood. The usual and customary procedure in such severe cases is to get the patient to a hospital as soon as possible. There was no evidence that the patient had been treated for shock. His loss of blood had been compensated for by two blood transfusions and he had recovered to a large extent from his shock. (R. 13-15) In response to questions by the court, Lieutenant White stated that the wound was the initial, primary and direct cause of Private Charles M. Corder's death. (R. 16)

4. For the defense Second Lieutenant George D. Taylor, Second Lieutenant Fred Z. Nichols, Sergeant Harvey L. White and Technician Fifth Grade Luther Davis, all of K Battery, 100th Coast Artillery, testified respectively as follows:

On or about December 8, 1942, the accused came to Lieutenant Taylor seeking advice as to a way of determining the paternity of a child which his wife had had. (R. 99, 100)

About three weeks prior to January 8, 1943, the accused approached Lieutenant Nichols upon the same subject. He seemed quite worried and inquired as to instituting divorce proceedings on the ground that he was not the father of the child. Lieutenant Nichols referred him to Lieutenant Nicholson. Thereafter accused told Lieutenant Nichols that he was trying to get a furlough so that he could go home and see what could be done. (R. 101, 102)

Sergeant White had not observed any particular change in the accused prior to the shooting on January 8, 1943. He was a carpenter and always did good work. Sergeant White, however, did observe that "* * * at times some of the boys would tease him about some things that happened when he was on furlough. * * * The boys teased him about his wife". He had never seen or heard Corder, the deceased, tease accused about these matters. (R. 102, 103)

Luther Davis, Technician Fifth Grade, stated that he heard the accused ask one of the lieutenants about domestic troubles. The accused, at times, seemed to act "kind of strange at times, like his mind wandered, as though he was thinking about something * * * hard thinking". He recalled one occasion when accused was reading "a letter or something"

accused made some statement "about committing suicide or something of that kind".

The accused testified that he was the battery carpenter. On the morning of January 8, 1943, Sergeant White came to the orderly room and told accused that he wanted him to build a pantry in Barrack No. 19. Accused went to the barrack with Sergeant White to see a diagram of the cabinet. On the way over they met Private Corder. Corder asked accused where Burns was and accused told him he did not know. After examining the diagram accused left Barrack 19 and went to the latrine. Returning from the latrine he met Corder again near the mess hall. Corder "cussed" him "quite a few times". Accused said "Go on, man, and leave me alone". Corder continued cursing and went to the day room. Accused went towards the mess hall and from the mess hall to the day room - entering the day room behind Corder. When Corder saw accused he turned around "* * * and come back, cussing me, and asked me for the key". Accused said "This tool box is issued to me at the time here and I do not have to open that tool box unless I want to". Corder then struck accused three or four times in the face and on the head, and accused went into a clinch with him. Privates Walker and Burns were present. Burns was leaning against the piano and Walker was to the left of the stove at the front entrance. The "scuffle" occurred near the library table as shown in Prosecution Ex. No. 1. Someone said "There is no need for you all to do that". Corder then turned accused "loose" and went towards the pantry in the south end of the day room, designated on Prosecution Exhibit No. 1 as the Day Room Orderly's Quarters. As he went towards the pantry, Corder said: "Get out of here, get out of here or else I will blow your head off". Accused left the day room and went to his barracks and sat on the side of his bed thinking "* * * how I could get my tool box out * * * I knew if I went back after my tool box and not give Corder the tools that he was going to jump on me". Accused said that he was 5 feet, 7 inches tall, weighed 140 pounds, whereas Corder was around six feet tall and weighed from 180 to 190 pounds. Finally accused took his rifle, which he knew was loaded with eight rounds of ammunition and returned to the day room. His reason for taking the rifle was that he knew Corder would "jump" him if he went for his tools without it, and he had no confidence in his ability to defend himself, if necessary, with his bare hands. He opened the door to the day room with his left hand, holding the rifle at the smaller part of the stock with his right hand, and entered the room. Walker was standing to the left of the door at the north entrance and yelled: "Look out!" He did not see Burns.

Accused (explaining his testimony by the use of Pros. Ex. 1) stated that Corder was standing on the east side of the "ping-pong" table, and was coming towards the front entrance. After yelling "look out", Walker "* * * grabbed me around both arms * * *. He carries me over into the telephone booth, swings me around like that * * *.". Corder, rushing towards the front entrance, hollered: "'Hold him'". Corder was "coming up on the side to my left and his right". Accused stated that as Corder reached a point east of the center stove, and as Walker carried him over to the telephone booth, the gun fired. Accused said that he did not remember pulling the trigger; that he was holding the rifle by the smaller part of the stock and it was not possible for him to have pulled the trigger. He did not know whether Walker's hand was near the trigger or not, but Walker was "fumbling to get ahold of the gun * * *. As the gun fired it jumped out of my hands and went to the floor".

After the gun dropped to the floor accused saw Corder on the east side of the south end of the library table, straightening up from a quarter knee bend. Accused did not remember extracting a round of ammunition from the rifle after it was fired. As the rifle fell to the floor, accused "tore loose from Walker and ran out the back door * * * down to the other street". He was not attempting to run away because at this time he did not know Corder had been shot. In a few minutes he saw Sergeant White and three other soldiers coming towards him. He went to meet them, and, without any resistance, accompanied them to the orderly room.

Accused stated that he entered the service June 3, 1942. He and Corder were not friends. They had had some "cross words" over a "dart" game about two days before the shooting. Accused was not with Walker at Camp Davis and had known him about three months. Accused and Burns had worked together two days but were not friends. On cross-examination accused stated that when he ran out the back door, he was running from Corder. He knew if Corder got hold of him it would be his end. He was not "seriously mad at Corder" after the "scuffle" - nor was he "seriously mad" at him when he went to the barracks and sat on the bunk. He stated that he did not have to load his rifle before returning to the day room because he had loaded it that morning on account of "a fuss with another boy, another fellow". His purpose in returning to the day room with the loaded rifle was to get the tool box. That was the only way he could think of to get it - "* * * without him beating me up". He just took it along for protection. When accused loaded the rifle that morning he put in eight rounds - a full clip, - but did not pull back the bolt to load it for firing. He did not know

how the loaded cartridge got into the chamber. It was rather dark that morning and when he allowed the bolt to go forward he did not know whether a cartridge went into the chamber or not. (R. 110-146)

Major Davies, testified that on the morning of January 8, 1943, he was notified that an injured patient was on the way to the hospital. The patient was received in the surgical pavilion and was found to have been seriously injured by a gunshot wound. Major Davies' testimony with respect to the nature, character and extent of the injury was in substance the same as that of Lieutenant White's, supra. In addition, Major Davies stated that about five hours before his death, Private Corder, while in extremis and under a sense of impending death - in response to Major Davies' question as to how far away his assailant was when he fired, quoted the deceased as making an unintelligible answer:

> "* * * He was very weak and his enunciation was very poor. I asked him to repeat it, and again all I could get was five feet. There were words ahead of the five feet but I was unable to determine whether it was 35, 45, or whether it was five feet". (R. 147-149)

Major Davies also quoted the deceased as saying to him on the day he entered the hospital and while he was likewise under a sense of impending death: "I was only fooling" or "only joshing the other soldier". Continuing Major Davies said:

> "He went on to state that as he went past the door, or as the other soldier went past the door -- I never was quite clear-- He looked up and the other soldier pulled up and shot him. Now, whether it was the accused that went past the door and he saw him, or whether it was Corder that went past the door and he saw the accused, I am not sure. That was his expression as to his first knowledge of what was happening". (R. 151)

5. The undisputed evidence shows that Private Charles M. Corder came to his death on January 9, 1943, as the direct result of a gunshot wound from a service rifle in the hands of the accused. The shooting followed an altercation arising out of a petty dispute over the refusal of the accused to give the deceased the key to a tool box. Following

the altercation or "scuffle", the deceased, Corder, went out the front door of the day room. Two or three minutes thereafter the accused left. Private Walker stated that as Corder left via the front door, he said that he was going to see Lieutenant Nicholson about the key. The accused testified that Corder went towards the south end of the day room, saying: "Get out of here, get out of here, or else I will blow your head off". The evidence shows that shortly after this incident, Corder returned to the day room and began straightening some books in a bookcase next to the east wall of the day room, 45 or 50 feet from the front door. Seven or eight minutes after Corder's return, the accused entered the front door with his M-1 .30 caliber service rifle and pointed it in the direction of the bookstand. Before Private Walker could interfere, the rifle was fired by accused. While Walker grappled with the accused to wrest the rifle from him, Walker saw Corder getting up from the floor - "right by the bookstand". As Walker continued his struggle for the rifle, Corder went out the front door, leaving a trail of blood extending from a point close to the bookcase to the place where he fell - a distance of 248 feet from the front door of the day room. The injured soldier was quickly placed in an ambulance and taken to Fort Brady Hospital where he died on the night of January 9, 1943.

Four witnesses of the organization of accused testified for the defense that in December 1942, the accused came to them for advice in regard to his domestic affairs - something relating to his uncertainty about the legitimacy of his child. One of these witnesses testified that at times some of the boys teased accused about his wife, although he had never heard Corder do so. Another said he had heard accused ask one of the lieutenants about some domestic troubles; that the accused, at times, seemed to act "strange like". He recalled one occasion when accused made some statement about committing suicide. This testimony had no bearing upon the guilt or innocence of the accused of the crime with which he was charged. Nor does it raise any issue as to mental responsibility.

The testimony of the accused with respect to the events leading up to the altercation or "scuffle" in the day room is substantially the same as that of Private Walker. The principal conflict relates to the circumstances under which the rifle was fired and the position of Corder at the time the rifle was fired. In this connection the accused stated in effect that as he entered the front door of the day room, Private Walker attempted to disarm him and while "grappling" with him, the rifle was accidentally discharged. This contention is not only contradicted by two apparently disinterested eyewitnesses, but it is irreconcilable

with certain undisputable physical facts and circumstances as disclosed by the record. For instance, the accused stated in substance - that as he entered the day room Walker yelled: "Look out!"; that Corder at this time was standing on the east side of the ping pong table and was coming towards the front entrance. After Walker said "Look out" he (Walker) grabbed accused around both arms and carried him over to the telephone booth. In the meantime, Corder, rushing towards the front entrance, hollered: "Hold him". "* * * Corder was coming up on the side to my left and his right," and as Corder reached a point east of the center stove, the gun fired. (R. 123-125) If, as contended by the accused, the rifle was fired when Corder was at a point east of the center stove, how is the trail of blood beginning at the bookcase to be accounted for? And why would the bullet which had passed through Corder's body have entered the bookcase - entirely out of line with the center stove? Moreover, if, as contended by the accused, Corder was rushing towards the front where accused was standing when the rifle was fired, how can it be explained that the bullet entered Corder's back? The fact that the bullet passed through Corder's body and entered the bookcase at a point 22½ inches from the floor level is in corroboration of Walker's testimony.

Viewing the record in the light of all the evidence, direct and circumstantial, the Board of Review is of the opinion that the court was fully justified in rejecting the theory advanced by the defense, to wit: involuntary manslaughter, and in finding that at the time and place alleged, the accused with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation did, kill Private Charles M. Corder. This conclusion is supported by a chain of events and circumstances involving every element of murder. There is no contention of legal justification. Malice is shown, not only by the use of a deadly weapon, but by the testimony of the accused himself. His quarrel with the deceased two days before the shooting and the fact that he was cursed and abused by the deceased before entering the day room a short time before the shooting, not only warrant an inference of actual malice but are indicative of personal ill-will and constitute a basis for the motive and intent on the part of the accused to take the life of his adversary. Deliberation is shown by the fact that after the quarrel or "scuffle" the accused left the day room, walked a distance of 108 feet to his barracks, sat on his bed, and after meditating several minutes, armed himself with a service rifle, returned to the day room and without warning fired the fatal shot. A homicide under such circumstances is murder, in violation of Article

of War 92.

6. The Board of Review has carefully considered the dying declarations of the deceased as related by Major Davies, Medical Corps, a witness for the defense. These statements are so unintelligible as to render them of no probative value either to the defense or to the prosecution.

7. The charge sheet shows that the accused is 22 years and 6 months of age, and that he was inducted into the military service on June 3, 1942.

8. The court was legally constituted, and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence. A sentence either of death or of imprisonment for life is mandatory upon conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by sections 273 and 275, Criminal Code of the United States (18 U.S.C. 452, 454).

Austin S. Hill, Jr., Judge Advocate.

Percy E. Gray, Judge Advocate.

Samuel M. Drewes, Judge Advocate.

WAR DEPARTMENT
In the Office of The Judge Advocate General
Washington, D. C.

SPJGH
CM 232424

(81)

MAR 26 1943

UNITED STATES v. Private ELDON H. SMITH (14040423), 83rd Single Engine Flying Training Squadron, Maxwell Field, Alabama.	ARMY AIR FORCES SOUTHEAST TRAINING CENTER Trial by G.C.M., convened at Maxwell Field, Alabama, February 17, 1943. Dishonorable discharge and confinement for two (2) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
HILL, LYON and SARGENT, Judge Advocates

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

2. The only question requiring consideration is the legality of the confinement for two years included in the approved sentence.

The record discloses that the larceny of the several articles embraced in the approved findings of guilty under Additional Charges II and III was committed in substantially one transaction (R. 20). The ownership of the property covered by Additional Charge II (AW 93), was alleged in Corporal Edward A. Davis, and that covered by Additional Charge III (AW 94), in the United States. The larceny could well have been alleged in a single specification in violation of the 93rd Article of War.

The Manual for Courts-Martial, 1928, states -

"Where the larceny of several articles is substantially one transaction, it is a single larceny even though the articles belong to different persons. Thus, where 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"(par. 149g, M.C.M., 1928).

Applying this principle of law to the undisputed facts in this case, it is obvious that the acts alleged in Additional Charges II and III constitute in law but a single larceny for which a single penalty should be assessed.

The reviewing authority approved only so much of the findings of guilty of Additional Charge II and the Specification thereunder as involves a finding of guilty of the theft of one pair of slacks of an unknown value of not in excess of $10, and only so much of the findings of guilty of Additional Charge III and its Specification as involves a finding of guilty of the theft of one blouse, value about $10.34, and one O.D. shirt, value about $3.68. Thus, the known value of the property stolen is not in excess of $20. Therefore, the maximum punishment imposable for the theft of these articles in a single transaction is dishonorable discharge, total forfeitures, and confinement at hard labor for six months.

3. The maximum confinement authorized under each of the approved findings of guilty is as follows:

Charge I, absence without leave in excess of 60 days - six months; Charge II, absence without leave for four days - twelve days; Charge III, obtaining money, less than $20, upon the worthless check - six months; Charge IV, breach of arrest - three months; Additional Charges II and III, larceny of property of the value of not in excess of $20 - six months. The total maximum authorized punishment in this case for all approved findings of guilty is, therefore, dishonorable discharge, total forfeitures, and confinement at hard labor for one year, nine months, and twelve days (par. 104c, M.C.M., 1928).

5. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year, nine months, and twelve days.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGH
CM 232424 1st Ind.

War Department, J.A.G.O. MAR 27 1943 - To the Commanding General, Army Air Forces Southeast Training Center, Maxwell Field, Alabama.

1. In the case of Private Eldon H. Smith (14040423), 83rd Single Engine Flying Training Squadron, Maxwell Field, Alabama, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year, nine months, and twelve days, which holding is hereby approved. Upon reduction of the term of confinement to one year, nine months, and twelve days you will have authority to order the execution of the sentence.

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

(CM 232424).

E. C. McNeil,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

MAR 20 '43 PM
RECEIVED
MAR 31 1943
A. C. A. F. S.
Maxwell Field, Ala
MC No.

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

MAY 22 1943

SPJGH
CM 232451

UNITED STATES	)	ARMY AIR FORCES WEST COAST TRAINING CENTER
v.	)	
First Lieutenant THOMAS L. COX (0-430318), Air Corps.	)	Trial by G.C.M., convened at Victorville Army Flying School, Victorville, California, February 15, 1943. Dismissal, total forfeitures and confinement for two (2) years. Disciplinary Barracks.

OPINION of the BOARD OF REVIEW
HILL, DRIVER and LOTTERHOS, Judge Advocates

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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 Judge Advocate General.

2. Accused was charged with violation of the 93rd Article of War, Charge I and Specifications 1 to 3 thereunder, violation of the 94th Article of War, Charge II, and Specifications 1 to 3 thereunder, and violation of the 96th Article of War, Charge III and Specifications 1 to 30 thereunder. The defense moved that Specifications 1, 2 and 3, Charge III, be stricken. The motion was granted as to Specifications 1 and 2 and denied as to Specification 3. On motions by the defense, other Specifications were consolidated, and the Specifications were renumbered so as to run consecutively in unbroken sequence. The accused was then arraigned and tried upon the following Charges and Specifications:

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

Specification 1: In that 1st Lieutenant Thomas L. Cox, AC, did, at Victorville Army Flying School, Victorville, California, on or about November 5, 1942, feloniously take, steal, and carry away two (2) pressure flush type toilet bowls, value about eleven dollars and seventy cents ($11.70), the property of Coony & Winterbottom,

Inc., 25 North Michigan Avenue, Pasadena, California.

Specification 2: (Finding of guilty disapproved by the reviewing authority)

Specification 3: In that 1st Lieutenant Thomas L. Cox, AC, did, at Victorville Army Flying School, Victorville, California, on or about November 30, 1942, feloniously take, steal, and carry away two-hundred (200) feet of one-half ($\frac{1}{2}$) inch galvanized pipe, value about thirteen dollars and ten cents ($13.10), property of Lohman Bros., 1449 S. San Pedro, Los Angeles, California.

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

Specification 1: In that 1st Lieutenant Thomas L. Cox, AC, Bombsight Maintenance Officer, having in his charge, as such Bombsight Maintenance Officer, one (1) Colt revolver caliber .45, U. S. Army model No. 19, Serial No. 142694, of the value of about fourteen dollars and fifty cents ($14.50), property of the United States, furnished for the military service thereof, did, at Victorville Army Flying School, Victorville, California, on or about September 18, 1942, wrongfully and knowingly dispose of the said revolver by loaning the same to Mr. Tom Hillman, a civilian, and allowing him to keep and use the said revolver for his personal uses and purposes.

Specification 2: In that 1st Lieutenant Thomas L. Cox, AC, Bombsight Maintenance Officer, having in his charge, as such Bombsight Maintenance Officer, one (1) Colt automatic, caliber .45, U. S. Army model No. 1911A1, Serial No. 742232, of the value of about twenty six dollars and ninety-seven cents ($26.97), and one (1) holster designed for a Colt automatic, caliber .45, of the value of about one dollar and ninety-eight cents ($1.98), property of the United States furnished and intended for the military service thereof, did, at Victorville Army Flying School, Victorville, California, on or about September 18, 1942, wrongfully and knowingly dispose of the said automatic and holster by loaning the same to Mr. R. P. Turner, a civilian, and allowing him to keep and use the said revolver and holster for his personal uses and purposes.

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

Specification 1: (Finding of guilty disapproved by the reviewing authority)

Specification 2: In that 1st Lieutenant Thomas L. Cox, AC, did, at Victorville Army Flying School, Victorville, California, on or about October 31, 1942, for his own personal gain and benefit and to the prejudice of good order and military discipline, knowingly, willfully, and unlawfully order Private Charles W. Sweeney, 935th Guard Squadron, to perform manual labor, to wit, load, haul, and transport one (1) truck-load of cement and gravel from Victorville Army Flying School, Victorville, California, to the premises of the said 1st Lieutenant Thomas L. Cox, AC, at Victorville, California.

Specification 3: In that 1st Lieutenant Thomas L. Cox, AC, did, at Victorville Army Flying School, Victorville, California, on or about November 20, 1942, for his own personal gain and benefit and to the prejudice of good order and military discipline, knowingly, willfully, and unlawfully order and cause Corporal Marcus R. Neuhaus, 87th Base Headquarters and Air Base Squadron, to perform manual labor, to wit, haul and transport eleven (11) rolls of roofing paper from Victorville Army Flying School, Victorville, California, to the premises of the said 1st Lieutenant Thomas L. Cox, AC, at Victorville, California

Specification 4: In that 1st Lieutenant Thomas L. Cox, AC, did, at Victorville Army Flying School, Victorville, California, on or about November 20, 1942, for his own personal gain and benefit and to the prejudice of good order and military discipline, knowingly, willfully, and unlawfully order and cause Private Fred P. Tasker, 521st Bombardier Training Squadron, to perform manual labor, to wit, haul and transport scrap lumber and three doors from Victorville Army Flying School, Victorville, California, to the premises of the said 1st Lieutenant Thomas L. Cox, AC, at Victorville, California.

Specification 5: In that 1st Lieutenant Thomas L. Cox, AC, did, at Victorville Army Flying School, Victorville, California, on or about November 30, 1942, for his own personal gain and benefit and to the prejudice of good order and military discipline, knowingly, willfully, and unlawfully order and cause Sergeant John Drago, 87th Base Headquarters and Air

Base Squadron, Private 1st class Kenneth R. Stroud, 87th Base Headquarters and Air Base Squadron, and Private 1st class Eugene D. Bratt, 87th Base Headquarters and Air Base Squadron, to perform manual labor, to wit, haul and transport one (1) bundle of one-half ($\frac{1}{2}$) inch galvanized pipe from Victorville Army Flying School, Victorville, California, to the premises of the said 1st Lieutenant Thomas L. Cox, AC, at Victorville, California.

Specification 6: In that 1st Lieutenant Thomas L. Cox, AC, did, at Victorville Army Flying School, Victorville, California, on or about May 1, 1942, for his own personal gain and benefit and to the prejudice of good order and military discipline, knowingly, willfully and unlawfully order and cause Sergeant Charles R. Zimbelman, 87th Base Headquarters and Air Base Squadron, to perform manual labor upon the premises of the said 1st Lieutenant Thomas L. Cox, AC, at Adelanto, California.

Specification 7: In that 1st Lieutenant Thomas L. Cox,AC, did, at Victorville Army Flying School, Victorville, California, on or about May 20, 1942, for his own personal gain and benefit and to the prejudice of good order and military discipline, knowingly, willfully, and unlawfully order and cause Corporal Everett J. Graham, 87th Base Headquarters and Air Base Squadron, to perform manual labor upon the premises of the said 1st Lieutenant Thomas L. Cox, AC, at Adelanto, California.

Specification 8: In that 1st Lieutenant Thomas L. Cox, AC, did, at Victorville Army Flying School, Victorville, California, on or about November 24, 1942, for his own personal gain and benefit and to the prejudice of good order and military discipline, knowingly, willfully, and unlawfully order and cause Private William S. King, 87th Base Headquarters and Air Base Squadron, Private Henry E. Neill, 521st Bombardier Training Squadron, and Private Carson F. Thomson, 87th Base Headquarters and Air Base Squadron, to perform manual labor upon the premises of the said 1st Lieutenant Thomas L. Cox, AC, at Victorville, California.

Specification 9: In that 1st Lieutenant Thomas L. Cox, AC, did, at Victorville Army Flying School, Victorville, California, on or about December 6, 1942, for his own personal gain and benefit and to the prejudice of good order and military discipline, knowingly, willfully, and unlawfully order and cause Private Barney J. Knutson, 87th Base Headquarters and Air Base Squadron, Corporal John W. Cox, Jr., 87th Base Headquarters and Air Base Squadron, and Private William R. Parsons, 518th Two-Engine Flying Training Squadron, to perform manual labor upon the premises of the said 1st Lieutenant Thomas L. Cox, AC, at Victorville, California.

Specification 10: In that 1st Lieutenant Thomas L. Cox, AC, did, at Victorville Army Flying School, Victorville, California, on or about December 9, 1942, for his own personal gain and benefit and to the prejudice of good order and military discipline, knowingly, willfully, and unlawfully order and cause Private Frank G. Stark, 521st Bombardier Training Squadron, to perform manual labor upon the premises of the said 1st Lieutenant Thomas L. Cox, AC, at Victorville, California.

Specification 11: In that 1st Lieutenant Thomas L. Cox, AC, did, at Victorville Army Flying School, Victorville, California, on or about December 12, 1942, for his own personal gain and benefit and to the prejudice of good order and military discipline, knowingly, willfully, and unlawfully order and cause Private Julian Heyman, 519th Two-Engine Flying Training Squadron, to perform manual labor upon the premises of the said 1st Lieutenant Thomas L. Cox, AC, at Victorville, California.

Specification 12: In that 1st Lieutenant Thomas L. Cox, AC, did, at Victorville Army Flying School, Victorville, California, on or about December 13, 1942, for his own personal gain and benefit and to the prejudice of good order and military discipline, knowingly, willfully and unlawfully order and cause Private Abe Brownstein, 518th Two-Engine Flying Training Squadron, to perform manual labor upon the premises of the said 1st Lieutenant Thomas L. Cox, AC, at Victorville, California.

Specification 13: In that 1st Lieutenant Thomas L. Cox, AC, did, at Victorville Army Flying School, Victorville, California,

on or about December 5, 1942, for his own personal gain and benefit and to the prejudice of good order and military discipline, knowingly, willfully, and unlawfully order and cause Corporal Glen F. Anderson, 521st Bombardier Training Squadron and Corporal Orwin C. Krant, 521st Bombardier Training Squadron, to perform manual labor upon the premises of the said 1st Lieutenant Thomas L. Cox, AC, at Victorville, California.

Specification 14: In that 1st Lieutenant Thomas L. Cox, AC, did, at Victorville Army Flying School, Victorville, California, on or about October 31, 1942, wrongfully and without proper authority convert to his own use and benefit one (1) International, 2½ ton, hydraulic dump truck, of a value of more than $50.00, the property of the United States.

Specification 15: In that 1st Lieutenant Thomas L. Cox, AC, did, at Victorville Army Flying School, Victorville, California, on or about November 20, 1942, wrongfully and without proper authority convert to his own use and benefit one (1), ½ ton, Chevrolet truck, of a value of more than $50.00, the property of the United States.

Specification 16: In that 1st Lieutenant Thomas L. Cox, AC, did, at Victorville Army Flying School, Victorville, California, on or about November 30, 1942, wrongfully and without proper authority convert to his own use and benefit one (1), 2½ ton, GMC truck, of a value of more than $50.00, the property of the United States.

Specification 17: In that 1st Lieutenant Thomas L. Cox, AC, did, at Victorville Army Flying School, Victorville, California, on or about December 5, 1942, wrongfully and without proper authority convert to his own use and benefit one (1), 2½ ton, GMC truck, of a value of more than $50.00, the property of the United States.

Specification 18: In that 1st Lieutenant Thomas L. Cox, AC, did, at Victorville Army Flying School, Victorville, California, on or about December 6, 1942, wrongfully and without proper authority convert to his own use and benefit one (1) Dodge, ½ ton, 4x4, Carryall, of a value of more than $50.00, the property of the United States.

Specification 19: In that 1st Lieutenant Thomas L. Cox,AC, did, at Victorville Army Flying School, Victorville, California, on or about December 9, 1942, wrongfully and without proper authority convert to his own use and benefit one (1), ½ ton, Dodge, 4x4, Carryall, of a value of more than $50.00, the property of the United States.

Specification 20: In that 1st Lieutenant Thomas L. Cox, AC, did, at Victorville Army Flying School, Victorville, California, on or about December 12, 1942, wrongfully and without proper authority convert to his own use and benefit one (1), 2½ ton, 6x6, GMC cargo truck, of a value of more than $50.00, the property of the United States.

Specification 21: In that 1st Lieutenant Thomas L. Cox, AC, did, at Victorville Army Flying School, Victorville, California, on or about November 15, 1942, wrongfully and without proper authority convert to his own use and benefit two (2) canvas tarpaulins and one (1) canvas and curtain, of a value of more than fifty ($50.00) dollars, the property of the United States.

Accused pleaded guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for four years. The reviewing authority disapproved the findings of guilty of Specification 2, Charge I, and Specification 1, Charge III; approved the sentence, but remitted two (2) years of the confinement; designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. No evidence was introduced by the prosecution.

4. Accused made an unsworn statement, which was, in pertinent part, substantially as follows:

Accused was the youngest of six children. He went through grammar school and, in 1932, finished high school at the age of 15 years. Although the father of accused was in failing health and without funds other than his pension as a disabled Spanish American War Veteran, accused decided to continue his education. He earned enough money to enter Baylor University, made his way "by working on the side", and graduated in 1935, with the degree of Bachelor of Arts. He then taught

eleventh grade English and Latin and coached debating in a high school. He had been a member of the Boy Scouts for eleven years, had advanced to the grade of Eagle Scout, and had taken a course in scout mastership. As an extra-curricular activity he engaged in boy scout work and had "charge" of all scouting in the vicinity of the school where he taught. After two years of teaching he attended the University of Texas where he completed his thesis for a Master's Degree in 1937. He then entered the University of Texas Law School and took torts, criminal law, and "just the primary courses" for a little more than a year. When offered a position as tutor in the School of English "at the end of 1939" he went back to that department and started working for the degree of Doctor of Philosophy. It was his ambition to become a dean in a college or the superintendent of a high school, and, in furtherance of that ambition he took courses dealing with the administrative phases of education. Beginning in 1939 and continuing through 1940 he worked as a salesman for an acquaintance in the "nickelodeon" machine business. In January, 1941, he was admitted to the flying school at Cal Aero, as an aviation cadet (R. 33-35).

Because of his age, the difficulty he was having learning to fly, and the advice of his instructor, accused decided to discontinue the course after two months of instruction. It was his own decision, and he acted with the knowledge that it was "an impartial and a fair thing" to do. At his own request he was sent to Armament School, Lowry Field, after he had been informed that men were needed in aircraft armament, and that his educational background and knowledge of guns would be advantageous in that work. For fourteen weeks he took intensive training in the loading of bombs on all types of bombers and the maintenance of all types of aircraft. He graduated from the Armament School in July 1941, and was one of eight men specially selected from his class of 45 students, on the basis of character, scholarship, and leadership ability, to take an advanced armament course in bombsight work. The course, which began early in August and ended November 7, 1941, covered the care, inspection and maintenance of bombsights, some flying in different types of bombers, and practice bombing. Upon completing the course, accused received his commission, November 12, 1941. After acting as assistant in the Armament School and receiving commendation for his work, on January 7, 1942, he went to Albuquerque, New Mexico, where he was one of four officers appointed to have charge of the bombsight vault and the maintenance of bombsights. He was then sent to Victorville, California, to establish a bombsight department, arriving February 19, 1942. Despite the difficulty in getting equipment, the school operated

on schedule. Accused had charge of the "AFCE department" and also was keeper of bombsight equipment. He gave himself unsparingly to the work of checking equipment upon its arrival and often found it necessary to fly in order to make adjustments although he did not receive flight pay (R. 35-38).

On April 12, 1942, accused married and subsequently established a house in Adelanto, California. About October 12, his father-in-law, a resident of Victorville, "volunteered" to give him some lots in that city. Accused had two trucks which had been assigned to him for use in connection with his bombsight work, and, about October 15, a sergeant borrowed one of them, as accused then believed, for some "line of duty" purpose. Some time later he learned that the truck had been used to haul some lumber to the house of the sergeant and that permission to take the lumber had been given by a foreman on a project involving the construction of five hangar buildings. It was scrap lumber left from the "job" that anyone "could get". Accused went to see the foreman who informed him that there was leftover material, which anyone, "civilian or military", had the right to take, sufficient to build a house, that it was "customary", and "what was not used was hauled away". It then occurred to accused that by picking up materials here and there he might contrive to build a house despite priority restrictions. After seeing several "civilian and military personnel" taking lumber he called the motor pool and "told them" he wished to use a truck. When a truck was sent to him accused loaded it with lumber, using enlisted men to help him. The foreman supervised the taking of the lumber and walked around and talked with accused while it was being loaded. He did the same thing on every occasion when accused was "down there". Accused also stated that "During this time too I obtained the pipe which was in the room there". Plans for the projected dwelling house of accused were furnished, without any "volition" on his part, by a civilian draftsman on the field, who "volunteered" to draw them. Another civilian, Tom Ross, offered his services as foreman, free of charge. Through a friend, accused learned of two United States Engineers, one of them named Dick Morris, who were in charge of the inspection of the cement used in the construction of runways. After making two trips for lumber, accused met Morris, who came by the vault one day, introduced himself, and stated that there were several loads of cement, rejected because of being under government specifications, which accused could have if he would come around and get it at night, when Morris was working. He showed accused the location of the cement on the ground at the end of the field. Accused stated that he would get permission from the proper authorities and the next day went

to see the contractor, Matt Dortman, who informed accused that he was welcome to take as much as he wanted of "several scraps" and of the rejected cement (R. 38-40).

A Master Sergeant, named Foster, who was in charge of the fatigue detail on the field, when talking to accused one day, remarked that he understood accused was building a house, and, as there were several men "left over" each day, he could loan accused a detail of three to five men. Accused stated that he did not know "whether that is right or not". Foster replied that he had been in the Army fifteen years and so far as he knew it was "all right", that he would order the men to report to accused, who could take them off the field, and that they were extra, unassigned men, and accused could use them as he saw fit. Accused then said "I will pay the men accordingly every day". Thereafter, every morning Foster would detail two or three men to accused for that day. The construction foreman, Ross, who had "a contractor's rating", figured the cost of building and material, then went with accused to a bank where they interviewed the president and accused was granted a loan of $1650 on the house for construction "under the builder-owner set up". Accused did not conceal the fact that he had "the plumbing" or that he was building a house. He wrote to the War Production Board in Los Angeles and was informed that it would be impossible for the Board to give him "a priority" but if he had any amount of materials on hand he could continue with construction. That was why he went on building and, with the help of enlisted men, poured part of the foundation, which was as far as the work had progressed when accused was notified that he was under investigation and would be confined to officers' quarters (R. 40-41).

As it was necessary to take every precaution to safeguard the bombsights, and to arm personnel working in the vault, accused, who was bombsight officer, always had a large supply of pistols on hand. It was difficult for him to refuse officers who requested loans of pistols when going on leave or making trips. "It got so bad" that he had to put up a written order directing that no more pistols be issued to such officers. He had several pistols out. On one occasion, a request for pistols to guard the fatigue detail came from the guardhouse, because "their rifles were broken". He issued the pistols on a memorandum receipt. He also loaned a pistol "to sub-depot engineering", and loaned others to guard the pay rolls. As bombsight officer he felt the need of a pistol in his house, and took one home with him. He had signed for it and "they" knew he had it. His father-in-law came over for dinner one night, saw the pistol lying at the head of the bed, and they "got to talking of guns and how defenseless everything was". His father-in-law,

who had no gun, asked if it would be out of line to borrow a pistol, not to keep, but to use, with the understanding that it would be returned when called for, and accused loaned him a pistol with the holster and six rounds of ammunition. On another occasion, with a similar understanding, accused loaned a revolver to one Tom Hillman, the brother-in- law of his father-in-law. There was an alert and it had been reported that there were "Japs" off the coast. "They had taken our automatics and given us pistols /revolvers/ in return". Accused had taken a revolver home to try it out and, upon seeing it, Hillman, who had come in to inspect a gas range, asked for the loan of a pistol". Hillman was not aware that his father-in-law had borrowed a pistol from accused (R. 43-44).

On December 14 three officers came to the house of accused and informed him that they had a search warrant for the premises. He asked what they wanted and the officers stated that they were looking for some materials. Accused told them that he had some roofing (accused was charged with the theft of roofing paper in one of the specifications as to which the finding of guilty was disapproved by the reviewing authority) and some plumbing and "showed it to them in the garage". Accused immediately went to the office of "Colonel Butler to talk with him. When Colonel Butler asked how he had obtained the materials accused told him. Accused was informed that the matter would be investigated and about thirty minutes later was directed to stay in officers' quarters (R. 44-45).

For the defense Colonel A. J. McVea, Air Corps, testified that he had been on the Victorville Army Flying School post for approximately a year, He had been Assistant Commander and also director of bombardier training. For a little more than a year he had known accused, whose duties as bombsight officer were related to those of his own office. The position of bombsight officer was one that required considerable administrative ability as well as maintenance ability and efficiency. Accused had been a very capable and efficient officer. Colonel McVea, who was a graduate of West Point, knew the reputation of accused on the post as a law abiding citizen and stated that it was good (R. 46-47) .

Major Royal C. Payne, Medical Corps, testified that he had been in charge of the Flight Surgeon's Office at Victorville Army Flying School for about a year, during which time he had known accused. He

knew the reputation of accused on the post as to being a law abiding citizen and testified that it was good. When asked concerning the reputation of accused on the post as to being an efficient and capable officer Major Payne answered that the statement repeatedly had been made to him, by members of the bombardier school, that accused was an excellent officer, and an excellent bombsight maintenance man (R. 47-48).

Captain Oliver J. Moss, Air Corps, testified that he had been on the "Victorville Post" about fifteen months, first as a bombardier pilot for five months and then for two months as a Training Squadron Commander. He had known accused for the past ten months. They had worked together "quite a lot", both being under Colonel McVea. In the opinion of Captain Moss accused was a very efficient bombsight officer and whenever they had occasion to work together was most cooperative. Captain Moss was familiar with the reputation of accused on the post as to whether he was a law abiding citizen and "would say it is good" (R. 49-50).

5. There is nothing in the unsworn statement of accused, or in the testimony offered by the defense, which is inconsistent with any plea of guilty pertaining to a specification as to which the finding of guilty was approved by the reviewing authority. The pleas of guilty fully support the approved findings of guilty.

6. The accused is twenty-nine years of age. The record of The Adjutant General shows his service as follows: Aviation Cadet, December 27, 1940; appointed second lieutenant, Air-Res., November 10, 1941; extended active duty November 12, 1941; temporarily appointed first lieutenant, Army of the United States, August 18, 1942.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the approved findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violation of Article of War 93, Article of War 94 or Article of War 96.

Arthur E. Neal Jr., Judge Advocate

Samuel M. Driver, Judge Advocate

F. J. Lotterhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., MAY 31 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Thomas L. Cox (0-430318), Air Corps.

2. I concur in the opinion of the Board of Review 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 approved findings of guilty are all based upon pleas of guilty.

Accused undertook to build a dwelling house near his post, despite priority restrictions, and, in furtherance of the undertaking, stole two toilet bowls of the value of $11.70 and 200 feet of pipe of the value of $13.10, belonging to private concerns, in violation of the 93rd Article of War. On seven different occasions, over a period of about six weeks, he misappropriated, one or another of several government trucks, by using them to transport to his building site, materials, consisting for the most part of scrap lumber and cement which had been rejected as under government specifications; on four such occasions took enlisted men from fatigue details to perform labor in connection with such transportation; on six different dates ordered and caused enlisted men from one to three at a time, to perform manual labor for him in the construction of the foundation of his dwelling, and on each of two other occasions about six months previously, had a non-commissioned officer work for him on the premises where he then resided; and misapplied to his own use two government tarpaulins and a canvas curtain, all in violation of the 96th Article of War. Accused also misappropriated a government revolver and a pistol with its holster, which were in his charge as Bombsight Maintenance Officer, by lending them to relatives of his wife, in violation of the 94th Article of War. I recommend that the sentence to dismissal, total forfeitures, and confinement for two years be confirmed and carried into execution.

3. Inclosed herewith are the draft of a letter for your signature transmitting the record to the President, for his action, and a form of Executive action, carrying into effect the recommendation made above.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
1- Record of trial
2- Drft. of ltr. for sig. S/W
3- Form of Action.

(Sentence confirmed but confinement remitted. G.C.M.O. 145, 17 Jul 1943)

WAR DEPARTMENT
Army Services Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGN
CM 232505

MAY 5 1943

U N I T E D S T A T E S	)	SIXTH SERVICE COMMAND ARMY SERVICE FORCES
v.	)	
Second Lieutenant WARREN D. BOLDEN (0-1030448), Cavalry.	)	Trial by G. C. M., convened at Fort Custer, Michigan, February 9, 1943. Dismissal.

OPINION of the BOARD OF REVIEW
CRESSON, LIPSCOMB and SLEEPER, Judge Advocates.

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

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

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

Specification: In that Second Lieutenant Warren D. Bolden, Cavalry, Headquarters Company, 795th Tank Destroyer Battalion, was, at Battle Creek, Michigan, on or about January 16, 1943, in a public place, to wit: Arizona Grill, Battle Creek, Michigan, drunk and disorderly while in uniform, the aforesaid acts being conduct unbecoming an officer and a gentleman.

ADDITIONAL CHARGE II: Violation of the 96th Article of War. (Finding of not guilty)

Specification: (Finding of not guilty).

He pleaded not guilty to both Charges and Specifications. He was found guilty of Additional Charge I and its Specification and not guilty of Additional Charge II and its Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and fowarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution concerning the Specification and Charge of which the accused was found guilty shows that the accused, a colored officer, entered the Arizona Grill, a public eating place in Battle Creek, Michigan, at about 1:30 a.m. on the night of January 16-17, 1943. At the time the accused entered the place there were a number of customers present, including one woman. The place was described as a restaurant frequented by decent middle-class people. After entering, the accused asked

for a sandwich and was promptly served. The accused then asked for beer. One of the proprietors, in declining to serve him beer, explained to him that under the Michigan law beer could not be sold after 2 a.m. Although there is some conflict in the testimony as to the exact time this incident occurred, the evidence shows that it occurred near 2 o'clock in the morning. When the proprietor explained the Michigan law relative to the sale of beer to the accused, the accused replied that he did not care about the Michigan law, stating, "I got to have beer. I got the law in my hand. * * * Nobody can talk to me." Then one or more of the civilian customers present sought to present to the accused additional explanation concerning the time limit fixed by the Michigan law for the sale of beer. The accused did not, however, accept the explanation with good grace, but became angry, spoke in a loud voice, took off his overcoat, and offered to fight. He warned everybody present against his anger, advising them "not to get him hot" and added the warning that he would "break your ass." He also referred to some persons present as "damn civilians." One of the proprietors tried unsuccessfully to quiet the accused, but the accused would not be quieted, and walked back and forth, talking in a loud and threatening tone. The accused appeared to have been drinking heavily before entering the Arizona Grill. At one time he pulled a half-empty bottle of whiskey from his pocket and placed it on the counter. One of the proprietors then asked him to place the bottle back in his pocket, stating to him that the Michigan law did not permit the drinking of whiskey there (R. 12-26, 30-34, 39-41, 45-50, 57).

Because of the disorderly conduct of the accused, one of the proprietors telephoned the military police, locked the door, and refused to let anyone leave. When the military police arrived the sergeant in charge requested accused to step outside. The accused then spoke of the "damn M.P.'s" and added that he was going to straighten them out "like they were down in Kansas somewhere." After the accused had been induced to go outside he tried to get back inside and started kicking when he was prevented from doing so. Several civilians followed the military police and the accused out of the restaurant and down the street. The sergeant in charge of the police requested the civilians to leave, whereupon the accused pulled off his coat and started after the civilians (R. 22, 39-46, 51, 55).

The accused would not of his own volition go back to camp with the military police. Furthermore, he wanted the sergeant to leave him and cross over to the other side of the street. Upon the sergeant's refusal the accused "started walking toward us with his fist clenched". The military police thereupon took the accused by the arms, put him in the truck and brought him to the orderly room of the post military police headquarters at Fort Custer. On the way to police headquarters the accused stripped off his coat again and "hollered" two or three times (R. 36-37, 42, 46-50).

4. The defense presented the company commander of the accused, and two other officers who testified that the accused was a dependable, efficient and capable officer, a good instructor with a knowledge of his subject, and an officer who handles men well (R. 59, 62, 66).

The accused testified that he arrived at the Arizona Grill sometime between 1 and 1:30 a.m., that he took off his coat in the restaurant

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NAVY DEPARTMENT

because it was warm, and that the argument which arose there was not over beer, but over the Army. On cross-examination the accused admitted that he had had four drinks of whiskey and a bottle of beer about midnight (R. 74-86).

5. The Specification, Additional Charge I, alleges that on or about January 16, 1943, the accused was drunk and disorderly while in uniform in a public place, the Arizona Grill, and that the conduct of the accused there was unbecoming an officer and a gentleman.

The evidence shows very clearly that the accused entered the Arizona Grill, a public eating place, about 1:30 a.m. on the night of January 16-17, 1943. The evidence is equally clear that the accused was in a quarrelsome, drunken condition, that he quarrelled with civilians present, that he spoke in threatening and contemptuous terms of them as "damn civilians" and threatened to break their "ass", that he made a general threat to the persons present by stripping off his overcoat in an offer to fight, that he demonstrated a scornful intolerance for the Michigan law restricting the sale of beer after 2 o'clock in the morning, and that he was disrespectful and defiant toward the authority of the military police in the presence of civilians. These facts show beyond a reasonable doubt that the accused was drunk as alleged, and that his conduct was so disorderly as to constitute conduct unbecoming to an officer and a gentleman, within the purview of Article of War 95.

6. The records of the Office of The Adjutant General show that the accused is 29 years of age and that he was commissioned a second lieutenant on August 29, 1942.

7. The court was legally constituted. No errors, injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and legally sufficient to support the sentence, and to warrant confirmation thereof. A sentence of dismissal is mandatory upon conviction of violation of Article of War 95.

Blake Bresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

01960

1st Ind.

War Department, J.A.G.O., MAY 10 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President, are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Warren D. Bolden (0-1030448), Cavalry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation thereof. The conduct of the accused in entering a public place in a drunken condition, in quarreling with civilians present, in angrily stripping off his overcoat in an offer to fight, in referring to civilians present as "damn civilians", in threatening them in contemptuous terms, in publicly proclaiming his defiance of the Michigan law restricting the hours for the sale of beer, and in being defiant and disrespectful to the authority of the military police, clearly shows the accused to be basically lacking the characteristics of a gentleman, and altogether unworthy of the responsibilities of an officer. I recommend, therefore, that the sentence be confirmed and carried into execution.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation should such action meet with approval.

Myron C. Cramer.

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls
Incl 1 - Record of trial
Incl 2 - Draft of ltr for sig. Sec. of War
Incl 3 - Form of Executive action

(Sentence confirmed. G.C.M.O. 122, 18 Jun 1943)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGK
CM 232573

15 JUN 1943

UNITED STATES	5TH ARMORED DIVISION
v.	Trial by G.C.M., convened at Camp Cooke, California, January 21,22 and April 16, 1943. Dishonorable discharge and confinement for life. Penitentiary.
Private JAMES E. HARRIS (35209761), Headquarters Company, Supply Battalion.	

REVIEW by the BOARD OF REVIEW
LYON, HILL and ANDREWS, Judge Advocates.

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 Private James E. Harris, Headquarters Company, Supply Battalion, Fifth Armored Division, Camp Cooke, California, did, at Lompoc, California, on or about December 23, 1942, forcibly and feloniously, against her will, have carnal knowledge of Mary Given, Lompoc, California.

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 dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated "McNeil Island, Federal Penitentiary, Washington", as the place of confinement, and forwarded the record for action under Article of War 50½.

3. The evidence shows that accused, a private in the 5th Armored Division, Camp Cooke, California (R.48), first met Mrs. Mary Given, the prosecutrix, about the middle of December, 1942, when she was walking home, in Lompoc, California, where she lived (R.33-34). Accused walked

up beside her, engaged her in conversation and accompanied her home (R.34). Mrs. Given was 53 years old, five feet one and one-half inches tall, and weighed 125 pounds (R.34). She was the mother of nine children, seven living, with one stationed at Camp Cooke (R.33). Her home was in West Virginia. She had come to Lompoc to visit her son (R.33,34). Accused was 26 years old (R.55), about six feet tall and weighed about 149 pounds (R.62).

At this first meeting accused said his name was "Jimmy Wilson" and that he was from West Virginia (R.34). Mrs. Given permitted accused to walk home with her because, as she testified, "I have a soldier boy in this Army and I wanted to treat him as any other mother would treat my son". At the gate, accused tried to put his arm around her. This gave her an unfavorable impression. She told accused she was old enough to be his mother. He wanted to talk, but she left him and went inside (R.37).

Mrs. Given next met accused in the early hours of December 23. She worked in the kitchen at the "Rancheros Cafe" until around 12:30 o'clock and was walking home when accused accosted her. He talked in a friendly manner and walked along with her (R.35,36,38,39,42). They came to a school house, located on the main street of town. Accused said he wanted to talk for a while, so they sat down on the steps and talked for five or ten minutes (R.35,36,39). Accused then "began to make some advances" (R.39). Mrs. Given did not consent to his advances. She stood up and said she had "better go home", that it was late (R.35). Thereupon accused "caught" her and "dragged" her "over there" (R.35), inside of the doorway (R.39), an area about six feet wide by eight feet deep (R.11). This was the entrance to the school building, two or three steps up from the sidewalk (R.10,11,42), undoubtedly the vestibule of the building. It was "dark in there" (R.42). Mrs. Given resisted physically from the start, on the steps (R.39). She testified: he "finally got me down and choked me and tried to stick a handkerchief down my throat, scratched my face all up and went ahead and attacked me and raped me" (R.35). He pulled her dress up and pulled her legs apart (R.43). There was penetration (R.35). During the attack she tried to free herself and get away. She attempted to call for assistance. His hand was on her mouth (R.43). There was one clear cry. The rest were muffled screams (R.35,43). Her struggles continued throughout. She used her hands trying to fight him off (R.35,43). He did not tear her underclothing. It was of a type that could be "pushed aside" (R.43,44). Mrs. Given testified to physical injuries inflicted by accused:

> "There were bruises on my shoulder (pointing to her left shoulder) and the skin was rubbed off on my back. My head was sore and my throat where he choked me. There were injuries on my thigh near the groin on the inside."

Her face was scratched (R.35,40).

As Private Stanley Owens, 81st Armored Regiment, was passing near the school building, between 12:30 and 12:45 that morning, he heard a woman scream and, after crossing the street, heard the woman scream again. Both screams "were loud and clear" and there were some that were "muffled". At the corner he met another soldier, a stranger to him, Private Harvey M. Lundy, 34th Armored Regiment (R. 9,10,16,17). At that time "the voice screamed out again". Both Owens and Lundy heard it (R. 10,17). Lundy testified that he heard the woman "holler" three or four times and then she screamed and "you could hear her two blocks" (R.20). Lundy said he was right across the street, 75 feet from the school when he met Owens and heard the woman scream (R.17,20). Recalled by the court, Lundy indicated the distance between him and the school house where he heard the first and second scream or "holler" and met Owens. The prosecution and the defense agreed that this distance was about 100 yards (R. 73-75). Private Owens fixed this distance as about seventy-five yards (R.9).

Without further investigation, Owens and Lundy "double-timed" to the military police station three and a half blocks away. They returned in about 5 minutes to the school house in a "peep" with two military police officers, Sergeant Raymond D. Williams and Private First Class Harry E. Looney (R.10,17,21,22,26).

As the "peep" drew up to the school house its lights illuminated the entrance (R.10,22,35). The attack had been completed (R.36). Mrs. Given was sitting with her back to the entrance. Accused was kneeling behind her trying to lift her to her feet (R.22,26). Sergeant Williams asked what the trouble was. The woman did not answer because, as she testified, she was "ashamed". Accused said there was no trouble (R.22, 36). Sergeant Williams instructed Private Looney to take Mrs. Given and accused to the police station, where they proceeded on foot, while he took Owens and Lundy to the police station in the "peep" (R.22,26). After Mrs. Given had walked approximately half a block, she told Private Looney that accused had raped her (R.26,36,41).

At the police station Mrs. Given repeated her charge that she had been raped by accused to Police Officer Chester Hart Talbott on desk duty that night (R.31,32,41).

At the police station Sergeant Williams noticed a fresh scratch on Mrs. Given's chin and marks on her throat that could have been made by a hand (R.23). Private Looney saw marks on her throat and a scratch on her chin (R.27). Police Officer Talbott testified that she had scratches around her neck, "on her chin", and "you could see where somebody held

her by the throat" (R.33). Doctor Walter M. Anderson, a private physician, examined Mrs. Given at 4 o'clock the next afternoon. He found a small bruise on the left shoulder and on the inner surface of the left thigh. There was also a scratch on her chin. He made no vaginal examination (R.8).

4. Corporal William Calcari, Headquarters Company, was called as a witness by the defense. He testified that he had never seen Mrs. Given in the company of accused in any place (R.44).

Accused testified on his own behalf. He stated that he first met the prosecutrix at her place of employment in November. They talked for a time, he "had a few drinks more and went around to some other beer joints", finally returned and asked to take Mrs. Given home. She replied that she was too old a woman, that she did not allow soldiers to walk home with her. Accused kept insisting. She refused. At any rate he did walk home with her. That night nothing particular happened, although accused "tried to play up with her" (R.48).

Accused next saw Mrs. Given on the street around the sixth or seventh of December, "or the first of December". She said she was sick and was going home. She would not drink with accused but they went to a restaurant and had something to eat. Later outside the Hut, evidently a cafe, they sat under the palm trees. Accused "played around with her awhile and took her home". Accused added: "In plain words, I 'laid' her that night" (R.49).

After these two meetings and prior to the morning of December 23, accused testified that he saw Mrs. Given on four other occasions, on two of which he had sexual intercourse with her (R.49,50,51). He testified that on the night in question he met her on the street while he was on his way back to camp. They walked toward her home. When they reached the school house he asked her to go into the entrance. She agreed. They sat on the steps a few minutes. He was drinking from a bottle. Finally she said she had to be going but made no effort to do so. Accused continued:

> "I stood up and picked her up, putting one arm around her legs and one arm around her thigh, and took her back into the entrance of the school house and stood her up against the wall. She pushed me away. 'If you are really determined to, wait a minute until I get ready.' She pulled up her clothes and loosened her underclothes and spread her clothes on the ground and laid down. She kicked the door two or three times. I turned her around to prevent her from kicking. She insisted that I quit; she said she heard

some guys on the walk. I went on about our business, but she insisted that I get up. The act was finished and the MP's came along in a minute or two." (R.51)

Accused stated that Mrs. Given did not "scream" or "holler" but spoke rather loudly. Her voice would not carry 75 feet (R.60). Accused said: "She kept trying to push me up. I said no use to be like that, no one would see us, and finally she quieted down and I went ahead with our act" (R.52). There was complete penetration (R.63). Accused noticed Mrs. Given had a scratch on her chin. He saw the blood. He "knew about how it happened". She rubbed herself against his blouse (R.56, 64).

On cross-examination accused stated that of all the times he had been with Mrs. Given he never met anyone he knew except Corporal William Calcari, Headquarters Company, because "usually it was too late" (R.44,58,59).

On direct examination accused recounted an incident claimed by him to have occurred on one occasion when he had been out with Mrs. Given and had had intercourse with her, prior to the act for which he was being tried. He said that they had been to a restaurant and had had something to eat; that later they went to the Hut and there met Corporal Calcari and his girl friend; that he, Mrs. Given and Calcari sat together at a table in the Hut (R.59); that he and Mrs. Given left the Hut and walked behind the Yellow Cab stand; it was dark there and he, accused, was just getting ready to get on top of Mrs. Given when Calcari and his girl friend came by and almost "fell over us"; and that Calcari "said he knew who it was" (R.49,50).

Corporal Calcari was recalled as a witness by the court. He testified again that he had never seen Mrs. Given anywhere with accused. He denied that he had ever sat at the same place at any time with accused or Mrs. Given or that he had ever "stumbled on" accused and Mrs. Given. Told that at one time he, Calcari, had thought he "had seen her" (evidently Mrs. Given in company with accused) he answered that he had "recalled that statement". He explained, in effect, that the next morning "after this thing happened", accused told him he was in trouble with some woman whom accused described and said was Mrs. Given. From this description the witness thought he knew her. But when the witness was shown Mrs. Given he said "that is not the woman the accused had been describing" (R.69-71). During this reexamination of Corporal Calcari, accused himself asked Calcari whether or not in the presence of the company commander, the first sergeant and the charge of quarters, he, Calcari, had not spoken up on his "own free will" and said that he knew

the woman with whom accused had been "the night before". The witness answered, "No, sir, I don't remember" (R.73).

The company commander, the first sergeant, and Corporal Charles J. Wagner, Headquarters Company, were all called as witnesses by the court. They all had been present on the occasion referred to by accused in his question directed to Corporal Calcari. None of these witnesses were able to testify that Corporal Calcari made the statement attributed to him by accused's question (R.81-87).

While on the witness stand, under questioning by the court, accused said that Private First Class Lundy had originally told the military police that "there was no screams, only just loud talk", "that the only sound he heard was rather loud talk" (R.66,68); and that there were present, at the time Lundy made this statement, a couple of men, drunks, in the police station on charges, and also "the boy who handles the medical section" (R.67,68).

Three men who were in the police station that night, under charges, were called as witnesses by the court. Each was confronted with Lundy and with the accused. None remembered having seen either Lundy or the accused before (R.77-81).

5. The Board of Review is of the opinion that there was substantial evidence sufficient to warrant the findings of guilty. It was exclusively the province of the court-martial, including the reviewing authority, to weigh the evidence, judge of its credibility, and determine controverted questions of fact.

In this case it was not denied that accused had sexual intercourse with the prosecutrix. Complete penetration was admitted. The fact of carnal knowledge was not in dispute. The only issue controverted was as to whether or not the act was accomplished by force and against the will of Mrs. Given as charged.

The testimony of Mrs. Given on this issue was certain and unshaken. Accused caught her and dragged her inside the doorway. She resisted physically from the start. During the attack she tried to free herself and get away. She screamed. She was five feet one and a half inches in height and weighed 125 pounds. Accused was about six feet tall and about 150 pounds in weight. She was 53 years old and he 26. Any real resistance was futile. Accused himself testified that he picked her up and carried her into the doorway. He said that she

pushed him away and asked him to desist, attributing her resistance to her fear of being caught in the act. Her screams were audible for a substantial distance. They testify to the fact that an outrage was being perpetrated rather than that mere reluctance was being overcome. The scratch and fresh blood on her chin, and marks on her throat, corroborated her story of utmost resistance. She made immediate complaint. Had she been an accessory rather than a victim she could have held her tongue and escaped publicity. There was substantial evidence that accused had carnal knowledge of the prosecutrix by force and without her consent, sufficient to justify the findings of guilty.

6. At the request of the reviewing authority the court reconvened for the purpose of reconsidering the death penalty which it originally imposed. Proceedings in revision resulted in the sentence being reduced to life imprisonment. The original sentence was imposed January 22, 1943. The sentence was revised on April 16, 1943. Attached to the record are affidavits executed by Mrs. Geraldine Jones, Mrs. Given, Sergeant William C. Tipton, Sergeant Milton Brady, Corporal William Calcari, and Private Sabbatino Mirando, verified February 3, February 23, February 24, February 23, February 23, and February 24, respectively. These affidavits were undoubtedly submitted on behalf of accused. Their purpose evidently was to corroborate his defense. In her affidavit Mrs. Given said, among other things: "I perhaps as a grown woman should have known better than to sit in a dark spot with a young man; and I perhaps could have put up more of a struggle than I did".

7. Accused is 26 years old. He was inducted into service July 9, 1941. There was no prior service.

8. The court was legally constituted and had jurisdiction of the person and the subject matter. 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 is legally sufficient to support the findings of guilty and the sentence. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by section 2801, Title 22, District of Columbia Code.

Percy G. Gay, Judge Advocate.

John Rosenfield, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

WAR DEPARTMENT
Army Services Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGH
CM 232577

APR 5 1943

UNITED STATES	)	SEVENTH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Fort Ord, California, February 22, 1943. Dismissal.
	)	
Second Lieutenant ROLLA E. WILLIAMS (0-1291049), 184th Infantry.	)	

OPINION of the BOARD OF REVIEW
HILL, LYON and SARGENT, Judge Advocates

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

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

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

Specification 1: In that 2nd Lieutenant Rolla E. Williams, 184th Infantry, did, at Fort Ord, California, on or about 1830, 22 November, 1942, desert the service of the United States and did remain absent in desertion until he surrendered himself at Fort Ord, California, on or about 1900, 21 January, 1943.

The accused pleaded and was found not guilty of desertion in violation of the 58th Article of War, but guilty of absence without leave in violation of the 61st Article of War. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. It was stipulated by the prosecution and defense that accused, a member of the 184th Infantry, on or about 1830, November 22, 1942,

at Fort Ord, California, absented himself without leave and remained absent without leave until he surrendered himself at Fort Ord, California, on or about 1900, January 21, 1943 (R. 5).

4. The evidence for the prosecution shows that the accused joined Company L, 184th Infantry, on Saturday, November 21, 1942. Major Otto G. Niemann, "Regimental Officer", 184th Infantry, on Sunday, November 22, 1942, received a call from the hospital chaplain, stating that the mother of accused was ill, and that accused wanted a sick leave from the hospital. The request for leave was denied. Accused later "came over and stated the fact that he had received good news and that he would be able to go to work". On November 22, Major Niemann sent Second Lieutenant David L. Carmen to Monterey, California, to "pick up" accused. Lieutenant Carmen found accused at a hotel, brought him back to camp, and took him to Major Niemann. Accused asked that he be allowed to return to the town to get his luggage. The request was refused, and Major Niemann ordered him "to remain in the East Garrison area and also to report to the Colonel, who at that time was my senior" (R. 7-10).

Captain Robert L. Pelloux had been commanding officer of Company L, 184th Infantry since about November 5. The accused joined the company on Saturday, November 21, 1942. Excluding the dates January 14 to 17, 1943, when Captain Pelloux was himself absent from the company, he knew that accused was not present for duty between November 23, 1942, and January 21, 1943. Captain Pelloux had reported the absence of accused to the personnel adjutant. An extract copy of the morning report of Company L, 184th Infantry, was offered in evidence by the prosecution "solely for the purpose of showing the dates on which accused was present and absent from the organization", and was received in evidence as Exhibit A. The extract copy of the morning report, however, is not attached as an exhibit, nor is it contained among the papers accompanying the record of trial. Accused did not have permission to be absent on November 23, 1942, nor had he a pass on that date (R. 5-7, 10).

5. Accused testified that he was formerly an enlisted man in the National Guard, that he entered on active duty as an enlisted man on October 15, 1940, and that he attained the grade of staff sergeant. He was graduated from an Officer Candidate School where his ranking "was up pretty high". Accused was married on September 1, 1942. After receiving his commission he reported to Camp Roberts, (California), on September 5, 1942. He came to Fort Ord, California, about November 18, and spent about two days in the hospital. His

wife had joined him at Camp Roberts and accompanied him to Fort Ord (R. 11-12, 14).

When accused came to Camp Roberts on September 5th he had sent his wife $300 for airplane fare. She sent a telegram to the effect that she could not join him at that time. About September 18thehe received a telegram from her aunt stating that she was in the hospital but had not undergone an operation. Three or four days later accused received a letter from his mother stating that his wife's ovary was infected and that she would be hospitalized for about 28 days. On September 28 his wife left the hospital and "came out by plane". Accused had no reason to believe that his wife had had any trouble other than with her ovaries. On November 22, 1942, accused went home with his wife to McConnelsville, Ohio. "The main reason was that another man was involved". Accused had received a letter stating that his wife had been pregnant for two months on the day they were married. "I wanted to see her as I couldn't trust her, and I was going to take her home and was going to leave her there". Accused believed that his wife would be more protected at home than at the camp at which he was stationed. He also believed that the "only thing I could do was to give birth to the child". When he was married, accused did not know that his wife was then pregnant. When he left for Ohio he knew that he had been restricted by Major Niemann to the east garrison area at Fort Ord. He had requested a leave of absence by telephone from the hospital, but did not then wish to disclose the real reason for his request. He received no reply, left the hospital, and reported to his organization (R. 12-15).

Accused remained in Ohio about four weeks. The sheriff in his town received a telegram to the effect that he was to pick up the accused. As the sheriff had not apprehended him after a three or four day interval, accused went to San Francisco and endeavored "to contact the outfit". Some of his equipment had been shipped home. Accused then returned to his home in Ohio because of his wife. "I was almost frantic when I got to 'Frisco'. My clothes had been shipped, and my wife - - -". The sheriff had again been instructed to pick up the accused but failed to do so. During his absence accused wore his uniform at all times and did not seek employment. He wore his uniform when he surrendered. At no time did he intend to remain permanently away from the service. While absent he did not have time to discover the identity of the man who was responsible for the pregnancy of his wife. (R. 12-14).

Accused had never spoken to his wife of her pregnancy, and she had never informed him of the fact. He had known her since he

was 12 years of age, and she was the first and only girl "that I went with in my life". He had "dated her" for the last six years. He had known "no other girl like her". "She is the only woman I love, and that I ever will love". Accused testified that two aunts and uncles could vouch for the fact of the pregnancy of his wife. He stated that he could obtain the "true reports" from the hospital. Accused was always willing "to soldier" and would, in the future, refrain from further absences. He was 23 years of age (R. 12, 14-15).

6. The findings of guilty, by exceptions and substitutions, of absence without leave in violation of Article of War 61, were fully supported by the pleas of guilty, by the evidence for the prosecution, by stipulation, and by the testimony of the accused himself.

7. The accused is 23 years of age, and was graduated from high school. The records of the Office of The Adjutant General show his service as follows: Ohio National Guard, October 30, 1939, to October 14, 1940; inducted October 15, 1940; appointed temporary second lieutenant, Army of the United States from Officer Candidate School, and entered on extended active duty, August 21, 1942.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violation of Article of War 61.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., APR 8 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Rolla E. Williams (O-1291049), 184th Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence to dismissal, and to warrant confirmation of the sentence. Accused was absent without leave from his organization at Fort Ord, California, from November 22, 1942, to January 21, 1943. He testified that he was married on September 1, 1942, without knowledge that his wife was then pregnant, and that another man was responsible for her condition. Upon discovering this fact, he absented himself for the purpose of taking his wife to her home in Ohio. He remained in Ohio for approximately four weeks; went to San Francisco, California, where he attempted to get in touch with his organization; again returned to Ohio because of his wife; and later surrendered at Fort Ord, California, on January 21, 1943.

In my opinion, the sentence to dismissal should be confirmed and ordered executed in view of the length of his absence without leave - two months - in time of war. The accompanying papers contain a resignation submitted by accused, under date of February 6, 1943, in which the accused stated that the responsibilities of an officer were too much for him, that he always did well as an enlisted man, and that he believed that it was a mistake for him to become an officer. In a recommendation for reclassification, dated November 27, 1942, the Commanding Officer of the Third Battalion, 184th Infantry, concluded:

> "This officer has shown himself to be evasive, disobedient, untruthful, childish of nature, unable to or unwilling to accept the restrictions of military life, suffering from a 'suffering hero' complex, and of a weak character".

I recommend that the sentence be confirmed and carried into execution.

3. Inclosed are the draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action carrying into effect that recommendation.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Record of trial.
Incl.2-Dft.ltr.for sig.Sec. of War.
Incl.3 -Form of Executive action.

(Sentence confirmed. G.C.M.O. 101, 12 May 1943)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGK
CM 232592

25 MAY 1943

UNITED STATES v. Second Lieutenant ELMO LAW (O-1574941), Quartermaster Corps.	SIXTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp McCoy, Wisconsin, February 10 and 11, 1943. Dismissal and total forfeitures.

OPINION of the BOARD OF REVIEW
COPP, HILL and ANDREWS, Judge Advocates.

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

2. Accused was tried upon the following Charges and Specifications:

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

Specification: In that Second Lieutenant Elmo Law, QMC, 97th Railhead Company, did, without proper leave, absent himself from his organization at Camp McCoy, Wisconsin on or about December 22, 1942 to about January 3, 1943.

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

Specification 1: In that Second Lieutenant Elmo Law, QMC, 97th Railhead Company, did, at La Crosse, Wisconsin on or about December 28, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the Peter Newberg Clothing Company, a certain check, in words and figures as follows, to wit:

Sparta, Wis. 12/28 1942 No.____

MONROE COUNTY BANK

Pay to the
Order of Cash $ 25.00
Twenty Five & no/100 - - - - - - - - - - - DOLLARS

Lt. Elmo Law
258 QM 0-1574941

he, the said Second Lieutenant Elmo Law, then well knowing that he did not have and not intending that he should have sufficient funds in the Monroe County Bank at Sparta, Wisconsin, for the payment of said check.

Specification 2: In that Second Lieutenant Elmo Law, QMC, 97th Railhead Company, did, at La Crosse, Wisconsin on of about December 28, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the R.C. Cheney Company, a certain check, in words and figures as follows, to wit:

12/28 19 42 No. 16

Sparta, Wis.
MONROE COUNTY BANK

Pay to the Order of Cash $ 10.00
Ten & no/100 - DOLLARS

Lt. Elmo Law
258 QM Bn. 0-1574941

he, the said Second Lieutenant Elmo Law, then well knowing that he did not have and not intending that he should have sufficient funds in the Monroe County Bank at Sparta, Wisconsin, for the payment of said check.

Specification 3: In that Second Lieutenant Elmo Law, QMC, 97th Railhead Company, did, at La Crosse, Wisconsin on or about December 28, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the Linker Hotel, a certain check, in words and figures as follows, to wit:

12/28 19 42 No. 18

Sparta, Wis.
MONROE COUNTY BANK

Pay to the Order of Linker Hotel $ 15.00
Fifteen & no/100 - - - - - - - - - - - - - - - - - - DOLLARS

Lt. Elmo Law
258 QM Bn. 0-1574941

he, the said Second Lieutenant Elmo Law, then well knowing that he did not have and not intending that he should have sufficient funds in the Monroe County Bank at Sparta, Wisconsin,

for the payment of said check.

Specification 4: In that Second Lieutenant Elmo Law, QMC, 97th Railhead Company, did, at La Crosse, Wisconsin on or about December 29, 1942, with intent to defraud, wrongfully and unlawfully make and utter the La Crosse City Car Company, a certain check, in words and figures as follows, to wit:

Sparta, Wis. 12/29 19___ No. 18
MONROE COUNTY BANK

Pay to the
Order of Cash $ 10.00
Ten & no/100 - DOLLARS

0-1574941 Lt. Elmo Law
258 QM Bn

he, the said Second Lieutenant Elmo Law, then well knowing that he did not have and not intending that he should have sufficient funds in the Monroe County Bank at Sparta, Wisconsin, for the payment of said check.

Specification 5: In that Second Lieutenant Elmo Law, QMC, 97th Railhead Company, did, at La Crosse, Wisconsin on or about December 29, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Wm. Markos, a certain check, in words and figures as follows, to wit:

12/29 19 42 No. 18
Sparta, Wis
MONROE COUNTY BANK

Pay to the
Order of Cash $ 15.00
Fifteen & no/100 - - - - - - - - - - - - - - - DOLLARS

Lt. Elmo Law
258 QM Bn. 0-1574941

he, the said Second Lieutenant Elmo Law, then well knowing that he did not have and not intending that he should have sufficient funds in the Monroe County Bank at Sparta, Wisconsin, for the payment of said check.

Specification 6: In that Second Lieutenant Elmo Law, QMC, 97th Railhead Company, did, at La Crosse, Wisconsin on or about

December 30, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the Sheldon Cigar Store, a certain check, in words and figures as follows, to wit:

Sparta, Wis. 12/30 1942 No. 16
MONROE COUNTY BANK
Pay to the
Order of Cash $ 15.00
Fifteen & no/100 - - - - - - - - - - - - - - - - - - DOLLARS

Lt. Elmo Law
258 QM Bn. 0-1574941

he, the said Second Lieutenant Elmo Law, then well knowing that he did not have and not intending that he should have sufficient funds in the Monroe County Bank at Sparta, Wisconsin, for the payment of said check.

Specification 7: In that Second Lieutenant Elmo Law, QMC, 97th Railhead Company, did, at La Crosse, Wisconsin on or about December 30, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Arnold Traaen, a certain check in words and figures as follows, to wit:

MONROE COUNTY BANK
Sparta, Wisconsin 12/30 19 42 No.
Pay to the
Order of Cash $ 10.00
Ten & no/100 - - - - - - - - - - - - - - - - - - DOLLARS

Lt. Elmo Law
258 QM Bn. 0-1574941

he, the said Second Lieutenant Elmo Law, then well knowing that he did not have and not intending that he should have sufficient funds in the Monroe County Bank at Sparta, Wisconsin, for the payment of said check.

Specification 8: In that Second Lieutenant Elmo Law, QMC, 97th Railhead Company, did, at La Cross, Wisconsin on or about December 31, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the Continental Clothing House, a certain check, in words and figures as follows, to wit:

No. 12 12/31 19 42
Sparta, Wis.
MONROE COUNTY BANK

Pay to the Order of Continental Clothing House
Twenty Five & no/100 - - - - - - - - - - - - - DOLLARS

$ Lt. Elmo Law
258 Q.M. Bn. 0-1574941

he, the said Second Lieutenant Elmo Law, then well knowing that he did not have and not intending that he should have sufficient funds in the Monroe County Bank at Sparta, Wisconsin, for the payment of said check.

Specification 9: In that Second Lieutenant Elmo Law, QMC, 97th Railhead Company, did, at Camp McCoy, Wisconsin on or about January 1, 1943, with intent to defraud, wrongfully and unlawfully make and utter to the American Red Cross a certain check in words and figures as follows, to wit:

MONROE COUNTY BANK
Sparta, Wis., 1/1 19 43 No. 17

Pay to the
Order of American Red Cross $ 40.00
Forty & no/100 - - - - - - - - - - - - - - - - DOLLARS

Lt. Elmo Law
258 QM Bn. 0-1574941

he, the said Second Lieutenant Elmo Law, then well knowing that he did not have and not intending that he should have sufficient funds in the Monroe County Bank at Sparta, Wisconsin, for the payment of said check.

Specification 10: In that Second Lieutenant Elmo Law, QMC, 97th Railhead Company, did, at La Crosse, Wisconsin on or about December 23, 1942, with intent to defraud, wrongfully and unlawfully make and utter to the La Crosse Hotel, a certain check in words and figures as follows, to wit:

Sparta, Wis., 12/23 19 42 No.
MONROE COUNTY BANK

Pay to the
Order of La Crosse Hotel $ 20.00
Twenty & no/100 - - - - - - - - - - - - - - - DOLLARS

Lt. Elmo Law
258 Q.M. Bn 0-1574941

> he, the said Second Lieutenant Elmo Law, then well knowing that he did not have and not intending that he should have sufficient funds in the Monroe County Bank at Sparta, Wisconsin, for the payment of said check.

He pleaded guilty to Charge I and its Specification, and not guilty to Charge II and its Specifications. He was found guilty of Charge I and its Specification, guilty of each of the Specifications of Charge II except the words "with intent to defraud" and the words "and not intending that he should have", and adding at the end of each Specification the words "being conduct of a nature to bring discredit upon the military service", of the excepted words not guilty, of the additional words guilty, and not guilty of Charge II but guilty of violation of Article of War 96. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record for action under Article of War 48.

3. The evidence shows that accused, a second lieutenant in the Quartermaster Corps assigned to the 97th Railhead Company, Camp McCoy, Wisconsin, absented himself without leave from his organization from December 22, 1942, to January 3, 1943. An extract copy of the morning report of accused's organization showing the initial absence was received in evidence without objection (R.13; Pros. Ex. 1), and it was stipulated between the prosecution and defense that accused returned to military control on or about January 3, 1943 (R.14).

On December 1, 1942, accused had a checking account in the Monroe County Bank of Sparta, Wisconsin, with a balance on that date of $155.06 (R.15-16; Pros. Ex. 2). On December 21, 1942, as a result of various checks drawn by accused, his account was overdrawn in the amount of 94 cents (R.17; Pros. Ex. 2). No further deposits to the account were made on or after December 21, 1942 (R.17; Pros. Ex. 2). The account remained overdrawn until January 11, 1943, when the bank eliminated the overdraft through a charge to expense (R.17-18). Documents marked Prosecution's Exhibits 3 to 12-B inclusive were admitted in evidence without objection (R.18). These exhibits included the checks referred to in Specifications 1-10, inclusive, of Charge II. All of the checks were drawn by Lieutenant Elmo Law on the Monroe County Bank, and on all of the dates shown on the checks the account of accused at that bank was overdrawn in the sum of 94 cents and none of the checks was honored by the bank (R.18-23).

Specification 1: On December 28, 1942, Mervin Olsen, a salesman for the Peter Newburg Clothing Company of LaCrosse, Wisconsin (R.27),

sold accused a pair of gloves (R.28-29). Accused asked for and received a blank check which he drew on the Monroe County Bank in the sum of $25 (R.29; Pros. Ex. 3). Accused received the gloves, costing $6, and $19 in cash (R.30).

Specification 2: On December 28, 1942, M.M. Christenson, employed as an accountant by the R.C. Cheney Company of LaCrosse, Wisconsin (R.43), was asked by accused for a blank check, accused stating that he had an account in the Monroe County Bank (R.46). Witness gave accused a blank check and accused filled it out (R.45,46; Pros. Ex. 4). Witness gave accused $10, property of the R.C. Cheney Company, for the check (R.47). Although witness was unable to identify accused (R.43,44), he testified that the party for whom he cashed the check stated that he was Lieutenant Law (R.46) and was dressed in the uniform of a lieutenant (R.45).

Specification 3: On December 28, 1942, Charles Klaus, a clerk at the Linker Hotel, LaCrosse, Wisconsin, at accused's request cashed a check for him out of the funds of the Linker Hotel Company and paid to accused the sum of $15 (R.70; Pros. Ex. 5).

Specification 4: On December 29, 1942, J. Lanawartz of the LaCrosse City Car Company cashed a check for accused in the sum of $10, paying the money out of the funds of the LaCrosse City Car Company (R.70-71; Pros. Ex. 6-A).

Specification 5: On December 29, 1942, William Markos, owner of a tavern in LaCrosse, Wisconsin (R.32-33) cashed a check for accused at accused's request, giving him $15 in cash (R.33-34; Pros. Ex. 7).

Specification 6: On December 30, 1942, Lester Wagner, an employee of the Sheldon Cigar Company of LaCrosse, Wisconsin (R.38), cashed a check in the sum of $15 for accused at his request, giving him in return for the check a package of cigarettes and $14.82 in cash (R. 39-40; Pros. Ex. 8).

Specification 7: On December 30, 1942, Arnold Traaen, proprietor of a tavern located in LaCrosse, Wisconsin (R.49), was asked by accused to cash a check (R.50). He gave accused a blank check of the Exchange State Bank, LaCrosse, Wisconsin. Accused crossed out the bank's name and substituted the name of the Monroe County Bank as drawee (R.51). Accused filled out the check and witness gave him $10 for it, which sum was the amount of the check (R.50; Pros. Ex. 9).

Specification 8: On December 31, 1942, Herman Trinkes, a salesman of the Continental Clothing House, sold accused a pair of gloves.

Accused asked that he be allowed to make out a check, was given a blank check, and filled it out for the sum of $25. The witness gave accused in return for the check a pair of gloves and $21.50 in cash (R.59-61; Pros. Ex. 10).

Specification 9: On January 1, 1943, Joseph Cappiello, acting Field Director for the American Red Cross at Camp McCoy, Wisconsin (R.67), was asked by accused to cash a check. Accused was given a blank check of the Monroe County Bank and accused filled it out on that bank. Witness gave accused $40, funds of the American Red Cross, for the check (R.68,69; Pros. Ex. 11-A).

Specification 10: On December 23, 1942, E.M. Atwood, a clerk at the LaCrosse Hotel (R.65), was asked by accused to cash a check. Accused had just registered for a room and witness cashed the check, taking out $2.50 for the room and giving accused $17.50, money belonging to the LaCrosse Hotel (R.66; Pros. Ex. 12-A).

Accused testified that he attended the Officers' Candidate School at Fort Warren, Wyoming. He was nominated for student honors there. He received his commission and was stationed at Camp McCoy, Wisconsin (R.73-75). On December 21, 1942, he went to the dispensary (R.75-76). He was given a slip at the dispensary dated December 23, 1942, recommending that he be excused from special duty for three days (R.76-77; Def. Ex. 1). He informed "Lieutenant Wanamaker", a member of his organization, of the contents of the slip. He remained in bed that day (R.78).

He testified further that he had an account at the Monroe County Bank. He deposited his entire pay check for November, 1942, in the bank (R.79). He received a checkbook containing blank checks and a place for keeping a record of the checks drawn, and he kept a record of the checks he wrote until all of the blank checks had been used up (R.80). After that he used blank checks of other banks, striking out the bank's name and substituting the Monroe County Bank (R.80). He had run out of blank checks on the Monroe County Bank early in December, 1942 (R.81). The defense offered in evidence Defense Exhibits 2 to 23 which were checks drawn by accused on this account, the last dated December 11, 1942 (R.82). It was after December 11, 1942, that accused began to use the different blank checks, and about that time he ceased to keep a detailed record (R.82). Thereafter he kept a record by "mental concept" (R.83). On December 21, 1942, accused believed that his balance at the bank was a little more than $40 (R.85). Accused

was never rendered a statement by the bank as to his balance, and was not notified of any overdraft until after his confinement (R.93-94). However, he was absent from his station during the period involving the check transactions (R.95). He did not know until after his confinement that any checks of his had been dishonored (R.98). He received no pay after December 1, 1942, and as a result was never able to reimburse the persons to whom he issued the dishonored checks (R.100).

For the defense the first sergeant of accused's company testified that he prepared accused's pay voucher for December and, pursuant to instructions from accused, designated that the check should be paid to accused personally. Witness delivered the pay voucher to accused. About December 25, 1942, the voucher was returned by the Finance Office for correction. There was no indication on the voucher that the funds were to be deposited in a bank or to any person other than accused. Accused was absent at the time, because of which the Finance Office notified witness not to submit the voucher again. Consequently the first sergeant threw it away (R.101-103).

4. The evidence thus shows that at the place and time alleged, accused was absent from his organization as alleged in the Specification, Charge I, and that at the places and times alleged in the Specifications, Charge II, accused executed and uttered the various checks as alleged, and received value therefor. Throughout the entire period involved, his account at the drawee bank was overdrawn and all the checks were dishonored. Although the person who cashed the check set forth in Specification 2 did not positively identify accused, the evidence proves beyond a reasonable doubt that accused was the person who made the check and received the value. Without doubt accused knew that he did not have sufficient funds in the bank to meet the checks, as found by the court. Even by accused's "mental concept" method of computing his balance he must have known that his account was overdrawn, for by his own testimony he kept a detailed record of his checks until about December 11, at which time his balance was $45.06, and within a few days of which he drew several checks totaling more than that amount. The Board of Review is convinced that knowledge was proved.

As noted, the court found accused guilty of the Specifications of Charge II with exceptions and additions and found him not guilty of violation of Article of War 95 but guilty of violation of Article of War 96. In effect the findings were that accused wrongfully and unlawfully made and uttered the checks knowing that he did not have sufficient funds in the bank for their payment, "being conduct of a nature to bring discredit upon the military service". The conduct of which accused was found guilty constitutes a violation of Article of War 96 (CM 202027, McElroy; CM 208870, Moore; CM 220160, Faulkner; CM 220760, Fanning; CM 224286, Hightower).

As the Board of Review stated in the Fanning case:

"The making and delivery of the checks with knowledge that there were not on deposit sufficient funds for their payment, and without making definite arrangements for their payment was discreditable to the military service within the meaning of Article of War 96."

5. The defense offered testimony by the accused that he took his pay voucher to the Finance Office on or about December 21 and verbally instructed one of the clerks to mail his December check to the Monroe County Bank. He did not submit his instructions in writing. The law member overruled an objection to the evidence upon the condition that accused later introduce evidence to verify his own testimony (R.84,85). No such evidence was introduced, accused testifying that the clerk could not be produced as a witness because accused could not find him at the Finance Office (R.107). Accused evidently did not know the clerk's name. There was evidence that one of the men on duty in the applicable section of the Finance Office at the time of accused's alleged visit was absent on furlough at the time of trial (R.108-109). The defense having failed to produce corroborative testimony, the law member ruled that all questions and answers relating to accused's directions to the Finance Office be stricken from the record (R.104-106,117, 118). The ruling of the law member was clearly erroneous. Accused's testimony was competent and the element of corroboration went only to the weight of the evidence. Insofar as the excluded evidence indicated that accused had no intent to defraud and that he intended to have funds in the bank to meet the checks, the error was cured by the findings of the court. So far as accused's knowledge of the state of his account is concerned, it is important to note that he was found guilty of issuing the checks knowing at the time of issuance that he did not have sufficient funds in the bank for their payment. The evidence clearly shows this to be true.

The findings of the court, by eliminating the words "with intent to defraud" reduced the conduct of accused to carelessness and neglect. In effect it found that though he had insufficient funds in the bank to meet his checks when drawn, he intended to have sufficient funds on hand before they were presented. As seen from the Fanning case good intentions alone do not constitute a defense to a charge laid on these facts under Article of War 96. Nothing short of definite arrangements will suffice. It is clear, that accused did not make such "definite arrangements" for payment. His own evidence falls short of proving that he ever signed a pay voucher containing instructions for sending his check to the bank, and the testimony of the first sergeant,

a witness for the defense, proves conclusively that the pay voucher contained no such direction. Accused should have known that his mere verbal directions would not accomplish his alleged purpose. Furthermore, accused testified that so far as he knew, no check was ever sent by the Finance Officer to the Monroe County Bank (R.97). Under all the circumstances the Board of Review is convinced that the exclusion of the evidence did not injuriously affect the substantial rights of accused.

6. The punishment for conviction of violation of Article of War 95 is limited to dismissal. A more extensive punishment for the lesser included offense under Article of War 96 would be legally improper (CM 224286, Hightower). However, the finding of guilty of Charge I and its Specification supports the additional sentence imposed by the court.

7. War Department records show that accused is 29 years of age. He is a high school graduate. He attended Birmingham-Southern College for three years. He served as an enlisted man from February 28, 1941, to September 28, 1942, when, upon graduation from the officers' candidate school at Fort Warren, Wyoming, he was appointed a second lieutenant, Army of the United States.

8. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Articles of War 61 and 96.

Andrew Copp Jr., Judge Advocate.

Wm Trimble, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., JUN 11 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Elmo Law (O-1574941), Quartermaster Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the forfeitures be remitted and that the sentence as thus modified be suspended during the pleasure of the President.

3. Consideration has been given to the attached letter, with inclosures, from Honorable Lister Hill, United States Senate, dated February 17, 1943, and addressed to The Adjutant General.

4. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

4 Incls.
Incl.1-Record of trial.
Incl.2-Draft of let. for sig. Sec. of War.
Incl.3-Form of action.
Incl.4- Let. fr. Hon. Lister Hill, with incls., 2-17-43.

(Sentence confirmed but forfeitures remitted. Sentence as thus modified suspended. G.C.M.O. 143, 16 Jul 1943)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

MAY 18 1943

SPJGQ
CM 232596

UNITED STATES	)	3RD AIR FORCE
v.	)	Trial by G.C.M. convened at Dale Mabry Field, Tallahassee, Florida, February 1, 1943. Dismissal and confinement for one (1) year.
Second Lieutenant THOMAS F. KING (O-1549314), Ordnance.	)	

OPINION of the BOARD OF REVIEW
ROUNDS, LYON and FREDERICK, Judge Advocates

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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 Judge Advocate General.

2. Accused was tried upon the following Charges and Specifications:

CHARGE: Violation of the 61st Article of War.

Specification 1: (Stricken).

Specification 2: In that 2nd Lt Thomas F. King, 312th Fighter Squadron, 338th Fighter Group, Dale Mabry Field, Tallahassee, Florida, did, without proper leave, absent himself from his Squadron, at Dale Mabry Field, Tallahassee, Florida, from about December 11, 1942, to about December 21, 1942.

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

Specification: In that 2nd Lt., Thomas F. King, 312th Fighter Squadron, 338th Fighter Group, Dale Mabry Field, Tallahassee, Florida, having been duly placed in arrest in quarters on or about December 21 1942 did at Dale Mabry Field, Tallahassee, Florida, on or about January 12, 1943, break his said arrest before he was set at liberty by proper authority.

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

Specification: In that 2nd Lt., Thomas F. King, 312th Fighter Squadron, 338th Fighter Group, Dale Mabry Field, Tallahassee, Florida, did in Leon County, Florida, near the City of Tallahassee, on or about January 12, 1943, wilfully and without authority make as true and genuine a certain instrument purporting to be a pass for Private Henry C. Campbell, and Private Leslie A. Darby, both men being assigned to duty with Base Ordnance, attached to 42d Base Hq. & AB Sq, which said instrument was, as he, the said Thomas F. King then well knew, falsely & with out authority made.

A motion to strike Specification 1 of Charge I was "sustained". Accused pleaded not guilty to all Specifications and Charges. He was found guilty of all the Specifications and Charges. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for one year. The reviewing authority approved the sentence and forwarded the record for action under Article of War 48.

3. The evidence shows that accused, then serving as Ordnance officer and assistant armament officer of the squadron to which he was assigned, absented himself from his station, without leave, on December 11, 1942, and remained so absent until December 21, 1942 (R. 7, 8, 9). An extract copy of the morning report of accused's organization, duly authenticated and identified as such by the commanding officer, was introduced and admitted in evidence (Ex. A). Upon his return accused was placed in arrest in his quarters by his commanding officer, and

forbidden to leave them except for the purposes of visiting the latrine or going to his meals. He was given pertinent sections of the Manual for Courts-Martial to read with particular reference to the 69th Article of War. When asked whether he understood the meaning of "arrest in quarters" he admitted that he did (R. 8, 10, 11).

On the night of January 12, 1943, two privates of Base Ordnance serving at Dale Mabry Field, were absent on pass from their station and while seeking transportation to a dance hall known as "Wilder's Place", about seven miles from town, encountered accused at a taxi stand in the city of Tallahassee, Florida (R. 11-12, 18, 19; Ex. B, Ex. D).

Accused, in company with the two enlisted men, got into a cab and after the privates had "picked up" a couple of girls, the party proceeded to Wilder's Place (R. 11, 12, 14, 18, 19). During the ensuing hours there was some drinking and dancing among the members of the group which then comprised the enlisted men, their female companions, accused and a young woman whom he had brought to the hall subsequent to their arrival (R. 14, 15, 16, 19). Private Leslie A. Darby, Base Ordnance, testified that accused was entirely sober and that he had not seen him take a drink (R. 14, 16), although Private Henry C. Campbell, Base Ordnance, stated he could not say whether he was drunk or sober (R. 22). As the evening wore on the enlisted men became apprehensive because their passes required them to be on the post by midnight. They made efforts to obtain a cab without avail. Accused, when told of their situation, stated that he "thought he could help them", that "maybe he could write out a pass" and that he had a cab "that was supposed to pick him up" and they "could come back with him" (R. 13, 14, 15, 19, 20). It is not clear exactly when or where the act was performed but at some time around midnight, presumably at the home of Miss Frances Skipper, accused's companion, accused wrote out in his own hand, a paper purporting to give both Darby and Campbell lawful authority to be absent from their station until 6:15 a.m., January 13, 1943 (R. 13, 17, 20, 23; Ex. C). This pass was used by the enlisted men and was turned in, together with the original passes, when the men entered camp at about 12:15 a.m., January 13, 1943 (R. 14, 20). The men were not soldiers in accused's organization, and had never seen him prior to this occasion (R. 11, 14, 18, 21). Accused did not return to camp with the soldiers but remained at the home of his companion, Miss Skipper (R. 13, 19). Major Forrest W. Sheinwald, Air Corps, Investigating Officer, testified that on January 14, 1943, after he had been warned of his rights, accused made a statement in his

own handwriting admitting that he had written the pass to enable the soldiers to return to camp and in the belief that he had the authority to write it under the circumstances (R. 24, 25; Ex. E). Major Horace A. Hanes, Commanding Officer of accused's organization, testified that he had never authorized accused to sign passes and issue passes for men of his organization or men in any other organization (R. 25). Major Hanes who had ordered accused into arrest in quarters gave accused no permission to leave his quarters nor did he authorize any other person to give such permission (R. 8).

For the defense, Albert Pettit, a civilian welder, Tallahassee, Florida, testified that he had known accused for six or eight months, that accused visited him several times a week during the months of November and December, 1942, at his apartment, most of the time in a drunken condition. He could not recall a time when accused did not appear to be under the influence of liquor and drugs but he would nevertheless drink with him (R. 26, 28). Witness further testified that he had seen accused take pills which he stated were sulfathiazole tablets, simultaneously with whiskey, and that he had also seen him take benzedrine sulphate tablets, recognizing them by shape and color (R. 28, 29, 31). On one occasion he had reason to believe that accused removed a quantity of benzedrine sulphate tablets from a bottle which he kept in his apartment for his own use (R. 27, 28). Witness also stated that accused was frequently ill and that "the only solution for his illness seemed to be another drink of whiskey" (R. 29).

Miss Frances Skipper, Tallahassee, Florida, a witness for the defense, testified that she had known accused since October, 1942, had occasional dates with him and had seen him several times during the period between December 11 and 21, 1942. She saw him drink a lot of times and knows that he took benzedrine sulphate and sulfathiazole tablets at the same time when he drank whiskey (R. 34). On the night of January 12, 1943, accused called for her at her home twelve miles out in the country, took her to Wilder's Place where, in company with two soldiers, they ate and drank some, returning home at about 12 o'clock. Accused was rather drunk when she first saw him and he drank more during the evening (R. 34). Witness heard the soldiers ask accused to write a pass but she did not see him write one and he seemed too drunk to be in condition to write. Accused did not act like himself and seemed in a daze (R. 35, 36). She had not seen him take any pills on the night of

January 12 and had not seen him at all prior to that night over a period of two or three weeks, although she knew he was "on the base" (R. 36). Lieutenant Colonel Joseph A. Baird, Medical Corps, was called by the defense, apparently as an expert opinion witness, and he testified generally as to the effects of benzedrine sulphate tablets, sulfathiazole tablets, and whiskey, when taken separately and together (R. 37-42).

Accused, having been fully advised of his rights, was at his own request, sworn and testified substantially as follows: He stated that he was married when he was eighteen years of age and his wife fifteen; that they lived together approximately six years, at the end of which they were divorced, the custody of three children being awarded to the wife. His occupation is that of machinist, having followed that trade for nine and one-half years. Three months after the divorce he was drafted into the Army and assigned to the Medical Corps where he served eighteen months. In June, 1942, he applied for admission to the Officer Candidate School, Ordnance Department, assuming that he would be put at machine work to which he was accustomed. After being commissioned, he was sent to Dale Mabry Field and assigned to Aviation Ordnance Department. He drank very little whiskey up to four months prior to the trial and never enough to say that he was actually drunk (R. 43). Starting on an occasion in the middle of November, when he fell out of a boat and went to the apartment of a friend where he drank considerable whiskey and took a benzedrine sulphate tablet, he continued in a state of intoxication from repeated use of whiskey and benzedrine sulphate tablets to such an extent that he did not return to his station until the ninth day of his absence. For this misconduct he was restricted to the barracks for three weeks. Later, on the night preceding another day off, he had a drinking party with other officers. He had also procured a supply of sulfathiazole tablets, which had been prescribed for a skin disorder with which he was suffering, several of which he had taken that afternoon. The party proceeded to Mr. Pettit's apartment. He can remember nothing thereafter except that he woke up next morning in the apartment, feeling very sick. Intending to return to the base he drank more whiskey but cannot recall whether he took any drugs. On Friday, the seventh or eighth day after leaving his station he "came to himself" enough to realize he had again gone absent without leave. He intended to return to the base but instead took some more tablets and drank more whiskey (R. 44). On the tenth day he again came to his senses and returned to camp where he was placed in arrest in quarters. He stayed in arrest

in quarters for three weeks and then, one evening, having again taken some benzedrine sulphate tablets and whiskey and feeling downcast because of the receipt of a letter from a girl friend in Atlanta advising him that she would pass through Tallahassee that night and realizing that he would be unable to see her, he started drinking. He does not remember how he got to town as he was "pretty well drunk" when he left. He saw the girl friend and thereafter joined two privates and went with them and their girl companions to Wilder's Place. Some time later, having had a few more drinks he went to Miss Skipper's home and brought her to Wilder's. Later in the evening the two soldiers who stated they were in the Ordnance Department, being unable to return to camp by the time fixed in their passes, suggested that, since accused was an Ordnance officer, it would be all right for him "to give them some kind of paper or take them in". After some discussion and more drinking, accused took the entire party in his cab, went to Miss Skipper's home where he wrote out a pass for the men whereupon the soldiers went on while he remained (R. 45). Accused thought any officer would be permitted to do what he did under the circumstances (R. 46). He and Miss Skipper then went to several places in town where he had more drinks and later woke up in a cafe in such slovenly condition that he could not appear in public. He went to the Skipper home where he slept until 2 or 3 o'clock in the afternoon and then reported to camp (R. 37).

Upon cross-examination he admitted that he had written the pass, knowing the valid passes held by the enlisted men had expired, and for the purpose of aiding them to pass into camp after the hour fixed in their original passes (R. 52).

4. Upon arraignment, when asked whether defense had any special pleas to offer, defense counsel moved that Specification 1 of the original Charge be stricken "the reason being that the defendant was punished under the 104th Article of War, inasmuch as he served a period of three weeks' restriction confined to this base". The court thereupon called for evidence in the matter and Major Hanes, accused's squadron commander, testified that punishment under the 104th Article of War had been imposed upon accused for an absence without leave from November 7 to 17, 1942. The law member then ruled that the motion was "sustained" (R. 5, 6). While niceties of pleading require that such an issue be raised by plea in bar (par. 69c, M.C.M., 1928), the substance of a plea and not the designation given to it will control (par. 64a, M.C.M., 1928) and if a motion amounts

in substance to a plea, or other matter for which a procedure is provided, such motion will be regarded as a plea or other matter. (par. 71a, M.C.M., 1928). The court properly considered the motion as a plea in bar and, under the evidence, was justified in striking the Specification.

5. The uncontradicted evidence shows that the accused did absent himself, without proper leave, from his station for a period from December 11 to December 21, 1942, as alleged in Specification 2 of the Original Charge and that, having been duly placed in arrest in quarters on or about December 21, 1942, the accused did break said arrest on January 12, 1943, before he was set at liberty by proper authority, as alleged in the Specification of Additional Charge I.

In the light of the amazing defense offered by accused, it becomes necessary to determine whether under the circumstances, he shall be held accountable for the acts so charged and admitted.

By his own testimony accused outlines a course of conduct over the entire period covered by the dates set forth in the various Specifications from which the only reasonable inference to be drawn is that he voluntarily kept himself in a state of intoxication by the use of whiskey and drugs. Clearly, the accused hoped that the court would further infer that he was therefore incapable of committing the offenses charged.

It is a general rule of law that voluntary drunkenness, whether caused by liquors or drugs, is not an excuse for crime committed while in that condition; but it may be considered as affecting mental capacity to entertain a specific intent, where such an intent is a necessary element of the offense. Such evidence should be carefully scrutinized, as drunkenness is easily simulated or may have been resorted to for the purpose of stimulating the nerves to the point of committing the act (par. 126, M.C.M., 1928).

Obviously the offenses of absence without leave and breach of arrest require no specific intent and therefore the accused cannot be permitted to urge his voluntary drunkenness in defense.

The evidence amply supports the findings of guilty of Specification 2 of the Original Charge in violation of the 61st Article of War, and of the Specification of Additional Charge I, in violation of the 69th Article of War.

It remains to be seen whether such a defense can avail under the Specification of Additional Charge II wherein it is alleged that accused did "wilfully and without authority make as true and genuine a certain instrument purporting to be a pass * * * which said instrument was, as he * * * then well knew, falsely & with out authority made".

It will be noted that the offense thus charged is not the making without authority of an instrument which, in form and substance, resembled and appeared to be a pass but the making of an instrument which purported to be a true and genuine pass. The gravamen of the offense is the willful making without authority, of a paper intended to be used as a genuine pass knowing that it is, in fact, spurious. The use of the word "wilfully" involves design and purpose and the allegation that accused willfully and without authority made a purported pass implies that the act was done with a set purpose to accomplish the results which followed the act. This being so, the findings of guilty of this Specification cannot be supported unless it clearly appears from the evidence that the accused had the mental capacity to comprehend what he was doing when he committed the acts alleged.

A careful review of all the evidence adduced leads to the inescapable conclusion that accused was able to and did understand the full significance of what he was doing on the night of January 12, 1943. However muddled his mind may have been because of the use of whiskey and drugs, he knew that, because of his arrest in quarters, he would be unable to see a girl friend who was passing through Tallahassee that night. Though he drank more whiskey because of his despondency, he nevertheless had sufficient mental capacity to meet the girl at the train and visit with her for several hours after breaking his arrest. Thereafter without persuasion or coercion, he went with several enlisted men and their female companions to a roadhouse to which he later brought another girl friend from her home eight or ten miles away; and when apprised of the fact that the soldiers were overstaying the time specified in their authorized passes, he wrote, with meticulous attention to details and remarkable choice of phraseology, in a firm and legible hand, a pass authorizing the men to be absent from their post and duties until 6:15 a.m., January 13, 1943.

The course pursued by accused during the series of events portrayed by the evidence at no time or place discloses that lack of possession of mental faculties which should excuse him. Indeed, from the evidence of

accused, under oath, it abundantly appears that at the time when he wrote the pass he was fully aware of all the circumstances surrounding the situation; he knew the men were not members of his organization; he knew they were overstaying their leave; he had no reason to believe that he had authority to extend their leave; and he intended that they should use the pass written by him to escape the consequences of their absence. He was fully aware of his acts and mentally capable of comprehending them.

Connivance by an officer with enlisted men for the purpose of enabling them to violate Army rules and regulations is undoubtedly a disorder to the prejudice of good order and military discipline.

The Board of Review is of the opinion that the evidence clearly supports the findings of guilty of the Specification of Additional Charge II, in violation of the 96th Article of War.

6. War Department records show that accused is 27 years of age. He was inducted into Federal service on January 9, 1941, served with Company D, 105th Medical Battalion, Fort Jackson, South Carolina, until his admission to an Officer Candidate School. He was commissioned Second Lieutenant, Army of the United States and assigned to duty with the 58th Fighter Group, Dale Mabry Field, Tallahassee, Florida, on September 19, 1942.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings and sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 69 and dismissal and confinement at hard labor are authorized upon conviction of violation of Article of War 61 and Article of War 96.

William H. Jones, Col. J.A., Judge Advocate.

Amy C. Gow, Judge Advocate.

Herbert B. Fredericks, Judge Advocate.

1st Ind.

War Department, J.A.G.O., MAY 23 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Thomas F. King (0-1549314), Ordnance Department.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed, that the forfeitures and confinement be remitted, and that the sentence as thus modified be carried into execution.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Record of trial
Incl.2-Draft of let. for sig. Sec. of War.
Incl.3-Form of action.

(Sentence confirmed but forfeitures and confinement remitted. G.C.M.O. 127, 29 Jun 1943)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

APR 24 1943

SPJGH
CM 232604

U N I T E D S T A T E S	)	SOUTHERN LAND FRONTIER SECTOR WESTERN DEFENSE COMMAND
v.	)	Trial by G.C.M., convened at Papago Park, Phoenix, Arizona, February 13, 1943. Dismissal.
First Lieutenant RUSSELL T. BRENNAN (O-116557), Corps of Military Police, 733rd Military Police Battalion.	)	

OPINION of the BOARD OF REVIEW
HILL, LYON and DRIVER, Judge Advocates

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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 Judge Advocate General.

2. Accused was tried upon the following Charges and Specifications:

CHARGE: Violation of the 96th Article of War.
(Finding of not guilty.)

Specification: (Finding of not guilty.)

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

Specification: In that 1st Lieutenant Russell T. Brennan, CMP. A. U. S., 733rd. Military Police Battalion, was,

> at Randolph Park, Tucson, Arizona, on or about January 26, 1943, in camp, to wit; the parade grounds of the 733rd Military Police Battalion, at Randolph Park, Tucson, Arizona, drunk at retreat, in the presence of troops, and while in uniform.

Accused pleaded not guilty to all Charges and Specifications. He was found not guilty of the original Charge and its Specification, and guilty of the Additional Charge and its Specification. 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 50½". The record is here considered as forwarded for action under Article of War 48.

3. The evidence for the prosecution pertaining to the Specification of which he was found guilty shows that accused was, on January 26, 1943, a platoon leader in Company A, 733rd Military Police Battalion, at Tucson, Arizona. About 5:30 p.m. there was a battalion retreat and parade ceremony in which all officers, not assigned to other duties, were required to participate. When Company A marched on the parade grounds the battalion commander, Major Fred M. Fuecker, observed accused coming along the road in front of the kitchens fifty or sixty yards in the rear of the company. When he came on the field, instead of taking his position in front of the company or staying with the company commander, Captain Fred H. Stephens, accused "went on down through the company and started moving his hand and talking to him" (R. 15, 18, 45, 85-86).

As Company A was "lining up" for the parade, accused was staggering and "kind-of weaving around". Noticing this, Captain Stephens told accused to go to the orderly room and get out of sight until after the ceremony. Accused said something to the effect that he knew what he was doing, and Captain Stephens did not have an opportunity to say anything more to him. Accused undertook to verify the alignment when the command to dress the company was given. He "sort of staggered" and Captain Stephens could see that accused was "tight" (R. 42-43).

At "Officers -- Center, March" accused, with the other officers and the guidons, advanced toward the battalion commander but could not walk straight and was weaving. Accused had difficulty doing about face in response to the command "Officers, Post". He hesitated, was slow in completing the movement, and staggered considerably. Going back to his post he staggered and went on past his regular position in front of the

company. This conduct on the part of accused was in plain view of the enlisted men of the battalion. It does not appear that any civilians were present. On the march around the field, accused walked in an irregular manner. He would lag back, the company would catch up with him, and he would move forward again. He did not maintain his position at the front of the company but wandered "all around", dropping back along the flank several times. Accused executed all of the required movements, including "Eyes Right" and the hand salute in passing the reviewing stand, but Major Fuecker noticed that accused was staggering at that time. Accused was in uniform. He ordinarily performed his duties as platoon leader in a military manner, but did not do so that day (R. 16-17, 43, 47, 56, 58-59, 74-75, 85, 87-88).

Immediately after retreat and parade, at the direction of Major Fuecker, accused was taken to battalion headquarters where Major Fuecker talked with him and smelled liquor on his breath. Accused was then sent to the dispensary under the care of a Medical Corps officer, Captain William A. DeSautelle, who testified that he could smell liquor on the breath of accused at that time. Basing his conclusion on observation made on the parade grounds during the ceremonies and at the dispensary afterward, Captain DeSautelle thought that accused showed symptoms of drunkenness. He did not, however, give accused a blood test or other sobriety test. Captain Horace V. Whitcomb, Dental Corps, a member of the staff of the reviewing officer (Major Fuecker), Captain Stephens, and the battalion adjutant each testified that in his opinion accused was under the influence of liquor, intoxicated or drunk during the ceremonies. Asked whether in his opinion accused was drunk at retreat, Major Fuecker replied "He was; decidedly". (R. 19, 56, 67, 88, 106, 167-170).

4. For the defense, Sergeant Gus Caldwell, mess sergeant of Company A, testified that about 5:30 p.m. and just before retreat, as he was making out the menu for the following day and posting up his mess accounts, accused came in the mess hall and discussed the handling of the mess with him. They went over a very complicated mess form (Number 469) together, and accused gave Caldwell certain advice with reference to the form. Accused made intelligent, pertinent, and "understandable" answers to the questions asked of him and found where Caldwell was "a hundred wrong in the daily ration". Caldwell did not smell liquor on the breath of accused, although accused was right in front of him. Accused did not appear to be drunk. His actions, demeanor, and conversation were those of a sober man (R. 109-111).

Sergeant Ely B. Haskins carried the guidon of Company A at the retreat parade on January 26. He testified that just before retreat, accused formed the company between the barracks and marched with the company to the parade ground. At the command "Dress right - Dress", accused moved to the flank, checked the alignment, and took his post. He did not weave or stagger or do anything else to indicate that he was drunk. Haskins was of the opinion that accused was not drunk. When the command "Officers and guidons Front and Center" was given, accused went up to the reviewing officer with the others. He came back to his post and there was nothing unusual about him so far as Haskins could see. When Company A passed in review accused executed the various movements properly and marched beside Haskins in cadence and in step. Haskins did not notice accused step aside to speak to any of the men as the company approached the reviewing stand. Accused walked as an officer is supposed to walk and did not reel or stagger against Haskins in any way (R. 112-117).

Accused testified that on January 11 and 12, 1943, at Camp Pleyto, California, where he was serving with a detachment of his battalion, he was ill in bed with an acute attack of bronchitis and a very heavy cold. A doctor gave accused Sulfanilimide and Sulfathiazole. The cold persisted and accused continued to take the drugs to and including January 18. He was relieved of duty at Camp Pleyto on January 19 and left there in his car about noon that day to return to his station at Randolph Park, Arizona. Accused and his wife attempted to drive down the coast route but found the highways flooded or blocked as the result of a severe storm. They arrived at Tucson in the early morning of January 26, and accused reported for duty at 2 o'clock that afternoon. The next morning he began active duty with Company A (R. 122-126, 130-131).

Accused had been with the 733rd Military Police Battalion when it moved from Spokane, Washington, and he was with it when it went, successively, to Seattle, Portland, Phoenix, and Tucson. When formal retreat parade was held at Phoenix he was a member of the staff and did not attend. Prior to January 26 accused had taken part in only one formal retreat ceremony of the battalion and that was during the period from December 29 to January 5, 1943 (R. 131-133).

Accused further testified that on January 26 he performed his company duties until recall, when he went to officers' quarters, poured himself two drinks, and drank them. Each drink consisted of a "good-sized jigger", about an ounce and a half to two ounces. Upon leaving

the officers' quarters he met and talked briefly with Major Fuecker. The mess form, number 469, "had gotten behind" and as accused was trying to get it straightened out, he went to the kitchen to get certain information and bills. After leaving the mess hall he made a company inspection of clothing and equipment and turned the company over to the first sergeant to be marched to the parade grounds. Accused followed the company there, met Captain Stephens, and when assembly sounded took position in front of the left file and opposite the guidon bearer (R. 134-135, 141).

According to his own testimony, accused, at the command "Dress right — Dress", moved to the right of the flank, dressed the ranks, and returned to his original position. He came to parade rest, and when the command "Present — Arms" was given, executed the hand-salute. At "Officers, Front and Center" he made a diagonal movement to his position which was the right file of the second rank of officers moving toward the battalion commander. However, he found that he was about sixteen to eighteen inches too far to the right, and, he testified "so I tried to pick — Now, that is the movement, that is where I tried to pick that distance up and crowd over". The officers halted in front of the battalion commander and as the commands were given, accused faced about and returned to his post. When the battalion started to pass in review Captain Stephens gave the command "Right Turn", and in making the turn accused noticed that a soldier had his rifle out of dress. When the soldier did not correct his dress after accused had called it to his attention, accused stepped out of position and moved back about two paces. A little later accused glanced over his shoulder and observed that the same soldier still did not have his rifle dressed. Accused moved out of position, "called" him again, and returned to his post. When Company A passed the reviewing stand accused properly executed "Eyes Right" and the hand-salute. He marched straight to the front until, at a point some distance beyond the reviewing stand, the signal was given for the officers of his company to fall out. Shortly thereafter he was informed by the battalion adjutant that Major Fuecker wanted to see him (R. 135-137).

Accused also testified that throughout the retreat ceremonies he was in full possession of his faculties and knew each and every order that he was called upon to execute. He did not stagger or weave or "balk". He was not under the influence of liquor and was not intoxicated. Accused categorically denied that, as his company was coming out on the parade ground, Captain Stephens told him to go back to quarters (R. 137-138, 147).

Captain DeSautelle and another Medical Corps officer, Captain William M. Bush, testified for the defense that in some exceptional cases administration of Sulfanilimide and Sulfathiazole induced symptoms which might simulate mental disorder and confusion. It was possible, they testified, for a patient taking the drugs, to lose control of his movements and appear to be under the influence of liquor or in a drunken condition. This testimony manifestly was advanced as a defense to the Specification, Original Charge (of which accused was found not guilty) in which it was alleged that accused was drunk at Camp Pleyto, California, on January 18, 1943. However, both medical corps officers testified that when the drugs were taken over a period of time, such as seven or eight days, there was a greater probability that the patient would suffer undesirable or complicating reactions, than if only one or two doses were taken. When Captain DeSautelle was recalled as a witness he was asked by a member of the court whether at the time of his examination of accused at the dispensary on January 26 there was anything in the general appearance of accused to indicate that he was suffering from "the cumulative effect of this drug". Captain DeSautelle answered that he thought accused was under the influence of alcohol, not drugs, but if "it came down to a fine point" it might not be possible to determine without blood tests what was causing the trouble (R. 147, 151-153, 161-164, 167-168).

5. The evidence clearly shows that accused was, as alleged in the Specification, Additional Charge, drunk in uniform, at retreat, in the presence of troops on January 26, 1943. When Company A, in which he was a platoon leader lined up on the parade grounds, the inebriated condition of accused was so apparent that his company commander, Captain Stephens, told him to go to the orderly room and keep out of sight until the parade was over. As accused, with the other officers and the guidons, approached the battalion commander on "Officers Center, March" accused was unable to walk straight. He could not do "about face" properly, and staggered and weaved about in full view of the entire battalion. When his company marched in the parade and passed in review, accused continued to stagger. He walked in an erratic, irregular manner. He did not keep his position at the front of the company, but several times fell back along the flanks. Accused did not claim that these symptoms of intoxication were due to his having taken sulpha drugs and there is no evidence in the record that he took any such drugs subsequent to January 18. The defense of accused was that he was not drunk on January 26, and he flatly denied exhibiting any symptoms of drunkenness. However, on that point, the Board of Review regards the testimony of the witnesses for the prosecution as convincing beyond any reasonable doubt.

The Manual for Courts-Martial, 1928 (par. 151) defines conduct unbecoming an officer and a gentleman as follows:

> "The conduct contemplated is action or behavior in an official capacity which, in dishonoring or disgracing the individial as an officer, seriously compromises his character and standing as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally as a gentleman, seriously compromises his position as an officer and exhibits him as morally unworthy to remain a member of the honorable profession of arms. (Winthrop)"

With reference to the nature of the conduct denounced by the 95th Article of War Winthrop's Military Law and Precedents (Reprint, p.711) states:

> "Though it need not amount to a crime, it must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents."

Winthrop (Reprint p. 717) gives as an example of offenses charged under the 61st (95th) Article of War:

> "Drunkenness of a gross character committed in the presence of military inferiors or <u>characterized by some peculiarly shameful conduct or disgraceful exhibition of himself by the accused</u>." (Underscoring supplied)

Whether in a particular instance drunkenness is of such a character as to constitute conduct unbecoming an officer and a gentleman depends not only upon the degree of intoxication but also upon the time, place, occasion, and other attendant circumstances (CM 221591, <u>Brown</u>).

Retreat is one of the most impressive and inspiring ceremonies known to the military service. It involves paying respect and homage to the national flag. In common with similar ceremonies, it has an important

military value in that it tends to enhance the morale of troops and develop their spirit of cohesion (par. 2c, Infantry Drill Regulations F.M. 22-5, Aug. 4, 1941). An officer should meticulously observe the courtesy and deportment which such an occasion demands. It is difficult to imagine a situation in which the open exhibition of drunkenness by an officer would be more indecorous and reprehensible than at retreat. While the drunkenness of accused was not of a gross character, it occurred under circumstances of aggravation, namely, during his participation, as a platoon leader of his company, in battalion retreat and parade ceremonies. The conduct of accused was below the standard of behavior of an officer and gentleman. The Board of Review is of the opinion that the evidence is sufficient to support the findings of guilty of violation of Article of War 95.

6. The accused is 47 years of age. The records of The Adjutant General show his service as follows: Enlisted service from September 6, 1917; appointed second lieutenant, Infantry, National Army, June 1, 1918; appointed first lieutenant, October 19, 1918; honorably discharged, May 10, 1920; appointed first lieutenant, Infantry-Reserve, November 15, 1920; reappointed November 15, 1925; reappointed November 15, 1930; discharged from commission because he could not be located, February 26, 1935; appointed temporary first lieutenant, Army of the United States, March 24, 1942, active duty April 11, 1942.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of 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. Dismissal is mandatory upon conviction of violation of Article of War 95.

Walter J. Hick Jr., Judge Advocate.

(Dissent), Judge Advocate.

Samuel M. Driver, Judge Advocate.

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGH
CM 232604

APR 24 1943

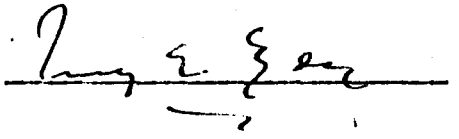
UNITED STATES v. First Lieutenant RUSSELL T. BRENNAN (O-116557), Corps of Military Police, 733rd Military Police Battalion.	)))))))	SOUTHERN LAND FRONTIER SECTOR WESTERN DEFENSE COMMAND Trial by G.C.M., convened at Papago Park, Phoenix, Arizona, February 13, 1943. Dismissal.

DISSENTING OPINION by LYON, Judge Advocate

I regret that I find myself unable to agree with the majority opinion that the evidence in this case is sufficient to support the finding of guilty of Article of War 95. Winthrop (Reprint, 717), says that drunkenness within the meaning of Article of War 95 must be "* * * of a gross character committed in the presence of military inferiors, or characterized by peculiarly shameful conduct or disgraceful exhibition of himself by accused". There is no proof of any act showing moral unfitness, or that the degree of intoxication was gross, nor is there the slightest evidence of any disorderly or shameful conduct as required to constitute a violation of Article of War 95.

The record shows that this officer - a veteran of the last war - is 47 years of age. He had been ill and had been taking, under a doctor's orders, sulfanilimide and sulfathiazole. He had just returned from a long, hard automobile trip. He had been on duty all day. He was tired and weak, and before joining his company for the retreat ceremony, made the mistake of taking two drinks of whiskey. On account of his previous illness, the resulting weakness from the sulphur drugs, etc., he had some difficulty in handling himself with that degree of military precision and alertness desired upon such an occasion. This, in my opinion, constitutes conduct to

the prejudice of good order and military discipline, in violation of Article of War 96, rather than conduct unbecoming an officer and a gentleman, in violation of Article of War 95.

 , Judge Advocate.

SPJGH
CM 232604 1st Ind.

War Department, J.A.G.O., APR 3 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Russell T. Brennan (O-116557), Corps of Military Police, 733rd Military Police Battalion.

2. I do not concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty of the Specification in violation of the 95th Article of War. This officer was drunk while in command of a platoon at retreat formation. He was unsteadyin his movements and staggered somewhat at times. He was not grossly drunk and aside from appearing before the enlisted men of his platoon while obviously under the influence of intoxicants, did not make any degrading, shameful, or disgraceful exhibition of himself. I doubt that his misconduct was of such serious degree as to exhibit moral unfitness to be an officer, or to violate Article of War 95. I recommend that only so much of the findings of guilty of the Charge and the Specification thereunder be approved as involves a finding of guilty of the Specification in violation of Article of War 96, and that the sentence to dismissal be confirmed, but the execution thereof suspended during the pleasure of the President.

3. Inclosed herewith are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action carrying that recommendation into effect.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1- Record of trial.
Incl.2- Dft.ltr.for sig. Sec.of War.
Incl.3- Form of Executive action.

(Only so much of findings of guilty of the Charge and the Specification thereunder approved as involves findings of guilty of the Specification in violation of Article of War 96. Sentence confirmed but execution suspended. G.C.M.O. 116, 26 May 1943)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGN
CM 232656

APR 3 1943

UNITED STATES	CAMP ROBERTS, CALIFORNIA
v.	Trial by G.C.M., convened at Camp Roberts, California, February 26, 1943. Dishonorable discharge and confinement for twenty (20) years. Federal Correctional Institution, Englewood, Colorado.
Private JAMES R. BRINKERHOFF, (39313559), Company B, 81st Infantry Training Battalion.	

HOLDING by the BOARD OF REVIEW
CRESSON, LIPSCOMB, and COWLES, Judge Advocates.

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

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

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

Specification: In that Private James R. Brinkerhoff, Company "B" 81st Infantry Training Battalion, did, on U.S. Highway #101, near San Ardo, California, on or about December 30, 1942, with intent to commit a felony, viz, robbery, commit an assault upon Mrs. Opal Ruth Booth, by willfully and feloniously touching her body and threatening to cut her throat.

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

Specification: In that Private James R. Brinkerhoff, Company "B" 81st Infantry Training Battalion, did, at San Ardo, California, on or about December 30, 1942, wrongfully and by putting her in fear by unlawfully touching her body and threatening to cut her throat, forcibly arrest and carry Mrs. Opal Ruth Booth, of San Ardo, California, to a point on U.S. Highway #101 about ½ mile north of San Ardo, California.

He pleaded not guilty to and was found guilty of the Charges and Specifications. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. Evidence of one previous conviction was introduced. The reviewing authority approved the sentence but reduced the period of confinement to twenty years, designated the Federal Correctional Institution, Englewood, Colorado, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that San Ardo, California, is about 22 miles from Camp Roberts. U.S. Highway #101 connects the two places (R. 19-20). Prior to December 30, 1942, when this case arose, certain sergeants of Camp Roberts were allowed to live with their wives off the post. Some of them lived in San Ardo and commuted in their automobiles, sharing their cars at times with other soldiers going to and from the camp and San Ardo (R. 10).

Mrs. Opal Ruth Booth, age 23, was employed at the post laundry at Camp Roberts and lived at San Ardo. Her husband was a soldier, stationed at or near Camp Roberts. The married sergeants living at San Ardo had made a practice of giving rides to the Booths and they reciprocated the courtesy. (R. 9-10, 12)

On December 30, 1942, Mrs. Booth finished her work at Camp Roberts at midnight and started to drive home by herself. The accused, who had been released from the stockade at Camp Roberts the preceding day and had gone absent without leave, was five miles from Camp Roberts on the road to San Ardo. He had been drinking; had $12.50 in his pocket; had decided to "fool around" San Francisco; and, shortly after midnight, on December 30, was attempting to hitchhike a ride there. (R. 7, 10, 12, 16, 20, 23, 25-26) As Mrs. Booth came to the point where the accused was standing, she stopped, thinking he was one of the sergeants who lived in San Ardo. The accused said he was going to Frisco. Having stopped Mrs. Booth felt "there was nothing I could do after he asked for a ride" but give him one. She explained to the accused that she was going only to San Ardo. (R. 7, 9, 10, 20)

During the trip the accused conducted himself properly until they reached San Ardo. However, when Mrs. Booth told him he would have to get out, the accused pushed a hard instrument into her ribs and ordered her to drive him to San Francisco "or he would cut my God damn throat". He forced her to keep on driving past San Ardo; began to feel in both her coat pockets and the dashboard compartment of the car; and said to her: "You are going to Frisco but you probably won't be coming back." (R. 7, 10-12) When they were at an uninhabited spot between two or three miles beyond San Ardo, the accused ordered Mrs. Booth to stop the car. A military police truck came into sight at that moment. Mrs. Booth turned her car to the left deliberately,

trying to hit the truck. Their bumpers struck. Both cars stopped (R. 7, 8, 12, 19). The two military police in the truck testified that Mrs. Booth jumped out of the car, hysterically screaming "take this soldier away", one of the military police stating that she added, "he was trying to kill her" (R. 15, 20). The military police took the accused in charge, searched him and the car, but found no weapon (R. 8, 18, 20, 22). Followed by the military police truck, Mrs. Booth thereafter drove her car back to her home in San Ardo (R. 18).

4. The accused, the only witness for the defense, testified that when they reached San Ardo he said to Mrs. Booth "Let's go to Frisco and have a good time" and that she replied, "that wouldn't be a bad idea". He admitted that he might have touched her elbow, but stated that if he did, it was an intimacy only. He said that Mrs. Booth did not seem to be afraid of him; that she later decided not to go to Frisco because she had insufficient gas; and that that was the reason he told her to stop and let him out. (R. 24-25)

5. The Specification, Charge I, alleges that the accused assaulted Mrs. Booth with intent to rob her. In order to establish this it must be shown that the accused assaulted Mrs. Booth with a concurrent intent forcibly to take, steal and carry away from her person or in her presence something of value by violence or by putting her in fear (par. 148, p. 179, M.C.M. 1928). All these elements are proved in this case. The accused assaulted Mrs. Booth by pushing a hard instrument into her ribs and threatening to cut her throat; he felt in her pockets against her will and in the dashboard compartment of her car. An intent forcibly to take her money by violence and by putting her in fear can properly be inferred from this conduct. These facts, in the Board's opinion, are sufficient to justify the finding of guilty as to the Specification and Charge I. A motive for robbery could be inferred from the facts that the accused had only about $12.50 and was going to San Francisco to "fool around".

The Specification, Charge II, alleges that the accused by touching the body of Mrs. Booth and by threatening to cut her throat forcibly arrested her and carried her one half mile along the U.S. Highway #101. The evidence shows that the offense so alleged occured at the time and in the same manner as the assault with intended robbery alleged in the Specification, Charge I, and that the second offense is only a different aspect of one transaction. In view of this fact, and the basic principle that an accused may not lawfully be punished for two separate offenses when each is an integral part of the other and form only one single transaction, the imposition of a sentence in excess of the sentence prescribed for the major offense must be disapproved (par. 27, M.C.M. 1928; CM 156134, sec. 402(2) Dig. Ops. JAG 1912-40). In the present case, the more important aspect of the transaction was an assault with intent to commit robbery, and the maximum authorized punishment prescribed is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years (par. 104c, M.C.M., 1928).

6. For the reasons stated, the Board of Review holds that the record of trial is legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years.

Elias L. Dessory, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Willard B. Cox, Judge Advocate.

1st Ind.

War Department, J.A.G.O., APR 21 1943 - To the Commanding General,
Camp Roberts, California.

1. In the case of Private James R. Brinkerhoff (39313559), Company B, 81st Infantry Training Battalion, I concur in the foregoing holding by the Board of Review, and, for the reasons therein stated, recommend that only so much of the sentence he approved as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years. Upon compliance with this recommendation you will have authority to order the execution of the sentence.

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

(CM 232656).

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

APR 27 1943
HEADQUARTERS
MESSAGE CENTER
23591

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGN
CM 232661

UNITED STATES	93RD INFANTRY DIVISION
v.	Trial by G.C.M., convened at Fort Huachuca, Arizona, February 24, 1943. Dismissal.
Second Lieutenant WILLIAM B. NELSON (0-1289470), 369th Infantry.	

OPINION of the BOARD OF REVIEW
CRESSON, LIPSCOMB and SLEEPER, Judge Advocates.

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

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

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

Specification 1: In that 2d Lt. William B. Nelson, 369th Infantry, did, at Fort Huachuca, Arizona, on or about Feburary 4, 1943, with intent to deceive Colonel Thomas F. Taylor, his commanding officer, officially state that a delinquent bill owed to the Mountainview Officers' Club had been paid by him on January 8, 1943, which statement was known by the said Second Lieutenant William B. Nelson to be untrue.

CHARGE II: Violation of the 61st Article of War.
(Finding of not guilty.)
Specification: (Finding of not guilty.)

He pleaded not guilty to both Charges and Specifications and was found guilty of Charge I and its Specification and not guilty of Charge II and its Specification. 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. The evidence for the prosecution shows that on January 4, 1943, there was sent to the accused, from the headquarters of the 369th Infantry, at Fort Huachuca, Arizona, the following official communication:

"HEADQUARTERS, 369th INFANTRY
6/FHC/WRU/oop
241.3 Fort Huachuca, Arizona
January 4, 1943.
SUBJECT: Delinquent Account.
TO: 2D LT WILLIAM B NELSON,
369th Infantry.

"1. The Commanding General, 93d Infantry Division, has reported to this headquarters that you are indebted to the officers' Mountain View Club in the amount of $52.00.

"2. The amount as listed, plus any current amount will be paid immediately and your receipt presented to the Adjutant, this headquarters, by January 8, 1943.

"By order of Lieutenant Colonel LYONS:

FRANK H. CHRISTMAS
1st Lt., 369th Inf.,
Adj."

(R. 9; Ex. E).

The collection sheet of the Officers' Mountain View Club for the month of December, 1942, shows the accused's unpaid balance from the previous month to have been $52, with charges incurred during the month aggregating $36.40, "Total Due", $88.40, "Amount Collected", $88.40, with no entry at all in the column headed "Amount Unpaid To be Carried To next Month". The club collection sheet for January, 1943, was not introduced. (R. 7; Ex. C)

A book of "carbon copies of receipts given for some part of January, 1943", was identified by the bookkeeper of the "Mountain View Officers Club", and the following from among them, introduced as the prosecution's Exhibit D:

"NO 271 SAVE YOUR RECEIPTS
Fort Huachuca, Arizona, Jan 9 1943
RECEIVED OF Lt Wm B. Nelson
Fifty two ----------00/100 Dollars $52.00
Check X OFFICERS' MESS
Cash X Officers' Mountain View Club
By /s/ Lt C. A. Davis
Club Officer".

That receipt, according to the bookkeeper, who had checked it against the books of the club, is "reflected in the receipts of the club on the date which it shows". (R. 7-8; Ex. D)

On January 9, 1943, the accused exhibited to the regimental adjutant a receipt "relative to this delinquent account". Asked to explain its appearance, the adjutant characterized it as "a receipt from the Officers' Mountain View Club written in pencil". To the next inquiry, whether the prosecution's Exhibit D was a copy of the receipt which the accused had shown him on January 9, 1943, the adjutant replied, "the copy of the receipt that Lt. Nelson showed me was dated January 8, 1943". Asked to state to the court whether it appeared to have been altered, the adjutant testified,

> "The '8' appeared to have been altered; it seemed as if the '8' had been drawn over the '9'" (R. 10).

At this point in the examination of the regimental adjutant, the trial judge advocate turned to the accused and said "I will ask Lieutenant Nelson at this time whether or not he has the receipt with him". To this question the accused replied, "No, I do not". The prosecution then asked the further question: "Do you have the receipt in your possession yet?" The defense counsel then interposed an objection to the question, on the ground that the accused was not on the witness stand and it was not proper to question him. This objection was sustained by the court and the question was not answered. (R. 10, 11)

On February 4, 1943, the accused was called before Colonel Thomas F. Taylor, his regimental commander, who testified as follows:

> "As the result of an official report made to me by the Adjutant, I called Lieutenant Nelson into my office and asked him did he pay his officers club bill on January 8th, as he had been directed to do, and he replied that he had" (R. 4).

On re-direct examination the trial judge advocate asked the further question:

> "Why were you checking as to whether or not the bill had been paid on January 8th, or some subsequent date at that time, sir?".

In reply to this question Colonel Taylor stated:

> "I was considering classification proceedings against the officer" (R. 5).

4. The defense introduced no evidence whatever concerning the Specification, Charge I; the accused, whose rights were fully explained to him in open court, elected to remain silent (R. 22-23).

5. The evidence shows clearly that the accused officially made to Colonel Taylor the statement alleged in the Specification, Charge I; but it fails signally to establish, in the manner required by law to support a conviction, the falsity of the statement so made. The December collection sheet, introduced by the prosecution without further showing than that it correctly reflects the financial records of the club, indicates that the entire account was collected in December, 1942, and that no part of it remained unpaid to be carried forward into January, 1943. To offset this clear indication, there was no testimony whatsoever that the entry in the column headed "amount collected" was made at any other time than in the month of December, 1942. It is true that proof was made of a receipt for $52, issued to the accused and dated January 9, 1943, but no direct evidence establishes that such payment was in satisfaction of the accused's delinquent account, in contravention of the showing, by the collection sheet, that it had been paid in December. Regardless of this, however, and conceding that the collection sheet showing is incorrect, and that the payment for which the club issued the receipt to the accused was in satisfaction of the delinquent account referred to in the letter, the date on the receipt is not conclusive of the date on which it was actually paid. The prosecution failed to show how the account was paid. If the accused mailed his remittance on the 8th, his statement that he had paid it on that date would not be false; or, if he paid it personally on the 8th, after the books were closed, it would, according to common business usage, have been entered on the 9th. The officer who signed the receipt did not testify. The bookkeeper's testimony was not based on any personal knowledge of the transaction, but strictly limited to what was shown by the club's books. The adjutant's testimony of the apparent alteration of the receipt is a mere circumstance, of doubtful probative value, far from conclusive as to when the account was actually paid. If the accused had paid the bill on the 8th and received a receipt dated the 9th, he might have had reason to feel well within his rights, under the circumstances, in undertaking to alter the receipt to show the correct date of payment; or the officer who signed it might have altered it at his request, to reflect the true date of payment, and neglected to alter correspondingly the carbon copy of the receipt. The evidence is not such as to eliminate from a reasonable mind a reasonable doubt of the accused's guilt; and his election to remain silent may not

properly be taken into consideration in weighing the evidence against him.

Moreover, during the trial, several errors were committed which injuriously affected the rights of the accused. Colonel Thomas F. Taylor testified, without objection, that he "was considering classification proceedings against" the accused. As the accused did not testify, nor put his character or reputation in issue, this highly prejudicial statement was wholly unauthorized.

While the adjutant was on the stand, the prosecution, without any right to do so, asked the accused - - who was not then a witness and thereafter elected to remain silent - - if he had the receipt, which the adjutant had testified "appeared to have been altered". When the accused replied "No, I do not", the prosecution continued its unauthorized interrogatories by asking him if he yet had the receipt in his possession. True, defense counsel's objection to this latter question was properly sustained, but both unauthorized inquiries, and the answer elicited by the first, were highly prejudicial.

The proper evidence in the record -- the evidence legally entitled to consideration by the court -- does not sustain the finding of guilty of Charge I and of the Specification thereunder, and does not support the sentence.

6. The accused is a colored officer, 23 years of age. The records of the Office of The Adjutant General show enlisted service from March 31, 1941 until temporary appointment as second lieutenant, A.U.S., August 5, 1942.

7. For the reasons stated above the Board of Review is of the opinion that the record of trial is not legally sufficient to support the findings of guilty and the sentence.

Elias L. Bressoy, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

SPJGN
CM 232661

1st Ind.

War Department, J.A.G.O., 26 JUN 1943 - To the Commanding General, 93rd Infantry Division, Fort Huachuca, Arizona.

1. In the case of Second Lieutenant William B. Nelson (0-1289470), 369th Infantry, I concur in the foregoing opinion of the Board of Review holding the record of trial legally insufficient to support the findings of guilty and the sentence, and for the reasons stated therein I recommend that the findings of guilty and the sentence be disapproved. You are advised that the action of the Board of Review and the action of The Judge Advocate General have been taken in accordance with the provisions of Article of War 50½, and that under the further provisions of that Article and in accordance with the fourth note following the Article (M.C.M., 1928, p. 216), the record of trial is returned for your action upon the findings and sentence, and for such further action as you may deem proper.

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 opinion 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 232661).

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

1 Incl
Record of trial

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DISPATCHED
WAR DEPARTMENT
SERVICES OF SUPPLY
J.A.G.O.

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGK
CM 232720

18 JUN 1943

UNITED STATES	14TH ARMORED DIVISION
v.	Trial by G.C.M., convened at Camp Chaffee, Arkansas, February 18 and 27 and March 3, 1943. Dismissal.
Second Lieutenant HELON G. HARTER (O-1013806), 47th Armored Regiment.	

OPINION of the BOARD OF REVIEW
LYON, HILL, and ANDREWS, Judge Advocates.

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

2. Accused was tried upon the following Charges and Specifications:

CHARGE: Violation of the 95th Article of War.

Specification: In that Second Lieutenant Helon G. Harter, 47th Armored Regiment, was, at Fort Smith, Arkansas, on or about January 31, 1943, in a public place, to wit: Union Bus Terminal, 11th Street and Garrison Avenue, Fort Smith, Arkansas, drunk and disorderly while in uniform.

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

Specification 1: In that 2d Lieutenant Helon G. Harter, 47th Armored Regiment, did, at Camp Chaffee, Arkansas, on or about February 1, 1943, with intent to deceive Colonel Eugene L. Harrison, 47th Armored Regiment, his Regimental Commander, officially state to the said Colonel Harrison, that he met Staff Sergeants Edward F. Kelly and Harry F. Fahrendorf, both 47th Armored Regiment, just prior to being picked up by the Military Police in Fort Smith, Arkansas, on January 31, 1943 and

had not been with them the whole evening of January 30-31, 1943, which statement was known by the said Lieutenant Harter to be untrue in that he had been with the said Staff Sergeants Kelly and Fahrendorf the whole evening of January 30-31, 1943, prior to being picked up by the Military Police.

Specification 2: (Motion for finding of not guilty sustained).

Accused pleaded not guilty to all the Charges and Specifications. The court sustained a motion for a finding of not guilty of Specification 2 of the Additional Charge (R.46). Accused was found guilty of the Specification of the original Charge except the words "and disorderly", and of the excepted words not guilty. He was found not guilty of the original Charge but guilty of violation of the 96th Article of War, and guilty of the Additional Charge and Specification 1 thereof. 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 for the prosecution.

On January 30, 1943, from about 8 P.M. until midnight, accused bowled with Staff Sergeants Edward F. Kelly and Harry F. Fahrendorf, both of Company I, 47th Armored Regiment, and two other enlisted men, at a bowling alley in the city of Fort Smith, Arkansas (R.31,32,34,79). During this period the bowlers, including accused, had several rounds of beer, variously estimated as between five and eight bottles per man (R.32,34,80). At midnight accused and the four enlisted men visited Terry's Cafe and had something to eat (R.32,34,35,80,100). They left Terry's about 12:45 A.M., January 31, 1943 (R.80,100). As they emerged from the cafe they saw a military police truck standing at the curb with quite a crowd of enlisted men near it. Accused walked over to a lieutenant of the military police and talked with him for a few moments while the four enlisted men stood to one side (R.36,80,97). Two of the four enlisted men then left for camp about 1 A.M. (R.32,97). One of the two testified that accused was sober at the time and had been so all evening (R.33). Kelly, Fahrendorf, and accused took a taxi and went to the Hollywood Club, arriving there about 1:30 A.M. (R.33-36, 81,82,89,97). They sat together in the same booth and were joined by two women (R.82,85,87,89,113,114,115,118). Kelly, Fahrendorf, and one of the women sat on one side of the booth facing the wall, and accused and the other woman sat on the other side (R.98). The party consumed about two quarts of wine, accused drinking an equal share with the others (R.35,82,90,115,119). They all left the club between 3:30 A.M. and 4:30

A.M. and proceeded by taxi to the American Cafe in Fort Smith, where they had coffee (R.35,82,83,88,89,115,116,119). Accused and the two enlisted men walked home with the women and then left them (R.83,88, 89,116,119,120). One of the women testified that accused was undoubtedly drunk (R.120) and the other testified that he was "more drunk than he was sober, and I wouldn't story for nobody" (R.116). Accused and his two companions then walked toward the bus station on Garrison Avenue and 11th Street (R.22,35,83,89).

Sergeant Ralph C. Weaver, Private First Class T.L. Austin, and Private First Class L.E. Caudle, all members of the Military Police, were patrolling the district in a reconnaissance car. They testified that they saw accused, Kelly, and Fahrendorf walking arm in arm along the sidewalk and staggering from side to side (R.21,22,38,41-43). It was then about 5 A.M. (R.23,24,41). Accused was in uniform (R.25,40). Weaver directed accused and his companions to go to the bus station, which they did, followed by the military police (R.22,25,35,38). Accused gave his name to Sergeant Weaver and demanded that Weaver tell accused his name and the nature of the charges (R.23,24,36). Directed by the military police to enter the bus, accused protested but was finally persuaded (R.22,36,39,42). There were a number of people, both military and civilian, on the bus and a number outside the bus. Their attention was attracted to accused by the commotion he was making (R. 22,23,24,39,40). He talked in a loud voice, demanding the "fat sergeant's" name (meaning Weaver) and the nature of the charges against him. He weaved around and refused to sit down. After he had finally sat down at the rear of the bus, he kept trying to get up and gesticulating with his hands (R.23,24,36,39,42). Weaver and Austin each testified that in his opinion accused was drunk (R.23,40). Subsequently, accused and the two staff sergeants were taken off the bus and driven to the police station in order that accused might talk to the provost marshal (R.23,36,40,42). Weaver testified that accused "staggered out" of the bus (R.23).

Two deputy sheriffs, who saw accused momentarily at the police station, testified that he was drunk. Each based his opinion upon accused's manner of speech and the way he walked. One stated that accused staggered and that his eyes had a "glareness" (R.43-45).

Second Lieutenant Thomas W. Gause, Assistant Provost Marshal, 14th Armored Division, saw accused at the police station at about 6 A.M. (R.10,11). He testified that accused was not disorderly (R.20) and was not "staggering all over the place" (R.17). However, accused did not have full possession of his faculties and was drunk. His speech was thick, he was unsteady on his feet, the odor of alcohol was on his breath,

and he permitted Kelly and Fahrendorf to interrupt him and argue with him (R.17). Eventually, accused was driven back to camp (R.17,23).

Lieutenant Gause testified that the bus terminal and the streets around it were public places (R.17,18).

Colonel Eugene L. Harrison, 47th Armored Regiment, was commanding officer of the regiment to which accused belonged (R.26). Some time prior to January 30, 1943, Colonel Harrison summoned all the officers of the regiment and warned them that officers should not associate with enlisted men in town (R.28). On February 1, 1943, he called accused before him in connection with an investigation of the events previously described (R.26). Colonel Harrison explained to accused that he did not need to make a statement and that any statement made would be an official statement in the course of an official investigation (R.26). Colonel Harrison summarized for accused the statement given him by Lieutenant Gause. Lieutenant Gause's statement included an assertion that accused had "admitted" to Lieutenant Gause having met Kelly and Fahrendorf just before being picked up by the military police. When Colonel Harrison reached this point in his summary, accused said, "That is true". Thereupon witness asked accused whether he wished to make a statement. Accused said that he did, and after another warning by witness, made a statement, which witness wrote down and read back to him (R.27). The statement was that accused met Kelly and Fahrendorf near Walgreen's Drug Store just before being picked up by the military police and was not with them the whole evening (R.27,30). Witness interpreted this to mean that accused was not with the noncommissioned officers at any time during the evening except when he met them just before the military police picked them up (R.30). Later in the day, having discovered from others that accused had been with Kelly and Fahrendorf during part of the evening, Colonel Harrison recalled accused, who then admitted that he had spent some time with them earlier in the evening (R.27,29,30).

4. Evidence for the defense.

Second Lieutenant Francis E. Collins, 47th Armored Regiment, was on military police duty outside Terry's Cafe. He was standing about five or ten yards from the cafe at about 12:15 or 12:30 A.M., January 31, 1943, when accused came up to him and talked with him for a few minutes. Accused seemed sober at the time, although witness gained the impression that accused had been drinking, for although his speech was coherent and his powers of locomotion normal, there was a slight "slurriness" in the way he put his words together and a glassiness of eye (R.47,92,93). So

far as witness could judge, accused was alone, but there was quite a crowd present and witness was busy supervising the loading of enlisted men in the military police truck (R.92).

Staff Sergeant George G. Cason, Company G, 47th Armored Regiment, saw accused at the Hollywood Club (R.64). Witness estimated that accused arrived about 12:30 or 1 A.M. and left about 3 or 3:30 (R.65,66). Accused and a girl were in a booth together and no one else was with him (R.64,65,103). Witness was sitting about 15 paces from accused's booth (R.66). Witness could see all of accused's booth except one corner, and had there been three other people in the booth witness would have known it (R.103-105). Witness did not remember seeing Kelly and Fahrendorf at the club, but he did not know them then and they might have been there (R.65,66,106). Although at one time witness saw some beer on accused's table, he did not see accused drink and noticed nothing unusual about his appearance (R.65,104). When accused left, only the girl was with him (R.66).

Second Lieutenant O.R. Haines, Headquarters Company, 14th Armored Division, was on military police duty on the night in question and saw accused at the Hollywood Club at about 2:45 A.M. (R.48-51,93). Witness saw a woman sitting with accused in a booth. He did not notice anyone else in the booth, but he could see only one side of the booth and there might have been three people sitting on the other side without his knowing it (R.49-51,94-96). Accused left the booth and came up to speak to witness about the woman (R.48,50,95). Accused was not drunk, did not appear to be affected by liquor, and was normal in speech and appearance (R.48,49).

Second Lieutenants Eric A. Orsini and William E. Hanley, both of the Service Company, 47th Armored Regiment, saw accused on the bus. Accused was sitting in the rear seat and the two witnesses sat down about three seats in front of him on the other side (R.52,54,57,61). The two witnesses exchanged greetings with accused as they passed him. They noticed nothing unusual about his appearance or speech (R.52,53,57-59). Neither witness noticed any disorder upon the part of accused (R. 52,53, 57,58,59,61). Lieutenant Hanley heard some loud talking in the rear of the bus about the military police, but did not know who was speaking. He paid no attention to the conversation (R.60,61). Lieutenant Orsini was reading a newspaper and paid no further attention to accused or to anything going on in the bus (R.52,56). Very shortly after the arrival of the two witnesses on the bus, accused left with a staff sergeant of the military police (R.53,56,59,60). Neither witness noticed anything unusual in the manner in which accused left the bus or in his manner of

walking. He did not stagger and there was nothing to indicate that he had been drinking (R.53,58).

Accused testified that he went to Fort Smith about 6:30 P.M., dined with some officers, and then went to the bowling alley, where, at the invitation of Kelly and Fahrendorf, he bowled with them and two other enlisted men from about 8 P.M. until midnight (R.70). Accused had known Kelly and Fahrendorf for about two months and was on friendly terms with them (R.76). Accused drank five or six beers while at the bowling alley (R.73). From there, accused and the enlisted men went to Terry's Cafe together and had something to eat. At about 12:35 A.M., accused paid his check and left (R.70,73). He had a conversation with Lieutenant Collins outside the cafe and proceeded to the Hollywood Club by himself, arriving about 1 A.M. (R.70,71,73,74-76).

He sat in a booth with a girl named Betty, with whom he danced, talked, and ate. They had nothing to drink, as it was after closing time for serving drinks (R.71,73). He did not see Kelly, Fahrendorf, or Cason at the club, but did have a talk with Lieutenant Haines after 2 A.M. About 3:30 he left the club with Betty and spent an hour at her home. After leaving her he walked along 9th Street to Garrison Avenue, where, at about 5 A.M., he met Kelly and Fahrendorf. This was the first time he had seen them since leaving them at midnight. They were both drunk and accused walked between them. The three walked arm in arm toward the bus station (R.71,75,101). They were walking "fairly straight" and not walking from one side of the sidewalk to the other (R.76). They encountered Sergeant Weaver and a private of the military police (R.71). Accused told Weaver that they were going to the bus station, and gave Weaver his name and organization. Weaver and the other military policeman walked in front of them to the bus station. Accused asked Weaver several times why the latter had taken his name. Weaver made no reply. Accused asked Weaver to take him to the provost marshal if Weaver intended to turn in accused's name on any charge. At Weaver's direction accused and the two staff sergeants boarded the bus and took a seat in the rear. Shortly thereafter they left the bus and were taken to the provost marshal's office, where eventually Lieutenant Gause arrived. Lieutenant Gause asked what the trouble was and accused said that he was not drunk and had asked the sergeant to take him to the provost marshal. Lieutenant Gause then called accused's regimental adjutant (R.71,72). Accused had nothing to drink after midnight (R.73,74). With reference to his allegedly false statement, accused said that Colonel Harrison read to him a statement which accused had made to Lieutenant Gause to the effect that accused had not been with Kelly and Fahrendorf the entire evening. Colonel Harrison then said, "You were not with these men throughout the whole

evening?" Accused replied, "That is correct. I was not with the men throughout the whole evening". Accused understood the question to refer to whether he was with the enlisted men continuously during the evening, not whether he had spent any portion of the evening with them (R.76,77). Accused did not deny to Colonel Harrison that he had been with them part of the evening, but said that he had not been with them during the entire evening (R.77,78). When he told Colonel Harrison that he had met Kelly and Fahrendorf at 5 A.M. near Walgreen's Drug Store, he did not intend to imply that he had not seen them earlier in the evening. He figured that Colonel Harrison would understand this because he had been conducting an inquiry and there would be no reason to lie about it (R.78).

Called by the defense as a character witness, Colonel Harrison testified that accused enjoyed the reputation of being a very efficient officer, that he was very quiet, that witness had never seen him take a drink, and that accused was the last person in the world whom witness would expect to find "mixed up" with drunkenness (R.29).

Major William E. Skinner, 3rd Battalion, 47th Armored Regiment, testified that he was the commanding officer of the battalion to which accused was assigned, that he had known accused since the middle of December, and that the general reputation of accused was good. So far as witness knew, accused had never lied to him, and was not a drinker (R.68,69).

First Lieutenant Arnold H. Green, Company I, 47th Armored Regiment, testified that accused served as a junior officer under him for approximately two months, bore a very good reputation in the company, and was very reliable and dependable. Witness would rate accused as excellent. Witness had never known accused to be drunk (R.67).

An attempt was made by the defense to impeach the testimony of Kelly and Fahrendorf upon the ground that they were too drunk to remember the events of the evening. Lieutenant Green testified that he talked to Fahrendorf about 8:30 A.M., January 31, and asked him about the circumstances of his arrest. Fahrendorf told witness that he and Kelly were picked up at the bus station for being drunk and that he could not remember very much about the evening (R.67,68,109). About 11 A.M. witness talked to Kelly, whom he described as pretty hazy and unable to remember very well what had happened except that he heard his companions were apprehended at the bus station (R.68,108, 109). Kelly also told Lieutenant Green that accused and Fahrendorf were with him (R.108). Both Kelly and Fahrendorf testified at the trial that although they were drunk, they had a pretty clear recollection of what

had happened, and, as already noted, they were positive that accused was with them from midnight until 5 A.M. (R.84,89).

5. The evidence proves beyond a reasonable doubt that at the place and time alleged in the Specification of the original Charge accused was drunk while in uniform at the bus terminal, a public place. Accused's two women companions testified to his drunkenness shortly before his arrival at the bus station; three enlisted members of the military police testified to his drunkenness immediately prior to and after his arrival at the bus station; and two deputy sheriffs and the assistant provost marshal considered him drunk shortly after he had left the bus station and had gone to the police station. His appearance and actions were those of a drunken man. There was evidence that accused had been drinking beer and wine during the evening. Evidence of accused's sobriety earlier in the evening in no way weakens the overwhelming evidence of his drunkenness at the bus station. For that matter, even Lieutenant Collins, a witness for the defense, who saw accused about 12:30 A.M., observed a "slurriness" in accused's speech and a glassiness of eye, which he considered indicative of drinking by accused. The testimony of Lieutenants Orsini and Hanley collapses when pitted against the unanimous opinion of the other witnesses. Furthermore, the two lieutenants admitted that they paid little attention to accused.

With respect to Specification 1 of the Additional Charge, the evidence, including the accused's own testimony, shows without conflict that accused was at the bowling alley with Kelly and Fahrendorf from 8 P.M. until midnight, and that thereafter he accompanied them to Terry's Cafe. Kelly, Fahrendorf, and the two women, none of whom had any reason to lie, each testified positively that accused continued in the company of the two enlisted men during the subsequent escapades of the night. Although the enlisted men undoubtedly were drunk, there is no reason to believe that their drunkenness had reached such a stage as to make them unaware of the identity of their companions. Lieutenant Collins' statement that he thought accused alone outside Terry's Cafe is not inconsistent with the case for the prosecution, for the four enlisted men who emerged from Terry's with accused said that they stood to one side during accused's conversation with Lieutenant Collins, and the latter admitted that there was a crowd of enlisted men present and that he was somewhat preoccupied in supervising the loading of a military police truck. Lieutenant Haines, who saw accused at the Hollywood Club, apparently accompanied only by a woman, admitted that he could see only one side of the booth, and the prosecution's evidence showed that Kelly, Fahrendorf, and the second woman were on the other side. Sergeant Cason's testimony that accused was with the woman alone does not stand up against the strong array of testimony to the contrary.

It is apparent, then, that when accused told Colonel Harrison in an official statement that he met Kelly and Fahrendorf just prior to being picked up by the military police and had not been with them the whole evening, he was making a false statement, since he was with them the whole evening of January 30 to 31, from 8 P.M. to 5 A.M. It is equally apparent that he knew his statement to be untrue, for his drunkenness does not appear to have reached the point of amnesia and according to his own testimony he was not drunk at all. Furthermore, considered as a whole, accused's statement to Colonel Harrison may well be interpreted to mean that accused was not with Kelly and Fahrendorf during any part of the evening until their meeting on the street shortly before being picked up by the military police. Regarded in that light, the statement was a conscious lie, for accused admitted being with the enlisted men at the bowling alley and at Terry's Cafe. Under either interpretation the prosecution proved its case. Making a false official statement constitutes a violation of Article of War 95.

6. War Department records show that accused is 30 years of age. He received the degrees of Bachelor of Arts and Bachelor of Laws from the University of Michigan. He was inducted on April 9, 1942, and served as an enlisted man until, upon graduation from the Armored Force Officer Candidate School, Fort Knox, Kentucky, he was commissioned a second lieutenant, Army of the United States, on November 21, 1942. On the same date he entered upon active duty. In recommending accused for Officer Candidate School, his commanding officer stated that accused had demonstrated outstanding qualities of leadership and that his character was excellent.

7. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of violation of Article of War 95 and is authorized upon conviction of violation of Article of War 96.

Percy G. Gyan, Judge Advocate.

Wm Winthrop Stiel, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 24 JUN 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Helon G. Harter (O-1013806), 47th Armored Regiment.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the execution thereof be suspended during the pleasure of the President.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Record of trial.
Incl.2-Draft of let. for sig. of Sec. of War.
Incl.3-Form of action.

(Sentence confirmed but execution suspended. G.C.M.O. 195, 6 Aug 1943)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGN
CM 232728

27 MAR 1943

UNITED STATES v. Private BURLEY A. EVANS (14031836), Service Company, 22nd Infantry.	4TH MOTORIZED DIVISION Trial by G.C.M., convened at Camp Gordon, Georgia, February 12, 1943. Dishonorable discharge and confinement for twenty (20) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
CRESSON, LIPSCOMB and COWLES, Judge Advocates.

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

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

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

Specification 1: In that Private Burley A. Evans, Service Company, 22nd Infantry, did, on or about September 19, 1941, desert the service of the United States and did remain absent in desertion until he was apprehended at Winnfield, Louisiana, on or about July 11, 1942.

Specification 2: In that Private Burley A. Evans, Service Company, 22nd Infantry, did, on or about July 22, 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at Winnfield, Louisiana on or about December 14, 1942.

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

Specification: In that Private Burley A. Evans, Service Company, 22nd Infantry, having received a lawful command from Captain Neal J. Daley, his superior officer, who was then in the execution of his office, to "report to the Commanding Officer at Camp Gordon, Georgia without delay", did at Camp Livingston, Louisiana on or about July 22, 1942, willfully disobey the same.

He pleaded not guilty to and was found guilty of all the Charges and Specification, and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for forty years. Evidence of one previous conviction was shown. The reviewing authority approved,

> "only so much of the findings of Specifications 1 and 2 of Charge I as involve findings of guilty of desertion at the time and place alleged, terminated in each specification at the time and in the manner respectively alleged therein and at a place not shown, in violation of the 58th Article of War, is approved. Only so much of the sentence adjudged as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for twenty (20) years is approved",

designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record for action under Article of War 50½.

3. The evidence for the prosecution relative to Specification 1, Charge I, shows that the accused absented himself without leave from his organization on September 19, 1941, that on October 24, 1941, the accused was still absent without leave, and on the latter date an administrative entry of desertion was made after his name in the morning report of his organization (R. 5-6; Exs. A, B). Thereafter on July 10, 1942, at about 11 p.m. the accused was apprehended at Winnfield, Louisiana, by the local deputy sheriff. The accused, at the time of his apprehension was in bed. Upon being awakened and arrested, the accused dressed in civilian clothes and was conducted to the local jail and there incarcerated. The deputy sheriff making the arrest did not observe any Army clothes in the room occupied by the accused. At the time of his arrest, the accused stated that "*** he was going back and make a good soldier". He also stated that he had received "right smart of drilling & hoped" that he would be sent overseas. On the morning following the arrest of the accused he was surrendered to the Provost Marshal of Camp Livingston, Louisiana.

The only evidence offered by the prosecution relative to the second desertion alleged in the Specification 2, Charge I, shows that the accused was given a written order on July 22, 1942, by Captain Neal J. Daley, Personnel Adjutant, Camp Livingston, Louisiana, directing the accused to report to the commanding officer at Camp Gordon, Georgia, without delay (R. 7; Ex. D).

Thereafter, on December 14, 1942, the accused was again apprehended by Deputy Sheriff Walsworth of Winnfield, Louisiana, under circumstances similar to the apprehension previously described. On the second occasion the accused was again arrested while in bed and again dressed in civilian clothes.

4. The accused elected to remain silent and no evidence for the defense was presented.

5. Concerning the allegation of desertion, in Specification 1, Charge I, the evidence shows that the accused absented himself without leave from his organization and remained absent for approximately ten months, that he was apprehended at a considerable distance from his organization, and that the only clothes which he appears to have been wearing at the time of his arrest were civilian clothes. These facts are sufficient to justify the inference that the accused did not intend to return to the military service, and are sufficient to support the approved finding of guilty (par. 130, M.C.M., 1928).

The only evidence, however, concerning the allegation of desertion in Specification 2, Charge I, is that the accused was ordered on July 22, 1942, following his first apprehension, to return to Camp Gordon, Georgia, and that thereafter he was apprehended on December 14, 1942, under circumstances similar to his first apprehension nearly five months previous. There is no evidence, however, that the accused did not return to Camp Gordon as ordered or that he was in an absent without leave status when he was arrested on December 14, 1942. The evidence fails, therefore, to sustain the finding of guilty of Specification 2, Charge I.

6. The Specification, Charge II, alleges that the accused on July 22, 1942, willfully disobeyed a lawful order to report to the Commanding Officer at Camp Gordon, Georgia, without delay. The only evidence presented in support of this Specification shows that the order in question was given, and that approximately five months later the accused was arrested near Camp Livingston. These facts alone are legally insufficient to support the findings of guilty of Charge II and its Specification.

7. The maximum punishment authorized for desertion in time of peace, as alleged in Specification 1, Charge I, is dishonorable discharge, total forfeitures and confinement at hard labor for two and one-half years (par. 104c, M.C.M., 1928).

8. For the reasons stated the Board of Review holds that the record of trial is not legally sufficient to support the findings of guilty of Specification 2, Charge I, and not legally sufficient to support Charge II, and its Specification; legally sufficient to support the findings of guilty of Specification 1, Charge I, and Charge I; and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfieture of all pay and allowances due or to become due, and confinement at hard labor for two and one-half years.

Charles Gresson, Judge Advocate.

Abner E. Lipscomb Judge Advocate.

Willard B. Cowles Judge Advocate.

1st Ind.

War Department, J.A.G.O., SEP 9 1943 - To the Commanding General Fifth Motorized Division, Camp Gordon, Georgia.

1. In the case of Private Burley A. Evans (14031836), Service Company, 22nd Infantry, I concur in the foregoing holding by the Board of Review, and, for the reasons therein stated, recommend that only so much of the findings of guilty be approved as involves findings of guilty of Specification 1, Charge I, and Charge I, ~~and that~~ only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due and to become due, and confinement at hard labor for two and one-half years. Upon compliance with this recommendation you will have authority to order the execution of the sentence.

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

(CM 232728).

E. C. McNeil,
Brigadier General, U. S. Army,
Acting, The Judge Advocate General.

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGH
CM 232732

APR 21 1943

N.D

UNITED STATES	)	12TH ARMORED DIVISION
v.	)	Trial by G.C.M., convened at Camp Campbell, Kentucky, March 10, 1943. Dismissal and total forfeitures.
Second Lieutenant JAMES M. COOK, JR. (O-1014982), Infantry.	)	

OPINION of the BOARD OF REVIEW
HILL, LYON and DRIVER, Judge Advocates.

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

2. Accused was tried upon the following Charges and Specifications:

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

Specification: In that Second Lieutenant James M. Cook Jr, Infantry, 702d Tank Battalion Medium, Cadre, Camp Campbell, Kentucky, on or about February 21, 1943, did feloniously take, steal, and carry away, one 17 jewel, Bulova wrist watch, serial #1372453, value about $45.00, the property of one James F. Apple, a fireman in Fire Station #4, Camp Campbell, Kentucky.

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

Specification 1: In that Second Lieutenant James M. Cook Jr. was at Fire Station #4, Camp Campbell, Kentucky, on or about February 21, 1943, drunk in camp.

Specification 2: In that Second Lieutenant James M. Cook Jr., did at Fire Station #4, Camp Campbell, Kentucky, on or about February 21, 1943, defecate on the floor of the latrine in Fire Station #4.

He pleaded not guilty to Charge I and its Specification and to Charge II and Specification 2 thereunder and guilty to Specification 1, Charge II. He was found guilty of the Charges and Specifications and was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence shows that at about 1 a.m., February 21, 1943, accused, in uniform, entered Fire Station #4, Camp Campbell, Kentucky, and asked a fireman on duty if he might use the latrine in the building. Permission was given and accused went to the latrine. When he entered the latrine James F. Apple, a fireman, was in the room taking a shower in a shower booth. In preparing for his bath Apple had placed his Bulova wrist watch, Number 1372453, of the market value of about $40, on a shelf above a wash basin on the side of the latrine room opposite the shower. Apple's attention was called to accused through hearing an unusual amount of paper being torn from a toilet roll. There were two toilets, in booths, between the shower booth and the wash basin. (R. 5-7, 11, 14; Ex. A)

When Apple completed his shower he started to leave the latrine whereupon accused offered him a drink from a full "quart bottle". Apple declined, went to his bedroom in the fire station and there discovered that he did not have his watch. He returned to the latrine at once and found that the watch had disappeared from the shelf. Accused had also disappeared and Apple located him in a room in another part of the fire station talking to the fireman on duty there, one Williams. Apple had not heard or seen anyone other than accused in the latrine during the

occurrences described. Apple again returned to the latrine and in searching for his watch observed that someone had defecated on the floor near one of the toilets, apparently after Apple had first entered the latrine for his shower. Apple testified that he believed an attempt had been made to use the toilet and that the fouling of the latrine had not been deliberate or willful. Apple again went to the room where accused was talking to Williams. Accused remained in the room for about an hour, drinking from his bottle until about two-thirds of the contents had been consumed. He became very talkative, somewhat "uncertain" and "a little bit thick" in his speech, and often repeated his remarks. He seemed, however, to be coherent. His eyes became "glassy like". His breath bore the odor of whiskey. (R. 7, 8, 12, 13-16)

Accused finally started to leave the fire station. As he got outside Apple asked him if he had seen a watch in the latrine. Accused replied that he had not. Apple insisted that only two people had been in the latrine and suggested that accused had the watch. Accused again denied knowledge of the matter and remarked that he only had his own watch, an Elgin pocket watch. Accused made motions of "going through" his pockets and demonstrating that he did not have the watch, although he did not empty his pockets. Apple did not search him but insisted that he return to the fire station. Accused demurred but Apple asked Williams to call a third fireman, and accused then laid his left arm over Apple's shoulder and started inside. At the door they separated and Apple entered first. Accused left the door open but at Apple's suggestion closed it. In doing so he "staggered back against the wall" and reached outside in securing the door. About five minutes later Apple's watch was found lying on the ground about three feet from and to the right of the door in question. Accused left by another door. On the following morning a name plate with the name "Lt. J. M. Cook" which accused had not worn while talking to Williams, was found in approximately the same location as that at which the watch had been found. (R. 10, 15, 17; Ex. E)

4. Accused declined to testify or make an unsworn statement. No testimony was presented by the defense.

5. The evidence thus shows without contradiction that at the place and time alleged the watch described in the Specification, Charge I,

of the approximate value alleged, the property of Apple, was wrongfully taken from a shelf where it had been laid for temporary safekeeping. Accused was the only person other than the owner known to have been in the room at a time at which the watch could have been taken. He denied possession but the watch was later found at a spot where he could have placed it and under circumstances which leave no substantial doubt that he did in fact cast it there in an effort to avoid detection. The circumstances establish beyond any reasonable doubt that accused took and carried the watch away. His actions demonstrated his intent to steal.

As found under Specification 1, Charge II, accused was drunk while at the fire station. He consumed a quantity of liquor, and gave unmistakable evidence of drunkenness, but his actions were cunning and there is no basis in the testimony for concluding that he was incapable of entertaining the specific intent to steal.

The proof establishes the allegation of Specification 2, Charge II, with respect to accused's disorderly act of defecating on the floor of the latrine in the fire station. He may have been drinking to some extent when that act occurred.

6. War Department records show that accused is 33 years of age. He is a high school graduate. He served as an enlisted man in the Illinois National Guard from 1926 to 1929 and from 1938 to 1940. He was inducted into the Army on April 11, 1942. Upon completion of a course of instruction at an officer candidate school he was commissioned a second lieutenant and entered on active duty on January 30, 1943.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 93 or 96.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGH
CM 232732

1st Ind.

War Department, J.A.G.O., APR 24 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant James M. Cook, Jr. (0-1014982), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence, and to warrant confirmation thereof. I recommend that the sentence be confirmed, that the forfeitures be remitted, and that the sentence as thus modified be carried into execution.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer.

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1- Record of trial.
Incl.2- Dft.ltr.for sig. Sec.of War.
Incl.3- Form of action.

(Sentence confirmed but forfeitures remitted. G.C.M.O. 123, 18 Jun 1943)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGN
CM 232785

APR 7 1943

UNITED STATES v. Sergeant GEORGE R. BEE (36326519), 17th General Hospital, Camp McCoy, Wisconsin.	SIXTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp McCoy, Wisonsin, February 11, 1943. Dishonorable discharge and confinement for life. Penitentiary.

REVIEW by the BOARD of REVIEW
CRESSON, LIPSCOMB, and SLEEPER, Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Sergeant George R. Bee, 17th General Hospital, did, near Sparta, Wisconsin, on or about December 28, 1942, forcibly and feloniously, against her will, have carnal knowledge of Doris Mittelbach.

The accused pleaded not guilty to the Charge and to the Specification. He was found guilty of both, and sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due and to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that, about one o'clock on the morning of December 28, 1942, the complaining witness, Miss Doris Mittelbach, twenty-one, diminutive, single, and chaste, returned

from a Christmas visit to her parents in La Crosse, Wisconsin, to Sparta, where she was employed as a stenographer. On the train she met George Reutten, a casual acquaintance, whose car was parked at the station, and who offered to drive her to her rooming house. However, George's car refused to start, so they decided to wait for a taxicab. Just then the accused, who was a stranger to both of them, drove up in an Army car, and inquired whether they had seen a nurse whom he said he had been directed to meet at the train from which they had alighted. Being unable to find her, he offered to drive Miss Mittelbach and Reutten home. They accepted, and, since Reutten's home was out of town in a different direction from the camp, and Miss Mittelbach's rooming house was in town between the station and the camp, accused drove Reutten home first (R.28, 32-35, 37-41, 48, 62-63, 88).

After Reutten got out, Miss Mittelbach told accused she would direct him to the house where she lived. Accused then turned the car around and proceeded toward Sparta. En route, he turned away from town, contrary to her direction, saying he had to pick up an officer at a place three crossroads ahead. After driving a distance estimated by the accused (according to prosecutrix's testimony) at from twelve to sixteen miles, the accused turned the car around, heading back toward Sparta. Before arriving there, while still in the country, accused stopped the car and got out for a moment. When he got back in, he immediately tried to kiss Miss Mittelbach, who resisted. This was the first overture, either verbal or physical, which he had made to her since she had entered his car (R. 43, 45, 47, 69, 79, 88).

Accused then got on top of the prosecutrix, despite her screaming, praying aloud, and begging him to desist. She tried to push him off with her hands, and did manage to get the car door open twice, but the accused closed it both times. "What," he inquired, "do you think I brought you out here for?" She continued to scream, struggle and implore. "You shut up," he told her, "or I will hit you." He said he had hit other women before. He lifted up her dress and, despite her screaming and attempts to push him off, achieved penetration, hurting her so terribly that she fainted (R. 47-50, 73, 79-80).

After she regained consciousness, accused took her home. They arrived between 3 and 3:30 a.m. She got out, took her suitcase from the back of the car, and tried to look at his license number. He turned his lights off and drove away. Although she had a key to the front door, she rang the bell. Mrs. Rose Stiehl, her landlady's sister, let her in. Miss Mittelbach, according to Mrs. Stiehl, was crying very hard and practically hysterical. Her lips, chin and cheeks were bruised, her drawers bloody and her stocking torn. She immediately told Mrs. Stiehl that she had been raped. She was unable

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to get a doctor just at that time, but she telephoned Father Joseph Wagner, a Catholic priest, then and there. Later in the morning she called Dr. Phalen who made, at about 9:30, a vaginal examination, which disclosed labia quite swollen and very tender, a ruptured hymen and a continuing seepage of blood, which was not due to menstruation, indicating, in the doctor's opinion, that there had been penetration of sufficient force and extent to rupture the hymen (R. 84-85, 90-93, 18-20, 93).

4. The accused testified that on the morning of December 28, 1942, he had driven a nurse to the station in a staff car to catch the 12:57 train, after which he went up town for a cup of coffee and then returned to the depot, shortly after the train came in, thinking there might be some one on it whom he could drive back to camp. At the station he saw prosecutrix and Reutten in the latter's car, and went over to ask them if they had seen a nurse. In the course of the conversation, Reutten told accused that his motor failed to start, and suggested that accused take him home. Accused agreed, as an accommodation, though he mentioned that it was against the rules. Prosecutrix and Reutten got in the staff car, and accused took Reutten home first. Then when he got back to town, instead of going directly to prosecutrix's residence, he turned off to the other depot, telling her he was going to see if anybody was there. No one was, so he went on by, driving out into the country where the road was so icy that it was impractical to turn around until he had traveled considerably farther than he had intended. On the way back he stopped within a couple of miles of Sparta, and, although he had, up to that time, made no overtures to the girl and had no idea whether she would submit, got out of the car and put on a cundrum, buttoning his pants up before getting back in. In response to an inquiry by the law member, "What made you think, when you got out of the car, that it would do you any good to put on a safety?" accused replied, "I did not know whether it would, or not, sir. If the girl give in, all right; if she never, it was still all right with me." They had not been talking about sexual intercourse, and accused had neither fondled nor put his hands on her up to that time. When he got back in, he started playing with the girl and kissing her. She made no protest, and accused proceeded rapidly to the act of intercourse itself, without a sign of a struggle and without resistance of any kind. She showed no signs of being disturbed or angry in any way until he pulled up in front of the house where she said she lived. There she got out, grabbed her luggage and told him she despised him. He got back to camp at a quarter to four, feeling a little sick. There he tried to eat some corn flakes and milk, but when he started eating he got sick, and could not eat (R. 96-101, 104, 107-114).

The staff car which accused had driven was examined at seven o'clock that morning by Private Lowell to whom it was assigned for driving during the day. This examination disclosed no change

except an increase in mileage since Private Lowell had last used it. No marks were observed in and about the front seat, dash, windshield or door handles, and nothing unusual was noted in the appearance of the car (R. 115-118).

5. The Specification of the Charge alleges that the accused "did, near Sparta, Wisconsin, on or about December 28, 1942, forcibly and feloniously, against her will, have carnal knowledge of Doris Mittelbach." This language appropriately describes the crime of rape, one of the two crimes made punishable under the 92nd Article of War.

Rape is defined as "* * * the unlawful carnal knowledge of a woman by force and without her consent."

* * *

> "Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent" (par. 148b, M. C.M., 1928, p. 165).

The evidence, in the light of the above definition, is clearly ample to substantiate the court's finding. Every element of the crime is fully covered by Miss Mittelbach's testimony, which is convincingly corroborated, in many of its significant details, by Reutten, Mrs. Stiehl, Dr. Phalen and Father Wagner. Her prompt report of the outrage, her hysterical condition, and the physical evidence of the force used, all testified to by these disinterested third parties, add plausibility to her straightforward account of her resistance, as does the excellent reputation for chastity and virtue, which the defense admits she possesses.

Accused admitted the intercourse, and testified to conduct on Miss Mittelbach's part which, if true, clearly established her implied consent. This conduct involved failure to protest, struggle or resist, indicating a willing and compliant acquiescence, which, if signified by the attitude of the prosecutrix in the manner testified to by the accused, would have completely exonerated him of the offense charged. The one controverted issue was whether she gave her implied consent to the admitted act of intercourse. Her rashness in apparently willingly and unreluctantly going alone with a total stranger at that hour, and her failure to protest when he detoured into a country road, reflect little credit on her judgment. But there was nothing in her conduct, even according to accused's own testimony, prior to that fateful stop, to justify the assurance which he manifested in getting out of the car and preparing himself for an act of intercourse.

Her physical condition six hours later, as testified to by Dr. Phalen, adds no plausibility to accused's version that there was no struggle, force or outcry. Moreover, the fact that accused was "a little sick" when he returned to camp, and "got sick and couldn't eat" the cornflakes and milk which he had asked for, reflects a physical reaction on his part, which would be a far more likely aftermath of raping the prosecutrix than of the mere casual - indeed practically routine - act of intercourse which he testified he had indulged in.

The defense's only effort at corroboration of accused's story was its introduction of evidence that the driver who later on that morning examined the staff car in which accused admitted the act had occurred, noticed nothing unusual in the appearance of the car. This cannot be said to refute any portion of Miss Mittelbach's testimony, nor to furnish any real corroboration of accused's.

The evidence is ample to establish beyond any reasonable doubt every element of the crime alleged, and to substantiate the court's finding of accused's guilt under the Specification and the Charge.

6. At the trial judge advocate's request, the prosecutrix was permitted to remain in the court room, over defense counsel's objection, while the accused testified. Thereafter she took the stand in rebuttal (R. 95-96, 119).

> "Subject to the discretion of the court, a witness, before completing his testimony, is not ordinarily permitted to be present in court during the introduction of other evidence* * * " (par. 121, M.C.M., 1928, pp. 125-126).

In discussing judicial discretion in the matter of requested sequestration of witnesses, Wigmore says:

> "The most that ought to be conceded to the judge is to refuse an order of sequestration where it does not appear to be asked in good faith, i.e. * * * merely to obstruct the trial or to embarass the opponent's management of the case" (Wigmore on Evidence (2nd Ed.) p. 910).

Here defense counsel's objection was a clear invocation of the rule, with no indication that it was not made in good faith.

Courts which follow the early English doctrine (evidently incorporated in the Manual), that witnesses are excluded only in the

trial court's discretion, declare "usually, however, that in practice it [i.e., exclusion] is never denied, at any rate for an accused in a criminal case" (underscoring supplied, Wigmore on Evidence, pp. 910-911).

In the present instance, Miss Mittelbach had already testified fully in chief, and the record of her rebuttal testimony discloses no prejudice to accused resulting from her presence in the court room while he testified. The discretion which the court exercised, however, in permitting her to remain, was a discretion which courts exercise at their peril; and if, as a result of it, the record had disclosed prejudice to the accused, the court's permitting prosecutrix to hear accused's testimony before herself taking the stand in rebuttal, might well have constituted reversible error.

7. The accused is about 23 years of age. He was inducted at Camp Grant, Illinois, March 24, 1942. His record shows no prior service.

8. The court was legally constituted. 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 the trial is legally sufficient to support the findings and the sentence. A sentence of death or of confinement for life is mandatory upon a conviction of rape, in violation of the 92nd Article of War.

Israel Jesson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGK
CM 232786

MAR 31 1943

UNITED STATES v. Private EDWARD CONJURSKI (36285112), Attached, Unassigned, 1611th Service Unit, Recruit Reception Center, Fort Sheridan, Illinois.	SIXTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort Sheridan, Illinois, February 13, 1943. Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.

HOLDING by the BOARD OF REVIEW
COPP, HILL and ANDREWS, Judge Advocates

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 sentence.

Andrew Copp Jr., Judge Advocate.

Wm Hannah Hill, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., MAY 11 1943 - To the Secretary of War.

1. Herewith transmitted for your action under Article of War 50½,

as amended by the act of August 20, 1937 (50 Stat. 724; 10 U.S.C. 1522), is the record of trial in the case of Private Edward Conjurski (36285112), Attached, Unassigned, 1611th Service Unit, Recruit Reception Center, Fort Sheridan, Illinois.

2. I do not concur in the holding of the Board of Review, and, for the reasons hereinafter set forth, am of the opinion that the record of trial is legally insufficient to support the findings and sentence.

3. Accused was tried for making a certain affidavit "to the prejudice of good order and military discipline" in violation of Article of War 96. In paragraph 3 of the affidavit accused states that he will not bear arms against any of his fellow men including Germany, Italy and Japan, and that he does not want to serve in the armed forces of the United States or any other country. Paragraph 4 states that accused is not affiliated with any church or religious organization. Paragraph 5 states that accused is a conscientious objector, because of his belief that men should not fight against each other. In paragraph 6, accused states that he is willing to go to prison rather than to fight the people of any country, including Germany, Italy and Japan. Paragraph 10 states that accused has read the affidavit, that it is true, that he understands it fully, that he makes it voluntarily, without duress, coercion, or promise of any kind, and that he has been warned of his constitutional rights and of the fact that the affidavit may be used against him. He was also charged with willful disobedience of a lawful order by an officer to put on a military uniform, in violation of Article of War 64. Accused pleaded not guilty to the Charges and Specifications. He was found guilty of the Charge and Specification alleging the making of the affidavit and not guilty of the Charge and Specification alleging willful disobedience. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 5 years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½. The Board of Review held the record of trial legally sufficient to support the findings and sentence.

4. The evidence shows that on December 9, 1942, First Lieutenant Lawrence H. Meyer, Adjutant General's Department, Post Adjutant at Fort Sheridan, Illinois, was on duty at Post Headquarters (R. 9).

Accused was brought to Lieutenant Meyer's office "by a non-commissioned officer of the Intelligence Office" (R. 10). Lieutenant Meyer was requested to take accused's oath in connection with his affidavit. He read each paragraph of the affidavit to accused and asked accused "whether that was his statement and he voluntarily wished to sign it". Accused "indicated that he did" (R. 12). The affidavit described in the Charges was then signed and acknowledged before Lieutenant Meyer (R. 12). The defense objected to the introduction of the affidavit upon the ground that it did not "appear clearly and conclusively that this was a voluntary statement of the accused and that it was made under circumstances other than in arrest" (R. 13). The law member overruled the objection and admitted the document (R. 13; Pros. Ex. 1). On January 7, 1943, accused signed another affidavit (R. 14, 76; Pros. Ex. 2), the only significance of which in the present case is that he reaffirmed the views appearing in the first affidavit. Captain Nathan Zolt, Medical Corps, a neuropsychiatrist, testified that accused had no psychosis (R. 80) and was of at least average intelligence (R. 84).

Paul Conjurski, accused's brother, testified for the defense. He stated that accused was born in the United States (R. 113), that his parents were Catholic, but that so far as witness knew, accused had no particular religion at the present time (R. 112). Apparently accused's parents were Polish (R. 113). Some years previously, accused had told witness that he "was absolutely against war" (R. 110). Alex Ruffing testified that he had known accused since 1935 (R. 114) and that accused belonged to the Socialist Party (R. 115), which, according to witness, "has taken no action against this war whatsoever" (R. 117). Witness testified that at various times accused had told him that he was opposed to war and "never wanted any part of it"; that accused felt "he had nothing to gain in going to war"; and that accused believed that war "was fought not for the people as a whole, but for somebody that was promoting it" (R. 116). Accused declined to testify or to make an unsworn statement.

5. It is clear from the evidence that at the place and time alleged, accused made the affidavit and that he did so voluntarily. It is clear, too, that the affidavit was made in conjunction with an investigation by the intelligence officer of the post. Consequently the situation is essentially the same as in CM 229062, Bresky and CM 229063, Irskens, in which I expressed the view that the mere act

of a soldier in making a statement when questioned in the course of an official investigation, which statement honestly disclosed a disloyal state of mind, did not constitute a violation of the articles of war. In those cases the attitude of the accused was traceable to their German origin, whereas in the present case accused is not disloyal in the general sense but is simply conscientiously opposed to war. The distinction does not affect the essential principle involved. Since accused merely expounded his honest views in an official statement, when called upon by his military superiors to do so, his conduct, like that of Bresky and Irskens, did not violate Article of War 96. Accused declared his unwillingness to perform military service, but his expression of views did not involve disobedience of any military order or actual refusal to perform any specific military duty. As noted above, he was tried for willful disobedience of a lawful command but was found not guilty of that offense.

I recommend that the findings of guilty and the sentence be vacated.

6. Inclosed are two forms of action prepared for your signature. Draft "A" will accomplish vacation of the findings and sentence in accordance with my views, and Draft "B" will accomplish confirmation of the sentence in accordance with the views of the Board of Review.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls
Incl 1 - Record of trial
Incl 2 - Draft "A"
Incl 3 - Draft "B"

(Findings of guilty and sentence vacated, by order of the Secretary of War, 24 May 1943)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGH
CM 232790

MAY 8 1943

UNITED STATES	SEVENTH SERVICE COMMAND
v.	Trial by G.C.M., convened at Fort Leavenworth, Kansas, January 28, and February 8, 1943. Doath.
Private First Class LEVI BRANDON (17019314), DEML, Service Detachment, C&GSS, Fort Leavenworth, Kansas.	

OPINION of the BOARD OF REVIEW
HILL, LYON and DRIVER, Judge Advocates

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

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

CHARGE I: Violation of the 93rd Article of War.
Specification: In that Private First Class Levi Brandon, DEML, Service Detachment, C&GSS, Fort Leavenworth, Kansas, did, at Kansas City, Kansas, on or about January 9, 1943, with intent, forcibly and feloniously, against the will of Mary Elizabeth Ruiz, to have carnal knowledge of said Mary Elizabeth Ruiz, commit an assault upon said Mary Elizabeth Ruiz, by willfully and feloniously striking the said Mary Elizabeth Ruiz on the head with some blunt object, and by thrusting his fingers into her mouth and partly down her throat.

CHARGE II: Violation of the 92d Article of War.
Specification: In that Private First Class Levi Brandon,

> DEML, Service Detachment, C&GSS, Fort Leavenworth, Kansas, did, at Leavenworth, Kansas, on or about January 1, 1943, forcibly and feloniously, against her will, have carnal knowledge of Darline Carl, a woman.

Accused pleaded not guilty to and was found guilty of both Charges and the Specifications thereunder. Evidence of one previous conviction by special court-martial of disobedience of an order given by a superior officer in the execution of his office, in violation of the 96th Article of War, was introduced. He was sentenced, all members of the court present concurring, to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. With reference to Charge II and its Specification, the evidence for the prosecution shows that on January 1, 1943, about 5:15 a.m., Darline Carl, a sixteen-year-old girl, started to walk from her home in Leavenworth, Kansas, to a restaurant four blocks away where she was employed. As she proceeded on Third Street, she observed some negroes approaching, was frightened, turned down Osage Street to Fourth Street, and walked along Fourth. She had just crossed the alley between Osage and Miami Streets when a negro ran up, put his hand over her mouth so that she "couldn't holler again", and told her that if she "hollered" she would die. He took her up the alley by the arm. She was crying, he threw her to the ground, told her to "shut up", and took off her underclothes, a pair of pink silk pants. She tried to make him stop, but he was holding her and she could not move. She kept telling him to leave her alone, but he said "You wouldn't want to die, would you?" Her assailant had sexual intercourse with her without her consent. He had his private parts "clear in" her. He held her "pretty tight" - had his hand on her shoulder. She believed him when he told her that if she screamed again he would cut her throat. She did not suffer any tear or wound at the "point of contact", and lost no blood, but it hurt her "at first". Miss Carl was so "scared" she did not know whether she put on her underclothes afterward. She was frightened because he had threatened to kill her. He would not release her unless she "wouldn't report him", but finally let her go (R. 21-22, 27-28).

Miss Carl immediately went to the police station, about three blocks away, and told the police what had happened. She described the man who had assaulted her as short and stocky, about 5 feet, 8 or 10 inches tall, of the colored race, "not real dark and

not real light", dressed in an Army suit, with no overcoat, and wearing a mustache. She also said that he was wearing a cap of the garrison type. Two police officers then put her in a car and drove around to see if they could find the man she had described. They stopped a taxi and looked through a crowded bus headed toward Fort Leavenworth, but she did not see him. She did not know exactly what time it was, but thought that it was then almost 6 a.m. (R. 22-25, 33).

About 8 or 9 a.m., after Miss Carl had returned to the police station from this drive, she was examined by Dr. A. L. Suwalsky, a practicing physician and health officer of the city of Leavenworth. Dr. Suwalsky observed that her eyes were red, and she seemed to be highly nervous. The "step-ins" she was wearing were stained and had spots on them which were still somewhat moist. He examined her external genitalia and found that the tissues around the mouth of the vagina were more red than usual and seemed to be "a little puffed also". It "would be pretty hard to tell" whether she had had sexual intercourse, but from appearances he believed that such a thing could have happened. Dr. Suwalsky took some smears from the vaginal canal of Miss Carl and sent them, with her "step-ins" to the city laboratory technician. The latter, a chemist and bacteriologist, examined the smears under a microscope and found the spermatozoa "was plentiful". Dr. Suwalsky testified that the finding of spermatozoa in the vaginal canal was proof of sexual intercourse, as they could get there only by penetration. After her examination, Miss Carl was taken home and put to bed by her mother. The girl was not in a condition to work for two days. She was upset, and "frightened to death". She "cried and cried", and her parents could do nothing with her (R. 23, 27-30).

After accused had been arrested and confined in the Fort Leavenworth guardhouse in connection with the offense alleged in the Specification, Charge I, Major Harry L. King, one of the investigating officers in the case, noticed that "he met quite well" the description of a man involved in "a Leavenworth affair", and Miss Carl was brought in to see whether she could identify him. Accused was asked to walk a few paces, to speak so that his voice could be heard, and to remove his cap. According to the testimony of Major King, Miss Carl did not positively identify accused at that time, but said that he was about the same size, weight, and color, and had a voice that seemed the same as that of her assailant. It was then between 5 and 5:30 in the morning, and "exceedingly dark". The exact date does not appear, but it was on one of the occasions when accused was interviewed by Major King between January 17 and January 20. On January 21, at the instance of Major Allen R. Browne, another investigating officer, Miss

Carl was again brought to the guardhouse where accused was confined. He was taken to the guardroom and Miss Carl was asked to come into the room. She had been in an adjoining room, and as accused walked toward her she looked at him through the glass of the door. The prosecution asked Major Browne whether Miss Carl then identified accused, but the law member ruled that the question called for a hearsay response, and it was not answered (R. 19-20, 35).

Miss Carl testified that she did not know Major King, but recalled being at the guardhouse when accused came out and walked back and forth to see whether she could identify him. He was asked a few questions, and then she "recognized his voice too". On another occasion she saw the accused at the guardhouse when Major Browne was present. She saw accused "through the door", and identified him. On a prior occasion at the guardhouse another colored man had been brought before her. She thought he was about the same size, but did not say "it was him or not", because she was not sure. During the trial, when the prosecution asked Miss Carl whether she could see "that man" (her assailant) in the courtroom, she answered in the affirmative, and pointed out accused. She said she was sure that he was the man. On cross-examination, in answer to a question as to why she was so sure, she stated she could tell by his voice and that there was just enough light at the time she was attacked for her to see what he looked like. The place was back a "little piece" from the alley, which was not lighted in any way. There were street lights at the corners but they did not shine in the alley. However, it was not "real dark". On redirect examination, Miss Carl testified that she recognized accused as being "the man" by his height, his face, and his voice. She also testified that she weighed approximately 128 pounds (R. 22-26).

On January 17, in the course of the investigation of the Charges by Major King, accused made a statement which was reduced to writing, and was then signed and verified under oath by accused. Before making the statement, accused had been informed by Major King that he could remain silent if he so desired, that such silence would not be held against him, and that, should he choose to make a statement, it might be used against him if the case came to trial. Without objection, the statement was received in evidence. In it accused stated that he went to a dance at the Masonic Hall in Leavenworth on December 31, 1942, leaving there about 4 o'clock the next morning; that he went to "Laura's Hotel", bought some whiskey, drank it, and became sick and dizzy; that he went out to get some fresh air; and that he walked up Second or Third Street "about to Osage", where he

saw a girl walking along. He further stated that he ran up behind the girl, grabbed her, and put his hand over her mouth so that she could not scream, pushed her up the alley to a garage, and "criminally attacked her, standing her up against the garage". He could not remember that she offered any resistance. When he released her, she ran toward the police station and he ran up the alley. He fell down several times as he was quite drunk. Accused went "as far as Third Street to Skinney's Restaurant", where he bought some soda pop and waited about 15 or 20 minutes for the bus. He caught the bus about 5:30 or 5:40 a.m. and went to the Service Detachment, arriving there about 5:50 a.m. Accused stated that this was all done without previous planning, that he did not know the girl, and did not think he would recognize her if he saw her again (R. 19; Ex. 2).

Accused signed two other statements before Major King, one on January 18, and the other on January 20, both of which also were received in evidence without objection by the defense.

These later statements were made when Major King pointed out to accused that the first statement "was deficient" in places and "didn't cover the whole ground". In the statement of January 18, accused stated that the girl mentioned in his statement of January 17 was a white girl about 5 feet, 6 inches tall, weighing about 130 pounds, wearing a long light brown or cream colored coat; that he did not remember whether or not she was wearing a hat; that he was very drunk and some of the details were not clear in his mind; that it was possible he had the girl down on the ground instead of against the garage; and that he was not well acquainted with the streets in Leavenworth. In the statement of January 20, accused explained that by the words "criminally attacked her" used in his first statement, he meant that he had "complete sexual intercourse with her without her consent". In the course of an interview with Major Browne on January 21, and after his rights had again been explained to him, accused made still another sworn statement which was received in evidence at the trial. In pertinent part it reads: "I repeat my statements of Jan. 17, 18 and 20, 1943, which have just been read to me and which I have read. They are the truth. I have nothing to add to them or take from them" (R. 19-20, 35; Exs. 3, 4, 7).

4. Concerning Charge I and the Specification thereunder, the evidence for the prosecution shows that on January 9, 1943, about 7:30 a.m., Mary Elizabeth Ruiz, an unmarried girl, twenty years of age, was walking from her home at 82 Graystone Street, Kansas City, Kansas, to her place of employment, and had gone about three blocks when she heard someone running behind her. She did not pay any

attention and kept on walking. Then somebody "jumped on" her, and at the same time struck her on the top of the head. She tried to scream, but her assailant put two of his fingers down her throat. He tried to put his face close to hers, and told her that if she screamed he would kill her. He "had ahold of" her with both arms, and walked backward, pulling her along a path which ran through a vacant lot covered with high, thick weeds. It was not yet daylight and the place was "a pretty dark spot" (R. 6-10, 13-14).

At the first shock of the assault Miss Ruiz had dropped the purse containing a dollar which she was holding under her arm, and her assailant "sort of let loose", picked it up, and gave it to her. After he had pulled her along the path about four or five feet, she dropped her purse again and asked if she might pick it up. When he relaxed his hold, she broke away and ran home. She ran two blocks before looking back, and did not hear him follow or start to follow her. Her mother immediately called the police, and Miss Ruiz was taken to police headquarters and was treated by a physician. A little after noon she went to work. She did not know she had been struck at the time it happened, as she was so nervous and excited and preoccupied with trying to get away that her head did not hurt at all. When she reached home, however, "it was bleeding terribly and hurting". She had not smelled liquor on the breath of the man who assaulted her. When he put his fingers down her throat he had on dark, leather gloves, and she was "wearing" lipstick. She testified on cross-examination that he did not try to lift her dress or unfasten her clothing, nor did he unfasten his own clothing so far as she "could tell" (R. 6-11, 14-15).

It was stipulated that if L. B. Gloyne, M.D., were present and sworn as a witness, he would testify that at 9:15 a.m. on January 9, 1943, he examined Mary Elizabeth Ruiz; that he found a ragged wound about two inches long on the back of her head near the top, and that "from examination and diagnosis" he would testify that the wound was inflicted by some blunt instrument (R. 14).

After she had been attended by the physician, Miss Ruiz talked to the Kansas City police and gave them a description of her assailant. She told them he was a short, stocky, light-skinned negro, wearing an Army uniform, with an overcoat and cap. The police started an investigation, in which they learned that accused was at the home of a sister or "Some relative". They called for him there and took him to police headquarters in Kansas City, Missouri. When interviewed about 4 or 4:30 p.m. he was not intoxicated. At the house where accused had been arrested "this lady" brought out some articles of his clothing, among which was a pair of gloves. One of the police officers

observed that they were heavy, yellow colored gloves, and that there was a red mark on them, "make-up or rouge or something of that nature". After accused reached the police station a pair of gloves was found on the back seat of the car which had been used to bring him there. These gloves were turned over to a military police sergeant, who took them along with accused to the Fort Leavenworth guardhouse. Thereafter accused admitted that the gloves belonged to him. They were received in evidence at the trial (R. 7, 12-13, 36-37; Ex. 8).

On the afternoon of January 9, Miss Ruiz went to police headquarters in Kansas City, Missouri, and identified accused as the man who had assaulted her. The police had him talk and repeat what he had told her, "If you scream I'll kill you", and Miss Ruiz testified it sounded like the same man. When asked how she identified him, she testified that when they were struggling his cap fell off, she had a good look at his face, and "knew it was him". Under interrogation by a member of the court, Miss Ruiz testified that there was no doubt in her mind as to the identity of her assailant, and that she could positively say accused was the same person (R. 7, 9).

When accused was taken to the guardhouse on January 11 he was not searched. However, at that time he told a member of the military police that he had $1. On January 14, accused made a statement to Major Browne which was reduced to writing by the latter and signed by accused. It was received in evidence without objection. Before making it, accused had been informed of his right to remain silent and had been warned that anything he said could be used against him if the case came to trial (R. 17-18; Ex. 1).

This statement in pertinent part was substantially as follows:

On January 8, 1943, accused received a three-day pass and went to the home of his grandmother in Kansas City, Missouri, arriving about 2 a.m., January 9. He had been drinking whiskey continuously that night. After talking with his grandmother for some time he went to his room and drank an additional half pint of whiskey. He lay on the bed a while but did not go to sleep. About 7:30 a.m. he put on his overcoat and "billed cap", and went out doors. As he walked west on Graystone Street he passed a girl going in the opposite direction. It was still rather dark. After accused had gone past the girl a few feet, "the whiskey was working" on him, and he decided that he could run back, catch her, and have "intercourse" with her. He "kind of went crazy". He ran after her, and struck her on the back of the head with a stick about one inch and a half thick which he had picked up. She went down on one knee and started "hollering". He put the first two fingers of his left hand in her mouth to make her stop, and told her

to keep still or he would kill her. She then kept quiet. The girl had dropped her purse and accused picked it up and handed it to her, then grabbed her by one arm and tried to pull her back into a path which was like an alley and was "the state line". The path extended toward a railroad track to the south and down around a bluff into some high, dry weeds. Miss Ruiz dropped her purse again in the struggle, reached down to get it, and suddenly broke away and ran west. He "got scared" and ran in the opposite direction to the house of his grandmother, where he went to bed and slept until about 9:30 a.m. He ate breakfast and after first calling at a number of other places, went to the residence of his sister in Kansas City, Missouri, where he was arrested by two detectives. Accused had been wearing light yellow, leather, issue-gloves, and before his encounter with the girl they did not have any rouge or blood on them. He left them on the sofa the last time he was at his grandmother's house before his arrest. He next saw them in the possession of the "M.P.", but did not then examine them closely. On the day the statement was made, accused observed that there were pink or red stains which looked like rouge on the first two fingers of the left glove, and a mark on the thumb of the right glove which looked like blood. He did not notice whether these stains were on the gloves immediately after the affair with the girl or when he left them at the home of his grandmother. The statement concludes with the assertion that accused has "learned since" that the name of the girl is Mary Elizabeth Ruiz (Ex. 1).

5. For the defense, Bernice Davidson testified that she was in "Ma Pennington's", a beer tavern in Leavenworth, with two soldiers on December 31, 1942, when she was introduced to accused. She did not know what time it was, but thought that it was about 7 p.m. The four of them drank a quart of whiskey, and after four or five hours she and accused went to "Devil's", another beer tavern, where she drank some more whiskey. Accused wanted to go to "the Jitterbug dance" directly across the street from Devil's but she told him that she did not wish to go and he went on without her. She was wearing high-heeled shoes and "couldn't be swinging around", she was married, her husband was mean, and she did not want the public to think she was with another man, so she stayed and talked and drank with the other prople. She looked at the clock at one o'clock, and as she had missed her bus, stayed on. Accused came back about 4 a.m. and the two of them went to "Laura's", a hotel. She was in the kitchen "kidding Miss Laura", but accused, who was in the dining room, was in full view of her at all times. Mrs. Davidson and accused left the hotel about 4:45 a.m. and went to "Skinney's", a tavern, where they waited for the bus which they "caught" about 5:45 a.m. Accused left the bus at the Service

Detachment at Fort Leavenworth and she rode on to the next block where she got off and went to the quarters where she was employed. She was in the company of accused continuously from about 4 a.m. until he alighted from the bus at the Service Detachment (R. 38-41, 53).

On January 1, Sergeant Leonard Maloney, who was detailed as a military policeman, received a report of an "attempted assault or attack", and went to see the Chief of Police of Leavenworth to get as much evidence as possible and look for clues. The description of the man which he took "from the police" was that of a soldier in uniform, with a leather garrison belt and field cap, from 5 feet 8 to 5 feet 10 inches in height, and wearing a little mustache. Sergeant Maloney thought that he most likely told Major Key the height of the man. He talked to Miss Carl and she gave the same description "she gave downtown". She said that her attacker was 5 feet 8 or 10 inches in height and stockily built. As to what he would consider the height of accused, Sergeant Maloney testified, "I never noticed -- about five feet seven inches". He denied that he had told accused the civil courts would be "tough on him" if he were tried by them (R. 43-44).

Corporal Eugene A. Tomczak worked with Sergeant Maloney on investigations and was with him on January 1. The description given to them by the Leavenworth police was that of an individual between 5 feet 6 and 8 inches in height, heavy set, with a small mustache, and wearing a service cap. Miss Carl had told Tomczak that the man was of the colored race (R. 44-45).

On January 1, Sergeant Maloney told Major Homer B. Key, commanding officer of the DEML, Service Detachment, Fort Leavenworth, that a rape had occurred in town and that he (Maloney) was looking for a colored soldier, light complexioned, with a mustache, and about 5 feet 11 inches tall (R. 37-38).

Accused testified that after being on duty in the Service Detachment Mess Hall until 6 p.m., December 31, he took a shower, changed clothes, and went to Leavenworth on a bus at about 7:30 or 7:40 p.m. After a brief call at "Pete's", he went to Ma Pennington's beer tavern where he met Private First Class Louis Johnson and Ford R. Woods, and was introduced to Bernice Davidson who was with them. There was a pint of whiskey on the table, and when accused sat down he ordered another pint, "and drank and danced". Woods borrowed $1.50 from accused and left, as he (Woods) and Johnson were going to Kansas City. Accused and Mrs. Davidson went to Devil's. He did not remember at what hour they left Ma Pennington's, but they stayed there "quite a

long time until Bernice drank a pint --". He asked her to accompany him to the dance in the Masonic Hall across the street from Devil's but she said that she did not want to go, so he told her that he would rejoin her later. He went to the dance "pretty well" after midnight and stayed until it was breaking up about 4 a.m., when he rejoined Mrs. Davidson at Devil's. After approximately 20 or 25 minutes they went to Laura's, where accused bought chili and pop, and Mrs. Davidson went back to the kitchen and talked with Laura. They stayed at Laura's a "good half hour", then went to Skinney's and waited 15 to 30 minutes for the Fort Leavenworth bus. They got on the bus and rode to the fort together, where accused alighted at the Service Detachment quarters (R. 46-47, 49).

When asked by his counsel to explain why he signed "these statements in this charge", accused gave two reasons. The first was that he knew Bernice Davidson was married and he did not wish to involve her, as her husband was considered "a pretty bad fellow with a razor and he has cut her and other men about her * * *", and if her husband knew that she had been out with someone else he would threaten her. The other reason was that after he had been brought back from Kansas City and confined alone in the "hold" or "solitary" at the post guardhouse, he was questioned by "this Corporal", but would not tell "this girl's" name, whereupon the corporal told accused he "might as well put both cases together" because if he were found guilty on one, served time, and was discharged he would be sent for trial on the other to a civilian court where he would not get a fair trial. Accused also was told that he would have to serve for a year "and a lot of other stuff", all of which he did not remember. Major King and Sergeant Maloney told him that he would "get a better break" in the Army than if he were in civilian life and tried in a civilian court. On cross-examination accused admitted that Major King did not force him to sign any of the statements, and that he had told Major King "what was in these statements" after being advised of his rights. Accused testified also that he did not remember what he had said to Major Browne as to whether he had "done these things", and that Major Browne had not threatened him but had told him anything he said could be used against him and that he could remain silent if he cared to do so. When asked by a member of the court "You submitted the details of the statements yourself?", accused answered in the affirmative. Accused testified that he was not wearing any garrison belt "that night" as he had stomach ulcers and had not worn such a belt since a doctor had ordered him to stop wearing it about a year before. He stated that his height was 5 feet 5 inches (R. 47-48, 50).

Accused further testified that he received a three-day pass and, in company with a corporal from his detachment, started for Kansas City about 7:30 or 8 p.m. on January 8. While waiting in Leavenworth for the Kansas City bus they went into "Pete's and bought a half pint", and drank it. After his arrival in Kansas City accused went to a beer tavern and met some "boys and girls" and a soldier from a different camp. They had a few drinks there and talked and danced with two girls. After they took the girls home accused went to the home of his grandmother and he sat up and talked with his grandmother a while, noticed it was about 2 a.m., and they both went to bed. As he was still drunk, had a headache, and was "kinda sick", he decided to get up and go for a walk. He did not have much money left, as he was almost broke after buying the half pint. As he was walking east on Graystone Street, he met a girl going west. She passed him on the sidewalk, and he noticed that she had a pocketbook. After he had passed her about three feet, he stumbled over a stick. He picked it up, went back, and hit her on the head. She screamed and he put his "glove" in her mouth to keep her quiet. The pocketbook fell to the ground, the girl ran, and accused took the pocketbook and kept the dollar which it contained. Accused had not planned this in any way. He "had a date for Saturday night" and as he had asked his grandmother for money practically every time he went home, he did not want to ask her that night, so he "went out and saw this girl". He testified that his motive was robbery, "Taking the pocketbook", and he had "no intention of anything else". Answering a question asked by a member of the court, accused stated he did not remember saying in his statement to Major Browne that he decided to have intercourse with the girl. He denied that he picked up her pocketbook and handed it back to her (R. 5-51).

6. In rebuttal, the prosecution called as a witness Charles Edward Keating, who testified that he had been connected with the police force at Leavenworth, Kansas, for eight years, that he had known Bernice Davidson for the past six years, and that her general reputation in the community in which she resided as to truth, veracity, and morality was bad (R. 51-52).

7. The evidence shows that at the time and place alleged in the Specification, Charge II, as Miss Darline Carl, a sixteen-year-old girl, was walking along the street on her way to work, some man ran up to her, put his hand over her mouth to stifle her screams, pulled her into a dark alley, threw her to the ground, took off her underclothes, and had carnal knowledge of her by force and without her consent. At the outset, her assailant told Miss Carl that if she screamed again he would kill her. Later, when she tried to resist

him, he held her so that she could not move, and when she begged him to leave her alone he said, "You wouldn't want to die, would you?" She was frightened by his threats against her life, and her fright and the force which he applied overcame her resistance. The element of penetration was conclusively shown by the direct testimony of Miss Carl, and by the finding of spermatozoa in her vaginal canal in an examination made by a physician about three hours after the attack. In short, it appears from the undisputed evidence that the crime of rape was committed upon Miss Carl, and the only question for consideration is one of identity, namely, whether accused was the guilty person.

At the trial, Miss Carl testified that accused was her assailant and said that she was sure he was the man. She identified him by his voice, his height, and his face, and explained that there was just enough light in the alley where the crime was consummated to enable her to observe his appearance. On January 17, 1943, accused confessed to Major King, an investigating officer, that he had "criminally attacked" Miss Carl, and made a sworn, written statement to that effect. On two subsequent occasions, January 18 and January 20, accused signed written statements in which he added some explanatory details to his original confession. On January 21, he signed a fourth written statement before another investigating officer, Major Browne, in which he expressly confirmed and certified to the truth of his three prior statements. In each instance before making the statement accused had been fully informed of his rights by the investigating officer. All four statements were received in evidence without any objection by the defense.

In his testimony accused repudiated his entire confession with reference to the offense against Miss Carl. He stated that he had confessed in order to protect Bernice Davidson, as he feared that her husband might harm her if he learned that she had been in the company of some other man. Mrs. Davidson had been a stranger to accused until he met her the evening before the crime was committed. She was then drinking whiskey in a beer tavern with two men, neither of whom was her husband. It seems incredible that accused would confess a crime of which he was innocent, particularly a crime as serious as rape, merely to protect such a casual acquaintance from possible injury at the hands of a jealous husband. The other reason given by accused for making the confession was that after he had been in solitary confinement at the post guardhouse for a time, a corporal whom he did not name persuaded him that it would be to his advantage to confess both crimes of which he was suspected, as otherwise he might be tried for one by court-martial,

confession of accused and from the circumstances attending the assault upon Miss Ruiz that such assault was made with intent to ravish her:

8: When Miss Carl reported to the police in Leavenworth, she gave them a detailed description of her assailant, and testimony as to what she had said in that connection was received in evidence at the trial: According to a universally accepted rule it may be shown, in a trial for rape, that the prosecutrix soon after the event made complaint of the outrage: Although the authorities are divided whether the details of the assault as related by the prosecutrix are admissible, it is generally held that such details should be received in evidence if the complaint was so closely and intimately connected with the assault and was made under such circumstances as to constitute a part of the res gestae: (Wharton's Criminal Evidence, 11th Ed.; 823-831):

Miss Carl ran three blocks to the police station and made complaint of the assault immediately after her assailant released her: She was in a highly nervous state and clearly acting under the influence of the fright and shock induced by the outrage: The details of her complaint made under such circumstances were admissible in evidence as part of the res gestae: (CM 218643, Bright, and authorities therein cited:)

Miss Ruiz also made a complaint in which she described her assailant to the police, and testimony as to the details of her complaint was received in evidence: It is not necessary, however, to determine whether such testimony was properly received, because it pertained solely to the question of the identity of accused as the person who assaulted Miss Ruiz, and that question was not in dispute at the trial: In any event, therefore, admission of the testimony could not have prejudiced any substantial rights of accused:

9: Testimony was received to the effect that on two occasions while accused was in the post guardhouse, Miss Carl, after observing him and hearing him talk, identified him as her assailant: One such identification was qualified and uncertain, but the other was positive: There is a wide diversity of opinion whether evidence of such extra-judicial identification of an accused is competent: The recent trend of judicial decision, as well as the slight preponderance of authority, favors its admission, particularly where the identification test is fairly and impartially conducted: (Wharton's Criminal Evidence, 11th Ed.; 891; People v. Mix (Cal.), 222 P.148; State v. Frost (Conn.), 185 A. 446; Commonwealth v. Powers (Mass.), 200 N.E. 592; People v. Lange (Mich.), 208 N.W.; 93; State v. Davis (N.C.), 197 S.E. 811:)

It is the opinion of the Board of Review that under the circumstances of the present case, evidence of the extrajudicial identification of accused by Miss Carl was properly received.

10. During the cross-examination of Miss Carl, defense counsel asked permission of the court to conduct a test to determine whether, if three negro boys were placed behind her in such positions that she could not see them and each was to say the same thing, she could pick out the voice of accused. The court properly declined to permit the test. Miss Carl testified that her identification of accused was not based upon his voice alone, but also upon his height and his face. Moreover, Miss Carl had heard the voice of accused at the post guardhouse on at least two occasions after the attack, and if the result of the proposed test had been positive, it might have been unfair to accused.

11. There are two first indorsements on the original charge sheet accompanying the record of trial. By one, dated January 18, 1943, the charges were referred for trial to Captain Joseph L. Gutting, trial judge advocate of a general court-martial appointed by paragraph 9, Special Orders No. 322, Headquarters Seventh Service Command, November 24, 1942. By the other first indorsement, dated January 25, 1943, the charges were referred for trial to Captain Gutting, trial judge advocate of a general court-martial appointed by paragraph 3, Special Orders No. 23, same headquarters, January 23, 1943. The orders of reference for trial contained in both first indorsements were made, and both courts mentioned above were appointed by command of Major General Uhl, Commanding General of the Seventh Service Command. The later special orders contained a provision to the effect that all charges, on which there had been no arraignment, theretofore referred for trial to the court appointed by the earlier special orders "are hereby transferred to the trial judge advocate of this court for trial". The accused was arraigned and tried before the court appointed by paragraph 9, of the earlier special orders, dated November 24, 1942. Major General Uhl, as the reviewing authority, approved the sentence

In CM 138625, Woodward, the accused was arraigned and tried before a court to which there had been no reference of the charges for trial. However, the court had been duly appointed by the same convening authority who had previously appointed another court to which he had referred the charges for trial. The Judge Advocate General was of the

opinion, in which the Secretary of War concurred, that the court which tried accused had jurisdiction. The reasons for that conclusion appear in the following language of The Judge Advocate General, quoted with approval by the Board of Review in CM 198108, Casey:

> "(a) The charges were duly preferred, investigated, and submitted for appropriate action to the officer exercising general court-martial jurisdiction over the command to which Woodward belonged;
>
> "(b) That officer approved the charges for trial and ordered trial by general court-martial;
>
> "(c) Trial was had before a general court-martial duly appointed by the officer who had approved the charges for trial and had ordered their trial by general court-martial;
>
> "(d) That court was competent to try the accused for the offense with which he stood charged; and
>
> "(e) The officer who ordered the charges tried and had appointed the court before which they were tried approved the sentence, thus evidencing his approval of the trial of the charges by the particular court.
>
> "* * * With the foregoing conditions present, I find no element or condition missing that was necessary to give the court jurisdiction over the person of Woodward and the offense with which he stood charged."

All of the essential jurisdictional elements stated in the foregoing quotation are present in the instant case and this would be true even if it should be considered that the later reference for trial of January 25, 1943, in effect, revoked the earlier reference of January 18, 1943. The court before which accused was tried had been duly appointed and had not been dissolved. The charges were approved and by proper authority, ordered tried by general court-martial. The officer who ordered the charges tried and appointed the court clearly indicated by his approval of its sentence that he had not divested that court of jurisdiction by his action in referring the charges to a different court for trial.

In the Casey case the Board of Review stated:

"* * * the precedents of this office clearly hold that where the appointing and reviewing authority are one and the same he may elect to approve the trial and conviction of an accused even though it be shown that the original charges had been referred to a court other than the one which actually tried the case" (CM 198108).

In the opinion of the Board of Review the court had jurisdiction of the person of accused and of the offenses alleged in the Specifications of the Charges.

12. Attached to the record of trial and designated as Exhibit A is a request for clemency signed by the president of the court and individual counsel of accused. The reasons assigned for the recommendation that the sentence be commuted to life imprisonment are that according to all the evidence it was not "a premeditated happening", each act was performed while accused was under the influence of intoxicants, and if the sentence be reduced to life imprisonment, even considering the possibility that accused may ultimately be released for good behavior, "because of old age there would be no question of a re-occurrence of this happening". An explanatory letter by the president of the court is attached to the request for clemency.

13. The Board of Review has given consideration to three letters, attached to the record, dated, respectively, March 4, March 19, and April 18, 1943, written by Mrs. Edith Griffin, the mother of accused.

14. The charge sheet shows that the accused is 24 years and 2 months of age and that he enlisted November 29, 1940.

15. The court was legally constituted. No errors injuriously affecting the substantial rights of 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. The death penalty is authorized upon conviction of violation of Article of War 92.

Leslie S. Hilf, Jr., Judge Advocate.

Percy E. Eger, Judge Advocate.

Samuel M. Driver, Judge Advocate.

1st Ind.

War Department, J.A.G.O., MAY 23 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Private First Class Levi Brandon (17019314), DEML, Service Detachment, C&GSS, Fort Leavenworth, Kansas.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence. The accused, a colored soldier, 24 years of age, attacked a 16-year-old white girl, pushed her into an alley and raped her, overcoming her resistance by force and by fear induced by his threats against her life. Nine days later, accused, with intent to rape, assaulted another white girl, 20 years of age, struck her on the head with a club, and was dragging her along a path into a vacant lot when she escaped. For the earlier offense, accused was found guilty of rape, in violation of the 92nd Article of War, and for the later offense was found guilty of assault with intent to rape, in violation of the 93rd Article of War. He was sentenced to be hanged by the neck until dead. In my opinion there are no mitigating or extenuating circumstances. I recommend that the sentence be confirmed and carried into execution.

3. Consideration has been given to the request for clemency, appended to the record of trial, signed by the president of the court and the individual counsel of accused, and to the attached three letters, dated, respectively, March 4, March 19, and April 18, 1943, written by Mrs. Edith Griffin, the mother of accused.

4. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action carrying into effect the recommendation hereinabove made.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

6 Incls.
1- Record of trial.
2- Draft ltr. sig. Sec. War.
3- Form of action.
4- ltr. dated Mar. 4, '43.
5- ltr. dated Mar.19, '43.
6- ltr. dated Apr.18, '43.

(Sentence confirmed. G.C.M.O. 136, 2 Jul 1943)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGH
CM 232797

APR 5 1943

UNITED STATES	)	SEATTLE PORT OF EMBARKATION
v.	)	Trial by G.C.M., convened at A.P.O.997, Seattle, Washington, February 19, 1943. Confinement for six months, Post Guardhouse, A.P.O. 997.
Private DAVID G. COOMBS (35491071), DEML, Detachment Port Headquarters Company, Seattle Port of Embarkation, Seattle, Washington.	)	

OPINION of the BOARD OF REVIEW
HILL, LYON and SARGENT, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence. The record has now been examined by the Board of Review and the Board submits this, its opinion, to 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 David G. Coombs, Private, DEML, Detachment Port Headquarters Company, did at A.P.O. 997, Seattle, Washington, on or about November 1, 1942, feloniously take, steal, and carry away three (3) Premium Stock pocket knives, each of the value of One Dollar and Twenty-five Cents ($1.25); two (2)

Jumbo cigarette lighters, each of the value of Eighty-five Cents (85¢); the total value of Five Dollars and Forty-five Cents ($5.45); the property of N. Mussallem, doing business as the Variety Store.

Specification 2: In that David G. Coombs, Private, DEML, Detachment Port Headquarters Company, did at A.P.O. 997, Seattle, Washington, on or about November 28, 1942, feloniously take, steal, and carry away a Westclox-Dax pocket watch of the value of One Dollar and Fifty Cents ($1.50), property of N. Mussallem, doing business as the Variety Store.

Specification 3: In that David G. Coombs, Private, DEML, Detachment Port Headquarters Company, did at A.P.O. 997, Seattle, Washington, on or about November 29, 1942, feloniously take, steal, and carry away two (2) wrist watches, each of the value of Eight Dollars and Twenty-five Cents ($8.25); in the total value of Sixteen Dollars and Fifty Cents ($16.50), the property of Bert Morgan, doing business as the Grotto Cigar Store.

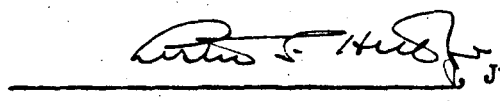
Specification 4: In that David G. Coombs, Private, DEML, Detachment Port Headquarters Company, did at A.P.O. 997, Seattle, Washington, on or about December 1, 1942, feloniously take, steal, and carry away one (1) black wallet of a value of about Two Dollars and Twenty-Five Cents ($2.25), the property of one Vernon Rowe.

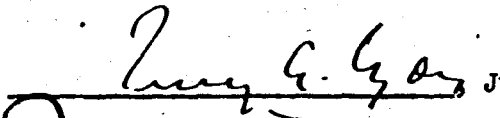
He pleaded not guilty to and was found guilty of the Charge and all Specifications. He was sentenced to be confined at hard labor for six months and to forfeit $30 of his pay per month for a like period. The reviewing authority disapproved the findings of guilty of Specifications 2, 3 and 4 of the Charge, approved the sentence, designated the place of confinement and directed the execution of the sentence. The proceedings were published in General Court-Martial Orders No. 24, Headquarters Seattle Port of Embarkation, Seattle, Washington, March 16, 1943.

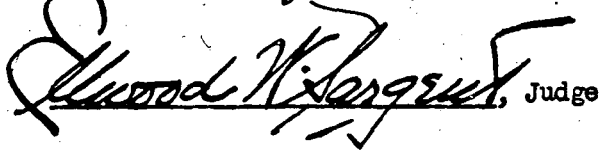
3. The record of trial shows that Captain John M. Prins, Transportation Corps, who signed and swore to the Charges and was the accuser (par. 60, M.C.M. 1928), participated in the trial as a member and law member of

the court. Article of War 8 provides in part "* * * no officer shall be eligible to sit as a member of such court when he is the accuser * * * ". The court was not legally constituted and the proceedings were null and void ab initio (Sec. 365 (7), Dig. Ops. JAG 1912-40; CM 216028, Nix; CM 220693, Dye).

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


, Judge Advocate.


, Judge Advocate.


, Judge Advocate.

(214)
SPJGH
CM 232797

1st Ind.

War Department J.A.G.O., MAR 7 1943 - To the Secretary of War.

1. Herewith transmitted for your action under Article of War 50½ as amended by the act of August 20, 1937 (50 Stat. 724; 10 U.S.C. 1522), is the record of trial in the case of Private David G. Coombs (35491071) DEML, Detachment Port Headquarters Company, Seattle Port of Embarkation, Seattle, Washington.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that the findings and sentence be vacated and that all rights, privileges and property of which accused has been deprived by virtue of said sentence be restored.

3. Inclosed is a form of action carrying into effect the recommendation above made.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

2 Incls.
Incl.1-Record of trial.
Incl.2-Form of action.

(Findings and sentence vacated, by order of the Secretary of War. G.C.M.O. 88, 16 Apr 1943)

WAR DEPARTMENT
Army Service Forces
In the Office of the Judge Advocate General
Washington, D. C.

SPJGN
CM 232838

APR 1 3 1943

UNITED STATES)	EIGHTH MOTORIZED DIVISION
)	
v.)	Trial by G.C.M., convened at
)	Fort Leonard Wood, Missouri,
Second Lieutenant JOHN K.)	March 10, 1943. Dismissal.
WILCOX (0-1291735).)	
121st Infantry.)	

OPINION of the BOARD OF REVIEW
CRESSON, LIPSCOMB and SLEEPER, Judge Advocates.

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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 Judge Advocate General.

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

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

Specification 1: In that Second Lieutenant John K. Wilcox, Company "M", One Hundred Twenty First Infantry, did, without proper leave, absent himself from his organization at Fort Leonard Wood, Missouri from about 6:30 AM February 5, 1943 to about February 9, 1943.

Specification 2: In that Second Lieutenant John K. Wilcox, Company "M", One Hundred Twenty First Infantry, did, without proper leave, absent himself from en route to his organization at Kansas City, Missouri from about February 10, 1943 to about March 1, 1943.

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

Specification: In that Second Lieutenant John K. Wilcox, Company "M", One Hundred Twenty First Infantry, having received a lawful command from Captain Wayne F. Kennedy, Provost Marshall, Kansas City, Missouri, a superior

officer, to report to the Commanding Officer One Hundred Twenty First Infantry, at Fort Leonard Wood, Missouri, did at Kansas City, Missouri, on or about February 10, 1943, willfully disobey the same.

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

Specification: In that Second Lieutenant John K, Wilcox, Company "M", One Hundred Twenty First Infantry was, at Kansas City, Missouri, on or about February 9, 1943, in a public place, to wit, Municipal Auditorium, drunk, while in uniform.

He pleaded guilty to Charge I and both Specifications thereunder, to Charge II and the Specification thereunder; not guilty to Charge III and the Specification thereunder, but guilty of a violation of the 96th Article of War. He was found guilty of all Specifications and Charges, and sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action pursuant to Article of War 48.

3. The evidence for the prosecution shows that on February 5, 1943, the accused departed without leave from his station at Fort Leonard Wood, Missouri, and had not returned when, at ten o'clock on the evening of February 9, he was found by two military policemen, lying in a drunken stupor in a frequented corridor of the Municipal Auditorium in Kansas City, where a Golden Gloves boxing tournament was in progress. The accused was clean-shaven and his uniform was neat, but he smelled strongly of liquor, and was so limp that he had to be carried from the building. Two or three city policemen were present while the military police were vainly attempting to rouse him, and two curious civilians were ushered past when they tried to stop. (R. 8, 12-18, 21, 23-24, 27, 33-34, 45; Ex. C)

In the patrolcar, the accused revived sufficiently "with a little aid", to walk up the stairs of the city police station to which the military policemen had conveyed him. There he was taken to the private office of one of the police lieutenants, where he was found an hour later, slumped in a chair with his eyes closed, "apparently asleep or in a stupor", by several officers from the Army Recreational Camp at Kansas City, who arrived in response to a telephone call from one of the military policemen to the officer of the day. These Recreational Camp officers roused the accused with some difficulty to thick and incoherent mutterings, from which - but more from the papers in his billfold, which he tendered them - they ascertained his name and organization, and that he was absent without leave. (R. 14-15, 18, 20-21, 26-27, 33)

They then took the accused to the Army Recreational Camp, Kansas City, where one of the officers reported via telephone to the officer of the day, 121st Infantry, Fort Leonard Wood, requesting disposition. The next morning, February 10, 1943, complying with instructions telephoned by order of the accused's regimental commander, the Provost Marshal, Kansas City, Missouri, signed in his official capacity, read and delivered to the accused a duplicate original of the following written order:

> "You, Second Lieutenant John Kelly Wilcox, O-1291735, of 121st Infantry, Fort Leonard Wood, Missouri, will report to your Commanding Officer at Fort Leonard Wood, Missouri, without delay. Refusal, neglect or failure to obey this order will render you liable to trial by Court Martial therefor."

The accused signed the following notation at the bottom of the order:

> "I have read the above order, understand same and acknowledge receipt of same by signature below."

At the time the order was given him, the accused appeared normal and fully capable of understanding it. To facilitate compliance, the Provost Marshal drove the accused to the Union Station in Kansas City. (R. 22, 27-28, 34-36, 38, 40-41; Ex. C)

The accused did not return to his organization as ordered but started drinking again. About three weeks later, on March 1, 1942, he voluntarily surrendered to the Kansas City police, and was returned, under guard, to Camp Leonard Wood, where he was placed in arrest in quarters. (R 8, 37, 45; Ex. A and B)

4. The evidence for the defense shows that the accused, when examined by the regimental surgeon on March 3, 1943, two days after his return, was diagnosed as neuresthenic and pronounced "ill", at the time, "with a strongly upset nervous system". (R. 47; Ex. D)

He was characterized by his former battalion commander as a satisfactory junior officer, who had, during the Tennessee maneuvers, commanded a company for a short time, in an average and unexceptionable manner (R. 49-50).

His company commander, a witness for the prosecution, testified, on cross examination, that he considered the accused "a fine officer", and, in reply to questions by the court;

"I never even knew that he took a drink before * * * prior to this offense, sir * * * he has always been efficient * * * I was greatly disturbed when I heard of this trouble, because - well, I could use him in my work; he is a good weapons man." (R. 46-47)

The accused, at his own request, was sworn and testifed that he enlisted July 1, 1939, advanced to rank of sergeant, and, at his company commander's suggestion, applied for admission to officers' candidate school, which he attended from June 1 to August 26, 1942, when he received his commission as second lieutenant. During his enlisted service, he was never tried or disciplined in any way. If the court should see fit to dismiss him from the service, he averred, "I would enlist tomorrow, sir, if I could." (R 51-52)

5. Specifications 1 and 2, Charge I, allege two successive absences without leave, from February 5, 1943, to February 9, 1943, and from February 10, 1943, to March 1, 1943, respectively. The uncontradicted evidence clearly establishes all elements of both offenses, and furnishes detailed corroboration of the accused's pleas of guilty to Charge I and the Specifications thereunder, eliminating any question of the propriety of such pleas.

The evidence plainly shows commission by the accused of each of the offenses alleged in Specifications 1 and 2, Charge I, in violation of Article of War 61.

6. The Specification, Charge II, alleges that the accused, having received a lawful order from Captain Wayne F. Kennedy, Provost Marshal, Kansas City, Missouri, a superior officer, to report to the Commanding Officer, 121st Infantry at Fort Leavenworth, Kansas, did, at Kansas City, Missouri, on February 10, 1943, wilfully disobey the same. The evidence shows that, at the time the written order was read and delivered to the accused by the provost marshal, the accused was properly in the custody and under the control of the provost marshal, who was his superior officer. Under these circumstances, it was the duty of the accused to obey all lawful orders given him by the provost marshal. The order which the accused disobeyed was not only a lawful order, but one that had been expressly authorized and directed by the accused's regimental commander. In view of the uncontradicted evidence that when the accused received the order and signed a receipt therefor, he appeared normal and fully capable of understanding it, wilfullness in disobedience would be imputed, even in the absence of the plea of guilty which confirms it.

The Specification alleges and the uncontradicted evidence establishes an offense in violation of Article of War 64, and, clearly demonstrates the appropriateness of the accused's plea of guilty thereto.

7. The Specification, Charge III, alleges that the accused was at Kansas City, Missouri, on or about February 9, 1943, drunk in uniform in a public place, to wit, the Municipal Auditorium, in violation of Article of War 95. Although the accused pleaded not guilty to the Charge, he pleaded guilty to the Specification as a violation of Article of War 96.

The evidence definitely shows that the accused was so drunk that he had to be carried from the auditorium by military policemen, after lying for an indefinite period of time in a frequented corridor, with the public generally passing to and fro, while a popular boxing tournament was in progress. The accused was in uniform and, according to the testimony, was observed by several members of the city police force, as well as at least two curious civilains who were very properly ushered away from his vicinity by the military police.

This gross and conspicuous drunkenness of an officer in uniform in a public place, although unaccompanied by disorderly conduct, so compromises the position of the accused as an officer of the United States Army as to constitute a violation of Article of War 95. The evidence clearly distinguishes this case from CM 196426 (1931), where the accused was merely boisterous from drinking, yet could talk coherently and was able to walk and enter an automobile without assistance, and CM 207887 (1937) where the last conscious act of the accused was to retire to a secluded room in the officers' club, in both of which cited holdings the offense was held to be a violation of Article of War 96 rather than of Article of War 95. (Dig. Ops. JAG, 1912-40, p. 343)

8. The accused is 32 years of age. The records of the Office of The Adjutant General show enlisted service from July 1, 1939; honorable discharge for the convenience of the Government, August 26, 1942; appointed Second Lieutenant (Temporary) AUS from Officer Candidate School, Fort Benning, Georgia, August 27, 1942.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty of Charges I, II and III and of the Specifications thereunder, legally sufficient to support the sentence, and to warrant donfirmation thereof. Dismissal is mandatory upon a conviction of a violation of Article of War 95 and is authorized upon a conviction of a violation of Article of War 61 or Article of War 64.

Chas. L. Bressors, Judge Advocate.
Abna E. Lipscomb, Judge Advocate.
Benjamin R. Sleeper, Judge Advocate.

1st Ind.

War Department, J.A.G.O., APR 18 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant John K. Wilcox (0-1291735), 121st Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. The conduct of the accused in absenting himself without leave on two successive occasions, of willfully disobeying an order of a superior officer, and of being grossly and conspicuously drunk in a public place, clearly shows the accused to be unfit and unworthy to remain an officer. I recommend, therefore, that the sentence be confirmed and carried into execution.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation should it meet with approval.

Myron C. Cramer

Myron C. Cramer
Major General,
The Judge Advocate General.

3 Incls.
Incl 1 - Record of Trial
Incl 2 - Draft of Ltr for Sig. Sec. of War
Incl 3 - Form of Executive Action

(Sentence confirmed. G.C.M.O. 105, 12 May 1943)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGK
CM 232864

MAY 31 1943

UNITED STATES	FIRST DISTRICT ARMY AIR FORCES TECHNICAL TRAINING COMMAND
v.	
Second Lieutenant MICHAEL A. CARSO, II (O-562689), Air Corps.	Trial by G.C.M., convened at Harrisburg, Pennsylvania, March 13, 1943. Dismissal.

OPINION of the BOARD OF REVIEW
LYON, HILL and ANDREWS, Judge Advocates.

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

2. Accused was tried upon the following Charges and Specifications:

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

Specification 1: In that Second Lieutenant Michael A. Carso, II, did, by telephonic conversation from New Orleans, Louisiana, to Harrisburg, Pennsylvania, on or about January 15, 1943, with intent to deceive the Commanding Officer, Air Intelligence School, Army Air Forces, Harrisburg, Pennsylvania, officially state to Major Reginald T. Lombard, Air Intelligence School, Army Air Forces, Harrisburg, Pennsylvania, that he was undergoing treatment at LaGarde General Hospital, New Orleans, Louisiana, and unable to return to duty at the Air Intelligence School, Army Air Forces, Harrisburg, Pennsylvania, at the expiration of his leave on January 16, 1943, which statement was known by the said Second Lieutenant Michael A. Carso, II, to be untrue, in that the said Second Lieutenant Michael A. Carso, II, was not undergoing treatment for an illness at said LaGarde General Hospital, New Orleans, Louisiana, at the aforesaid time.

Specification 2: In that Second Lieutenant Michael A. Carso, II, did, by telegram from New Orleans, Louisiana, to Harrisburg, Pennsylvania, on or about January 22, 1943, with intent to deceive the Commanding Officer, Air Intelligence School, Army Air Forces, Harrisburg, Pennsylvania, officially report to Major Reginald T. Lombard, Air Intelligence School, Army Air Forces, Harrisburg, Pennsylvania, in the following words and figures, to wit: "WU3 24 NL NEW ORLEANS LA JAN 22 MAJOR R T LOMBARD AAFIS= I HAVE BEEN CLEARED FOR TRAVEL BY THE DENTAL CLINIC AND AM LEAVING TONIGHT FRIDAY AT 845 PM AND SHOULD ARRIVE HARRISBURG SUNDAY EVENING=LT M A CARSO II.", which report was known by the said Second Lieutenant Michael A. Carso, II, to be untrue in that the said Second Lieutenant Michael A. Carso, II, had not received clinical aid at the aforesaid Dental Clinic at the said time.

Specification 3: In that Second Lieutenant Michael A. Carso, II, did, at Harrisburg, Pennsylvania, on or about January 25, 1943, with intent to deceive the Commanding Officer, Air Intelligence School, Army Air Forces, Harrisburg, Pennsylvania, officially report to Second Lieutenant Fred M. Hardy, now First Lieutenant, Personnel Officer, Air Intelligence School, Army Air Forces, Harrisburg, Pennsylvania, that his absence beyond the expiration of official leave from duty at said Air Intelligence School, Army Air Forces, was due to his being an out-patient in the Dental Department at LaGarde General Hospital, New Orleans, Louisiana, from January 15, 1943, to January 22, 1943, which report was known by the said Second Lieutenant Michael A. Carso, II, to be untrue in that the said Second Lieutenant Michael A. Carso, II, was not an out-patient at said hospital during said period of time.

Specification 4: In that Second Lieutenant Michael A. Carso, II, did at Harrisburg, Pennsylvania, on or about January 27, 1943, with intent to deceive the Commanding Officer, Air Intelligence School, Army Air Forces, Harrisburg, Pennsylvania, officially report by presenting to Second Lieutenant Fred M. Hardy, now First Lieutenant, Personnel Officer, Air Intelligence School, Army Air Forces, Harrisburg, Pennsylvania, a writing purporting to be that of Major E.G. Austin, Dental Corps, in the following words and figures, to wit: "LaGarde General Hospital, Office of the Dental

Surgeon, New Orleans, Louisiana, January 22, 1943. Subject: Extension of Leave. To: The Surgeon, Army Air Forces Intelligence School, Harrisburg, Pennsylvania. 1. Lt. Michael A. Carso reported to this hospital, while on sick leave from the Air Intelligence School, suffering from a recurrence of Vincent's Angina. He was admitted on January 15, and was treated here as an out-patient until this date. (S) E.G. Austin, E.G. AUSTIN, Major, Dental Corps, Dental Surgeon", which said report was known by the said Second Lieutenant Michael A. Carso, II, to be untrue in that the said Second Lieutenant Michael A. Carso, II, was not an out-patient at said hospital during said period of time, and in that said purported writing was not executed by or on behalf of Major E.G. Austin.

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

Specification: In that Second Lieutenant Michael A. Carso, II, AUS, 0-562689, did without proper leave absent himself from his station at Army Air Forces Intelligence School, Harrisburg, Pennsylvania, from about January 16, 1943 to about January 24, 1943.

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

3. The evidence shows that on January 5, 1943, accused, a second lieutenant assigned to the 334th Bombardment Group, Greenville Army Air Base, Greenville, South Carolina, on temporary duty at the Army Air Forces Air Intelligence School, Harrisburg, Pennsylvania, was given ten days sick leave (R.6,7; Pros. Ex. 1) on the recommendation of Major Reginald T. Lombard, Medical Corps, Post Surgeon. On January 15, 1943, the day before the expiration date of the leave, accused telephoned Major Lombard and told him "that a recurrence of his illness prevented him from traveling and that he was undergoing treatment at LaGarde General Hospital at New Orleans, Louisiana, and was unable to return to duty at this station at the expiration of his sick leave on January 16, 1943" (R.6). Accused, in fact, was at the LaGarde General Hospital at New Orleans, Louisiana, on only one occasion, on January 21, 1943, when he was given a dental examination only (R.8,9,10,12; Pros. Exs. 6,9,10).

On January 22, 1943, accused sent to Major Lombard the following telegram:

"I have been cleared for travel by the Dental Clinic and am leaving tonight Friday at 845 PM and should arrive Harrisburg Sunday Evening

Lt M A CARSO II." (R.6; Pros. Ex. 2)

On January 23, 1943, Captain George W. Browne, Air Corps, Adjutant of the Army Air Forces Intelligence School, wired the LaGarde General Hospital for confirmation of the dates when accused was a patient there (R.6-7; Pros. Ex. 3). Subsequently he wired asking if accused had ever been treated as an out-patient at the hospital (R.7-8). The answering messages, although inadmissible, were received in evidence without objection. Accused, in fact, had never been treated there (R.9,12-13; Pros. Ex. 10).

On January 24, 1943, accused returned to his organization (Pros. Ex. 12) and the next day he reported to the personnel officer, Lieutenant Fred M. Hardy, Air Corps, that he was back from his sick leave. He was asked for some letter or authority from the LaGarde General Hospital relative to his treatment there, and said that he had a letter in his luggage. Accused told Lieutenant Hardy that he had been instructed not to travel or eat in public places, and that he had been treated (R.10). On January 27, 1943, accused reported to Lieutenant Hardy at the latter's request and was asked for the letter substantiating his leave. That day or the next day accused presented to Lieutenant Hardy a letter dated January 22, 1943, purportedly from Major E.G. Austin, Dental Corps, the Dental Surgeon at the LaGarde General Hospital, which read, in part, as follows:

"1. Lt. Michael A. Carso reported to this hospital, while on sick leave from the Air Intelligence School, suffering from a recurrence of Vincent's Angina. He was admitted on January 15, and was treated here as an out-patient until this date.

E.G. Austin
E.G. AUSTIN,
Major, Dental Corps,
Dental Surgeon." (R.11; Pros. Ex. 8)

That letter was in fact not written by Major Austin or by anyone on his behalf (R.13;Pros. Ex. 11).

The defense offered no evidence.

4. Without regard to the pleas of guilty the uncontradicted evidence shows that accused on January 15, 1943, just before the expiration of a sick leave, reported by telephone to the Post Surgeon, Major Lombard,

that he had suffered a recurrence of his illness and was undergoing treatment at the LaGarde General Hospital at New Orleans. That statement was false. On January 22, 1943, accused telegraphed Major Lombard that the "Dental Clinic" had cleared him for travel, and that he would return at once. That statement was false in that the "Dental Clinic" had not said anything to accused relative to his traveling. Accused returned to his organization on January 24, 1943, and the next day reported to the personnel officer the fact of his return. He was told that some authority from the LaGarde Hospital was necessary to substantiate his leave. He said that he had a letter in his luggage. He also said that he had been treated in the hospital while he was away. One or two days later accused brought in to the personnel officer, Lieutenant Hardy, a letter supposedly signed by the dental surgeon that his delay in returning was due to illness and resultant treatment. The letter was not in fact signed or authorized by the officer whose signature it purportedly bore. The evidence substantiates the allegations of Specifications 1,2, and 4, Charge I and of the Specification, Charge II. There may be some doubt as to the sufficiency of the proof of Specification 3, Charge I. In view of accused's plea of guilty that need not be considered.

5. From the papers accompanying the record of trial it appears that by fourth indorsement Major Stanton C. Agnew, Air Corps, Executive Officer, Army Air Forces Air Intelligence School, forwarded the charges to the appointing authority, recommending trial by general court-martial in accordance with the recommendation of the investigating officer. Major Agnew signed the indorsement "For the Commanding Officer". The foregoing facts were not disclosed at the trial and Major Agnew, who was not challenged, sat as a member of the court. The papers accompanying the charges were available to the defense (par. 41 e, M.C.M.).

It has been held that the presence on the court of an officer who has forwarded the charges recommending trial by general court-martial is not ipso facto prejudicial error (CM 232229, Parks, and cases there cited) and that the test is whether, looking to the record as a whole, the substantial rights of accused have been prejudiced. In the present case accused pleaded guilty and as a result his rights were not prejudiced. In addition, Major Agnew forwarded the charges for the commanding officer and thereby acted merely in a routine administrative capacity.

6. Consideration has been given to a petition for clemency signed by the defense counsel and attached to the record of trial.

7. The papers accompanying the record of trial disclose that subsequent to the trial accused was dismissed from the Air Intelligence

School, Harrisburg, Pennsylvania, for conduct deemed to be a reflection upon the service and a bad example for the other officer students.

8. War Department records show that accused is 23 years of age. He attended Michigan State University and Tulane University for a total of four years. He was inducted into the Army on March 19, 1941, and served as an enlisted man until, after graduation from the Air Forces Officer Candidate School, Miami Beach, Florida, he was commissioned a second lieutenant, Army of the United States, on September 23, 1942. In approving accused's application for Officer Candidate School, his commanding officer stated that accused had not demonstrated outstanding qualities of leadership and that his character was fair.

9. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of violation of Article of War 95 and is authorized upon conviction of violation of Article of War 61.

Irving G. Lyon, Judge Advocate.

(On leave), Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., JUN 11 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Michael A. Carso, II (0-562639), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed and carried into execution.

3. Consideration has been given to the attached letter, dated April 17, 1943, to The Adjutant General, from the Commanding Officer, Headquarters Air Intelligence School, Harrisburg, Pennsylvania, with inclosure, from which it appears that subsequent to trial accused was relieved from further duty at the school for conducting himself in a manner deemed to be a reflection upon the service "and a bad example for the officer students".

4. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

4 Incls.
1- Record of trial.
2- Draft of ltr. for sig. Sec. of War.
3- Form of action.
4- Ltr. 4-17-43, fr. C.O. Air Intel. School with incl.

(Sentence confirmed. G.C.M.O. 164, 24 Jul 1943)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

MAY 15 1943

SPJGH
CM 232882

UNITED STATES v. Second Lieutenant KENNETH L. KOFORD (0-1304320), Infantry.	EIGHTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Wolters, Texas, March 5, 1943. Dismissal.

OPINION of the BOARD OF REVIEW
HILL, DRIVER and LOTTERHOS, Judge Advocates

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

2. Accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 69th Article of War.
(Findings of guilty disapproved by the reviewing authority.)

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

Specification 1: (Finding of guilty disapproved by the reviewing authority.)

Specification 2: In that Second Lieutenant Kenneth L. Koford, Company A, 59th Infantry Training Battalion, being indebted to the Hotel Texas, Fort Worth, Texas, in the sum of $27.30, for three days' room rent at $2.50 per day, local telephone calls, 30¢, long distance calls, $18.80, and one telegram, 70¢, which amount became due and payable

on or about December 28, 1942, did at Fort Worth, Texas, from December 28, 1942, to February 9, 1943, dishonorably fail and neglect to pay said debt.

Specification 3: In that Second Lieutenant Kenneth L. Koford, Company A, 59th Infantry Training Battalion, did, at Mineral Wells, Texas, on or about January 20, 1943, with intent to defraud Crazy Water Hotel Company, Mineral Wells, Texas, acting by and through its Night Clerk, O. E. Dickinson, wrongfully and unlawfully cause to be uttered and passed to the said Crazy Water Hotel Company a certain check in words and figures, substantially as follows:

Mineral Wells, Texas, 1/20 1943

On Demand
Pay to the Order of CRAZY WATER HOTEL COMPANY $ 24.00

Twenty-Four - - - - - - and - - - - - - no/100 - - - Dollars

For Value Received, I give this check and hereby certify that I have sufficient funds on deposit with this bank to pay this check when presented.

To First Natl Bank
Breckenridge Tex

Lt. K. L. Koford
Co "A" 59 Bn. - 364
Address Phone

And by means thereof did fraudulently obtain from the said Crazy Water Hotel Company, Mineral Wells, Texas, the use of Room No. 643 in said hotel for one day, of the value of $4.00, and the sum of $20.00, lawful money of the United States, then well knowing that he did not have and not intending that he should have any account with or sufficient funds in said First National Bank, Breckenridge, Texas, for payment of said check.

Specification 4: In that Second Lieutenant Kenneth L. Koford, Company A, 59th Infantry Training Battalion, did, at Dallas, Texas, on or about December 22, 1942, with intent to defraud J. H. Davis, wrongfully and unlawfully cause to be uttered and passed t o the said J. H. Davis a certain check in words and figures, substantially as follows:

Breckenridge, Texas 12-22 1942 No._____

FIRST NATIONAL BANK 88-966

Pay to the order of J. H. Davis $20.00

Twenty - Dollars

For _____ Lt. K. L. Koford

And by means thereof did fraudulently obtain from said J. H. Davis the sum of $20.00, lawful money of the United States, then well knowing that he did not have and not intending that he should have any account with or sufficient funds in said First National Bank, Breckenridge, Texas, for payment of said check.

Specification 5: In that Second Lieutenant Kenneth L. Koford, Company A, 59th Infantry Training Battalion, did, at Dallas, Texas, on or about December 23, 1942, with intent to defraud J. H. Davis, wrongfully and unlawfully cause to be uttered and passed to the said J. H. Davis a certain check in words and figures, substantially as follows:

Breckenridge, Texas Dec 23 1942 no._____

FIRST NATIONAL BANK 88-966

Pay to the order of J. H. Davis $20.00

Twenty dollars exactly - - - - - - - - - - - - - - Dollars

For _____ Lt. K. L. Koford

And by means thereof did fraudulently obtain from said J. H. Davis the sum of $20.00, lawful money of the United States, then well knowing that he did not have and not intending that he should have any account with or sufficient funds in said First National Bank, Breckenridge, Texas, for payment of said check.

Specification 6: In that Second Lieutenant Kenneth L. Koford, Company A, 59th Infantry Training Battalion, did, at Dallas, Texas, on or about December 26, 1942, with intent to defraud J. H. Davis, wrongfully and unlawfully cause to be uttered and passed to the said J. H. Davis a certain check in words and figures, substantially as follows:

Breckenridge, Texas, Dec 26 1942 no. _____

FIRST NATIONAL BANK 88-966

Pay to the order of J. H. Davis $20.00

Twenty dollars exactly - - - - - - - - - - - Dollars

For _____ Lt. K. L. Koford

And by means thereof did fraudulently obtain from said J. H. Davis the sum of $20.00, lawful money of the United States, then well knowing that he did not have and not intending that he should have any account with or sufficient funds in said First National Bank, Breckenridge, Texas, for payment of said check.

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

Specification 1: In that Second Lieutenant Kenneth L. Koford, Company A, 59th Infantry Training Battalion, did, without proper leave, absent himself from his organization at Camp Wolters, Texas, from about December 29, 1942, to about December 31, 1942.

Specification 2: In that Second Lieutenant Kenneth L. Koford, Company A, 59th Infantry Training Battalion, did, without proper leave, absent himself from his organization at Camp Wolters, Texas, from about January 20, 1943, to about January 26, 1943.

Specification 3: In that Second Lieutenant Kenneth L. Koford, Company A, 59th Infantry Training Battalion, did, without proper leave, absent himself from his organization at Camp Wolters, Texas, from about February 5, 1943, to about February 7, 1943.

Specification 4: (Finding of guilty disapproved by the reviewing authority.)

Accused pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority disapproved the findings of guilty of Charge I and its Specification, the finding of guilty of Specification 1, Charge II, so much of the finding of guilty of Specification 3, Charge II, as involved a finding of guilty of the words, "the use of Room No. 643 in said hotel for one day, of the value of $4.00, and", and the finding of guilty of Specification 4, Charge III; approved the sentence but remitted that portion thereof relating to forfeiture of pay and allowances, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution pertaining to the Charges and Specifications as to which findings of guilty were approved shows that on December 22, 1942, in Dallas, Texas, accused met Mr. J. H. Davis, a motion picture machine operator, whom he had known for about eight years. They were in the Crowder Cafe together when accused remarked that he had very little money with him and wished to cash a check. Using a blank check Davis wrote out and accused signed a check in the amount of $20.00, payable to the order of Davis, on the First National Bank, the only bank in Breckenridge, Texas. Davis endorsed the check and the cashier of the cafe cashed it for accused. When Davis asked him whether he had the money in the bank, accused replied, "Sure, I do." Subsequently accused cashed two other checks at the Crowder Cafe, dated, respectively, December 23, and December 26. Each of them was in the amount of $20.00, drawn on the same bank as the first check, payable to the order of, and endorsed by Davis. All of the checks were returned by the drawee bank unpaid, and Davis had to pay the Crowder Cafe $60.00 "to make them good." Accused did not reimburse him. Accused had no checking account in the bank on which the checks were drawn at any time between January 1, 1942, and March 5, 1943, and had no authority to draw checks on any other account in the bank during that period (R. 11-14, 17; Exs. C,D,E,F).

From December 27 to December 29 accused stayed at the Texas Hotel in Fort Worth. He left the hotel without paying his bill, and without making any arrangements for credit. The bill was due and payable the day he left the hotel but was not presented to him prior to his departure because the hotel management did not know when he left. His account, which aggregated $27.30, consisted of three days room rent, $7.50, local telephone calls, $0.30, long distance telephone calls, $18.80 and

telegram, $0.70. The credit department of the hotel wrote and mailed four letters to accused regarding this account. None of them was returned to the sender. The first letter dated January 4, directed to accused at Mineral Wells, Texas, acknowledged with thanks receipt of a "wire" from accused, dated January 1, requesting that his bill be held until January 10, at which time he promised to "wire" the money. The second letter, dated January 5, also addressed to Mineral Wells contained a statement to the effect that a $25.00 check of accused on the First National Bank of Breckenridge, Texas, accepted by the hotel on December 27, had been returned by the bank marked "No account". The third letter, dated January 12, was addressed to accused, "Co. 'A' 59th Bn., Camp Wolters, Texas". In it he was reminded that, notwithstanding his promise to pay his bill by January 10, he had not sent any remittance with his "letter dated January 10th". The fourth letter dated January 20, and bearing the same address as the third letter, called attention to the fact that the account of accused remained unpaid, although he had promised, in his letter of January 10, to send "remittance at once". The bill was paid after a copy of this fourth letter had been mailed to the commanding officer of accused (R. 23-27, Exs. H,J,K,L,M).

On December 15, 1942, by special orders of The Infantry School, Fort Benning, Georgia, accused had been assigned to the Infantry Replacement Training Center, Camp Wolters, Texas. His orders authorized a delay of ten days in addition to travel time, and it was stipulated that the authorized travel time between Fort Benning and Camp Wolters was three days. On December 28, at 9:00 p.m., accused signed the Officers' Register at Camp Wolters, but did not report for duty at the Infantry Replacement Training Center. On December 31 he was admitted to the station hospital. He did not sign in on the Officers' Register, at the Training Center until January 4. At that time he was entered upon the morning report of Company A, 59th Infantry Training Battalion as "hospitalized". He began active duty as a platoon leader of Company A on January 7 (R. 27-31, Exs. O,P,Q,R).

Accused was not present for duty with his company on January 20. Captain A. M. Tolzman, the company commander, searched the company area for him, to no avail. An entry in the morning report showed that the status of accused changed on January 20, at 10:00 a.m., from duty to absent without leave. He failed to return to duty until January 26. He did not have the permission of his company commander to be absent during the intervening period (R.29-30, Ex. S).

On January 20 accused, who was then a guest at the Crazy Water Hotel, Mineral Wells, near Camp Wolters, went to the desk clerk to pay his bill of $4.00. He told the clerk that he wanted some money, and the clerk gave him one of the regular printed blank check forms of the hotel. Accused drew and signed a check, in the amount of $24.00, on the First National Bank of Breckenridge, Texas, dated January 20, 1943, and payable to the order of the Crazy Water Hotel Company. On the face of the check, above the signature of accused, there was a printed statement which read: "For Value Received. I give this check and hereby certify that I have sufficient funds on deposit with this bank to pay this check when presented". The accused delivered the check to the hotel clerk and received $20.00, the difference between the amount of the check and the hotel bill of accused. The check was not paid upon presentation to the bank, but was returned to the Hotel Company, marked "no account". At the time of the trial the Company had not been reimbursed. The records of the Finance Office at Camp Wolters showed that the following payments had been made to accused: January 12, 1943, $60.64; January 13, 1943, $100.00, and February 9, 1943, $218.00. (R 26-27, 33-35, Exs. N,T)

On February 4, Lieutenant Colonel A. H. Parkam, commanding officer of the 59th Infantry Training Battalion, gave accused permission to go to Fort Worth for the purpose of obtaining some money. He was due to return to duty not later than reveille on February 5. He did not return until 7:30 p.m., February 7. He had no permission or leave to be absent from February 5 to February 7 (R. 36-38, Exs. V,W).

On February 9, accused made a statement to Major Homer F. Wicker, the officer investigating the Charges after he had been informed that he did not have to make a statement at all if he did not desire to do so, and that anything he said could be used in court as evidence against him. No threats were made, or promises offered by way of coercion or inducement. This statement, reduced to writing and signed by accused was substantially as follows:

Accused joined the Texas National Guard, at Breckenridge, Texas, in May, 1940, and his organization was called to active service in November of that year. He was promoted successively to the grades of Corporal and Sergeant, and, about the middle of September, 1942, was sent to the Infantry Officers' Candidate School at Fort Benning, Georgia, where he graduated and was appointed Second Lieutenant, December 15. The Special Orders assigning him to the Infantry Replacement Training Center at Camp Wolters gave him ten days leave and travel time in which

to report. While attending officers' school, accused had received but two payment of $30.00 each. He had made an allotment to his mother, "it had gotten all mixed up in some way", and on December 14, when he was supposed to be paid, he found that he had overdrawn his pay account. However, after graduating he drew a clothing allowance of $150.00. About December 26 accused "checked in" at the Hotel Texas in Fort Worth, where he incurred a bill of $27.30 which he did not pay "at the time". He also gave the hotel a check for $25.00, dated December 27, on the First National Bank of Breckenridge. This was the check alleged in Specification 1, Charge II, as to which the finding of guilty was disapproved by the reviewing authority. In his statement accused admitted that he knew, when he drew the check, that he had no account in the drawee bank, unless his mother had opened an an account for him. She had promised to lend him some money, and to deposit it in the bank to "tide him over" until he "got started" at Camp Wolters. He hoped that she had done so, and that was why he drew the check. He left the Hotel Texas, December 28, without "formally checking out", and immediately went to the Baker Hotel in Mineral Springs. About 9:00 p.m., he registered in at Headquarters, Camp Wolters and then returned to the hotel. He had intended to report to "IRTC" the next morning, but was sick with a cold and unable to go to camp. On December 31, he went to the Station Hospital, and on January 4, left there on a pass long enough to register in at "IRTC" headquarters. He was discharged from the hospital on January 5, and was then assigned to duty with Company A, 59th Battalion (R. 44-45; Ex. X).

Accused further stated that on January 20, he was called to the office of the Adjutant of the Training Center concerning some checks which he had given, he was worried about his financial affairs, and "just took off and went to Dallas to try and borrow some money". Meeting with no success, he went on to Breckenridge where he talked with his mother, learned that she had not received her allotment, and had been unable to open the joint bank account for his use. He returned to duty the morning of January 26. While at Camp Wolters he drew $100.00 additional clothing allowance and $60.00 for travel pay, which he used to pay a bill at the Baker Hotel in Mineral Wells and for living expenses. He asserted that on the day the statement was made he was drawing his first pay voucher of $218.00 from which he would "wire" to the Hotel Texas the sum of $52.30, to pay his account in full. "As to the latest charge against me", accused stated that after receiving from Lieutenant Colonel Parkam, his battalion commander, a "VOCO" to go to Dallas, February 4, and return the next day, he had gone there to borrow from friends some money with which to pay his outstanding checks. He was a

member of the Motion Picture Operators Union, and thought that he could get money from that source. Late in the afternoon of February 5, he saw the "parties" he had in mind, including the Secretary of the Union, but to no avail. The discovery that he could not get the money, "just tore me up", and "put me down in the dumps". Accused then "got to drinking", and did not return to Camp Wolters until Sunday night, February 7 (Ex. X).

4. For the defense, Captain Ralph M. Alley, M.C., testified that on December 31, he was Assistant Chief, Medical Service, and in charge of pulmonary diseases at the Station Hospital, Camp Wolters. He examined accused at that time and found him to be suffering from nasopharyngitis, a sore throat, running nose, and a little fever. The "final diagnosis" of accused, entered on his clinical record, which was received in evidence, was "nasopharyngitis, catarahal, acute, mild". The clinical record also showed that upon entering the hospital, accused was an ambulatory patient, and that his condition was "not acutely ill, but very uncomfortable". The history of his illness, as related by accused to Captain Alley, was that about December 7, at Officers' Candidate School, accused had contracted a cold from exposure to the weather, had suffered from fever and chills, and, about eight days before entering the hospital, had eaten some shrimp salad which "got his stomach upset". However, Captain Alley found that this stomach condition had practically cleared up at the time of his examination of accused. Captain Alley did not notice that accused appeared to be distracted or disturbed in any way (R. 46-48; Def. Ex. 1).

Accused testified that he had lived in Breckenridge, Texas, since 1921, and had finished his high school course there in 1929. He worked after school hours and during the summer periods. For two or three years he worked in the projection room of a theatre. His mother had been in very poor health due to high blood pressure and a tumor on her ankle, and he had reason to believe that she would not live very long. She had undergone an operation about March 1, 1942. "The doctor had given her up. That was what caused my father's death". He had been "pretty close" to his father, and also to his mother. He joined the National Guard in May, 1940, was inducted into Federal service in November of the same year, and, after promotion to the grades of corporal and sergeant, was appointed to Officers' Candidate School. He graduated from the school at Fort Benning, December 15, 1942, and received his commission as Second Lieutenant on the same date (R. 49-51).

On December 7, accused participated in a practice "dawn attack" at Officers Candidate School. He had to get up at two o'clock in the

morning, it was raining and cold, and he had a fever. As he knew there would be a grade test on the attack problem, and it would set him back two weeks or more to miss the test, he kept on working despite his illness. He procured a bottle of aspirin and took three tablets the morning of December 7. All the time he was out, he was in the rain and cold, and although he kept on taking aspirin, he felt very ill, "like it was all I could do to get in home". After graduation, on December 15, accused was allowed ten days and travel time, a total of thirteen days, to report to Camp Wolters. He went from Fort Benning to Breckenridge to visit his mother, whom he found to be very nervous and troubled, as she knew it would be necessary for her to go "back to Dallas again". The condition of his mother caused him "considerable trouble" (R. 51-52).

Accused went from Breckenridge to Dallas, where he saw his friend Davis on the evening of his arrival. He asked Davis to cash a check for him. They had worked together in Breckenridge, and frequently borrowed money from each other. Accused did not tell Davis that he had no account in the Breckenridge bank. He "expected" to have some money there "at the time", because of an allotment of $20.00 which he had made to his mother. She had not been receiving it, and thought that it might come in a "lump sum". His mother and sister had told accused that they would deposit some money for him, and he did not know when he wrote the check whether or not he had anything in his account. When he paid for his clothes, his mother had remarked that she was sorry he had written a check for all of it, as she wished to let him have some money "for that", but, he told her, it was all right as he had $150.00 for uniforms, and he might need anything she could let him have "to get home on". He had received only two cash payments when he "left down there", his mother was "lined up" for an allotment, and he thought that possibly she had received it. When he was ready to leave, and everything was "checked up", instead of getting any money accused had to pay the Finance Officer before he could get away. He was "broke" when he left Fort Benning (R. 52-54).

After registering at headquarters, Camp Wolters, accused went back to the Baker Hotel. He was weak and sick, his stomach was upset, and he could hardly talk. He instructed the taxicab driver to wait for him. He believed that he asked a sergeant where to go, and, when the latter directed him to headquarters "IRTC" and told him where it was, accused concluded that he could not "make it", and directed the taxicab driver to take him back to the hotel. He stayed there until he went to the camp hospital on December 31. He had contracted food poisoning from eating poor food, was unable to eat anything, his chest was sore,

his throat was sore, he ached all over, and he had taken so much aspirin he felt "like my heart was going to jump out of my chest". After an examination at the hospital, he was put to bed. He stayed in the hospital until January 7 when he reported for duty to the 59th Infantry Training Battalion, to which he had been assigned. In the meantime, he had been given a two hour pass and had signed in at the "IRTC". At the time he left the hospital, accused was worried about his sister who was leaving to join her husband, about making arrangements for his mother, about his own financial difficulties, and "on top of that" he was "under the weather". He had no money and he knew that he had unpaid bills at two hotels and owed Davis $60.00. He had sent a telegram from the hospital to the Texas Hotel, promising to pay his bill about January 10. He received one letter from the Hotel directed to him at Camp Wolters, but none addressed to him at Mineral Wells. The first money he drew at Camp Wolters was a $60.00 travel allowance. He used it to pay an old hotel bill at Fort Benning, and to buy a few things. Several days later he received $100.00 additional clothing allowance, from which he paid a debt of $35.00 "to one of the boys" who was leaving for foreign duty, sent "$35 or $40" to his mother and had to buy a few things which he needed. After February 1, he was paid $218.00. He sent $75.00 to cover an account at Columbus, Georgia, paid his bill with the Hotel Texas, and his barracks and mess hall bills which "did not leave much". At the time of the trial, accused did not feel that he had fully recovered from the effects of his illness. He had not been able to do good work at Camp Wolters. He knew that his diction was not good, his entire instruction was poor, and he "just could not put it across" (R. 54-58).

On cross-examination, accused testified that his mother was 55 years of age and that she was not "in bed now". Upon leaving Fort Benning, he had about $35.00 from which he had paid $22.50 for a railroad ticket to Fort Worth. During the month of January, he received, in cash, including $20.00 from the Crazy Water Hotel Company, the total sum of $180.00, of which he applied on bills at Camp Wolters only $4.50 "at the Battalion", and $28.00 for mess (R. 60-62; Def. Ex. 1).

When recalled as a witness for the defense, J. H. Davis testified that on December 22 accused appeared to be disturbed or distracted. He seemed to be "flighty" when Davis talked to him. Davis asked what was the matter, and accused replied that he would tell him some time (R. 65).

5. Charge III: According to the undisputed evidence accused upon his graduation from Officers' Candidate School at Fort Benning, Georgia,

was assigned to the Infantry Replacement Training Center at Camp Wolters, Texas, by special orders, dated December 15, 1942, which allowed him thirteen days, including travel time, to report for duty. He signed the Officers' Register at Camp Wolters on December 28, but did not report to his organization until January 4. He was absent without leave during the period December 29 to December 31, 1942, as alleged in Specification 1, Charge III. Accused testified that, on December 7, during a practice dawn attack, at Fort Benning, he had contracted a bad cold, subsequently had been poisoned by bad food, and, immediately after signing the Officers' Register, on December 28, had to return to his hotel, where he stayed continuously until he went to the hospital on December 31. This testimony, as to his physical condition prior to December 31, was wholly uncorroborated. Captain Ralph M. Alley, M.C., a defense witness, testified that, upon his admission to the hospital, accused was suffering from nasopharyngitis, a sore throat, running nose and a little fever. His clinical record, Defense Exhibit 1, shows that accused came to the hospital as an ambulatory patient and although very uncomfortable, was not acutely ill. There is nothing in the record to excuse his failure to report to the Infantry Replacement Training Center during the period December 29 to 31, inclusive.

The evidence further shows that accused absented himself without leave from his organization, Company A, 59th Infantry Training Battalion from January 20 to January 26 as alleged in Specification 2, Charge III and from February 5 to February 7, as alleged in Specification 3, Charge III. As a witness at the trial, accused offered no excuse as to either occasion. In the sworn statement, made to the investigating officer on February 9, he stated that on January 20, when he was worried about financial affairs, he "just took off", and went to Dallas to try to borrow some money. In the same statement he explained that on a "VOCO" from his battalion commander, which required him to return to duty on February 5, he had gone to Dallas February 4 to borrow money from friends, his lack of success had put him "down in the dumps", he "got to drinking" and failed to return to Camp until February 7.

6. Charge II: It also appears from the evidence that, as set forth in Specification 4, Charge II, accused, on December 22, 1942, at Dallas, Texas, uttered and passed to J. H. Davis, a check in the amount of $20.00 drawn on the First National Bank of Breckenridge. He falsely represented to Davis that he had funds in the bank to pay the check. Under similar circumstances, accused passed two other checks to Davis, each in the amount of $20.00 and drawn on the same bank, one on December 23, as alleged in Specification 5, Charge II, and the other on December 26, as alleged in Specification 6, Charge II. Accused received the face

amount of each of the three checks in cash and none of them was paid upon presentation to the drawee bank. Accused testified that he had made a $20.00 allotment to his mother, which she had not been getting but expected to receive in a "lump sum", and both his mother and his sister had told him that they would deposit some money for him. He did not claim that either of them had promised to make a deposit, in any specific amount, at any particular time. The first of the three checks to Davis was cashed the evening of the day accused arrived in Dallas, and he had come there directly from Breckenridge, where he had visited with his mother and sister. He knew, or reasonably should have known, when he left Breckenridge, whether they had opened an account for him in the bank.

On January 20, as alleged in Specification 3, Charge II, accused drew a check in the amount of $24.00 on the Breckenridge bank, and passed it to the Crazy Water Hotel Company at Mineral Wells, Texas. The check was given to cover a hotel bill of $4.00 and an advance of $20.00 in cash. Accused had no funds in the bank and the check was not paid. He offered no excuse or explanation for that particular transaction, either in his sworn statement to the investigating officer or in his testimony at the trial. Accused must have known when he gave the check to the Crazy Water Hotel Company that the Breckenridge bank had been refusing payment of his checks, because he testified that on January 7 he was aware he "owed Davis $60.00."

Accused had no checking account in the Breckenridge bank at any time between January 1, 1942 and March 5, 1943. In uttering each of the four checks mentioned above, he made an express representation that he had sufficient funds in the bank to pay the check upon its presentation, a representation which he knew to be false. His explanation that he expected his mother or sister to deposit some money to his account is far from convincing. Had he been acting in good faith he would not have cashed four checks, each in a substantial amount, and on a different date, over a period of approximately a month, without making some inquiry to definitely ascertain whether any deposit had been made for him and, if so, in what amount. Considering all the circumstances of the case the Board of Review is of the opinion that the record establishes beyond any reasonable doubt that the transactions concerning these four checks were fraudulent, that the checks were uttered with knowledge and intent as alleged, and that the conduct of accused with respect to them was in violation of the 95th Article of War (CM 200248 Briggs; CM 219428 Williams; CM 228. 394 Jarbeck).

Concerning Specification 2, Charge II, it appears that on December 28, after staying as a guest at the Hotel Texas in Fort Worth for three days, accused left without notifying any of the hotel employees of his departure, and without paying his bill of $27.30. No credit had been extended to him. On January 1, he sent a telegram to the hotel promising to pay the account on January 10. He did not pay it until February 9, after it had been brought to the attention of his commanding officer by the Credit Manager of the hotel. Accused received, from all sources, $180.00 during the month of January.

Neglect to pay debts does not violate the 95th Article of War unless the attendant circumstances are such as to make such neglect dishonorable (par. 151 M.C.M. 1928). Failure to discharge a financial obligation is dishonorable and constitutes conduct unbecoming an officer and a gentleman, if it is characterized by fraud, deceit, evasion, and false promises and is of such a nature as to bring dishonor upon the military service (Winthrop's Military Law and Precedents, Reprint, Footnote 42, p. 715; CM 213993 Casseday; CM 218970 Hendrickson).

When a person registers as a transient guest at a hotel, credit is not extended to him in the ordinary sense. The hotel management merely grants him the courtesy of deferring payment for his accommodations until the time of his departure. In accordance with what is known to be an almost universal custom, such a guest tacitly represents that he is financially able to pay for his lodging and will do so at the proper time. In the instant case, when he became a guest of the Hotel Texas, accused may be considered to have made such representations. They proved to be false. His action in surreptitiously leaving the hotel without paying his bill was deliberately evasive and deceitful. He failed to keep his subsequent promise to pay the bill within a specified period of time. In the opinion of the Board of Review, the course of conduct of accused with respect to his hotel bill was below the minimum standard to be expected of an officer and constituted a violation of the 95th Article of War.

The record shows that at the time of the trial the bill of the Hotel Texas had been paid by accused but restitution had not been made of the sums covered by the checks to Davis and to the Crazy Water Hotel Company.

6. The accused is 32 years of age. The records of The Adjutant General show his service as follows: Enlisted service from November 25, 1940; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School and active duty, December 15, 1942.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the approved findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violation of Article of War 61 and is mandatory upon conviction of violation of Article of War 95.

Curtis S. Hall, Judge Advocate.

Samuel M. Driver, Judge Advocate.

F. J. Lotterhos, Judge Advocate.

1st Ind.

War Department, J.A.G.O., MAY 20 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Kenneth L. Koford (0-1304320), Infantry.

2. I concur in the opinion of the Board of Review 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 accused absented himself without leave for two days, again for six days, and again for two days, in violation of the 61st Article of War, signed and uttered four checks aggregating $84 with intent to defraud, without having or intending to have sufficient funds in the bank for payment thereof, and dishonorably failed and neglected to pay a debt, consisting of a hotel bill of $27.30, all in violation of the 95th Article of War. All of these offenses were committed within two months after the graduation of accused from Officers' Candidate School. I recommend that the sentence to dismissal be confirmed and carried into execution.

3. Inclosed herewith are the draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action, carrying into effect the recommendation made above.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
1- Record of trial
2- Draft of letter for Sig. Secretary of War.
3- Form of Action

(Sentence confirmed. G.C.M.O. 128, 29 Jun 1943)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGQ
CM 232925

MAY 24 1943

UNITED STATES v. First Lieutenant EDWARD J. STENGLE (0-414750), Field Artillery.	40TH INFANTRY DIVISION Trial by G.C.M., convened at Wailuku, Maui, Territory of Hawaii, February 16, 25 and 26, 1943. Dismissal, total forfeitures and two (2) years confinement.

OPINION of the BOARD OF REVIEW
ROUNDS, LYON and FREDERICK, Judge Advocates.

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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 Judge Advocate General.

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

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

Specification 1: In that 1st Lt. Edward J. Stengle, Service Battery, 226th Field Artillery Battalion, having received a lawful command from Captain Clifford L. Schallmo, Service Battery, 226th Field Artillery Battalion, his superior officer, "To go to his quarters," did, at Maui, T.H. on or about January 30, 1943, willfully disobey the same.

Specification 2: (Finding of not guilty.)

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

Specification 1: In that 1st Lt. Edward J. Stengle, Service Battery, 226th Field Artillery Battalion, did at the Officers' Club, Maui, T.H., on or about January 30, 1943, with intent to do bodily harm, commit an assault upon 2nd Lt. William T. Glab, Service Battery, 226th Field Artillery Battalion, by pulling him from the car in which he was sitting and strike him with his hand.

Specification 2: In that 1st Lt. Edward J. Stengle, Service Battery, 226th Field Artillery Battalion, did at Wailuku, Maui, T.H., on or about December 5, 1942, with intent to do bodily harm, commit

an assault upon Miss Theresa Parmelee by threatening her with a dangerous weapon to wit, his service pistol, by holding it against her person and threatening to shoot her.

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

Specification 1: (Finding of not guilty.)

Specification 2: In that 1st Lt. Edward J. Stengle, Service Battery, 226th Field Artillery Battalion, did at Wailuku, Maui, T.H., on or about December 5, 1942, conduct himself in a manner unbecoming an officer and a gentleman by being drunk and disorderly in the home of Miss Theresa Parmelee, while in uniform.

Specification 3: In that 1st Lt. Edward J. Stengle, Service Battery, 226th Field Artillery Battalion, did at the Officers' Club, a public place, Maui, T. H., conduct himself in a manner unbecomming an officer and a gentleman, on or about January 30, 1943, to wit, drunk and disorderly while in uniform.

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

Specification 1: In that 1st Lt. Edward J. Stengle, Service Battery, 226th Field Artillery Battalion, having received a lawful order from Commander W. J. Hart, Retired, United States Navy, Section Base, Kahului, Maui, T.H., to get in his car, the said Commander W.J. Hart, being in execution of his office, did at the Officers' Club, Maui, T.H., on or about January 30, 1943, fail to obey the same.

Specification 2: (Finding of not guilty.)

He pleaded not guilty to all the Charges and Specifications and was found guilty of Charge I and Specification 1 thereunder; of Charge II and Specifications 1 and 2 thereunder; of Charge III and Specifications 2 and 3 thereunder; and of Charge IV and Specification 1 thereunder; and not guilty of Specification 2, Charge I; of Specification 1, Charge III and of Specification 2, Charge IV. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for two (2) years. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The offenses of which the accused was found guilty were committed on two separate occasions, eight weeks apart. The first incident occurred at the home of Theresa Parmelee in Wailuku, Maui, on December 5, 1942, where he was drunk and disorderly in uniform (Specification 2, Charge II) and assaulted Miss Parmelee with a service

pistol with intent to do her bodily harm (Specification 2, Charge III).

The second incident occurred on the night of January 30, 1943, at or near the Valley Isle Country Club, Maui, T.H., and involves willful disobedience of the lawful order of his superior officer (his battery commander) (Specification 1, Charge I); assault with intent to do bodily harm on another officer, (Lieutenant Glab) (Specification 1, Charge II); drunk and disorderly in uniform (Specification 3, Charge III) and failure to obey the lawful order of an officer (Commander Hart) who was then in the execution of his office (Specification 1, Charge IV).

4. The competent evidence of record as to each wrongful act alleged to have occurred on these two different occasions is set forth in two separate narratives in chronological sequence as follows.

On December 5, 1942, about 1:30 p.m., (R. 11), accused dressed in regulation uniform (R. 84), came into the back yard of the house in which Theresa Parmelee lived at the corner of Welles and Market Streets, Wailuku. He "had on his field dress—gun and everything" (R. 28). She greeted him but did not ask him to remain (R. 11). She had asked him to call at her home before (R. 15) but she had not invited him to her home on that particular day. She first knew Lieutenant Stengle in July or August and had accepted dates with him previous to this time (R. 4), but lost interest in him about the latter part of November when she found out that he was married and because of his behavior, his jealousy and the fact that he was drinking a little too much (R. 25). About 15 minutes after his arrival he followed her from the yard into the house (R. 10, 11) and there joined her step-grandfather, Mr. Bal, in the kitchen. About 2:30 p.m. he brought out and opened a new quart bottle of White Label Scotch liquor (R. 12, 29, 38). Accused opened the bottle, had four "jiggers" right then (R. 29). After having one drink with him, Mr. Bal left the kitchen, went to his own room (R. 30) but he came back about 3 o'clock, at which time there was about 2½ inches of liquor left in the bottle (R. 30, 38). At that time Stengle was in the kitchen drinking with a Mr. Keisel (Miss Parmelee's uncle, R. 76) who had come home from the afternoon show (R. 38, 41). Keisel spent about an hour and a half with Stengle in the kitchen, during which time he (Keisel) had only four drinks. How many Stengle had he could not say (R. 40, 41). Sometime around 4:30 or 5 o'clock, just before dinner, Mr. Keisel saw that the bottle was empty and the accused "seemed all right" (R. 43). Miss Parmelee states that the family, consisting of her grandfather, grandmother, Mr. Keisel, her little daughter and herself, had dinner about 5:30 or 6 o'clock. At that time the accused was lying down on the couch in the lanai (porch) seemingly asleep (R. 13) and in her opinion he was "very much intoxicated". She shook him to wake him up and invited him to have dinner with them but he refused (R. 13). She noticed the liquor bottle after dinner and it was empty (R. 13). Mrs. Bal, who was outside the house most of the afternoon, testified that accused was "all right" about 3:30 or 4 o'clock when they began to cook the dinner (R. 36). After dinner and about 7 p.m. Miss

Parmelee returned from taking her daughter out for a walk. She was approached by Lieutenant Stengle as she entered the living room and was accused by him of going out to meet someone. She paid no attention to him (R. 14) because he seemed to still be under the influence of liquor and she put her little girl to bed (R. 15-21). Immediately thereafter when she was walking from her bedroom into the dining room she requested Stengle to leave as it was late. Stengle came up to her, grabbed her by the arm (R. 13) and pulled her into the kitchen against her will (R. 15, 16). In her opinion, he was then under the influence of liquor. He could not walk straight, he backed into chairs (R. 22), and he staggered and swayed (R. 23). He had his gun in his hand and cornered her against the icebox. He placed the gun against her left side and said he would shoot her "and if he did shoot me I would make a very unpleasant sight on the floor". He kept the gun placed against her left side (R. 16). While it left no marks or bruises on her body, it hurt her for a couple or three days after that. The light was dim and a person in front of you could be seen. She could see the gun against her and she felt it with her hand when she pushed it aside. Her back was up against the icebox and she was in such a position that she could not move or get away from him. She was forced back up against the icebox for a period of perhaps five minutes (R. 16). Miss Parmelee testified that Stengle "did not seem to be so intoxicated then; he seemed to be sobered up somewhat", but not entirely so. Finally she got away from him without any assistance, ran into her own room and from there to Mr. Keisel's room where she told him what Stengle had done. Mr. Keisel told her to keep out of his way. She returned to her own room and was there probably a minute or so when Stengle came in there with his gun in his hand and spoke to her. She asked him to put his gun away and to leave. He asked her to go out into the back yard. After a period of about 15 minutes or half an hour, she agreed to go, thinking that he might go on home. She started to go down the back stairs, suddenly became frightened because she did not know what he planned to do. He had hold of her arm. She pulled away from him and ran back into the house and he ran after her (R. 17). She first ran into her own bedroom and then into her grandmother's bedroom. While she was standing at the foot of the bed of her grandmother's room, she heard Lieutenant Stengle moving around inside the house, heard him come to her grandmother's bedroom door, heard him with his gun and knew that it was a gun "because it had a sound pertaining to metal", heard the door open which leads into the dining room from the kitchen "and then the gun went off". This was between 8:30 and 9 o'clock (R. 18, 19). After firing the pistol, Lieutenant Stengle called to Mrs. Bal, the grandmother who was screaming, and said "Granny, you must not worry, it went off by accident". He repeated that three or four times (R. 36). Shortly thereafter while Mr. Bal was in the kitchen, Stengle called to him from outside in the back yard. Bal went to the back porch and asked him to go home. Stengle insisted on seeing Mrs. Bal. He said he wanted a drink of water. He came into the kitchen, got a glass of water, waited a little while, went through the house, stood by Mrs. Bal's bedroom and left the house by the front door (R. 32), at "pretty close to 10 o'clock" (R. 31).

Testifying in his own behalf as to this incident, accused admitted that he came to Miss Parmelee's house armed with a .45 caliber

pistol. About three minutes after he came into the house, he removed the pistol from his person and put it on the couch on the lanai. He also removed the magazine from the chamber of the pistol, put the clip in his pocket, and the pistol back in its holster. From then on until he left the house he did not pick up the pistol again except once when he was sitting on the couch about an hour and a half after he arrived. A little girl of about two came in and sat beside him. She had her knee near the pistol so he removed it from the couch and "put it down directly at the bottom of the couch". The pistol was in its holster. At no time during that afternoon or evening did he threaten Miss Parmelee with his pistol (R. 79). When the gun went off, he was standing in the house very close to the lanai couch. "It was too dark to see". He had withdrawn the gun from the holster and while holding it in his right hand he was inserting the clip in the chamber. Immediately after insertion, the gun discharged. The slide was not drawn back when he inserted the clip (R. 84).

On January 30, 1943 accused arrived at the Officers' Club (Valley Isle Officers' Club, Maui, T.H., R. 2, 4, 45), had his first drink about three minutes thereafter, and had about six or eight drinks while there (R. 83). About 7:30 p.m. (R. 45) accused was outside the club building beside Captain Markland's private car, which was parked in the circle in the driveway just outside the building (R. 47, 51, 52). He was standing outside of the car on the right-hand side talking to Mrs. (Mildred) Green through the window. She occupied the front seat on the right side of the car and a Lieutenant Glab was seated on the left front seat beside her (R. 46). Accused came around to the left side of the car, opened the car door, and Lieutenant Glab fell to the running board, and then accused shoved him into the ground with his open hands (R. 46, 47, 48, 60). He fell on his back. Accused stood over him and said, "Now, get up and fight" (R. 50). Glab got up and they went into a clinch (R. 50). Lieutenant Glab believes that Stengle was "rather drunk at the time". When the fight ended Stengle was on his hands and knees and Glab was on his left side holding his arms. Stengle was dressed in the regular sun-tan uniform (R. 56). Private First Class Walter Hadlock, District Headquarters, witnessed the fight from a car in which he was sitting, parked about 15 to 18 feet behind Captain Markland's car (R. 52). It was about dusk (R. 53). He saw Lieutenant Stengle withdraw his left arm from the window, open the door of the car with his right hand, grab Lieutenant Glab, pull him out on the ground and hit him with his fist or open hand when Glab was coming out of the car (R. 52). They were both down on the ground but Lieutenant Glab got up once and Stengle started to get up. He saw Lieutenant Glab on top of Stengle during the fight holding him down with his hands. During the fight Stengle told Glab to wait until he got his breath and he would "kick the shit out of him" and he called Glab "a yellow-bellied son of a bitch" (R. 53). In Hadlock's opinion, Lieutenant Stengle was obviously drunk at that time, his voice was thick and heavy (R. 53, 54). As a witness in his own behalf as to this incident accused testified that when he opened the door of the car something hit him on the forehead close to his nose and he recognized Glab. He put his

hand out to prevent himself from being hit. Then Glab landed on him "with his back". He was struck four or five blows on the face and head while on his back (R. 81). Until the time the door of the car opened his mind was "perfectly clear and coherent" (R. 82). Captain Clifford L. Schallmo came over from the club house to the scene of the fight, got hold of Lieutenant Stengle, and ordered him to get into a quarter-ton vehicle which was standing in front of the door of the club. Stengle got in and Captain Schallmo ordered him to stay in the vehicle (R. 58).

The vehicle had proceeded about 20 yards (R. 57,73) when Captain Schallmo looked back and saw Stengle was out and on the road running back towards the flower patch in front of the club (R. 85). Accused testified that he fell out of the vehicle over the back while changing his seat (R. 83) and while taking off "a gas mask or gun" the car jerked (R. 81). He fell on the concrete on the left side of his body but the fall left no bruises and he did not make a report to the regimental surgeon (R. 83, 84). The Captain chased after him and threatened to hit him with his gun if he did not get back in the car. Stengle said "I don't want to fight with you, Captain, I want to get Glab" (R. 57). He then broke away from Captain Schallmo "again" and the latter told a Lieutenant Cameron standing nearby to "grab hold of him and put him back in the vehicle". Stengle backed away from both of them and said "I'll take you one at a time". At that moment Glab hit him with a running tackle and they were on the ground fighting again (R. 47, 57, 58). Captain Schallmo interrupted the fight and ordered Stengle to get back in the car (R. 58, 64). Stengle said "I want to get Glab" and did not obey the order (R. 59). Just at that moment Commander William J. Hart, Jr., U.S.N., arrived on the scene (R. 68), saw Stengle and Captain Schallmo "struggling in the drive - around at the entrance to the Valley Isle Club, told them who he was, to stop fighting and ordered Stengle to get in the jeep and to leave the grounds of the club" (R. 69). Stengle got in the jeep, sat there and talked with Commander Hart about five minutes and then the car drove off with Captain Schallmo and the driver, but Stengle did not "leave the grounds" of the Officers' Club (R. 69). Stengle had told Commander Hart he had left his glasses. He also told Captain Schallmo that he was missing a package containing a bottle of rum which he had under his shirt (R. 81-84). Commander Hart went to the entrance of the club and requested a waitress to look for them. When Hart turned around he saw Stengle struggling with Captain Schallmo while six or eight Army officers and a few non-commissioned officers looked on (R. 70, 71). To Hart it looked like a fight but he later learned Schallmo was trying to get Stengle back in the jeep. Commander Hart then gave an order to all the officers and non-commissioned officers there present to force Stengle into the car. Stengle was knocked down, eagle-spread on the ground, held there about a minute and two or three officers helped hoist him in the car (R. 70). He resisted with all his force. It required eight officers to assist (R. 71). They drove away from the club about 8:00 p.m. (R. 59). Captain Schallmo testified that Stengle "was under the influence of liquor all evening, but not to the extent that he was drunk". (R. 67)

From the club Captain Schallmo drove Stengle to his area and told him to go to his quarters (R. 60). Between 9 and 10 o'clock that evening while playing cards at a battery party with two warrant officers and a staff sergeant, he heard talking close to his quarters and the click of metal--like the noise made when the slide of an automatic is pushed forward. He went out on the porch and saw Stengle walking up the path. He asked Stengle to come up on the porch and let him see his gun. Stengle said "Is that an order"? Schallmo said "Yes". When he came inside in the presence of the two warrant officers and the sergeant, Schallmo said to him "Stengle, go to your quarters until you hear from me". Stengle replied, "What right have you got to give me an order? I refuse to go"! He did not obey the order (R. 60-61). Twenty minutes to half an hour later he was still there and received a phone call from the Chaplain. Stengle did not go to his own quarters until 20 or 30 minutes after this phone call (R. 61-62).

As a voluntary witness in his own behalf Stengle testified that (after the second fight with Lieutenant Glab took place) he has no knowledge of having any discussion with, or receiving any orders from, Captain Schallmo or Commander Hart or even of getting in the jeep (R. 81). He did hear a voice saying "I am the senior officer present, this is Commander Hart", and Hart did tell him to get in the car and go home. Stengle asked to stay and see Glab but Commander Hart refused saying "No, get in your car and go home" (R. 81). He next remembers "being up in the area and eating a very large hamburger in the kitchen", twice calling Lieutenant Glab, and seeing Captain Shallmo, who ordered him to his quarters. He also remembers the Captain asking him for his weapon. His reason for refusing to go to his quarters when told was that he went to Captain Schallmo to get him to either bring him (Stengle) over to the District or get the Colonel or somebody who could straighten out this mess (R. 82). He was not aware that a legal order had been given him (R. 83).

5. Jurisdiction - Accused is a member of the 226th Field Artillery Battalion, which organization was stationed at the time of this trial (February, 1943) on the island of Maui, T.H., and a part of the Maui District. By par. 1, G.O. 189, Headquarters, Hawaiian Department, dated December 13, 1943, the Maui District was placed under the jurisdictional control of the 40th Infantry Division for general court martial purposes only.

6. Irregularities - Although the Manual for Courts-Martial (p. 44, par. 58a) provides that a court martial "shall not receive a challenge to more than one member at a time", this court simultaneously received and, in closed session, sustained a defense challenge, based on identical cause, to three of its eight members. (R. 4) No substantial rights of the accused were injuriously affected thereby (Article of War 37).

It is noted that the court, at the request of the prosecution and with the approval of the defense, in open court, and before

the pleas, amended Specification 1 of Charge IV by adding the words "and go back to his quarters" immediately following the words "to get in his car", and directed the trial to proceed upon the Charge and Specification as amended (R. 7). This amending action did not result in a substantial change in any or all of the essential elements of the offense as originally charged or allege a wholly different offense or one not a lesser and included offense (par. 428 (8) Dig. Ops. JAG 1912-40). Such amendment did not affect the substantial rights of accused (Article of War 37).

7. The competent evidence as to Charge II, Specification 2 and Charge III, Specification 2, clearly pictures an attempt by accused to inflict a corporal hurt on Miss Theresa Parmelee in her own home by overt acts of unlawful force and violence. He used physical violence in pulling her into the kitchen against her will. He cornered her with her back to a refrigerator, so that she could neither retreat further nor escape, and jammed his .45 caliber automatic pistol into her left side so hard it hurt for several days thereafter, and then and there threatened to shoot her. He held her thus at the point of his pistol and forced her back up against the ice box for a few minutes, "perhaps five minutes or so". Any lack of resistance on her part at the moment is logically attributable to her reasonable fear of great bodily injury or death in the face of such a demonstration of violence coupled with obvious ability to carry out his threat to shoot to kill. There were no other witnesses to this occurrence. Accused testified that at no time during that afternoon or evening while he was in Miss Parmelee's house did he threaten her with his pistol (R. 79). Miss Parmelee, however, when she finally broke away from accused reported to her uncle, Mr. Keisel, who was asleep in a nearby bedroom that accused had threatened her with a pistol and Keisel, as a witness, corroborated her assertion. The Board of Review is of the opinion that witness Parmelee's testimony as to this occurrence is worthy of full credence. The only element of this assault concerning which there can be any question as to the legal sufficiency of the evidence of record to sustain is that of specific intent. Does the evidence legally justify the conclusion that accused had the mental capacity willfully and intentionally to do bodily harm, or do such circumstances and testimony of accused's drinking as are in evidence negative that conclusion?

The Manual for Courts-Martial provides, in pertinent part,

> "In certain offenses * * * a specific intent is a necessary element. In such a case the specific intent must be established either by independent evidence, as, for example, words proved to have been used by the offender or by inference from the act itself".

And again,

> "It is a general rule of law that voluntary drunkenness, whether caused by liquors or drugs, is not an excuse for

crime committed while in that condition; but it may be considered as affecting mental capacity to entertain a specific intent, where such intent is a necessary element of the offense". (par. 126a, M.C.M.) (253)

The evidence discloses accused entered Miss Parmelee's house between 1:30 and 2:00 p.m. His assault on her took place about six hours later, or 7:30 p.m. He had four "jiggers" of Scotch whiskey about 2:00 p.m. with Mr. Bal, who had only one and left. About 3:00 p.m., when Mr. Bal next saw accused drinking with Mr. Keisel he was drunk (R. 32, 33), his voice did not sound natural. Mrs. Bal testified he "seemed to be all right" to her between 3:30 and 4:00 p.m. when she began to cook dinner (R. 36). He seemed all right all afternoon and she did not see him fall down or stumble over any furniture (R. 37). Mr. Keisel, who drank with accused in the kitchen for about an hour and a half, from about 3:00 to 4:30 p.m., during which time Keisel had only four drinks and does not know how many accused had, testified as to accused's sobriety that just before dinner, around 4:30 or 5:00 p.m., accused "seemed all right" (R. 43), and that during that entire period accused was "normal" (R. 44). Miss Parmelee testified that about 5:30 or 6:00 p.m. accused was asleep on a couch and when she awakened him "he was very much intoxicated" (R. 14); when she returned from a walk with her child about 7:00 p.m. "he still seemed to be under the influence of liquor" (R. 15) and when he attacked her with the gun at 7:30 p.m. "he did not seem to be so intoxicated then; he seemed to be sobered up somewhat" - but not "entirely sober" (R. 19). She could not say "his talking did not make sense, but he was under the influence of liquor" (R. 23).

"Intent is the purpose to use a particular means to effect a certain definite result" (People v. Molineux, 61 N.E. (N. Y.) 256; Baker v. State, 97 N.W. (Wis.) 566). If one does an act intentionally his mind adverts to what he is doing and by an act of the will he effects what he desires. Drunkenness is a defense only where it negatives a specific intent and the burden of proof is upon the accused to prove that his state of drunkenness at the time was such as to prevent his forming the design to commit the offense. In this case the accused flatly denies that the alleged assault on Miss Parmelee ever took place (R. 79). Neither his testimony in his own behalf nor the theory of his defense contemplates advancing complete loss of mental capacity due to drunkenness as an excuse for his assault. Accused's words and acts fail to rebut the ordinary legal presumption that he intended the natural and probable consequence of his acts. Physically he could stand, move, speak, and rationally plan his actions. In a house full of her relatives he forced Miss Parmelee into the room furtherest away from the sight and hearing of her family and the public on the street to commit the assault. As to this offense, the Board, in scrutinizing the proof and the basis of inferences from accused's actions, finds no compelling evidence that accused was so drunk at the time of the assault that mentally he was incapable of entertaining the specific intent to do her bodily harm.

As to Specification 2, Charge III, the evidence is clear and conclusive that accused was both drunk and disorderly in Miss Parmelee's home on December 5, 1942. The Manual for Courts-Martial provides in pertinent part as to Article of War 95,

"This article includes acts made punishable by any other Article of War, provided such acts amount to conduct unbecoming an officer and a gentleman; thus, an officer who embezzles military property violates both this and the preceding article" (par. 151, p. 186).

It requires no further argument or additional evidence than that set forth above relative to the assault with intent to do bodily harm, described in detail in the preceding discussion as to the offense charged in Specification 2 of Charge II, to find that the same act also constitutes such disorderly conduct as unbecomes an officer and a gentleman. Further acts of disorderly conduct were committed when he entered Miss Parmelee's room, gun in hand, after the assault in the kitchen and his refusal to put his gun away and leave the house at her request (R. 17).

The evidence of record as to Specification 1 of Charge II is legally sufficient to sustain only a finding of guilty of the lesser included offense of assault and battery in violation of the 96th Article of War. Intent to do bodily harm is not proven. Private Hadlock testified accused opened the car door, "pulled or shoved" Lieutenant Glab out of the car onto the ground and struck him with "his fist or open hand", corroborating Lieutenant Glab, that when Stengle opened the car door, accused gave him a shove and he went down (R. 46-48). Accused admits he "opened up the door", following which Glab fell on him and struck him (R. 80-81). He contends he became embarrassed by the attentions of Mrs. Green, stepped around the car to avoid her and to work on the ignition (R. 80). As to his mental capacity, accused testified that "up until the door of the car opened I was perfectly clear and coherent" (R. 82). Private Hadlock believed accused was drunk because his voice was thick and heavy and his words "more or less run together"(R. 53-55). Captain Schallmo, his battery commander, testified that when he separated accused from Lieutenant Glab, accused "had been drinking, but I don't think he was drunk" (R. 67). This same circumstance, engaging in an unseemly broil in public in the presence of a lady and enlisted men and using vulgar and obscene language, is conduct unbecoming an officer and a gentleman (Winthrop, 1920 reprint, p. 718; CM 22747 (1943)). Not only this first fist fight but also the circumstances as to the second fight, which occurred within a few minutes after the first and in front of the club, are sufficient, although merely cumulative, to sustain the findings as to Specification 3 of Charge III.

The evidence as to Specification 1 of Charge I is legally sufficient to support the finding. The lawful order of Captain Schallmo,

who was then the accused's battery commander and in the execution of his office, was clear and specific. At the moment, although accused's actions plainly show that he had control of his mental faculties, he expressly refused to obey the order, doing so not only willfully and intentionally, but in words which both questioned and defied the Captain's military authority. Accused admitted getting Captain Schallmo's order to go to his quarters but is uncertain whether or not he obeyed it (R. 82). The accused's refusal was a direct and flagrant act of disobedience.

The evidence of record as to Specification 1 of Charge IV is legally insufficient to support the findings. Although Commander Hart did not know it at the time he ordered accused to get in his car and leave the grounds of the club with his company commander, Captain Schallmo also had just previously given accused an order to get back in the car again, and was struggling with him and seeking the aid of a bystander to enforce the order (R. 59). Captain Schallmo testified accused did obey Commander Hart's order (R. 63) to get in his car, and Commander Hart agrees that accused obeyed his order except that he did not leave the grounds of the club (R. 69). In view of the confusion due to the two fist fights, his excited and angry condition, and the fact that accused was receiving orders from two officers at about the same time, there is a reasonable doubt as to accused's failure to obey the order in question, because eventually he did leave the club grounds about 8:00 p.m. (R. 59) in Captain Schallmo's car, was driven to his battalion area, apparently let out and told to go to his quarters (R. 60), which he did.

8. War Department records show accused is 29 years of age. He served one enlistment as a private and private first class from March 28, 1932 to March 27, 1938 in the 105th Field Artillery (National Guard, New York) and re-enlisted April 28, 1938. On October 15, 1940 he was inducted into the Federal service. He was honorably discharged at the termination of that enlistment, April 27, 1941, as a corporal, and appointed as an officer candidate in the temporary grade of second lieutenant, Field Artillery, Army of the United States, on April 29, 1941. He was promoted to the grade of first lieutenant (Army of the United States, National Guard, New York) on September 29, 1942. He graduated from a vocational high school in 1929 after three years' attendance and had one year of college at American College. In civil life he is a self-employed salesman of automobile tools and parts. He is married and has a son, born September 5, 1942.

9. Clemency - Attached to the record of trial is a letter from the Commanding General, Maui District, Makawao, Maui, T.H., Brigadier General R. E. Mittelstaedt, who recommends reduction of the sentence to dismissal only on the grounds that such a sentence would be adequate punishment and if accused had had a stronger battery commander he would not have found himself in his present difficulties.

10. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is not legally sufficient to support the findings of guilty of Specification 1, Charge IV, and of Charge IV and legally sufficient to support only so much of the findings as to Specification 1 of Charge II, as finds the accused guilty of the lesser included offense of assault and battery on Lieutenant Glab at the time and place, and in the manner alleged, in violation of the 96th Article of War. The record of trial is legally sufficient to support the findings of guilty of Charge I and the Specification thereunder, of Specification 2 of Charge II, and of Charge II, and of Specifications 2 and 3 of Charge III, and of Charge III, and the sentence and to warrant confirmation thereof. A sentence of dismissal and such other punishment as the court-martial may direct is authorized upon conviction of violation of Articles of War 64 or 93, and is mandatory upon conviction of violation of Article of War 95.

William A. Rounds Col J.A., Judge Advocate.

Percy E. Glass, Judge Advocate.

Herbert B. Fredericks, Judge Advocate.

1st Ind.

War Department, J.A.G.O., MAY 31 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Edward J. Stengle (0-414750), Field Artillery.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Charge IV and Specification 1 thereunder, legally sufficient to support only so much of the finding of guilty of Specification 1, Charge II, as involves a finding of guilty of assault and battery, in violation of Article of War 96, legally sufficient to support the findings of guilty of Charge I and its Specification, of Charge II and Specification 2 thereunder, and of Charge III and Specifications 2 and 3 thereunder, and legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the findings of guilty of Charge IV and Specification 1 thereunder be disapproved, that only so much of the finding of guilty of Specification 1, Charge II, be approved as involves a finding of guilty of assault and battery upon the person, in the manner and at the time and place alleged, in violation of Article of War 96, that the sentence be confirmed, that the forfeitures and confinement be remitted, and that the sentence as thus modified be carried into execution.

3. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl.1-Record of trial
Incl.2-Draft of let. for sig. Sec. of War
Incl.3-Form of action

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but forfeitures and confinement remitted. G.C.M.O. 147, 17 Jul 1943)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

APR 10 43 AM

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MAR 27 1943

UNITED STATES v. Private First Class JAMES KING (33137164), and Private ALFRED G. YATES (38063344), both of Anti-Tank Company, 364th Infantry.	WESTERN DEFENSE COMMAND Trial by G.C.M., convened at Phoenix, Arizona, February 27, 1943. As to each: Dishonorable discharge and confinement for ten (10) years. Federal Correctional Institution, Englewood, Colorado.

HOLDING by the BOARD OF REVIEW
HILL, LYON and SARGENT, Judge Advocates

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

2. Each accused was found guilty of an attempt to commit a riot, in violation of the 96th Article of War, and sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for ten years. The reviewing authority, as to each accused, approved the sentence, designated the Federal Correctional Institution, Englewood, Colorado, as the place of confinement, and forwarded the record of trial under Article of War 50½.

3. The only question requiring consideration is the designation of a Federal Correctional institution as the place of confinement.

Confinement in a penitentiary in this case is not authorized under the 42nd Article of War. The offense of attempt to commit a riot is not punishable by confinement for more than one year by any statute of the United States excepting section 289, Penal Code of the United States, of general application within the continental United States nor by law of the District of Columbia (see CM 192456, Ciambrone; CM 196922, Killalea).

4. There is no maximum limit of punishment for attempting to

commit a riot, in violation of the 96th Article of War; nor for the offense of committing a riot, in violation of the 89th Article of War, under which the offense is punishable as a court-martial may direct (par. 104c, M.C.M., 1928; AW 89).

5. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years in a place other than a penitentiary, Federal correctional institution, or reformatory.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGH
CM 232961 1st Ind.

War Department, J.A.G.O., MAR 30 1943 - To the Commanding General, Western Defense Command, Presidio of San Francisco, California.

1. In the case of Private First Class James King (33137164), and Private Alfred G. Yates (38063344), both of Anti-Tank Company, 364th Infantry, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support, as to each accused, only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for ten years in a place other than a penitentiary, Federal correctional institution, or reformatory, which holding is hereby approved. Upon designation of a place of confinement other than a penitentiary, Federal correctional institution, or reformatory, you will have authority to order the execution of the sentence of each accused.

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

(CM 232961).

JA

E. C. McNeil,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGK
CM 232968

12 JUN 1943

UNITED STATES	NINTH U. S. AIR FORCE
v.	Trial by G.C.M., convened at Cairo, Egypt, February 17, 18, and 19, 1943. Dismissal.
Major RUSSELL McCORMICK (0-447813), Air Corps.	

OPINION of the BOARD OF REVIEW
LYON, HILL and ANDREWS, Judge Advocates.

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

2. Accused was tried upon the following Charges and Specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Russell McCormick, Major, Air Corps, IXth Fighter Command, was, at Drew Field, Tampa, Florida, U.S.A., on or about October 28, 1942, grossly drunk and conspicuously disorderly, while in uniform, in presence of military subordinates.

Specification 2: (Finding of not guilty).

Specification 3: In that Russell McCormick, Major, Air Corps, IXth Fighter Command, was, on board H.M.T. Dunera, at sea, on or about December 13, 1942, grossly drunk and conspicuously disorderly while in uniform in the presence of military subordinates.

Specification 4: In that Russell McCormick, Major, Air Corps, IXth Fighter Command, was, at the Cecil Hotel, Alexandria, Egypt, on or about December 26, 1942, grossly drunk and conspicuously disorderly while in uniform in a public place.

Specification 5: In that Russell McCormick, Major, Air Corps, IXth Fighter Command, was, at the Cecil Hotel,

Alexandria, Egypt, on or about December 27, 1942, grossly drunk and conspicuously disorderly while in uniform in a public place.

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

Specification 1: In that Russell (NMI) McCormick, Major, IXth Fighter Command, was, at Headquarters Ninth U.S. Air Force, Cairo, Egypt, on or about January 30, 1943, grossly drunk while in uniform in the presence of military subordinates.

Specification 2: In that Russell (NMI) McCormick, Major, IXth Fighter Command, was, at Headquarters Ninth U.S. Air Force, Cairo, Egypt, on or about January 31, 1943, grossly drunk while in uniform in the presence of military subordinates.

He pleaded not guilty to all Charges and Specifications. He was found of Specifications 1,3, and 4 of the original Charge guilty except the words "grossly" and "and conspicuously disorderly", of the excepted words not guilty; of Specification 5 of the original Charge, guilty; of Specification 2 of the original Charge, not guilty; of the original Charge, guilty as to Specification 5, as to Specifications 1, 3, and 4 not guilty but guilty of a violation of the 96th Article of War; of Specification 1 of the Additional Charge guilty except the word "grossly", of the excepted word not guilty; of Specification 2 of the Additional Charge guilty; of the Additional Charge guilty as to Specification 2, as to Specification 1 not guilty, but guilty of a violation of the 96th Article of War. 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. The evidence for the prosecution shows:

With respect to Specification 1 (Drew Field, October 28, 1942). The accused on October 28, 1942, was a member and the A-3 officer of the 9th Fighter Command, then stationed at Drew Field. The organization departed from Drew Field for overseas duty about 6 o'clock on the morning of October 28, 1942. Major Robert B. Snowden, Assistant A-2 Officer, 9th Fighter Command, saw the accused in uniform at the Officers' Club on the night of October 27. Twenty or 30 officers were present. As the organization was leaving the next morning, everyone was in "pretty spirits" and had had a few drinks (R.10,11). The accused was drunk. He was falling around the room, stumbling across chairs and reeling against the wall.

Major Snowden "delegated" First Lieutenant Raymond King Foust to take accused to the barracks. Major Snowden next saw accused at the headquarters. Numerous officers and enlisted men were present. It was then about midnight and all were preparing to leave for the train. Accused was "obviously still drunk". He fell on the floor and resented Major Snowden's assisting him in getting into his equipment. Accused assembled his A-3 officers, brought them to attention with their field packs on, and directed Lieutenant Foust to give them lessons in Judo (R.13,37). The witness again saw the accused on the march from headquarters to the train. At a point about two-thirds of the way accused fell into a ditch. After being lifted to his feet by Major Snowden "he made it to the train under his own power", but when he arrived at the loading warehouse he "went down in a heap". The officers and enlisted personnel of the three outfits were present at the station within 10 feet of accused. In the opinion of the witness accused was still drunk (R.14,16). Five other officers, Lieutenant Colonel Carlton Ketchum, First Lieutenant Raymond K. Foust, Major Walter D. Clark, First Lieutenant Henry F. Wanger, and Captain Allen A. Welkind, of the 9th Fighter Command, testified substantially as did Major Snowden with reference to the condition of accused at the Officers' Club, at the headquarters, and at the station. Colonel Ketchum stated that accused was intoxicated, unsteady in walking, and talked incoherently, that his face was flushed, and that he smelled of alcohol (R.26,28,30,33). Lieutenant Foust stated that accused took several drinks of Scotch at the Officers' Club, some drinks straight from the bottle, and that while at the club accused knocked over several glasses; "he wanted to get up once or twice, but was unable to do so". Witness, upon the suggestion of Major Snowden, induced accused to leave the club and assisted him to headquarters. Before leaving headquarters for the station, accused had witness instruct his officers in jiu jitsu. In the opinion of Lieutenant Foust accused was drunk in the club, the headquarters, and the station, but he was not grossly drunk or disorderly (R.35-39). Major Clark saw the accused at the headquarters about 1 o'clock A.M. as they were getting ready for the march to the station. Accused was intoxicated. He ordered Major Clark to call his (accused's) officers to attention for instruction in Judo by Lieutenant Foust. Witness also saw accused at the station and "he was still pretty drunk" (R. 42,43). Lieutenant Wanger stated that in his opinion accused was intoxicated at the club and at the headquarters (R.48,49). Captain Welkind, Medical Corps, saw accused at the station. Accused had vomited along one of the warehouses. "Colonel Kilborn" directed witness to see about his condition. Accused was sitting on the ground, stated that he felt terrible - "he was definitely ill". Junior officers and enlisted men were present. Witness made no test as to his sobriety, but stated that if he had seen accused drinking he would have attributed his condition to that (R.52,54).

Specification 2. Findings of not guilty.

Specification 3 (on board the H.M.T. Dunera, December 13, 1942). Upon arrival at Bombay, India, the 9th Fighter Command was given shore leave. The organization embarked from Bombay on a British transport, the Dunera. Accused was provost marshal of troops on board the transport. There was a bar on the ship in which liquor was sold from 5:30 P.M. to 7:30 P.M. On December 13, Major Snowden, because of information which he had received, went to the bar and upon entering saw accused in uniform on the far side of the room falling against the tables. Thirty to 40 junior officers were present. Major Snowden grasped the arm of accused and said, "Mac, we had better get out of here before someone sees you" (R.17). As they reached the exit accused shook himself loose, "squared off", called Major Snowden "a son of a bitch", and said he was going to kill him. At that stage of the incident Colonel Otto B. Linstad, Finance Officer of the organization, intervened and assisted accused to his state room (R.18). Colonel Linstad had been watching the progress of a game of chess in the bar or club room of the ship. He had not noticed accused until he "lurched on the floor and several junior officers attempted to assist him". Accused "pawed" them off by motions with his hands and arms. Colonel Linstad heard a conversation between accused and Major Snowden of a nature that was clearly not conducive to good order and military discipline. It progressed to a point where Colonel Linstad, being the senior officer present, felt it his duty to intervene. The witness acknowledged his signature to a written statement made by him prior to the trial in which he stated, among other things, "In my opinion, he [accused] was not grossly drunk but ungentlemanly in his conduct in the bar room by resisting with force and expression assistance proffered by other officers" (R.47). Later in the evening Colonel Ketchum went to the state room of accused. The door was open and the accused was urinating in the wash bowl. Colonel Ketchum told accused that he had better go to bed. Accused replied, "That is none of your God-damn business". Accused was insolent and disrespectful. He was incoherent in his speech. He stated that he was going to have Major Snowden and Major Clark court-martialed and added that there was a colonel to be court-martialed. After making a number of loose statements about the character of other officers on the ship, accused agreed to go to bed. In the opinion of the witness the accused was "very intoxicated". This opinion was based upon the odor of his breath, his appearance, his violence and incoherence of speech, his insolence to a superior officer, and his loose reference to the character of various other officers (R. 29). After breakfast on the following morning, Colonel Ketchum went to the stateroom of accused and demanded that he turn over his side arms. Accused was then advised that the commanding officer of troops had ordered

him relieved of duty as provost marshal. Accused was told to remain in his stateroom except for meals until Colonel Ketchum returned for a further talk with him. Between 1 and 2 o'clock that afternoon Colonel Ketchum again saw accused and reminded him of his conduct the night before and told him that he was extremely sorry but that that was the last time such conduct could be tolerated,

> "* * * I told him I was taking statements from men who had been present the night before and on other similar occasions, that I did not wish to make an official report of this conduct, and if it was not repeated I would not do so but that those statements would be locked up in the company records and detachment records and would be presented if he conducted himself that way again. He said he thought that was very fair. He had no complaint to make" (R.29,30).

When asked what comment was made by accused with reference to the happenings of the night before, Colonel Ketchum stated that accused could not recall all that had transpired. He knew that he had an argument in the lounge with Major Snowden, and that Colonel Linstad had brought him to his stateroom. He did not recall making threatening statements regarding other persons, but admitted that he might have about Major Snowden. He did not deny that he had been drunk the night before and stated that he was very sorry (R.30). In obedience to the instruction of Colonel Ketchum, Captain Welkind, Medical Corps, visited the accused in his stateroom about 9 o'clock. Accused was moderately intoxicated. He had a definite odor of alcohol. He was somewhat disoriented and made a number of statements that could not be understood (R.53).

Specification 4 (Cecil Hotel, Alexandria, Egypt, December 26, 1942). First Lieutenant George R. Steinkamp, Medical Corps, 9th Fighter Command, with several friends visited the bar in the Cecil Hotel in the early evening of December 26, 1942. Twenty or thirty people were present. Accused, in uniform, was sitting at the bar with a drink in his hand and came over and talked with one of the officers at Lieutenant Steinkamp's party. Accused was "a little unsteady on his feet, and his speech a little thick". Later accused sat on a divan that was nearby. Thereafter witness saw accused leave the bar with First Lieutenant Joe M. Biddle, Corps of Military Police. Accused was "slightly inebriated". He was not grossly drunk, was not disorderly, created no commotion, and needed no assistance (R.56,57).

As Lieutenant Biddle entered the bar of the Cecil Hotel on the evening of December 26 he saw accused asleep on a divan. The bar was

pretty well filled with officers of the allied nations. Witness approached accused and asked him if he had not had "too much" and if he should not go to his room. "He agreed" (R.58,60). Accused was not loud, discourteous, or disorderly, but in walking to his room he was unsteady on his feet and needed assistance. In the opinion of the witness accused was drunk. Lieutenant Biddle saw accused around noon the next day. He referred to the incidents of the previous evening and stated to him that it was improper for an officer to get in that condition in a public place. Accused did not deny that he was drunk the night before and stated that there would be no further trouble from him (R.57-60).

Specification 5 (Cecil Hotel, December 27, 1942). Major Snowden saw accused in the lobby and in the bar of the Cecil Hotel a little before 1 o'clock P.M. December 27, 1942. Witness saw accused take two drinks. Accused was in uniform. His face was "very red" and he "weaved" as he walked (R.19). Major Earle W. DeForest, Chemical Warfare Service, shared a room with accused in the Cecil Hotel. At approximately 12:30 P.M. on December 27 witness was in his room shaving when two British officers came to the door and stated that they had an American officer who belonged in the room. The officer referred to was accused. Accused was assisted into the room by the British officers. He was drunk. His condition was such that he needed assistance, his speech was incoherent, his face flushed, and he was unable to "propel very far under his own power". Accused went to bed. Major DeForest returned to the lavatory to finish shaving. In a few minutes he heard a "commotion in the room and the sound of a body. It seemed like the impact of a body hitting the floor" (R.62). Witness entered the room and found accused lying on his back on the floor. Accused got himself together and "crawled back to bed". Witness left the room around 12:45 P.M. and did not return until 4:30 P.M. Switching on the lights he found accused asleep, lying on his back on the floor between the bed and the wall. "There was some vomit on the floor, mixed with the vomit I believe there was some urine, although I couldn't say, not making the analysis" (R.61-63).

Specifications 1 and 2 of the Additional Charge (Headquarters 9th U.S. Air Force, Cairo, Egypt).

Specification 1. First Lieutenant James William Sweeney, Headquarters and Headquarters Squadron and Transportation Officer of the 9th U.S. Air Force, stated that about 7:30 P.M. on January 30, 1943, accused was "led" into the transportation office by "Private Alsman". Accused was in uniform and staggered as he came through the door. "He did not know where he was". He was weaving and staggering and he smelled of alcohol. "He sat down almost immediately and went to sleep" (R.69,70).

In the opinion of the witness accused "was intoxicated". (R.69,70)

Private James Alsman, Headquarters and Headquarters Squadron, 9th Air Force, testified that he smelled the odor of liquor on accused's breath, that accused was staggering a little, and that his speech was a little thick. Witness helped accused up some stairs leading to the transportation office. Accused sat in a chair with his head in his hands. A few minutes later witness helped accused to the car and took him to his billet. Accused was not disorderly. In the opinion of witness, accused was "a little better than half tight" (R.63-67).

Private Frank Martin, 981st Military Police, testified that at the entrance to the headquarters accused was being supported by a soldier and was not very steady in his walking. This was also true when he emerged from headquarters a few minutes later. Accused was in uniform. He was not guilty of any disorderly conduct (R.67-69).

Specification 2. On the morning of January 31, 1943, accused appeared in uniform at the transportation office of headquarters with orders to report to a unit at Kilo 13 and requested transportation. He smelled of alcohol. His clothes were disarranged, his speech was incoherent, and he did not know where he was going. He sat down and went to sleep. Lieutenant Sweeney attempted to awaken him but he "dozed off" again. Lieutenant Sweeney then called a medical officer (R.70,71,78). Major Albert J. Rice, Medical Corps, Commanding Officer, First General Dispensary, 9th Air Force Headquarters, responded to the call and arrived at the transportation office about 11 o'clock. He asked accused his name which accused was unable or unwilling to give. Witness then asked to see accused's identification card, from which was obtained the name, rank, and the date of birth of accused. Accused was "obviously well under the influence of liquor of some kind". "He was semi-comatose. You might say he was disoriented in that he didn't know exactly where he was. His coordination was poor in that he was unable to unbuckle his belt * * *. He couldn't stand very well by himself, we had to help him and hold him." In giving his age accused first stated that he was 18, then 19, and finally settled on 23. His condition was such as to require hospitalization. An emergency medical tag was made out and he was sent to the 38th General Hospital. One or two officers and enlisted men were present and several officers and enlisted men were in and out of the room during this examination (R.79-81). Captain James D. Nelson, Medical Corps, 38th General Hospital, made a physical examination of accused (presumably in the hospital) on the afternoon of January 31, 1943. "What I found was that he was just a drunken man. * * * He had a staggering, unsteady gait, mental confusion, disorientation, somewhat belligerent manner, strong odor of alcohol on his breath * * *". Accused told Captain

Nelson that he had been drunk three days. Captain Nelson examined the contents of the canteen which was found among the personal effects of accused. The canteen was two-thirds or three-fourths full of a fluid that smelled of an alcoholic nature, something like brandy. Accused at no time showed any disposition towards violence (R.82-84).

For the defense. Accused testified (Specification 1) that on the night of October 26 he received information that his organization would entrain for an overseas destination the following day. As several of the officers lived in outlying communities, accused was in constant use of a telephone from 9 o'clock P.M. until 1 o'clock A.M., in an effort to reach all officers of the command. He returned to headquarters at 7:30 on the morning of the 27th and spent a hectic day securing clearances and locating certain equipment. The result was that he missed his lunch and dinner and did not complete his clearances until 11 o'clock that night, October 27. Knowing that the bar of the officers' Club closed at 10 o'clock, he made arrangements for the kitchen to serve him and his party sandwiches and a bottle of Scotch. Accused had several drinks with members of his organization and left the dining room of the club about 12 o'clock. He did not fall against the table and did not knock over any tables, chairs, or glasses. Lieutenant Foust went with him from the club to his (accused's) quarters. After packing his luggage they went to the command headquarters. He was not assisted by Lieutenant Foust. He remained at headquarters until about 3 o'clock when it was time to move out to the station. Everybody was standing around waiting for the orders to move. After calling the roll of his section, and to pass the time, accused suggested that Lieutenant Foust give his officers instructions in Judo tactics. The entire section with one exception entered into it with the spirit in which it was suggested. The organization left the headquarters for the entraining area around 3 o'clock. With the quantity of luggage that he was carrying it was difficult to keep it in place so he stopped a number of times to redistribute his load. After reaching the station there was a delay of about 3 hours before the departure. Accused, in common with most of the officers of the command, either sat down or lay down on the ground adjacent to the warehouse about the tracks. The squadron was not in formation and the enlisted men did likewise. Accused denied falling into any ditch en route to the station, denied that he was "grossly drunk" in the Officers' Club, at the headquarters, on the march to the station, or at the station, and added, "I have never been grossly drunk in uniform" (R.115-118). Accused stated that he did not have more than four drinks at the club. He admitted that Lieutenant Foust went with him from the club to the headquarters, that Lieutenant Foust possibly held his arm, but denied that he needed any assistance. He admitted being sick at his stomach at the station and stated that he tried to vomit but "retching" was all that he

did (R.126,128).

As to Specification 3. On the evening of December 13, 1942, accused was in the bar of the H.M.T. Dunera watching a card game. While he was standing at the bar taking a second drink, Major Snowden came in and in order to return a courtesy which Major Snowden had shown him in Bombay accused invited Major Snowden to join him in a drink. Thereupon each had a double brandy and soda. Major Snowden then left the bar and resumed his card game in the front room. Accused did not take another drink. As the dinner hour approached accused picked up his equipment and started to his stateroom. Major Snowden caught up with him in the darkened hall and said, "Mac, you are drunk, come on to your stateroom". Since he had had some unpleasantness with Major Snowden in Drew Field and on the transport West Point, accused stated, "Snowden, I believe you understand how I feel about you. Let's let it go at that". Then Colonel Linstad walked up, ordered Major Snowden to leave and told accused that he would go with him to the stateroom. Colonel Linstad did not lead or assist him to his stateroom (R.119). Concerning the testimony of Colonel Ketchum, accused stated that when Colonel Ketchum relieved him as provost marshal the colonel referred to the episode of the night before. He recalled that liquor was discussed, but did not recall that Colonel Ketchum used the "exact words that he was drunk the night before". He stated that Colonel Ketchum relieved him of his side arms and relieved him as provost marshal "because of the episode of the night before". (R.129,130)

Specification 4. Upon his arrival at Alexandria, Egypt, on the afternoon of December 26, 1942, accused met a number of officers of his command in the Cecil Hotel and had a couple of drinks with them. Shortly thereafter he joined a flight officer and a British transport officer for lunch in the LeRoy Hotel, which carried over until 3:30 or 4 o'clock. He returned to the Cecil Hotel between 5:30 and 6 o'clock and went to the bar. After talking with some officers he left the bar and sat down on a divan at the far side of the room. While he was sitting there, Lieutenant Biddle approached him and said that one of his (accused's) officers had suggested that he should go to his room as there were certain officers who were endeavoring to make it difficult for accused. In deference to this intimation and without any discussion, accused went to his room, washed some soiled linen, took a bath, went out about 8:30, and returned to the hotel about 12:30. Accused stated that he was not "grossly drunk" at any time during the afternoon or evening of December 26. He had two drinks before lunch, a bottle of wine with lunch, and he did not drink any more until after the bar opened. He acquiesced in going to his room with Lieutenant Biddle because several officers had already

approached him and said that people were "gunning" for him. He denied having admitted to Lieutenant Biddle the next day that he was drunk the night before. Accused admitted that he leaned back across the divan and put his foot up on the long stretch of cushions and may have nodded, but he denied stretching out and going to sleep (R.130,131).

Specification 5. Accused testified that he had spent the morning of December 27 shopping and returned to the Cecil Hotel about 12:30. The bar had just opened. Two British officers whom he had met the evening before invited him to join them in a drink. The upshot was that he took several drinks with them and realized that he was "beginning to feel it". He told the officers that he could not afford to get "tight", and invited them to his room. Upon arriving in the room and finding Major DeForest taking a bath, the British officers excused themselves (R.120). Asked if the British officers assisted him to the room, accused stated, "They had a hold of my arm, yes. They did not assist me physically". Referring to the testimony of Major DeForest that he had fallen out of bed, accused stated, "Frankly, I don't recall that at all". He recalled going to sleep between the wall and the bed, but did not recall vomiting or urinating on the floor. He admitted that he had probably had more to drink than he should have had. He did not think that he had had too much to drink when in company with the British officers, because he remembered distinctly telling them that "I could not afford to get out of control in the Cecil Bar" (R.131,132).

Specifications 1 and 2 of Additional Charge.

Specification 1. Upon being advised by the Chief of Staff of the 9th Fighter Command that he was being transferred to another command, accused on Saturday, January 30, 1943, called the headquarters at Cairo about his orders and was told that he should call for his orders in person. "Lieutenant Garry", who had just arrived at LG-1 from Cairo, advised accused that if he would wait until he finished some business in Alexandria accused could go to Cairo in a government car which had brought Lieutenant Garry over from Cairo. Accused left Alexandria between 5:30 and 6 o'clock and arrived in Cairo about 7:30 P.M. Before leaving Alexandria he stopped at the Officers' Club, took two drinks and had them put "a little brandy" in his canteen and fill it with water, but on cross-examination he stated that the canteen was half filled with brandy, the rest water (R.142). On his arrival at the 9th Air Force headquarters in Cairo he went to the transportation office to see about his orders and to arrange for transportation to Kilo 13. He was advised not to go to Kilo that night, but to stay in the Elite Pension. "That is all that happened there" (R.121,122).

Specification 2. On the following morning, January 31, 1943, accused after getting his orders returned to the 9th Air Force headquarters for transportation. Referring to the testimony of Major Rice, accused stated that he had no idea that Major Rice was at the headquarters to examine him. He had seen Major Rice several times previously, in fact Major Rice had arranged for accused to get a pair of glasses. Accused did not recall any conversation with Major Rice as to his age. There was some discussion about his identification number. When Major Rice stated that he was sending accused to the hospital, "there was presence of mind enough to realize that an argument or controversy would not help the situation and I went quietly" (R.122,123). Accused stated that he was wet and cold the night before and before going to the headquarters he took four aspirin tablets and drank probably a quarter of the contents of the canteen. He stated that he did not go to sleep in the transportation office. He admitted that he told Major Rice to mind his own business and that "I had more to drink that morning than was good for me * * * but I was not drunk". Although he had a "beastly cold from being wet", he was not sick and asked why he was being sent to the hospital and was told because of alcoholism. On arrival at the hospital he told Captain Nelson that he had been "drinking three days" not "drunk for three days" (R.133,134). Accused was asked by a member of the court if his apparent failure of memory as to certain events referred to in the evidence was due to the lapse of time or to his physical condition on the occasions referred to. He stated that the episodes extended over a period of several months and the time element would be a factor.

> "This last episode in Cairo, I am frank to admit that I had more to drink than I should. I am not making this as an excuse, but I think the last few weeks, at least the week immediately preceding and following the Cairo episode, was such that I couldn't help being a little confused. I have not denied that I was drinking on each of these occasions, but I definitely deny that I was intoxicated, grossly intoxicated on any of them. On most of them I was not in a stage even approaching intoxication" (R.134).

Accused stated that he volunteered for service in the Army the day after the declaration of World War No. 1 and was an honor graduate of the U.S. School of Aeronautics at Cornell University. Upon graduation his unit was sent overseas. In June, 1918, he was made flight commander of Spad 164, 21st Combat Group. He stated that he had been awarded several decorations: U.S. Purple Heart, the Croix de Guerre with Palm, and the French Order d'Etoile, and that he wore the Victory Medal with three clasps. Accused stated that he was 47 years of age, and that despite

a defective eye caused by an old wound, he volunteered for service in the present war and requested overseas duty (R.125,126).

By agreement between the defense and prosecution and with the consent of the court, the defense read into the record statements made to the investigating officer by Second Lieutenants Edward C. Talmadge, John L. Brooks, and Captain Jack B. Marshall, of the 9th Fighter Command. It appears in the respective statements that each of these officers saw accused at the headquarters and at the station at Drew Field on the night of October 27-28, 1942, and observed nothing "abnormal" about his actions. Lieutenant Talmadge stated that he saw accused in the bar of the Cecil Hotel, Alexandria, about 6 o'clock P.M., December 26, at which time accused was perfectly sober and orderly. Captain Marshall stated that he had a drink with accused in the bar of the Cecil Hotel during the day or evening of December 26, that accused had been drinking and was partially drunk, but could walk around and talk. Captain Marshall left accused seated on a "settee" in the bar. Lieutenant Talmadge stated that accused is outstanding in leadership and is the most efficient officer of the organization. Lieutenant Brooks stated that accused is very effecient and an unusually hard worker (R.113,114). Captains Christian M. Evanson, Frank O. Haile, and Russell H. Moock, First Lieutenant Willie C. Evans and Warrant Officer Earl R. Richard of the 9th Fighter Command, each testified for the accused with respect to Specification 1 of the original Charge. Mr. Richard saw accused at Drew Field between 8 and 9 o'clock on the night of October 27, 1942. Accused was not disorderly and he noticed no sign of drunkenness. He did not see accused in the early hours of the morning of October 28 (R.88,90). Lieutenant Evans saw accused at the headquarters after midnight on October 27. Accused had been drinking but was not abnormal or disorderly (R.91,92). Captain Evanson was at the headquarters about 15 minutes before the organization left the station. Accused looked sober (R.94,95). Captain Moock stated that he had had some drinks with accused at the club, and that accused was not drunk or disorderly (R.107). Captain Haile stated that accused appeared to be sober at the club between 11 and 11:30, but that later when he saw him at the headquarters the accused was drunk "but not grossly drunk" (R.103,104).

Second Lieutenant Joseph Feinstein and First Lieutenant Booth T. Jameson, both of the 9th Fighter Command, also testified for the defense. The former saw accused leaving the Officers' Club about 11:30 P.M. and saw him again between midnight and 1 A.M. During that hour accused called the roll three times and caused the section to be instructed in Judo. Accused acted "a little too formal". He was not grossly drunk or disorderly (R.96-98).

Lieutenant Jameson did not notice anything in accused's actions indicative of drunkenness and had no opinion one way or the other about his condition. He did not remember observing any disorderly conduct upon the part of accused (R.98-102).

Specification 3. On the night of December 13, 1942, Lieutenant Evans who was then junior officer of the day, saw accused in the bar of the Dunera. Accused was drinking but was not "grossly drunk". Major Snowden tried to get accused to go to his stateroom (R.92,93). First Lieutenant Kenneth W. Kurbitz, Medical Corps, saw accused in his stateroom about 9 o'clock. Witness did not smell any odor of liquor in the room. He had had a drink himself. Accused talked coherently and recited part of an argument which he had had with Lieutenant Colonel Ketchum and Major Snowden. Witness told accused to calm down and obey orders (R.109-111).

Specification 4. Lieutenant Jameson saw accused at 2 o'clock and again around 6 o'clock either in the bar or in the lounge of the Cecil Hotel. Accused was neither drunk nor disorderly (R.99,100). Lieutenant DeLane E. Anderson, Air Corps, 9th Fighter Command, stated that he saw accused sitting in the bar between 7 and 8 o'clock that evening and that accused was sober (R.112,113).

Specification 5. Captain Baer stated that he saw accused at midday on December 27 and in his opinion "he was completely sober" (R. 111). Captain Moock saw accused at about 9:30 A.M. and accused seemed "perfectly all right" and did not appear to have been drinking (R.107-109).

Specification 1, Additional Charge. Second Lieutenant Norman H. Smith, AAF, 9th Air Force, stated that around 8 o'clock P.M. on January 30, 1943, he saw accused in the transportation office of headquarters "crouched over in a chair asleep with his head in his hands". Witness accompanied accused to his barracks. Accused smelled of alcohol and staggered. He was not abusive or conspicuous (R.85-87).

Specification 2, Additional Charge. Lieutenant Jameson stated that accused was entirely sober when he reported at the office of the headquarters for orders about 11 o'clock on the morning of January 31, 1943 (R.101).

4. The competent evidence relating to Specification 1 of the original Charge shows and warranted the court in finding beyond a reasonable doubt that accused was drunk at Drew Field on the night of October

28, 1942. His condition at the Officers' Club was such that he staggered and knocked over glasses. He was unable to get up from the table without being assisted by another officer. In the headquarters before leaving for the station he assembled his section of officers and while they were loaded with field packs, directed Lieutenant Foust to give them instructions in Judo tactics. Accused smelled of alcohol, was unsteady on his feet and talked incoherently. He had difficulty on the march to the station and, arriving at the station, "he went down in a heap and vomited".

The evidence shows with respect to Specification 3 of the original Charge that accused, on the evening of December 13, 1942, was drunk at sea on board the H.M.T. Dunera. On this occasion accused was in the bar with 30 or 40 subordinate officers. He was the provost marshal of the ship, his face was "extremely red", he staggered and fell against the furniture. It was obvious that he needed to be taken to his stateroom. When a brother officer undertook to render assistance accused shook himself loose, called the officer a "son-of-a-bitch" and threatened to kill him. The incident progressed to a point which called for the intervention of a superior officer who accompanied accused to his stateroom. Later in the evening Lieutenant Colonel Ketchum, commanding officer of accused, went to the stateroom of accused and found him "very intoxicated" and urinating in the wash bowl. When the colonel told him to go to bed, accused replied, "that is none of your God-damn business". Accused smelled of liquor, was incoherent in speech, and was disrespectful and insolent to his superior officer.

Specification 4 and 5, original Charge. On the evening of December 26, 1942, accused was seen drinking in the bar of the Cecil Hotel, Alexandria, Egypt. He was "a little unsteady on his feet and his speech a little thick". The bar was fairly well filled with officers of the allied nations. Accused went to sleep on a divan in the bar and was later escorted to his room in the hotel by a lieutenant of the military police. He was not grossly drunk or disorderly. On the day following, to-wit, December 27 (Specification 5), accused was observed staggering in the lobby and bar of the Cecil Hotel. His face was "very red". Two British officers assisted him to his room. His speech was incoherent, his face flushed, and he was unable "to propel under his own power". Accused fell off his bed and was found asleep lying on his back on the floor between the bed and the wall. Vomit was on the floor.

With respect to Specifications 1 and 2 of the Additional Charge, the evidence shows as to Specification 1: on the evening of January 30,

1943, accused was led into the transportation office of the headquarters of the 9th U.S. Air Force by an enlisted man. He was weaving and staggering and smelled of alcohol. He sat down and went to sleep. As to Specification 2 of the additional Charge, the evidence shows that about 10 o'clock on the morning of January 31, 1943, accused appeared at the headquarters 9th U.S. Air Force. At this time he smelled of alcohol, was incoherent of speech, and did not know where he was. He was unable or unwilling to disclose his identity to the medical officer. He was unable to stand alone. When the doctor asked his age accused stated that he was 18, then changed to 19, and finally said that he was 23. His condition of intoxication was such as to require hospitalization, but he was not grossly drunk or disorderly. One or two officers were present and several were in and out of the office when the examination of accused was made.

It thus appears that the evidence is ample to sustain the findings of the court with regard to Specifications 1, 3, and 4 of the Charge, and Specification 1 of the Additional Charge. As noted, the court found accused guilty of Specification 5 of the Charge and Specification 2 of the Additional Charge. Although accused's conduct on these two occasions was reprehensible, his drunkenness was not so gross nor his actions so disorderly as to constitute a violation of Article of War 95, and the record is legally sufficient to support only so much of the findings of guilty of those Specifications as involves findings of guilty in violation of Article of War 96.

5. Before pleading to the general issue the defense entered various motions and pleas which require discussion.

a. The first of these was a motion to strike all the Charges and Specifications upon the ground that each of them failed to state any offense under Article of War 95 and did not apprise accused of the offense intended to be charged (R.6). The court overruled the motion (R. 7). The court's ruling was clearly correct. The Specifications were patterned after the form appearing in Appendix 4, on page 253, of the Manual for Courts-Martial and were even more complete than required thereby.

b. The defense next moved that Specifications 1 to 5 of the Charge be "stricken" on three grounds, as follows (R.7):

1. Improper accumulation of Charges.

2. That disciplinary measures had been taken in part at least.

3. Constructive condonation.

The motion was also referred to as a plea in bar (R.8). The court overruled it (R.8). The court's action was correct insofar as the first ground is concerned. Although an accumulation or saving up of charges through improper motives is prohibited, it is entirely permissible when a good reason exists, provided the person is not in arrest or confinement (par. 26, M.C.M.). The present case comes within the latter category. It is clear that accused's superiors hoped that his earlier actions would not be repeated. Certainly he was not unjustly treated by receiving a chance to avoid court-martial proceedings by mending his ways, nor by being tried for his several infractions when it became apparent that he had failed to take advantage of his opportunity.

The defense attempted to sustain the second ground of the plea by the introduction of evidence concerning the disciplinary measures taken. Lieutenant Colonel Carlton G. Ketchum, Air Corps, 9th Fighter Command, testified that he became commanding officer of the detachment two or three days after the "first incident", referring to the October 28 episode, the subject of Specification 1 of the Charge. He made no investigation after either that incident or the second; namely, the incident alleged in Specification 2 of the Charge (R.30). On the morning of December 14, the day after the occurrence alleged in Specification 3 of the Charge, witness directed accused to turn over his sidearms because he had threatened an officer the night before. He also informed accused that the commanding officer of troops had ordered accused relieved of duty as provost marshal on the ship, and told accused that he was restricted to one drink a day. In the afternoon Lieutenant Colonel Ketchum talked further to accused. He branded accused's conduct of the night before as disgraceful, told him that the action taken that morning was the minimum which could be taken under the circumstances, and said that this was the last time that such conduct would be tolerated (R.29). Lieutenant Colonel Ketchum told accused that he was taking statements from witnesses who were present the night before and on other similar occasions; that he did not wish to make an official report of accused's conduct and would not do so unless such conduct were repeated; but that the statements would be locked up among the records of the detachment and presented if accused again conducted himself in the same manner (R.29,30). Accused replied that he thought this very fair and that he had no complaint to make. Lieutenant Colonel Ketchum testified that he considered the reprimand part of the disciplinary action for accused's misdeeds and that the disciplinary action related to the night before; i.e., to Specification 3 (R.30,32). He took the disciplinary action as commanding officer of the detachment and intended it as an unofficial, informal

warning, not pursuant to Article of War 104. For that reason he did not notify accused in writing of an intention to impose punishment under that article of war (R.32,33). He caused statements to be taken from witnesses to the December 13 affair (Specification 3). He did not relieve accused as "A-3" of the fighter group (R.31). There was a recital on accused's efficiency report that accused had been the subject of disciplinary action during the period covered by the report (R.33), but the evidence did not show what period the report covered nor to what disciplinary action it referred.

At the conclusion of the foregoing testimony the defense renewed its motion to strike or plea in bar, but limited the plea to Specifications 1,2, and 3 of the Charge. The court overruled the plea (R.34). From the evidence as set forth above it is apparent that the event alleged in Specification 3 is the only one on which disciplinary action was taken and therefore the only one necessary to be considered in connection with the plea in bar. It is true that punishment under Article of War 104 may be pleaded in bar of trial (par. 69 c,M.C.M.). But it is likewise true that a commanding officer may take nonpunitive measures, including admonition and reprimand, for corrective purposes, in order to further the efficiency of his command (par. 105,M.C.M.), and that such measures do not constitute a bar to trial. It is apparent that the measures taken in the present case fall within the latter category. The surrender of the sidearms, the relief of accused as provost marshal, the restriction to one drink a day, and the warning, are all consistent with this concept rather than with punishment under Article of War 104. The plea in bar or "motion" was properly overruled so far as this ground is concerned.

The "constructive condonation" ground is without merit. Constructive condonation relates solely to a charge of desertion (par. 69b, M.C.M.). Besides, Lieutenant Colonel Ketchum made it clear to accused that he would refrain from preferring charges only if accused behaved himself in the future - a condition with which accused failed to comply. The court acted correctly in overruling the plea in bar.

c. The defense also filed a plea in abatement to all Charges and Specifications upon two grounds: (1) insufficient allegations of time and place; (2) that the Specifications did not fairly apprise accused of the offense intended to be charged (R.8). The plea was overruled (R.9). The second ground is merely a repetition of one of the grounds stated in the first motion and has been discussed already. There is no merit to the first ground. It is difficult to see how the allegations of time and place could be made any more definite unless the exact hour and the exact square foot of ground by metes and bounds

were to be set forth and of course no such pleading is necessary. Specifications 4 and 5 were amended by adding the words "Cecil Hotel" after the word "at" (R.9). The defense agreed to the amendment but renewed its plea in abatement as to those Specifications in their amended form, which plea was overruled (R.9,10). Time and place were adequately alleged and the action of the court was correct.

6. Defense counsel made a number of objections to the admission of evidence. The Board of Review has carefully considered these and holds that in most instances the evidence was properly admitted and that where it was not accused's substantial rights were not prejudiced.

7. An attempt was made by the defense to show bias upon the part of certain witnesses (R.22-24,135,138,141). The evidence thereon was insufficient to sustain the contention of bias and there was ample evidence of guilt without considering the testimony of the allegedly biased witnesses.

8. The record fails to show that after the two adjournments accused and the reporter were present. Since the record was typed and no other reporter was mentioned, it is reasonably certain that the reporter was present, and since the accused testified after one adjournment and no reference was made to his absence after the other, it may be assumed that he was in the courtroom throughout the proceedings.

9. Attached to the record of trial are a communication from accused to the Commanding General, 9th Fighter Command, 9th Air Force, dated January 11, 1943, and a plea for clemency submitted by counsel for the defense, dated February 6, 1943.

10. War Department records show that accused is 46 years of age. He graduated from the Wharton School of Finance, University of Pennsylvania. He served as an enlisted man, a second lieutenant, and a first lieutenant in World War No. I, was wounded in action as a combat flyer, and received decorations for bravery. He was appointed Major, Army of the United States, on April 5, 1942, and ordered to extended active duty on April 20, 1942.

11. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of accused occurred at the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support only so much of the findings of guilty of Specification 5 of the Charge

and Specification 2 of the Additional Charge as involves findings of guilty of those Specifications in violation of Article of War 96, and legally sufficient to support the remaining findings of the court and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 96.

Henry E. Kox, Judge Advocate.
John Wannemuehl, Judge Advocate.
Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., JUN 1 6 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Major Russell McCormick (0-447813), Air Corps.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein recommend that only so much of the original Charge and Specification 5 thereunder and only so much of the Additional Charge and Specification 2 thereunder be approved as involves findings of guilty of those Specifications in violation of Article of War 96. I recommend that the sentence be confirmed and carried into execution.

3. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer.

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl. 1 - Record of trial.
Incl. 2 - Draft of let. for sig. Sec. of War.
Incl. 3 - Form of action.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed. G.C.M.O. 271, 29 Sep 1943)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

MAY 13 1943

SPJGH
CM 232980

UNITED STATES N.D v. Second Lieutenant HERBERT B. PURVIS (0-1290656), 369th Infantry.	93RD INFANTRY DIVISION Trial by G. C. M., convened at Fort Huachuca, Arizona, February 19, 1943. Dismissal and forfeiture of all pay and allowances.

OPINION of the BOARD OF REVIEW
HILL, DRIVER and LOTTERHOS, Judge Advocates.

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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 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 2d Lieutenant Herbert B. Purvis, 369th Infantry, did without proper leave, absent himself from his organization and station at Fort Huachuca, Arizona, from about November 5, 1942, to about November 18, 1942.

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

Specification 1: In that 2d Lieutenant Herbert B. Purvis, 369th Infantry, did at Fort Huachuca, Arizona, on or about November 18, 1942, with intent to deceive his regimental commander, Colonel Thomas F. Taylor, 369th Infantry, officially state to the said Colonel Taylor, that his mother Mary Purvis had broken her leg on October 24, 1942, and that he had spent several days in getting her entered in Charity Hospital, New Orleans, Louisiana; that it was necessary for him to remain with her until the arrival of his sister from Detroit, Michigan, which statement was known by the said Lieutenant Purvis to be untrue.

Specification 2: (Nolle prosequi entered).

ADDITIONAL CHARGE: Violation of the 94th Article of War. (Finding of not guilty).

Specification: (Finding of not guilty).

He pleaded not guilty to all Charges and Specifications, and was found guilty of Charge I and its Specification, of Specification 1, Charge II substituting the date October 26, 1942, for the date October 24, 1942, and of Charge II, and not guilty of the Additional Charge and its Specification.

He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. As to Charge I and its Specifications, the evidence shows that the accused was granted ten days leave on October 26, 1942, and that he was due back November 5, 1942. The accused made telegraphic request for an extension of leave on November 5, 1942, which request was not granted. He did not return until November 18, 1942. There was introduced in evidence an extract copy of the morning report of the organization of the accused, showing that his status changed on November 5, 1942, from leave to absent without leave and on November 19, 1942, from absent without leave to duty (R. 4-5; Ex. A).

The defense offered no evidence on this Charge and Specification.

4. As to Charge II and Specification 1, Charge II, the evidence shows that on his return the accused stated to Colonel Thomas F. Taylor, Commanding Officer, 369th Infantry, that "on October 26 his mother had broken her leg * * * that it was not until November 3, 1942, that he was able to enter her into Charity Hospital at New Orleans", and that "he had to wait for his sister to return from Detroit to take care of his mother" (R. 5).

As to the falsity of these statements, Colonel Taylor testified that he asked the Red Cross to investigate and that "They reported back that no record of Mother Purvis having broken her leg was carried on the record or books", that "she didn't have a broken leg", and that she "had never been in the hospital." Upon the offer by the prosecution of "this deposition of the superintendent of Charity Hospital, New Orleans, Louisiana", and upon an affirmative "No objections" by the defense, there was received in evidence a deposition addressed to "Superintendent, Charity Hospital, * * * New Orleans, Louisiana", signed by the deponent with a name which is undecipherable, and with no designation of his office or capacity, in which the only interrogatory propounded and the answer thereto read as follows:

> "Third interrogatory: On or about November 3, 1942, did you admit, as a patient, one Mary Purvis, colored, to be treated for a broken leg?
> "Answer: We have checked our files for a record on the above named patient and can find no one listed under that name."

The certificate thereon states that the deposition was taken by a notary public at New Orleans, Louisiana, February 9, 1943. (R 5-6; Ex. B)

The defense presented no witness upon Specification 1, Charge II. During cross-examination of Colonel Taylor, however, there were received in evidence upon offer of defense counsel and upon an affirmative statement of "no objections" by the prosecution but without identification, a telegram dated Baton Rouge, Louisiana, November 30, addressed to accused, 369th Infantry, Fort Huachuca, Arizona, reading as follows:

> "Mothers condition required hospitalization for successful treatment may loose limb if not properly treated.
> R M BARANCO MD."

and a note in pencil dated Baker, Louisiana, "11-2-42", reading as follows:

"Mary Purvis is at present taking treatment from my office. E.W. Singletary M.D." (R 6; Exs. I and II).

5. Even if there could properly be drawn from the deposition (Ex. B) the inference that the deponent was in fact the Superintendent, Charity Hospital, New Orleans, Louisiana, there is no proof in the record which identifies "Mary Purvis" as the mother of the accused. The only other reference in the record to "Mary Purvis" is in the pencil note of Dr. Singletary (Ex. II), offered by defense without identification and without explanation, showing that "Mary Purvis" was then, on November 2, 1942, taking treatment from his office. These references to a "Mary Purvis" fall short of supporting even an inference that Mary Purvis was the mother of accused.

The statement of Colonel Taylor as to the contents of a report by the Red Cross as to "Mother Purvis" was mere hearsay and incompetent, and the failure to object to such incompetent evidence did not cure the error in its admission (Dig. Ops. JAG, 1912-40, sec. 395 (21), CM 178446).

"It is not necessarily to be implied that the substantial rights of the accused have been injuriously affected by the admission of incompetent testimony; nor is the absence of such prejudice to be implied from the fact that even after the illegal testimony had been excluded enough legal evidence remains to support a conviction. The reviewer must, in justice to the accused, reach the conclusion that the legal evidence of itself substantially compelled a conviction. Then indeed, and not until then, can he say that the substantial rights of the accused were not prejudiced by testimony which under the law should have been excluded. C. M. 127490 (1919).

"The rule is that the reception in any substantial quantity of illegal evidence must be held to vitiate a finding of guilty on the charge to which such evidence relates unless the legal evidence of record is of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty. If such evidence is eliminated from the record and that which remains is not of sufficient probative force as virtually to compel a finding of guilty, the finding should be disapproved. C. M. 130415 (1919)."
(Dig.Ops. JAG 1912-30, sec. 1284)(See CM 211829, Parnell)

The competent evidence falls far short of compelling a finding that the statements of accused to Colonel Taylor were untrue. In the

opinion, therefore, of the Board of Review the erroneous receipt in evidence of the incompetent statement of Colonel Taylor injuriously affected the substantial rights of the accused within the meaning of the 37th Article of War, and that the record is legally insufficient to support the findings of guilty of Specification 1, Charge II and of Charge II.

6. The record of trial of this officer upon other offenses (CM 234443) now before the Board of Review should be considered in connection with action upon this record.

7. The accused is twenty-six years of age. The records of the Office of the Adjutant General show his service as follows: Inducted September 18, 1941; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty, August 19, 1942.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial other than herein referred to under Specification 1, Charge II. For the reasons stated the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Specification, Charge I, and of Charge I; legally insufficient to support the findings of guilty of Specification 1, Charge II, and of Charge II; and legally sufficient to support the sentence. Dismissal is authorized upon conviction of violation of the 61st Article of War.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

(Filed without further action in view of the execution of the sentence to dismissal, total forfeitures, and confinement for three years against the same officer in a subsequent case, CM 234447, confirmed in G.C.M.O. 134, 1 Jul 1943)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGN
CM 233004

MAY 29 1943

UNITED STATES v. Second Lieutenant CLIFFORD H. BRUNKELLA (O-1288697), Air Corps.	2ND DISTRICT, ARMY AIR FORCES TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Chicago, Illinois, March 5, 1943. Dismissal, total forfeitures and confinement for one (1) year.

OPINION of the BOARD OF REVIEW
CRESSON, LIPSCOMB, and SLEEPER, Judge Advocates

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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 Judge Advocate General.

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

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

Specification 1: In that 2nd Lieutenant Clifford H. Brunkella, Air Corps, 993rd Technical School Squadron, did, at Chicago, Illinois, on or about the 6th day of January, 1943, wrongfully borrow the sum of Fifty Dollars ($50.00) from Corporal Frank P. Bausone, 993rd Technical School Squadron, an enlisted man.

Specification 2: (Withdrawn).

Specification 3: In that 2nd Lieutenant Clifford H. Brunkella, Air Corps, 993rd Technical School Squadron, did, at Chicago, Illinois, on or about January 5, 1943, wrongfully borrow the sum of Fifty Dollars ($50.00) from Private William M. Karesh, 993rd Technical School Squadron, an enlisted man.

Specification 4: (Finding of not guilty).

Specification 5: In that 2nd Lieutenant Clifford H. Brunkella, Air Corps, 993rd Technical School Squadron, did, at Chicago, Illinois, on or about the 7th day of January, 1943, wrongfully borrow the sum of Thirty-Two Dollars ($32.00) from T/Sergeant Isaac C. Moore, 993rd Technical School Squadron, an enlisted man.

Specification 6: In that 2nd Lieutenant Clifford H. Brunkella, Air Corps, 993rd Technical School Squadron, did, at Chicago, Illinois, on or about January 11, 1943, wrongfully exact and receive from Private James D. Heuer, 993rd Technical School Squadron, an enlisted man, the sum of Fifty Dollars ($50.00), for an emergency furlough.

Specification 7: In that 2nd Lieutenant Clifford H. Brunkella, Air Corps, 993rd Technical School Squadron, did, at Chicago, Illinois, on or about January 25, 1943, falsely report to Lt. Col. Jack H. Turner, executive officer of Chicago Schools, AAFTTC, that he had not borrowed any sums of money from enlisted men and was not indebted to enlisted men, he, the said 2nd Lieutenant Clifford H. Brunkella, then being indebted to Corporal Frank P. Bausone, Private William M. Karesh, Private Maurice J. Biscaccia, and T/Sergeant Isaac C. Moore, enlisted personnel of the 993rd Technical School Squadron.

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

Specification 1: In that 2nd Lieutenant Clifford H. Brunkella, Air Corps, 993rd Technical School Squadron, did, at Chicago, Illinois, on or about January 11, 1943, wrongfully exact and receive from Private James D. Heuer, 993rd Technical School Squadron, the sum of Fifty Dollars ($50.00), for an emergency furlough.

Specification 2: In that 2nd Lieutenant Clifford H. Brunkella, Air Corps, 993rd Technical School Squadron, did, at Chicago, Illinois, on or about January 25, 1943, falsely report to Lt. Col. Jack H. Turner, executive officer of Chicago Schools, AAFTTC, that he had not borrowed any sums of money from enlisted men and was not indebted to enlisted men, he, the said 2nd Lieutenant Clifford H. Brunkella, then being indebted to Corporal Frank P. Bausone, Private William M. Karesh, Private Maurice J. Biscaccia, and T/Sergeant Issac C. Moore, enlisted personnel of the 993rd Technical School Squadron.

He pleaded not guilty to all the Charges and Specifications and was found guilty of Specifications 1, 3, 5, 6 and 7, Charge I, and Charge I; Specifications 1 and 2, Charge II, and Charge II; and not guilty of Specification 4, Charge I. Specification 2, Charge I, was withdrawn by the trial judge advocate at the direction of the appointing authority (R. 4). There was no evidence of any previous conviction. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence bearing upon those Specifications and Charges of which the accused was found guilty may be summarized as follows:

On January 5, 1943, the accused, a commissioned officer acting as squadron adjutant, borrowed $50 from Private William M. Karesh, an enlisted man in his command in the presence of and with the assistance of Technical Sergeant Isaac C. Moore (R. 16, 17, 22, 23).

Although he had agreed to repay this loan on January 11, he failed to do so until a week or more later when Karesh requested payment (R. 17).

On January 6, 1943, the accused borrowed $50 from Corporal Frank P. Bausone, another enlisted man in his command, and gave Bausone his promissory note for this amount, payable January 16, 1943. This obligation, however, was not paid by the accused until the day before the trial (R. 29, 30; Ex. 6).

The accused also borrowed $32 from Sergeant Moore, mentioned above, another enlisted man in his command, on January 7, 1943, which remained unpaid at the time of this trial (R. 24).

Private James D. Heuer, an enlisted student soldier attached to the squadron of the accused, on or about January 11, 1943, consulted the accused regarding the obtaining of a ten-day furlough. At the suggestion of the accused, Heuer telephoned to the local representative of the Red Cross at Heuer's home town to send a wire to the accused confirming the need of the furlough (R. 51; Ex. 1). While awaiting this wire Heuer was told by Corporal Bausone, an enlisted man in the accused's command, that the furlough which he was seeking would cost him $50. Heuer agreed to pay this sum for the furlough (R. 50, 53). After all the details had been arranged between Heuer, Bausone, and the accused, for procuring the furlough, Heuer delivered to Bausone $50 in cash in one of the offices of the headquarters of that particular detachment in Chicago, Illinois. The accused stood outside of the office when the money was paid and as Heuer came out of the office the accused handed to Heuer the furlough (R. 60). At the same time, the accused told Heuer, if he needed any extension of the furlough, to have the local representative of the Red Cross send a wire to the accused for such an extension. After Heuer had left, Bausone turned the $50 which he had received from Heuer over to the accused (R. 81).

At the expiration of his furlough Heuer caused the local Red Cross representative to send a wire to the accused requesting an extension of the furlough (Exs. 2, 3) and immediately received back a wire granting the extension, purportedly from Captain Percy E. Tucker (Ex. 4). This wire (Ex. 4) was sent by Sergeant Moore upon the orders of the accused (R. 69). The squadron commander, Captain Percy E. Tucker, although he was on duty at the time, was not consulted about the matter and did not authorize the use of his name (R. 10).

On January 25, 1943, Lieutenant Colonel J. H. Turner, the post executive officer of the detachment to which the accused was assigned, was making an official investigation of loans made by officers from enlisted men. He sent for the accused, and in the presence of Major Levi J. Baker, the administrative inspector, asked the accused if he had ever borrowed any money from enlisted men. His answer was no (R. 86). At the same time the witness showed to the accused the note that Corporal Bausone said the accused had given to him, Corporal Bausone (Ex. 6), and asked the accused whether that was his signature. The accused admitted that it was his signature but disclaimed any knowledge as to how this signature came to be upon the document in question (R. 87). Major Baker corroborated Lieutenant Colonel Turner's testimony (R. 94).

4. The accused, having been warned of his rights, elected to submit to the court a sworn written statement (Def. Ex. 3), and also to take the stand and be subjected to cross-examination (R. 97). The sworn statement, together with his testimony, constituted a sweeping denial of each and every material allegation of the prosecution's witnesses relating to the offenses with which he was charged. He denied borrowing any money from any of the enlisted men (R. 101, 102, 103, 105). He denied that the signature on the note (Ex. 6) was his (R. 100). He denied ordering Sergeant Moore to send a wire to Heuer extending Heuer's furlough (R. 113). He was cross-examined at great length concerning the procurement for Heuer of the furlough, and admitted that he was instrumental in procuring a furlough for Heuer and that he inconvenienced himself considerably to obtain the furlough for Heuer promptly (R. 110).

5. The issues involved in this case are purely issues of fact. For the prosecution, Private Karesh, Corporal Bausone, and Sergeant Moore testified to various loans that the accused had made from them as enlisted men. A written note appearing as Exhibit 6 was, according to the testimony of Corporal Bausone, signed by the accused. A handwriting expert, who compared this signature with authentic signatures of the accused, was of the opinion that the signature on the note was that of the accused. Both Private Heuer and Sergeant Moore swore to the transaction regarding the sale of the furlough. The two officers, Lieutenant Colonel Turner and Major Baker, testified that in their investigation the accused stated that he had not borrowed any money from enlisted men. As against all of these

witnesses the word of the accused stands alone.

The court having the right to determine the facts from the evidence produced before it elected to accept as true the testimony of the prosecution's witnesses. All of the findings were supported by substantial evidence.

Each Specification of which the accused was found guilty stated an offense either under Article of War 95 or Article of War 96, as charged. Borrowing money from enlisted men by commissioned officers has long been considered an offense under Article of War 96 (CM 122920, CM 130989, CM 117782). The relationship of debtor and creditor between a superior officer and his military subordinate is in itself prejudicial to good order and military discipline. The sale of military privileges, such as the sale of a furlough to enlisted men by an officer, is obviously contrary to good order and military discipline. It is equally contrary to donduct becoming an officer, and constitutes a violation of Article of War 95.

The court, having determined as a fact, based upon the evidence produced before it, that the accused had borrowed various sums of money from various enlisted men, properly concluded that when the accused stated to the investigating officers, Lieutenant Colonel Turner and Major Baker, that he had not borrowed money from enlisted men, such statement was false. A false statement made to a superior officer during an official investigation constitutes an offense under Article of War 96 (CM 122249) as well as under Article of War 95 (par. 151, M.C.M., 1928, p. 186).

6. The accused is 29 years and 9 months of age. The records of the Office of The Adjutant General show that he served as an enlisted man from July 1, 1940, to July 23, 1942, when he was honorably discharged in order that he might accept a commission as Second Lieutenant, Infantry. A.U.S., on July 24, 1942, which he did on that date and was assigned from the Infantry School at Fort Benning, Georgia, to Fort McClellan, Alabama. Thereafter he was assigned to the Air Corps, 993rd Technical School Squadron, Chicago Schools, Chicago, Illinois.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. A sentence of dismissal is authorized upon conviction of a violation of Article of War 96, and is mandatory upon conviction of Article of War 95.

Charles Gresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

1st Ind.

War Department, J.A.G.O., JUN 7 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Clifford H. Brunkella (0-1288697), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed and carried into execution.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls
Incl 1 - Record of trial
Incl 2 - Dft of ltr for sig. Sec. of war
Incl 3 - Form of Executive action

(Sentence confirmed. G.C.M.O. 162, 24 Jul 1943)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGK
CM 233013

JUN 9 - 1943

UNITED STATES	FOURTH DISTRICT ARMY AIR FORCES TECHNICAL TRAINING COMMAND
v.	
Second Lieutenant GORDON D. BENNETT (O-560621), 66th Mess Squadron, 21st Mess Group, Air Corps.	Trial by G.C.M., convened at Buckley Field, Colorado, March 12, 1943. Dismissal.

OPINION of the BOARD OF REVIEW
LYON, HILL and ANDREWS, Judge Advocates.

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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 Judge Advocate General.

2. Accused was tried upon the following Charge and Specifications:

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

Specification 1: (Motion to strike sustained).

Specification 2: (Motion to strike sustained).

Specification 3: In that Second Lieutenant Gordon D. Bennett, Assigned Sixty-sixth Mess Squadron, Twenty-first Mess Group, was, at Lowry Field, Colorado, on or about March 1, 1943, drunk in uniform while in station and in the presence of military inferiors.

Specification 4: In that Second Lieutenant Gordon D. Bennett, Assigned Sixty-sixth Mess Squadron, Twenty-first Mess Group, was, at Lowry Field, Colorado, on or about March 3, 1943 drunk in uniform while in station and on duty as Officer of the Guard.

On motion by the defense, Specifications 1 and 2 were stricken. Accused pleaded not guilty to Specifications 3 and 4 of the Charge, but subsequently changed his plea to a plea of guilty of Specifications 3 and 4 of the Charge, not guilty of the Charge, but guilty of a violation of Article of War 96. He was found guilty of the Charge and Specifications 3 and 4 thereunder. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the sentence as provided for dismissal from the service and forwarded the record for action under Article of War 48.

3. The evidence shows that the accused, a second lieutenant assigned to the 66th Mess Squadron, 21st Mess Group, was, on March 1, 1943, drunk in uniform while in station and in the presence of enlisted men. On the morning of that day accused telephoned the adjutant of his group, First Lieutenant Charles J. Thomas, and said "he felt one of his spells coming on". Accused asked Lieutenant Thomas whether he would be sent to the hospital if he came to work, and was told that he had better come down to the office (R.7). Accused then came down to the office about half an hour later. Lieutenant Thomas testified that accused "was a little shaky on his feet, having a little trouble keeping his balance" (R.8). At the invitation of witness, accused sat down. He told witness that he "had had a couple of drinks" (R.8). Witness detected the odor of alcohol on accused (R.9). A number of enlisted men were out in the hall being paid and accused insisted on going down the hall repeatedly to get a drink of water against the advice of Lieutenant Thomas (R.9).

Lieutenant Colonel Jefferson M. Stewart, Air Corps, accused's commanding officer, came into the office and accused was seated at a desk with his arms on the desk and his head resting on his arms. (R.9, 12). He was in uniform (R.12,14). Lieutenant Colonel Stewart asked Lieutenant Thomas what was wrong with accused. The colonel testified that at that point accused got up and "in a rather unsteady gait weaved over in front of me at my desk and saluted me in a weaving manner and said 'Sir, I'm not as drunk as you think'" (R.13). On Lieutenant Colonel Stewart's orders Lieutenant Thomas took accused to the station hospital (R.10,13). In the opinion of Lieutenant Colonel Stewart and Lieutenant Thomas accused was drunk (R.10,13). At the hospital Lieutenant Colonel Frank D. Edington, Medical Department, Lowry Field, gave accused a physical examination and found him to be "intoxicated". His eyes were dilated. The odor of alcohol was on his breath. He could not stand with his feet together and his eyes closed (R.15). Lieutenant Thomas testified that accused was not disorderly (R.11).

On March 3, 1943, accused was Officer of the Guard, his tour of duty beginning at 8:30 on the morning of that day and ending at 8:30 on the morning of March 4, 1943 (R.21,33; Pros. Ex. "A"). Mary Hartwell, a driver at the motor pool, was assigned to drive accused that day, and in the morning she drove him about on a check of the posts (R.24-25). She could smell whiskey on the breath of accused (R. 25,28), and he "weaved" as he walked. He was unable to salute the guard at one of the posts in proper fashion (R.27). The guard, Private Louis Paul Klapa, 867th Guard Squadron, testified that when accused came toward witness he "seemed to stagger a little bit" and that accused's breath smelled "like he had been drinking liquor" (R.30). Accused tried unsuccessfully to persuade Miss Hartwell to go to lunch with him off the post (R.27). Accused then suggested that she take him to the post exchange, which she did (R.28).

Accused was seen leaving the post exchange by Staff Sergeant Tapper (R.16) who testified that accused "staggered" while walking and appeared to be "ill or intoxicated" (R.17). Accused went to the Service Club (R.17) and the sergeant telephoned Captain Dutton (R.18). The sergeant said that accused was not disorderly (R.18).

At the Service Club accused went to the office of the hostess and said to her, "I'm going around in circles" (R.19). The hostess, Marjory Forbes, testified that she smelled whiskey on accused's breath and that he was drunk (R.19,20); she stated on cross-examination, however, that he was not disorderly and that he walked in a steady manner (R.20).

Captain Earl L. Dutton, Air Corps, Provost Marshal at the field, went to the Service Club in response to Sergeant Tapper's telephone call (R.20-21). He found accused in the cafeteria line and, after relieving accused of his gun, sat with him while he ate (R.22). Accused was in uniform, including an Officer of the Guard insignia on his left arm (R.21).

At the next table, about three or four feet away, were seated four or five women employees. Captain Dutton testified that accused, in a tone of voice loud enough to be heard by the women, said,

> "Lowry Field is trying to fuck me and the officers at Lowry Field apparently have it in for me and I would like to get off the field" (R.22).

On cross-examination witness stated that he observed nothing to indicate that the women at the nearby table had heard what accused said, that possibly they might not have heard it, and that his admonition to accused was simply a precaution in order to insure that accused did not say anything that the women would overhear (R.24).

Captain Dutton took accused to the post hospital where he was given a blood test by Lieutenant Colonel Edington (R.23,31). The test showed over two hundred milligrams per cent of alcohol in accused's blood. Lieutenant Colonel Edington testified that anything over one hundred fifty milligrams per cent was considered as proof of drunkenness (R.31). He also gave accused a physical examination which showed accused to be intoxicated (R.31).

On cross-examination the colonel testified that on neither this nor the preceding occasion did accused create any scene in his office, that he did not use loud or boisterous language. Witness observed no evidence of disorderly conduct except the drunkenness itself (R.32,33).

For the defense, First Lieutenant Golden B. Branch, Adjutant 41st School Squadron, Officer of the Day, on March 3, 1943, testified that he saw accused on that date about 8:30 A.M. and around noon, and that he seemed sober, although he looked as though he had a "hangover" (R.37-38). John Johnson, a civilian employee at Post Exchange No. 864, testified that on March 3, 1943, around noon, accused was sober (R.40).

Accused testified, restricting his testimony to a recital of his military career. He enlisted in the Infantry in 1940 and in about two months attained a noncommissioned officer's rating. He endeavored to transfer to the Air Corps. He twice took automatic reductions to the grade of private in order to obtain the transfer. He refused ratings on various occasions and eventually succeeded in being transferred to the Air Corps. He attended Officers' Candidate School at Miami Beach, Florida. He graduated officially on August 5, 1941, but prior to that date left for the Adjutant General's School. He was one of forty-nine men out of two thousand students selected on their records. He finished a six weeks course at the Adjutant General's School and then was assigned to Lowry Field (R.42-43).

On cross-examination accused stated that the course at the Adjutant General's School was an eight weeks course. After attendance for three weeks accused became intoxicated one day and was reprimanded under Article of War 104. He was allowed to finish six weeks (R.44).

4. Without regard to the pleas of guilty the evidence shows that accused was drunk in uniform while in station and in the presence of military inferiors at the place and time alleged in Specification 3; and that he was drunk in uniform while in station and on duty as Officer of the Guard at the place and time alleged in Specification 4. However, his drunkenness was not extreme and his conduct was not disorderly. In the opinion of the Board of Review he was not guilty of a violation of Article of War 95, but only of a violation of Article of War 96. With reference to Specification 4, drunkenness on duty is not ipso facto a violation of Article of War 95. In CM 220672, Erickson, decided on June 4, 1942, an officer was convicted under Article of War 95 for being found drunk while on duty as a pilot and flight commander. In holding that the record failed to show such a degree of drunkenness as to constitute a violation of Article of War 95, but that it did show a violation of Article of War 96, the Board of Review said:

> "The evidence * * * shows clearly that the accused was under the influence of intoxicating liquor while on duty, that his intoxication * * * constituted drunkenness within the meaning of the 85th Article of War. The degree of drunkenness shown does not, however, approach a degree which could be characterized as gross, and cognizable under Article of War 95. The available proof should have indicated the propriety of charging * * * this Specification as a violation of the 85th instead of the 95th Article of War."

Although the offense should have been charged as a violation of Article of War 85, it is proper to find accused guilty of the Specification in violation of Article of War 96 (CM 220672, Erickson; CM 227863, Kiplinger).

5. The testimony on page 32 of the record to the effect that accused is a "periodic drunkard" was improper, but in view of the plea of guilty to the Specifications and the incontrovertible evidence of his drunkenness, its admission did not amount to prejudicial error.

6. War Department records show that accused is 34 years of age. He is a high school graduate. He enlisted in the National Guard of the United States, 131st Infantry, Chicago, Illinois, on December 5, 1940, and was inducted into the service on March 5, 1941. He served as an enlisted man until August 5, 1942, when, upon graduation from the Air Corps Officers' Candidate School at Miami Beach, Florida, he was appointed second lieutenant, Army of the United States, and was ordered to active duty at Fort Washington, Maryland. He was assigned to the Adjutant General's School at Fort Washington, Maryland, and on September

10, 1942, his assignment was changed. On December 24, 1942, he tendered his resignation by letter. The Commanding General, Lowry Field, Colorado, approved it, stated that accused was guilty of excessive drinking and that his resignation was submitted under paragraph 12, AR 605-230. The Adjutant General's Review Board recommended that the resignation be accepted. Prior to acceptance, on February 11, 1943, accused by telegram requested that it be cancelled. The recommendation of the Adjutant General's Review Board was thereupon disapproved, and the resignation and the file were returned to the Commanding General, Lowry Field, Colorado, for such further action as he deemed appropriate.

7. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support only so much of the findings of guilty of the Charge and Specifications 3 and 4 thereunder as involves findings of guilty of those Specifications in violation of Article of War 96, and legally sufficient to support the sentence as approved by the reviewing authority, and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 96.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., JUN 11 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Gordon D. Bennett (0-560621), Air Corps.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that only so much of the findings of guilty of the Charge and Specifications 3 and 4 thereunder be approved as involves findings of guilty of those Specifications in violation of Article of War 96. I recommend that the sentence, as approved by the reviewing authority, be confirmed and carried into execution.

3. Accompanying the record of trial is a communication dated March 31, 1943, from the Officer of the Day, Lowry Field, Colorado, forwarded through channels to this office, indicating that on March 20, 1943, subsequent to his trial, accused broke arrest.

4. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer.

Myron C. Cramer,
Major General,
The Judge Advocate General.

4 Incls.
Incl.1-Record of trial.
Incl.2-Draft of let. for sig. Sec. of War.
Incl.3-Form of action.
Incl.4-Let. fr. O.D., Lowry Field, 3-31-43.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence, as approved by reviewing authority, confirmed. G.C.M.O. 165, 24 Jul 1943)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGQ
CM 233029

MAY 25 1943

UNITED STATES	)	4TH AIR FORCE
v.	)	Trial by G.C.M., convened at March Field, California, February 22-23, 1943. Dishonorable discharge and confinement for life. Penitentiary.
Privates THOMAS WILLIAM POTENZA (390244767), and JOSEPH TROVATO (32322921), both of Company A, 770th Military Police Battalion.	)	

REVIEW by the BOARD OF REVIEW
ROUNDS, LYON and FREDERICK, Judge Advocates.

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

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

As to Potenza:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Pvt. Thomas William Potenza, Co. "A", 770th M.P.Bn., did, at Santa Barbara, California, on or about January 29, 1943, forcibly and feloniously, against her will, have carnal knowledge of Betty King.

As to Trovato:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Pvt. Joseph (None) Trovato, Co. "A", 770th M.P. Bn., did, at Santa Barbara, California, on or about January 29, 1943, forcibly and feloniously, against her will, have carnal knowledge of Betty King.

Each accused pleaded not guilty to, and each was found guilty of, the respective Charge and Specification. No evidence of previous convictions was introduced. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural

life. The reviewing authority approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement and forwarded the record of trial under Article of War 50½.

3. The evidence shows that Betty King, 32 years of age and weighing about 135 pounds, was head cashier of Southern Counties Gas Company at Santa Barbara, California, a position of considerable responsibility, involving the handling of between fifty and one hundred thousand dollars a month (R. 7, 15, 30). On the night of January 28-29, 1943, at approximately midnight, while going home, she was accosted by two soldiers whom she had never seen before.

They walked along the street with her, one on each side, attempting to engage her in conversation. When they arrived at a vacant lot or garden both soldiers grabbed her arms and dragged or pushed her into the lot. A struggle ensued after which she found herself on the ground. She attempted to free herself by jerking her arms to shake off their grasp but without avail (R. 9, 22). She screamed as loudly as she could, cried, and asked them to let her go when she first fell to the ground. (R. 9).

More struggling ensued and she continued to try to free herself and might have done so except for the fact that one of her assailants held her shoulders to the ground. While she was thus pinned down by one soldier the other approached from her feet, pried her legs apart with his, and crept between them. She tried to resist and to get her legs out of the position they were in but was unable to do so. One of the men then struck her violently with his fist upon the left temple (R. 10). The blow stunned her, caused her head "to spin" for a while (R. 11), and was sufficiently severe to cause a swelling of the left side of her face and to result in a darkened contusion of a bluish color (R. 59).

Meanwhile she had been screaming and attempting to resist but, when struck, was so badly frightened that she ceased struggling and made no further outcry for fear that she might be even more seriously injured by a further blow, or be maimed or killed (R. 11, 20, 22). This fear was augmented by her knowledge of certain events that had recently occurred in that part of the country because of "the Pachucco gangs".(R. 31). When her resistance ceased the soldier who had crept upon her had sexual intercourse with her while the other held her. Thereupon he withdrew and his companion assaulted her. When he had completed the act he called to his companion by name, who then returned and again had sexual intercourse with her (R. 11, 21, 24). At no time did she consent to any of the acts so perpetrated upon her, offered no cooperation in any manner, but throughout insisted that she was compelled to submit because of violence and fear (R. 11-12, 22, 24, 31).

The street upon which the lot abuts was quite dark because of dimout regulations but the lot itself was in almost total darkness because an adjoining building shut off light from State Street.(R. 12, 26, 30-31, 37-38).

When the third attack had been accomplished, she was allowed to get up, the men departed and she went home and called the police department. Two officers responded (R. 13), one of whom testified that he went to her home upon receipt of the call, listened to her statement, examined the clothing she was wearing and observed the bruised swelling on the side of her face (R. 56-59). Miss King had taken several drinks during the evening but was not intoxicated (R. 19, 59). Though they had both been drinking, neither of the accused was drunk (R. 36, 48, 93, 94). There had been rain on January 21 (R. 37, 40, 44, 57) and the ground at the scene of the crime was muddy and damp (R. 15, 75).

First Lieutenant William P. Fonville, Air Corps, the investigating officer, on February 3, 1943 had separate interviews with each accused, after having read to them the charges and list of witnesses therein contained and advised each of his rights. Potenza stated that he had nothing to do with the woman he was charged with raping. He had gone to town with Trovato at about 7 o'clock on that evening, visited the "S & K Liquor Store", bought some wine and then wandered around town,during which time someone had given the one a dollar and the other fifty cents. At about 11:40 p.m., being too early for the truck which was to take them back to camp, they had gone to "the Carillo" to get some beer. When they came out they found the truck gone and went on down the highway to "catch a ride". They entered a cafe, the name of which he did not know, where they got coffee and "kidded" the waitress, whom witness was very anxious to locate in order to substantiate their being there at that time. They obtained a ride to camp on a truck. Shortly after arrival at camp a policeman came in, mentioned a charge of rape and asked to see their clothes. When asked about mud stains on the pants, Potenza stated they were caused by a fall he had while entering camp that night. He admitted that when he was first asked for the clothes he had worn he had given the wrong pair because he was confused (R. 71, 72, 73).

Trovato separately made a statement to the investigating officer almost identical with that of Potenza (R. 73).

On February 9, 1943, the investigating officer had another interview with each of the accused, separately, after each had been again warned of his rights and told of the statements Miss King had made. Potenza was also told that his clothes had been examined and that the shorts showed evidence of seminal fluid and the mud on his

trousers was identical with the soil at the scene of the crime (R. 74). Potenza then interrupted and made the following statement.

He had gone with Trovato and Pompillio in a truck to Santa Barbara on the night in question. At about 11:25 p.m. they had gone into "the Carillo" to get some beer while waiting for the truck to go back. After leaving there they saw a girl who, when she passed, turned, looked at them and "sort of smiled", whereupon Trovato said, "I think she can be made". Trovato followed her and when she had turned the corner went alongside, started talking to her and took her arm. Meanwhile he followed behind. The girl and Trovato went into an alley between a house and a business building. He waited outside on the sidewalk because "three is a crowd". Trovato returned and told him "if he wanted to go in it was all right". He went in and found the girl lying on the ground with her legs spread apart and her dress up. He got down beside her, then on top of her, but had some difficulty in having an erection. He finally pulled her pants down and had intercourse with her. While he was so engaged Trovato returned and asked for a cigarette. The girl told him there were cigarettes in her purse and Trovato later told him he had opened a new package of cigarettes he had found in the purse. When he had completed the intercourse he got up and went back to Trovato, whereupon Trovato returned to the girl. He waited on the sidewalk until Trovato got up when they together looked for the girl's shoe, gathered her things, put them back in her purse and brushed off her clothes, which were covered with mud. When Potenza asked to take her home she replied that it would "look funny if we go out together, you two go out first and I will come later". They left, expecting her to follow. When they reached the corner he told Trovato "I hear some yelling", though Trovato did not hear any or know of any reason why there should be any yelling; but they were nevertheless "scared" and went on down the street to the "Signal Cafe" where they played music, drank coffee and asked a truck driver to take them back to camp. When they arrived in camp a police officer came in, asked to see the clothes they had worn that night and mentioned that a rape case was under investigation. The next day he was questioned by several officers and gave them the clothes he had worn on the night of January 28. He had on all previous occasions denied that he had anything to do with the rape because of the embarrassment to his family and the girl he was going to marry (R. 74, 75). At the same time and place witness also had a second private interview with Trovato. He again warned accused of his rights and advised him that Potenza had said he wanted to make a statement, whereupon Trovato expressed a willingness to do likewise stating that he had not told the truth before but intended to do so now.

He then said that after leaving the "Carillo bar" he saw a girl, who appeared to be staggering, come out of the bus depot. He followed her and when she turned the corner went up to her and asked

whether he might take her home, to which she replied "It is OK with me". He began "pawing" her and talking to her. She said something about a boy friend and he told her not to worry as he would take care of her. He had then asked her "how about it" when they were opposite a "lawn" between a house and a business building. He continued his "pawing" and tried to persuade her by telling her he "would do anything", "pay her anything she asked", to which she replied "oh, you haven't got any money". He had his arms about her and when he asked her "how about it" she turned into the "lawn" as "if she lived there". He was not pushing her and as they went in his foot hit something and they both fell, he alongside of her. Her dress was then up over her knees and she made no effort to pull it down. He then "pawed" her, got on top of her, she pulled her pants aside and he put his penis in her and "seduced her" while she put her arms around his neck and her legs around his body. When he was finished he went back to the sidewalk where Potenza was waiting, and said "Potenza, if you want to go in it's all right; go ahead on in". Potenza then went in while he waited. After three of four minutes he wanted a cigarette. Returning to Potenza and the girl he asked for one and Potenza told him to go away and not bother him, whereupon he asked the girl who said there were some cigarettes in her purse. He picked up the purse, found a full package, opened it and took some cigarettes, together with a bottle of whiskey from which he "took a slug". He tried to close the purse but the zipper failed to work and the girl told him to put it down, that she would close it later. Potenza was "seducing" her meanwhile. He put the purse down, returned to the sidewalk and smoked a cigarette. In about two minutes Potenza came out and said, "Joe, she sure gave me a good hump", whereupon he returned to the girl who was still lying on the ground with her feet spread apart. He began "pawing her", kissing her and told her how much he loved her and then "seduced" her again. Both then got up, and looked for the girl's shoe without finding it. He called Potenza, they struck a match, found the shoe and put it on her foot. She commented on how muddy her clothes were and asked them to brush her off, which they did. They wanted to take her home and were moving out together when she suggested that it would look better if they went first and she came later. They left, thinking she would follow but when they got to the corner they heard a sound like "help! help!", and he told Potenza "she is yelling for help". They were scared and went down the highway to the Signal Cafe where they talked with the waitress, played the "juke box" and arranged with a truck driver for transportation to camp.

Shortly after their return to camp an officer came in and inspected the clothes they had worn that night. When, later in the day, he had been asked by several officers to produce the pants he had worn on the previous night he had shown them a pair which had just come from the cleaners because he did not see why he should show them the pants which had dirt on them with a charge of rape against him but that he then figured they were going to find them and so he finally

produced them. He had denied any knowledge of the rape at that time because he was "scared". He now realized he had made a mistake, had merely protected the girl and was "putting himself in a jam by denying having had anything to do with her". Asked if the girl had screamed at any time before the "seduction" he said that she had not and that she was "as hot as a firecracker". When asked whether he had struck the girl at any time he said he had not. He further stated that when he was lying by her side, before the first intercourse, she had said "don't do that to me, you will give me the clap", and he had said "what are you talking about, I am taking the same chance you are". He swore that this was the truth, the whole truth, and nothing but the truth, and stated he was sorry he had not told the truth in the first place (R. 75-77).

The statements thus made were all under oath (R. 73, 77, 78).

Patrolman Cecil Darby of the Santa Barbara police force testified that he had gone to the home of Miss King in the early morning of January 29, 1943, taken her statement and observed a bruise on the left side of her face (R. 56, 57, 59). Later in the day he had gone to Refugio Beach and obtained from each accused articles of clothing worn by them the previous night (R. 50-51; Exs. F-M). He had also obtained specimens of the soil at the scene of the crime (R. 53, 54, 55; Exs. N-Q) and from the railroad embankment (R. 55; Ex. R) where accused claimed to have fallen and gotten mud on his trousers (R. 56). All of these articles had been turned over to the police chemist (R. 53, 54) and were introduced in evidence without objection (R. 50-52, 54, 55).

Ray Pinker, forensic chemist of the Santa Barbara police department, testified that he had made an examination of the girl's coat, dress and slip, the trousers of Trovato, and the shorts and trousers of Potenza, all worn on the night of the crime, and had found seminal stains on the girl's slip and on the shorts; that the dirt on the girl's coat and accuseds' trousers were spectro-chemically identical with the soil at the scene of the crime but the dirt on Trovato's trousers bore no characteristic of the soil taken from the railroad embankment at Refugio Beach (R. 65-70).

4. Accused Trovato elected to be sworn and testified that at about 11:40 p.m. January 28, 1943 he and Potenza saw Betty King near the corner of Chapalla and Figueroa streets in Santa Barbara, California.

"When she passed by she was staring at me and I told Potenza 'there is a girl that is easy on the make'and I said 'hello

honey' and she turned around and smiled and I went after her. * * * and the first thing I asked her was 'where are you going, honey' and she said she was going home and I asked her if it was all right to walk her home, as we walked around the corner I put my arms around her. * * * I said 'how about it' and she just looked at me and kind of smiled and I said I would pay her, and she said 'you haven't any money'. Well, this girl and I was walking, there was a lawn there and I said 'come on, honey', 'lets go in here'. I just had my arms around her waist, I didn't push her or anything, but we tripped. We fell down and I fell with her and her dress was way above her knees and I said I had something and I put my arm around her and started kissing her and she said, 'of all the places, it is so muddy and damp here' and I started kissing her and telling her how much I love her and just before I seduced the woman she said, 'don't, you might give me the clap' and I said 'what are you worried about, I am taking the same chance' and I seduced her and after I seduced her I said, 'is it all right to call my friend Potenza' and he was walking towards the corner that was where Potenza was, he was coming toward me, and I said, 'all right Potenza, if you want to she's hot as a firecracker' and he did go inside the lot and he was gone about eight minutes and I figured he was through and I was dying for a cigarette and I went inside and asked Potenza for a cigarette and he said, 'go away Joe, I am busy' and so I asked the girl if she had a cigarette and she said, 'yes' in her purse and I opened the purse and there was a full pack of Luckies and I took out three or four and as I put the package back I felt a bottle and it was a whisky bottle and on the label it said 'Kesslers' and I said, 'I am going to have a drink' and I took a sip and put the bottle back and Potenza was watching me and I tried to close the zipper but I couldn't and she said, 'put it down, I'll close it later' and finally Potenza came out and said, 'go in, Joe, she sure gave me a good hump'. So I went inside and this time she was really hot and put her arms and legs around me and was kissing me in the neck. Well, finally I got through with her and she said, 'honey, see if you can find my shoes' and I couldn't find the shoes and I called Potenza and he came in and pulled out a package of matches and we struck one and the two of us looked for the shoe or shoes, I don't know whether it was one or two shoes, and we found them and I put the shoes on myself, on this Miss King, and when we got up she said, 'Jeez, my coat is all muddy, will you clean it off' and I said, 'Sure' and I patted it on the back, and she said, 'first you two fellows go out because looks embarrassing if I go out with you' and I walked toward the corner and as I go toward the corner I hear something that sounds like, 'help! help!' and I tell my friend Potenza I think she is yelling for help and he says, 'oh, you

> are crazy' so finally we go down to the Signal Cafe and get some coffee and we figured we would catch a trailer there because we had missed the detail truck, it only stays there until twelve o'clock. So we went inside and had a cup of coffee and kidded the waitress and we saw the two officers who were here. I thought it was twenty-five after twelve when I got there. So finally Potenza, after we had the coffee, went out and there was a huge trailer there and there was a soldier there and the chauffeur said he didn't have room for both of us, he could only take one. No, at first he didn't want to take any at all because he said we was a little drunk and he didn't want to be responsible for anything happening to us, but finally he put Potenza in the cab with him and me inside the sleeper and we went to Refugio Beach. The investigator covered most of it."

He further stated that he had not at any time used any force (R. 81, 83), did not strike or threaten her (R. 83), saw no bruise on her face (R. 98), did not know where she got the blow on her eye (R. 83), that she neither cried nor screamed at any time while he was with her (R. 83, 88), and that she lay on the ground with her dress up for over half an hour (R. 95, 97), though at no time were her pants removed (R. 81). From the time when he had first accosted her until he returned to the corner after the first intercourse he did not see Potenza or know where he was (R. 84, 85).

It was clear enough for him to recognize the labels on the cigarette package and whiskey bottle (R. 84) but he could not find the girl's shoes without a lighted match (R. 80, 95) because it was too dark on account of a blackout (R. 88). When asked why he had denied any knowledge of the affair when first interviewed he stated:

> "Well, the truth was, because I didn't use any rubbers on her and I didn't pay her as I said I would pay her, and I was afraid, and when they told me about the mud on my pants I surmised, but I still didn't know it was Betty King, but I was suspicious" (R. 84).

On cross-examination, when asked where his left arm was at the time he and the girl fell down in the lot he said, "I believe I hit her. Hit her on a stake or post as we went down" (R. 86). When examined by the court he stated he was not drunk on the night of January 28; that he and Potenza had talked with one another every day while in the guardhouse and had discussed the case (R. 94).

Private First Class Lawrence Osborne, Marine Corps Reserve and Mr. Arthur Stray, Santa Barbara, both testified that they were sitting in an automobile about 85 feet from the scene of the crime at about 12:15 a.m., January 29, 1943, and that they heard no screams or unusual noises of any kind while they were there (R. 105, 110).

Depositions of Sergeant Harold R. Young, Corporal Milburn L. Kemp, Corporal Stanley W. Flum, Corporal Max Meirowitz, Private Louis F. Giannattasio and Private Harold Schmalberg, all members of Company A, 770th Military Police Battalion and each offered as opinion evidence as to the reputation for truth and veracity of accused Potenza, were admitted in evidence (R. 112-115; Def. Exs. 1-6). It was also stipulated that if Mrs. Josie Orella, about 70 years of age, were present she would testify that she lives in a one-story cottage next to the vacant lot which was the scene of the crime; that on the night of January 28-29, 1943 she had slept in a room at the rear of the house on the side opposite to the vacant lot; that she slept soundly throughout the night because she was very sleepy; and that she heard no scream or any sound of disturbance. (R. 111-112).

Accused Potenza elected to remain silent (R. 115).

5. The Specifications separately charge each of the accused with rape upon the same girl, at approximately the same time and at the same place.

Rape is the unlawful carnal knowledge of a woman by force and without her consent.

Three acts of sexual intercourse were performed; one by Potenza, admitted by him in an interview with the investigating officer prior to trial and two by Trovato, admitted by him both at the investigation and by his testimony at the trial. Although each of the accused was properly advised of his rights prior to the making of any of the sworn statements, none of them are confessions. They each constitute admissions and were so treated on the trial. However, it should be noted that neither the law member nor the trial judge advocate cautioned the members of the court that the statements of one accused should not be considered as evidence against the other (par. 114c, M. C.M. 1928). A careful examination of each statement impels the conclusion that, on each occasion, the stories told by both were virtually identical in substance; that at no time prior to trial was any testimony damaging to either of the accused elicited from the other which the other had not himself freely given and that, therefore, no substantial right of either accused was in any manner affected by such failure.

It is conclusively shown and no where denied that each of the accused did have carnal knowledge of Betty King in Santa Barbara, California on the night of January 28-29, 1943. What remains to be determined is whether any or all of their sexual acts with the woman were committed forcibly and without her consent and on this issue the

the testimony of the prosecution and the defense is in irreconcilable conflict.

Betty King maintains that, while on her way home at about midnight she was accosted, on a dark street, by the accused who, as they approached a still darker vacant lot between two buildings, grabbed her arms and forced her into the lot. Though she struggled to free herself and screamed as loud as she could she was pushed or pulled to the ground where, while one of the accused held her down by the shoulders, she was assaulted by the other. During this phase of the episode one of the accused struck her violently upon the left temple so as to stun her temporarily. Thereafter, through dread of further physical injury or possible death, as well as because of a fear engendered by news of recent crimes of violence which had reached her ears, she was compelled to submit, against her will and consent, to two further attacks, one by the man who had held her during the first and again by the one who had first assaulted her. As soon as the men had left her and she was able to go home she promptly reported the matter to the police.

On the other hand, the accused each insist that the incident was merely a common dalliance in which the woman, a total stranger to them, voluntarily submitted to and enjoyed the sexual relations with each, notwithstanding the sordid and unromantic environment of their tryst.

To resolve such incompatible testimony it becomes necessary to apply ordinary and well understood principles whereby the credibility of witnesses is weighed and determined.

Miss King was employed in a position of responsibility requiring her to receive, bank and account for between $50,000 and $100,000 a month for Southern Counties Gas Company of California. No effort was made to impeach her character for truth and veracity or her reputation as to chastity. Her testimony bears every evidence of restraint to the point of reticence and at no time did her answers disclose any vindictive bias against the accused. She readily admitted that she had quarrelled with a married man and had done some drinking in the evening just prior to the crime. She made no contradictory statements either on direct or cross-examination.

Potenza and Trovato each made two statements prior to the trial. In the first two each denied that he had anything whatever to do with the woman he was charged with raping and detailed separate stories identical in almost every detail. On the occasion when the interviewing officer saw them for the second time and they were confronted with the

statements made by Miss King and advised that a chemical examination of certain clothes worn on the night of the crime showed seminal stains and that dirt on one pair of trousers was identical with the soil at the scene of the crime each of the accused recanted what he had formerly sworn to as true and, under oath, admitted having had sexual relations with Miss King at the time and place alleged.

As to Trovato, the court may well have rejected so much or such parts of his testimony as it deemed unworthy of credibility and belief because of his false statements and at the same time may have accepted the remainder as true; for the maxim "falsus in uno falsus in omnibus" is a mere rule of evidence affirming a rebuttable presumption of fact under which the court must consider all of the testimony of the witness other than that which is found to be false and give effect to so much of it, if any, as is relieved from the presumption against it and believed to be true.

Thus, though Potenza was silent on trial, he may be convicted upon the corroborated testimony of his accomplice, Trovato, and such other testimony as the court believed to be true notwithstanding it likewise found other portions of his testimony false.

Another compelling reason for doubting the accused is the utter implausibility of their naive defense. Common sense and common decency alike lead to the conclusion that only a lustful, wanton and wholly shameless woman would permit two strange men, upon such casual meeting, without recompense or hope of reward other than her own gratification, to have repeated sexual intercourse with her in a vacant lot upon a public street. Since Miss King does not appear to be such a woman, the testimony of her assailants who would attribute such conduct to her is not only implausible but incredible.

The record abounds in other discrepancies and contradictory statements found in the stories told by both Potenza and Trovato prior to and in Trovato's testimony at the trial but no useful purpose would be served in discussing them.

There was more than mere verbal protestation and pretense of resistance in this case. The outraged woman took every reasonable measure to frustrate the execution of the accused's evil designs which she was able to take and which were demanded by the circumstances. Enough has been shown to discredit the attempts of the accused to show that their carnal escapade was a mutual enterprise in which the woman gave her consent without any resort on their part to violence against her or putting her in fear.

The findings as to each accused are amply supported by the evidence.

At the outset of the trial a telegram from Major General B. M. Giles, Commanding General of the Fourth Air Force and the authority appointing the general court-martial by which accused were tried, directing that they be jointly tried in the absence of objection by either of the accused, was read (R. 3).

While it nowhere appears that either of accused expressly consented to a joint trial, neither did either, at any time, object thereto. Each was tendered the right to a peremptory challenge and to challenges for cause (R. 4); when separately asked whether he was "satisfied to be tried by the court as it now sits" each expressly stated that he was (R. 4); each was separately arraigned (R. 4-5) and each severally entered his plea: the findings were separate and each was separately sentenced (R. 119). Throughout the trial it appears evident that their individual rights were respected and in the light of the whole record it cannot be said that the substantial rights of either accused were injuriously affected by their joint trial (A.W. 37; and see par. 395 (33) (49), Dig. Ops. JAG 1912-40).

6. The Board of Review has noted the telegraphic request of the Commanding General, Fourth Army Forces to The Judge Advocate General received April 6, 1943, requesting that action upon the cases be held in abeyance pending further investigation. The further investigation suggested by the letters and information found among the allied papers has been made and reported to The Judge Advocate General by the Commanding General, Fourth Army Forces, and the Board agrees that nothing which warrants disturbing the findings in the case has been discovered.

7. Accused Potenza is 33 years of age. The Charge Sheet shows that he was drafted June 15, 1942 and has had no prior service. Accused Trovato is 27 years of age. He was drafted April 23, 1942 and has had no prior service.

8. The court was legally constituted and had jurisdiction of the persons and the offenses. No errors injuriously affecting the substantial rights of either of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence as to each of the accused. A sentence of death or imprisonment for life is mandatory upon conviction of a violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement of more than one year by section 2801, Title 22, Code of the District of Columbia.

William A. Rounds, Judge Advocate.

Terry E. Gow, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

MAY 20 1943

SPJGH
CM 233131

N.D

UNITED STATES	)	81ST INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Camp Rucker, Alabama, February 24, 1943. Dismissal.
	)	
Second Lieutenant RAYMOND L. CHAMBERS (O-1296812), 322nd Infantry.	)	

OPINION by the BOARD OF REVIEW
HILL, DRIVER and LOTTERHOS, Judge Advocates

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

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

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

Specification 1: In that Second Lieutenant Raymond L. Chambers, 322nd Infantry, did, at Columbus, Georgia, on or about December 8, 1942, neglect to take proper prophylaxis treatment after illicit sexual intercourse and did thereby develop a venereal disease, to wit: syphilis.

Specification 2: (Finding of not guilty).

CHARGE II: Violation of the 95th Article of War. (Finding of not guilty).

Specification: (Finding of not guilty).

He pleaded not guilty to all Charges and Specifications, and was found guilty of Specification 1, Charge I, and of Charge I, and not guilty of Specification 2, Charge I, and of Charge II and its Specification. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence shows that the accused admitted to Major John Henry Dougherty, Chief of the Urological Section, Station Hospital, Camp Rucker, Alabama, on January 15, 1943, when Major Dougherty examined him, that he had intercourse and the "proximate" date, and that he thought he was exposed at that time. The statement of the accused indicated to Major Dougherty that the date of infection (apparently meaning the date the infection was noticeable) was eight to fifteen days before January 15. The examination made at that time disclosed that the accused was afflicted with "new" syphilis, primary (R. 18-20; Ex. C).

According to the pay records in charge of the Assistant Personnel Adjutant of the regiment, the accused was single (R. 11).

There was introduced in evidence without objection a letter written for the information of the Division Surgeon by Captain Frank A. Hill, Medical Corps, which was identified by Captain Hill, in which it was stated that "exposure to venereal disease took place upon graduation from Cannon Class at Fort Benning, Georgia on December 8, 1942" and that "no contraceptive was used". The information which Captain Hill gave was gained from a letter drawn by Captain Marshall I. Hewitt, Acting Regimental Surgeon (R. 15-16; Ex. A).

A certificate signed by Captain Hewitt was introduced in evidence, over objection, after proof of the signature and on testimony that it was his official duty to "report such cases" and to "know the matter stated therein and report it". It appears from this certificate that the accused stated that "the exposure to venereal disease took place on December 8, 1942", that "no contraceptive was used", and that "no prophylactic measure was instituted following this intercourse" (R.15-17; Ex. B).

Captain Hill testified that ninety-nine percent of syphilis is contracted by sexual intercourse. Major Dougherty testified that Army prophylaxis is not a "sure fire" protection, but usually does protect, on a basis of eighty percent, depending on the matter of time, and that if used in a two hour period it is "almost sure". He stated that when

a man gets a venereal disease, the probability is that he did not take prophylaxis in due time (R. 17-18; 21-22).

4. The defense offered no evidence. The accused elected to remain silent.

5. The proof is sufficient to show that the accused had illicit intercourse at some date not long before January 15, 1943, and that he contracted "new" syphilis. The competent proof is not sufficient to show that the accused neglected to take proper prophylaxis. The letter written by Captain Hill (Ex. A), which states the details of the accused's exposure to infection, though not specifically the failure to use prophylaxis, is clearly a hearsay statement, inasmuch as Captain Hill obtained the information from a letter drawn by Captain Hewitt, and the facts with reference to the history of the infection of the accused were obviously not based on personal knowledge of Captain Hill. The certificate of Captain Hewitt (Ex. B), was nothing more than a written statement of facts prepared by a person who was not introduced as a witness. It constituted hearsay evidence and was clearly inadmissible. It was not admissible within the exceptions noted in paragraph 117a, Manual for Courts-Martial, 1928. The facts stated in this certificate could have been placed in evidence only by putting Captain Hewitt under oath as a witness, subject to cross-examination, either in person or by deposition (par. 113a, M.C.M., 1928; CM 228401, Webster). The court first properly excluded the certificate, giving correct reasons (R. 13), but subsequently admitted it (R 16-17), on proof of Captain Hewitt's signature, and testimony that it was his official duty to know the matter and report it. Such testimony did not make the certificate admissible.

If this evidence be omitted from consideration, the only support for a finding that the accused did not take prophylactic treatment lies in an inference based on the probability that if such treatment had been taken the infection would not have resulted. This proof is not of such quantity and quality as practically to compel a finding of guilty, and therefore receipt in evidence of the certificate showing an admission by the accused that "no prophylactic measure was instituted following this intercourse" was prejudicial to the substantial rights of the accused within the meaning of the 37th Article of War (CM 210404, Cameron; CM 211829, Parnell; CM 219511, O'Neal).

6. The accused is twenty-seven years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted

service from March 6, 1934; appointed temporary Second Lieutenant, Army of the United States from Officer Candidate School, and active duty, October 16, 1942.

7. The court was legally constituted. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the finding of guilty and the sentence.

Lester S. Hale Jr., Judge Advocate.

Samuel M. Drivers, Judge Advocate.

F. J. Lotterhos, Judge Advocate.

SPJGH
CM 233131

1st Ind.

MAY 26 1943

War Department, J.A.G.O., - To the Commanding General, 81st Infantry Division, Camp Rucker, Alabama.

1. In the case of Second Lieutenant Raymond L. Chambers (O-1296812), 322nd Infantry, I concur in the foregoing opinion of the Board of Review holding the record of trial not legally sufficient to support the findings of guilty and sentence, and, for the reasons therein stated, recommend that the findings of guilty and the sentence be disapproved. You are advised that the action of the Board of Review and The Judge Advocate General is taken under the provisions of Article of War 50½ and in accordance with note 4 following the article (M.C.M., 1928, p. 216), and that under the further provisions of that article the record of trial is herewith returned to you for a rehearing or such other action as you may deem proper. In that connection your attention is invited to paragraph 23, e, (1), C2, AR 40-210, March 16, 1943, effective subsequent to the date of trial in this case, which provides that persons in the military service will not be subjected to trial by court-martial or other disciplinary action upon charges of having failed to take prophylactic treatment after illicit sexual intercourse.

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 opinion and this indorsement, except that in the event a rehearing is directed the foregoing opinion and this indorsement should be returned alone and the disposition of the record of trial and the publication of the general court-martial order in the case shall follow the provisions of paragraph 89, Manual for Courts-Martial, 1928. 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 233131).

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

1 Incl.-
Record of trial.

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGN
CM 233132

APR 7 1943

UNITED STATES	81ST INFANTRY DIVISION
v.	Trial by G.C.M., Convened at Camp Rucker, Alabama, February 23, 1943.
First Lieutenant JESS A. LARCH (0-1283797), Infantry.	Dismissal, total forfeitures and confinement for one (1) year.

OPINION of the BOARD of REVIEW
CRESSON, LIPSCOMB and SLEEPER, Judge Advocates.

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Jess A. Larch, 01283797, 1st Lieut., 323rd Infantry Regiment, Camp Rucker, Alabama, having a lawful wife then and there living, did, at Ozark, Alabama, on or about November 7, 1942, marry Mary Jane Dougherty.

He pleaded not guilty to and was found guilty of the Charge and Specification. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution as presented by Second Lieutenant Mary Jane Dougherty of the Army Nurses Corps shows that on October 14, 1942, the accused and Lieutenant Dougherty met, and that thereafter on November 7, 1942, they were married. Following their marriage the accused and Lieutenant Dougherty lived together as husband and wife and the accused presented Lieutenant Dougherty to his friends as his wife. About a week prior to their marriage the accused told Lieutenant Dougherty that he had previously been married but that he had been divorced. (R. 6-8; Ex B)

Lieutenant Dougherty was later recalled by the court and her further testimony shows that when she married the accused she did not believe he was married. On December 20, following the marriage of Lieutenant Dougherty and the accused, Lieutenant Dougherty discovered a partially completed voucher of the accused for the month of December in which Ada Campbell Larch was named as the lawful wife of the accused. Thereupon Lieutenant Dougherty wrote to the Finance Officer at Orangeburg, South Carolina, and requested him to investigate the matter as to whether the accused was claiming dependency for her. About two weeks later Lieutenant Dougherty told the accused of her discovery of the partially completed pay voucher, and in reply he told her not to worry over the matter, that he had not had a chance to see the Finance Officer and get the matter "straightened out." Thereafter, Lieutenant Dougherty was notified by officers at the hospital where she was employed that the accused was married at the time he had married her. Lieutenant Dougherty then called upon the staff judge advocate and through his efforts her marriage to the accused was annulled. (R. 11-13)

The prosecution also placed in evidence a copy of a marriage certificate from the Probate Court of Meigs County, Ohio, which was proportedly certified to by Earl R. Titus, Judge and Ex-Offico Clerk of said Probate Court. This certificate stated that Jess Larch, was married to Miss Ada Mae Campbell on June 18, 1937. The official position of Earl R. Titus and his authority to make the proported certification were not, however, certified to by any other official of the State of Ohio, as prescribed by Article 688, United States Code Annotated.

The prosecution then read to the Court Section 47, Title 14, Code of Alabama, 1940, which provides as follows:

> "Bigamy, and bigamous cohabitation; punishment of. - If any person, having a former wife or husband living, marries another, or continues to cohabit with such second husband or wife in this state, he or she shall, on conviction, be imprisoned in the penitentiary for not less than two nor more than five years."

4. The accused testified that the certified copy of his record from Meigs County, Ohio, showing his previous marriage to Ada Mae Campbell was correct except that the true date of his marriage was June 18, 1936, instead of June 18, 1937, as shown on the certificate. The accused testified further that he had not lived with Ada Mae Campbell since the latter part of 1937, and that he did not consider her his wife. In explanation of such conclusion, the accused testified that after meeting Lieutenant Dougherty he conferred with the staff judge

advocate and was advised by him that he was not legally married to Ada Mae Campbell. The accused testified that the statement of the judge advacate was based on the fact that he, the accused, was only 17 years of age at the time of his first marriage and that he violated the law of Ohio requiring permission to marry to be granted to one under 18 years of age. He asserted that he also violated the Ohio law requiring a physical examination and notice for five days before marriage.

Concerning his attitude toward his first marriage the accused testified, as follows:

> "A. * * * She deserted me, and I then checked up on it and found that there were flaws in marriage, and I did not consider her my wife after that, until I came into the Army and they told me I would have to claim her as my dependent.
> Q. Then as such dependent, you have claimed dependency subsistence for her since you have been in the Army?
> A. Yes Sir."

The accused testified further that through his instigation his marriage with Lieutenant Dougherty had been annulled, and that he had paid the court cost of annulment proceedings (R. 9-10).

5. The accused is charged, under Article of War 96, with marrying Mary Jane Dougherty on November 7, 1942, while having a lawful wife, then living. The evidence shows very clearly that the accused was married to Ada Mae Campbell either on June 18, 1936, or June 18, 1937, that he had not been divorced from her on November 7, 1942, the date of his marriage to Mary Jane Dougherty, and at that time the accused was claiming Ada Mae Campbell as his dependent wife. Although the certificate which was introduced by the prosecution to show the prior marriage between the accused and Ada Mae Campbell was not properly authenticated, this defect in the establishing of the first marriage was cured by the direct testimony of the accused which admitted his first marriage, and the correctness of the certificate thereof except as to its representation of the date of the marriage, which the accused asserted occurred on June 18, 1936, instead of June 18, 1937, as stated in the certified copy of the marriage certificate.

The contention of the accused that he thought his first marriage was void at the time of his second marriage is untenable in view of his claim of dependency for his first wife. Furthermore, the statement of the accused to Lieutenant Dougherty that he had been divorced is inconsistent with his testimony that he thought his first marriage was void.

The above evidence presents clear proof in support of the findings of guilty. The conduct of the accused in marrying Lieutenant Dougherty with the knowledge that he had a lawful, living wife, was shown to be a crime against the law of the State of Alabama, the state wherein the second marriage was consumated, and for that reason, as well as because of the obvious outrage to Lieutenant Dougherty, and the basic wrong to society, reveals an offense of a nature to bring discredit upon the military service within the purview of Article of War 96. (Sec. 47, title 14, Code of Alabama, 1940).

6. The accused is 25 years of age. The records of the Office of The Adjutant General show that the accused served as an enlisted man and noncommissioned officer for approximately three years in the Ohio National Guard, and that he was appointed a second lieutenant, Infantry Reserve, United States National Guard, on January 29, 1940, and received an honorable discharge therefrom on August 11, 1941. He was inducted into the Army on February 10, 1941, and upon graduation from The Infantry School, Fort Benning, Georgia, on May 15, 1942, was temporarily appointed a second lieutenant, Army of the United States. He was promoted to first lieutenant on December 15, 1942.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty, and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 96.

Blasil Dresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

1st Ind.

War Department, J.A.G.O., APR 10 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of First Lieutenant Jess A. Larch (O-1283797), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. The conduct of the accused in marrying Lieutenant Dougherty of the Army Nurses Corps with the knowledge that he had a lawful living wife was an outrage to the feelings of Lieutenant Dougherty and a basic wrong to society. In view of the fact that defendant was claiming dependency for his first wife at the time of his second marriage, his testimony that he thought his first marriage was void is a mockery of truth. I recommend that the sentence be confirmed and carried into execution.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation should it meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls
Incl 1 - record of trial
Incl 2 - draft of ltr for sig. Sec. of War
Incl 3 - form of Executive action

(Sentence confirmed. G.C.M.O. 108, 12 May 1943)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGQ
CM 233148

MAY 25 1943

UNITED STATES	)	SEVENTH SERVICE COMMAND
v.	)	Trial by G.C.M., convened at Fort Leonard Wood, Missouri, March 1, 1943. Dismissal.
Second Lieutenant EDWIN J. SWANSON (0-1821930), Field Artillery.	)	

OPINION of the BOARD OF REVIEW
ROUNDS, LYON and FREDERICK, Judge Advocates.

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

2. Accused was tried upon the following Charges and Specifications:

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

Specification: In that Second Lieutenant Edwin J. Swanson, F. A., 608th Tank Destroyer Battalion, did, without proper leave, absent himself from his place of duty at Fort Leonard Wood, Missouri, from about January 12, 1943 to about January 31, 1943.

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

Specification 1: In that Second Lieutenant Edwin J. Swanson, F. A., 608th Tank Destroyer Battalion, did, at Waynesville, Missouri, on or about January 12, 1943, with intent to defraud, wrongfully and unlawfully make and utter to the Waynesville Security Bank, Waynesville, Missouri, a certain check in words and figures as follows, to wit:

JAN 12 1943 19
Date

First Natl Bank OF Killeen Tx
Write Name of Bank on above line City or Town State

PAY TO Cash OR ORDER $ 25.00

Twenty-five and No/100 DOLLARS
For Value Received, I represent the above amount is on deposit in said bank or trust company, in my name, is free from claims and is subject to this check.

Co. A. 608 T.D. Lt. E. J. Swanson
104
1072-A Barnard-St. Louis and Dallas

and by means thereof, did fraudulently obtain from the Waynesville Security Bank twenty-five dollars, lawful money of the United States, then well knowing that he did not have, and not intending that he should have any account with the First National Bank of Killeen, Texas for the payment of said check.

Specification 2: In that Second Lieutenant Edwin J. Swanson, F. A., 608th Tank Destroyer Battalion, did, at Waynesville, Missouri, on or about January 12, 1943, with intent to defraud, wrongfully and unlawfully make and utter to the Fort Wood Military Supply Company, Waynesville, Missouri, a certain check in words and figures as follows, to wit:

First National Bank Killeen, Tex. 88-627

Jan 12 19 43 No.

Pay to the order of Fort Wood Military Supply $25.00

Twenty five & No/100 Dollars
Waynesville - The Gateway to Fort Leonard Wood Area

Lt. E. J. Swanson

and by means thereof, did fraudulently obtain from the Fort Wood Military Supply Company a total of twenty-five ($25.00) dollars in merchandise and lawful money of the United States, the exact value and description of the

merchandise and the exact amount of money obtained by him being unknown, then well knowing that he did not have and not intending that he should have any account with the First National Bank, Killeen, Texas, for the payment of said check.

Specification 3: In that Second Lieutenant Edwin J. Swanson, F.A., 608th Tank Destroyer Battalion, did, at Waynesville, Missouri, on or about January 12, 1943, with intent to defraud, wrongfully and unlawfully make and utter to the Gem Jewelry Shop, Waynesville, Missouri, a certain check in words and figures as follows, to wit:

First National Bank of Killeen, Texas

Waynesville, Mo., Jan 12 19 43 No _____

Pay to the order of Cash $ 25.00

Twenty five and No/100 Dollars

Waynesville - The Gateway to Fort Leonard Wood Area

Lt. E. J. Swanson
Co. A, 608 T.D. Bn.

and by means thereof, did fraudulently obtain from the Gem Jewelry Shop a ring of the value of twenty-seven dollars and fifty cents ($27.50), paying two dollars and fifty cents ($2.50) of said value in cash, then well knowing that he did not have, and not intending that he should have any account with the First National Bank of Killeen, Texas, for the payment of said check.

Specification 4: In that Second Lieutenant Edwin J. Swanson, F. A., 608th Tank Destroyer Battalion, did, at Waynesville, Missouri, on or about January 13, 1943, With intent to defraud, wrongfully and unlawfully make and utter to the Gem Jewelry Shop, Waynesville, Missouri, a certain check in words and figures as follows, to wit:

Waynesville Security Bank

Waynesville, Mo., January 13 19 43 No _____

Pay to the order of Gem Jewelry Shop $ 10.00

Ten and No/100 Dollars

Waynesville - The Gateway to Fort Leonard Wood Area

Lt. E. J. Swanson
Co. A, 608 TD Bn.

and by means thereof, did fraudulently obtain from the Gem Jewelry Shop a total of ten ($10.00) dollars in merchandise and lawful money of the United States, the exact value and description of the merchandise and the exact amount of money obtained by him being unknown, then well knowing that he did not have and not intending that he should have any account with the First National Bank, Killeen, Texas for the payment of said check.

Accused pleaded guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record for action under Article of War 48.

2. By a properly authenticated, extract copy of the morning report of Company A. 608th Tank Destroyer Battalion, submitted at Fort Leonard Wood, Missouri, it was shown that accused, then a member of that organization, absented himself without leave on January 12, 1943.

Mr. Sam T. Rollins, President of Waynesville Security Bank of Waynesville, Missouri, testified that, on the same date, accused visited the bank, introduced himself and inquired whether any funds had been received by the bank for his account stating that he had been transferred from some place in Texas to Fort Leonard Wood and since he had been obliged to leave rather hurriedly he had telephoned to his bank in Texas and requested them to transfer his money to a bank in Waynesville. Upon examination it was learned that no such funds had arrived and, after asking whether there were any other banks in Waynesville and being advised that there were none, accused wanted to know whether the bank would advance about $25 to him so that he could make arrangements for living quarters. Upon being told that the bank would accommodate him accused said, "Just let me give you a check on my bank out there", whereupon witness wrote out a check drawn upon the First National Bank of Killeen, Texas, in the amount of $25, accused signed it and received that sum in cash from the bank (R 9-13, 15, 16; Ex.4). Accused had no smell of liquor on his breath at the time; gave no evidence of anything being wrong with him and was not drunk (R.27); nor was he other then normal on several other visits shortly thereafter (R. 29).

On the same date, accused purchased a ring for $27.50 from the Gem Jewelry Shop in Waynesville and tendered as payment $2.50 in cash and a check drawn by him on the First National Bank, Killeen, Texas, in the amount of $25 (R. 14; Exs. 5,8). It was likewise shown that accused made sundry purchases on January 12, 1943, from Fort Wood Military Supply Company, tendering in payment a check drawn by him on the First National Bank, Killeen, Texas, in the amount of $25 (which was in excess of the purchase price of the articles bought) and receiving in exchange, the goods and an amount of cash equivalent to such excess (R. 6; Ex. 9).

On January 13, 1943, accused purchased a bracelet for $2.04 from the Gem Jewelry Shop and tendered, in payment, a check drawn by him on the Waynesville Security Bank in the amount of $10 in exchange for which he received the bracelet and $7.96 in cash (R. 14; Exs. 7, 10).

Accused never had an account in the First National Bank, Killeen, Texas, had never made arrangements at any time for the honoring of any checks drawn by him on said bank and, consequently, the checks drawn by accused on the bank had been dishonored upon presentation and payment had been refused (R. 17; Ex. 11); nor did he have any account with the Waynesville Security Bank nor had he made any arrangements with them for the establishment of credit or the cashing of checks (R. 15).

4. Accused, sworn as a witness in his own behalf, testified substantially as follows:

> He is married and his home is in Wisconsin but his wife lives in Tacoma, Washington (R. 19, 20). He has been in the Army almost six years (R. 20, 31) and attended school at Camp Hood, Texas from August 1 until October 29, 1942, when he was commissioned as an officer. He joined the 608th Tank Destroyer Battalion on November 9, 1942 (R. 19). On the night the organization arrived at Fort Leonard Wood from Camp Hood sometime in January, he and some other officers went to one of the officers' mess clubs, got some whiskey and he got drunk. He did not remember going to his quarters that night but recalls "coming to" sometime in the morning with a bottle in his possession. He started drinking again and was very drunk when he got back that night. His company commander came to see him during the morning and when accused told him he was unfit for duty he advised accused to "try to sleep it off" and see whether he "could be in shape to come to work by noon". He did not remember when he left the Fort, whether on January 12 or 13. He recalled going into Waynesville and to another nearby town. Where he went he did not know. He kept on drinking all the time and stayed drunk until he was picked up in Waco, Texas (R. 17, 18). He had purchased a round trip ticket when he left (R. 20) and while he could not remember how much money he had when he left he did not believe it could have been more than seven or eight dollars. At the time of the trial he had due and owing to him his pay for part of January, his February pay, longevity pay for three months and a clothing allowance which he had not as yet received and that, prior to trial, he had made arrangements with the Post Judge Advocate to pay any outstanding debts which he had contracted (R. 18).

When examined by the court he admitted that he drank quite often and when asked whether he got drunk every time he drank stated:

> "I don't get drunk, sir, in the sense of the word that some people do; by that I mean staggering or falling down on the street or anything like that. I have been drinking for the last ten years more than is normally good for anybody, sir" (R. 19).

He admitted that he had signed all of the checks and that he had never had an account in the First National Bank of Killeen, Texas, although they had frequently cashed Government checks for him (R. 30, 31).

Captain Walter C. Shirley, accused's company commander, testified that he had known accused since December 5, 1942; that he was a platoon leader and always did his work very well, was a good leader of men and seemed an all-around good officer. Accused had commanded the company from December 31, 1942 to January 8, 1943. To witness' knowledge accused was not "in the habit of drinking quite a lot"; that although he and accused would drink "several beers apiece" at the officers' club that was all he knew of the extent of accused's drinking other than on January 11, 1943 when he drank whiskey heavily. On the morning of January 12 he had gone to accused's quarters at 10 o'clock when he found him suffering from overindulgence and told him to go to bed and stay there until he was fit for duty and not to drink any more, after which he did not see him again until he was returned from Texas. Witness knew that accused had some association with a girl in Texas while he was in Camp Hood and that this might have been the motive for him wanting to leave (R. 20-22).

Captain T. H. Black, Battalion Executive Officer, called as a witness by the court stated that he had known accused since early December, 1942 but not intimately. He had gone to Texas to get accused and return him to Fort Hood. Accused had about $12 and a return trip ticket to Crocker, Missouri, on his person. He was in military uniform and had no civilian clothes in his possession. Witness had never seen accused do any excessive amount of drinking. He had observed work done by accused who seemed to be doing a good job with his lectures and he had been a model prisoner on the way back from Texas.

5. Accused pleaded guilty to all Charges and Specifications and the prosecution introduced competent evidence in proof of every offense alleged to have been committed. It is noted that although Specification 4, Charge II alleges that the check in question was drawn upon Waynesville Security Bank and Exhibit 7 supports the allegation, Exhibit 10, which is stipulated testimony of the Assistant Manager of the payee, shows that it was drawn upon the First National Bank - Killeen, Texas. The president of the Waynesville Security Bank testified that the check was presented for payment at his bank and that payment was refused and the check was marked "No Account, 2-6-43" (R. 15). In Exhibit 10 the words "Waynesville Security Bank" were striken out and the words "First National Bank - Killeen, Texas" were substituted and the initials "B.A.N." indicate that this was done by the trial judge advocate. In the light of all the testimony and the plea of accused it seems reasonable to assume that this action of the trial judge advocate was inadvertent and unintended notwithstanding the agreement that the original might be withdrawn at the conclusion of the trial and that "photostatic

copies or exact copies of the checks be attached to the record" (R. 14).

There is little doubt that accused intended to defraud the Waynesville Security Bank when he asked for "an advance" against a purported account which he stated was being transferred from his bank in Texas to a Waynesville, Missouri, bank and then obtained $25 in cash on the strength of a check drawn upon a bank in Killeen, Texas, where he knew he had never had an account. It is equally certain that he had a similar intent when he obtained goods and cash from Fort Wood Military Supply Company and Gem Jewelry Shop in return for equally worthless checks.

It does not seem plausible that accused was as he testified constantly drunk from the time he was told by his commanding officer to go to bed and stay there until fit for duty to the time when he was apprehended in Waco, Texas. The president of the bank from whom he obtained $25 upon his fraudulent representation stated he was not drunk on the occasions when he saw him; no one else but the accused testified to any unusual conduct on his part which would have indicated that he lacked possession of his normal faculties. Neither his company commander nor the battalion executive officer had any knowledge of his habitual drinking. It is apparent that the court was not impressed with the excuse thus offered and chose to disbelieve it.

Even though it is true that accused has made arrangements for the payment of all outstanding obligations, this fact, as well as the effort to suggest intoxication at certain times within the period covered by the dates alleged in the specifications, could only be considered in extenuation or mitigation.

Such evidence neither justified the court in condoning the offense nor in wholly absolving accused from punishment. Indeed, the effort to minimize the wrongs done by the offer of such a defense tends to discredit accused and adds further justification to the conclusion that he either does not possess or has not yet come to fully understand and appreciate the honor and integrity required by the high standards of an officer and a gentleman.

6. War Department records show that accused is 28 years of age. He enlisted June 11, 1940 and on July 21, 1942 made application for and later attended the Officers' Candidate School for Tank Destroyers at Camp Hood, Texas. On October 30, 1942, he was commissioned a Second Lieutenant, Army of the United States, and on the same date was ordered to active duty with the 608th Tank Destroyer Battalion at Camp Hood.

7. The court was legally constituted. 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 of dismissal is authorized upon conviction of a violation of Article of War 61 and is mandatory upon conviction of a violation of Article of War 95.

William A. Jones, Judge Advocate.

Percy E. Lyons, Judge Advocate.

Herbert B. Fredine, Judge Advocate.

1st Ind.

War Department, J.A.G.O., JUN 7 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Edwin J. Swanson (0-1821930), Field Artillery.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed and carried into execution.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
1 - Record of trial.
2 - Dft., ltr. for sig. S/W
3 - Form of Executive action

(Sentence confirmed. G.C.M.O. 161, 24 Jul 1943)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGQ
CM 233182

10 JUN 1943

UNITED STATES v. Second Lieutenant ROBERT V. BLUE (0-1298178), Infantry.	FOURTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Wheeler, Georgia, March 4, 1943. Dismissal.

OPINION of the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, Judge Advocates.

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

2. Accused was tried upon the following Charges and Specifications:

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

Specification: In that Second Lieutenant ROBERT V. BLUE, Infantry, Company "A" Sixth Infantry Training Battalion, Camp Wheeler, Georgia, did, without proper leave, absent himself from his organization from about December 28, 1942, to about January 5, 1943.

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

Specification 1: (Finding of guilty disapproved by the reviewing authority.)

Specification 2: (Finding of not guilty.)

Specification 3: (Finding of guilty disapproved by the reviewing authority.)

Specification 4: In that Second Lieutenant Robert V. Blue, Infantry, Company "A" Sixth Infantry Training Battalion, Camp Wheeler, Georgia, did, at Macon, Georgia, on or about January 1, 1943, with intent to defraud wilfully, unlawfully and feloniously make and utter a certain check in words and figures as follows, to wit:

MACON, GEORGIA January 1 19 43 NO. 5

THE FIRST NATIONAL BANK & TRUST COMPANY 64-47
IN MACON

PAY TO THE
ORDER OF Cash $20.00

TWENTY----------00/100 DOLLARS

Lt. Robert V. Blue

indorsed on the back thereon:

Lt. R. V. Blue
Co. A, 6th Bn
Camp Wheeler, Ga.

probably drawn on us in error
First National Bank and Trust
Company in Macon
R.C. Bookkeeper

Mrs. Harry Cally
Green Grill

and by means thereof did fraudulently obtain from the Green Grill, Macon, Georgia, twenty dollars ($20.00), in payment of the check, he, the said Second Lieutenant Robert V. Blue, then well knowing he did not have, and not intending that he should have an account with The First National Bank & Trust Company, for the payment of said check.

Specification 5: In that Second Lieutenant Robert V. Blue, Infantry, Company "A" Sixth Infantry Training Battalion, Camp Wheeler, Georgia, did, at Macon, Georgia, on or about January 1, 1943, with intent to defraud wilfully, unlawfully and feloniously make and utter a certain check in words and figures as follows, to wit:

64-47

MACON, GEORGIA January 1 19 43 NO. 4

THE FIRST NATIONAL BANK & TRUST COMPANY
IN MACON

PAY TO THE
ORDER OF Cash $ 20.00

TWENTY----------00/100 DOLLARS

Lt. Robert V. Blue

indorsed on back thereof:

Lt. Robert V. Blue
Co. A, 6th Bn.
Camp Wheeler

B. H. Drew
508 Second Street
Drew & Johnson
No account

Probably drawn on us in error

and by means thereof, did fraudulently obtain from B. H. Drew Macon, Georgia, twenty dollars ($20.00), in payment of the check, he, the said Second Lieutenant Robert V. Blue, then well knowing he did not have, and not intending that he should have an account with the First National Bank and Trust Company, for the payment of said check.

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

Specification 1: In that Second Lieutenant Robert V. Blue, Infantry, Company "A" Sixth Infantry Training Battalion, Camp Wheeler, Georgia, did, at Macon, Georgia, on or about January 1, 1943, with intent to defraud wilfully, unlawfully and feloniously make and utter a certain check in words and figures as follows, to wit:

MACON, GEORGIA January 1 19 43 NO. 5

THE FIRST NATIONAL BANK & TRUST COMPANY 64-47
IN MACON

PAY TO THE ORDER OF

Cash $ 20.00

TWENTY----------00/100 DOLLARS

Lt. Robert V. Blue

indorsed on the back thereof:

Lt. R. V. Blue
Co. A, 6th Bn
Camp Wheeler, Ga.

Probably drawn on us in error
First National Bank & Trust Company
in Macon
R.C. Bookkeeper

Mrs. Harry Cally
Green Grill

and by means thereof did fraudulently, obtain from the Green Grill, Macon, Georgia, twenty dollars ($20.00), in payment of the check, he, the said Second Lieutenant Robert V. Blue, then well knowing he did not have, and not intending that he should have an account with The First National Bank & Trust Company, for the payment of said check.

Specification 2: In that Second Lieutenant Robert V. Blue, Infantry, Company "A" Sixth Infantry Training Battalion, Camp Wheeler, Georgia, did, at Macon, Georgia, on or about January 1, 1943, with intent to defraud wilfully, unlawfully and feloniously make and utter a certain check in words and figures as follows, to wit:

64-47

MACON, GEORGIA January 1 19 43 NO. 4

THE FIRST NATIONAL BANK & TRUST COMPANY
IN MACON

PAY TO THE
ORDER OF Cash $ 20.00

TWENTY----------00/100 DOLLARS

Lt. Robert V. Blue

indorsed on the back thereof:

Lt. Robert V. Blue
Co. A, 6th Bn.
Camp Wheeler

B. H. Drew
508 Second Street
Drew & Johnson
No account

Probably drawn on us in error

and by means thereof, did fraudulently obtain from B. H. Drew, Macon, Georgia, twenty dollars ($20.00), in payment of the check, he, the said Second Lieutenant Robert V. Blue, then well knowing he did not have, and not intending that he should have an account with the First National Bank and Trust Company, for the payment of said check.

Specification 3: (Finding of guilty disapproved by the reviewing authority).

Specification 4: In that Second Lieutenant Robert V. Blue, Infantry, Company "A" Sixth Infantry Training Battalion, Camp Wheeler, Georgia, wrongfully being indebted to Sergeant Elwood W. Thompson, Company "B" Service Battalion, First Student Training Regiment, Fort Benning, Georgia, in the sum of FIFTY DOLLARS AND NO CENTS ($50.00), for money borrowed, which amount became due and payable on or about November 10, 1942, did, at Fort Benning, Georgia, and continuing upon transfer to Camp Wheeler, Georgia, from November 10, 1942 to January 5, 1943, dishonorably and wrongfully fail and neglect to pay said debt.

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

Specification: In that Second Lieutenant Robert V. Blue, Infantry, Company "A", Sixth Infantry Training Battalion, Camp Wheeler, Georgia, did, at Camp Wheeler, Georgia, on or about January 10, 1943, desert the service of the United States, and did remain absent in desertion until he was apprehended at Chattanooga, Tennessee, on or about January 20, 1943.

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

Specification: In that Second Lieutenant Robert V. Blue, Infantry, Company "A", Sixth Infantry Training Battalion, Camp Wheeler, Georgia, having been duly placed in arrest in quarters at Camp Wheeler, Georgia, did, at Camp Wheeler, Georgia, on or about January 10, 1943, break his said arrest before he was set at liberty by proper authority.

He pleaded not guilty to all Charges and Specifications and was found guilty of the Specification of Charge I, and of Charge I, guilty of Specifications 1, 3, 4 and 5 of Charge II, and of Charge II, guilty of all of the Specifications of Charge III, and of Charge III, guilty of the Specification of Charge IV except the words "desert" and "in desertion", substituting therefor the words "absent himself without leave from" and "without leave", of the excepted words not guilty, of the substituted words, guilty, not guilty of Charge IV but "guilty of the 61st Article of War" and guilty of the Specification of Charge V and of Charge V. He was found not guilty of Specification 2, Charge II. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority disapproved the findings of

Specifications 1 and 3 of Charge II and of Specification 3 of Charge III, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution discloses that accused, on October 31, 1942, two or three hours after he had been commissioned as an officer (R. 43), borrowed the sum of $50.00 from Staff Sergeant Elwood W. Thompson, Service Battalion, 1st Student Training Regiment, and agreed that the money should be repaid within ten days (R. 14). Several written demands were made by Thompson for repayment (R. 14, 15, 17; Ex. P. 4, P. 6) and accused promised in writing, to make payment upon receipt of his November pay check (R. 15, 16; Ex. P. 5). It was not paid until about February 5, 1943 and Thompson never saw accused again from the day the loan was made until March 4, 1943, the day of the court-martial trial.

On December 28, 1942 accused left his station at Camp Wheeler, Georgia, without proper authority, and remained so absent until January 5, 1943 (R. 10, 23, 24; Ex. P. 1).

While in Macon, Georgia during this unauthorized absence accused, on January 1, 1943, requested the operator of the "Green Grill" to cash a check for him and upon writing out and tendering a check drawn on the First National Bank and Trust Company of Macon, Georgia, in the amount of $20 accused was given two $10 bills (R. 21; Ex. P. 8). Payment of the check was later refused by the bank upon presentation and the holder also never saw the accused again until the day of the court-martial trial (R. 21, 22).

On the evening of the same day, January 1, 1943, accused visited the Exchange Liquor Store in Macon and requested the manager to cash a check for him. Upon the manager's refusal, Mr. B. H. Drew, who operated the store and who had overheard the conversation stated, in accused's presence, that the "check should be all right; an officer's check is usually good", and personally cashed the check which was drawn upon The First National Bank and Trust Company of Macon, Georgia in the amount of $20 by giving accused $20 in cash. This check was later cashed by Drew at his bank and when it was returned to him unpaid and marked "probably drawn on us in error" he was obliged to reimburse the bank (R. 17, 18; Ex. P. 7). Some one later paid Drew the sum of $20, though he could not remember who it was (R. 21).

The cashier of The First National Bank and Trust Company of Macon, Georgia testified that accused never had any account with the bank (R. 22).

On January 5, 1943, accused was placed under arrest in quarters by Captain Harry J. Walters, Infantry, in accordance with orders from accused's Regimental Commander. He was advised of his arrest, the limits of his restriction were pointed out, and the 69th and 95th Articles of War were read to him and explained (R. 24, 26). Notwithstanding these warnings he broke his arrest on January 10, 1943, left the camp and was apprehended at a bus terminal in Chattanooga, Tennessee, by a sergeant of the Fort Oglethorpe Military Police Detachment on January 20, 1943 (R. 29; Ex. P. 9). He was held by the Provost Marshal at Fort Oglethorpe until he was returned to Camp Wheeler in custody of another officer (R. 30; Ex. P. 11).

4. Accused elected to be a witness in his own behalf and, after being sworn, read a lengthy prepared statement preliminary to any examination (R. 31, 32).

Upon cross-examination he explained that he had read the statement not because of any dramatic effect it might have upon the court but because of his nervousness and fear lest he would omit anything (R. 35). He admitted receiving two requests for repayment of the Thompson loan; he likewise admitted his signature upon an indorsement of the basic communication in which a request for repayment was made (R. 35; Ex. P. 5) as well as his signatures upon the two checks cashed by him in Macon (R. 38, 39; Ex. P. 7, P. 8). He had never read any ethical guide or text book on the conduct of an officer and did not know it was dishonorable to draw a check on a bank in which he had no funds. He had, however, understood the significance and purpose of his arrest while charges were pending against him, knew that he could not transgress the limits of his restrictions and that he was not at liberty until his restraint was removed (R. 36, 37, 39).

5. In Specifications 4 and 5 of Charge II and in identical Specifications under Charge III accused is charged with "wilfully, unlawfully, and feloniously" making and uttering worthless checks and fraudulently obtaining value for them. Accused never had an account in the bank upon which the spurious checks were drawn and the evidence clearly shows the intent to defraud both in the making of the checks and in the means employed to obtain money with them. While the use of the term "feloniously" in each of these Specifications was unnecessary and irregular inasmuch as the crime alleged is nowhere denounced as a felony it cannot be said to be harmful. The meaning of the word is no longer restricted to its ancient and traditional use and it may connote a wrongful, malicious and wicked act contrary to the admonition of the law regardless of whether the act which it describes is, in fact, a felony. Its use in charging a felony was indispensable at common law and is so in many jurisdictions today, but when applied to a crime of lesser grade it can have no harmful significance.

Accused was also charged, in identical Specifications under both the 95th Article of War and the 96th Article of War with "dishonorably and wrongfully" failing to pay a debt and was found guilty of both. The reviewing authority disapproved the finding under Article of War 95. This had the effect of purging him of that dishonorable conduct contemplated by and which is the essential element of a violation of Article of War 95; but the failure of an officer to repay a debt contracted with an enlisted man after repeated requests for payment and a promise to pay have been made can be a dishonorable as well as wrongful act within the purview of Article of War 96. It was so charged in Specification 4 of Charge III and the evidence clearly supports the finding thereon.

There can be no reasonable doubt, in the light of all the evidence relating thereto, that accused did, with intent to defraud, make and utter the worthless checks above mentioned at the time and place specified, knowing that he had no funds upon which to draw them and that he received cash in exchange for each. Such conduct is clearly a violation of both the 95th Article of War and the 96th Article of War.

Coupled with these civil infractions and the misconduct in failing to pay the debt to an enlisted man are three military offenses for which accused can offer no reasonable excuse or show the slightest extenuation. He left his station at Camp Wheeler, Georgia, without any authority and remained absent for eight days. When placed in arrest because of this misconduct and with a full knowledge of the consequences of his acts he broke the arrest, left his station and again remained absent until he was apprehended in Chattanooga, Tennessee, and returned in custody to his camp. There is not the slightest doubt of his guilt of all of these offenses and the implausible excuse offered by accused in attempted explanation of his conduct could only have served to strengthen this conclusion.

6. The records in the office of The Adjutant General show that accused is 26 years of age. He is married, has one child and the family resides in Hattiesburg, Mississippi. He enlisted August 10, 1940 in Company H, 151st Infantry, Indiana National Guard, was inducted into Federal service on January 17, 1941, attended an Officer Candidate School at Fort Benning, Georgia, after which he was commissioned as a second lieutenant, Infantry, Army of the United States on October 31, 1942.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority and the sentence and to warrant confirmation thereof. A sentence of dismissal is mandatory for

violation of Article of War 95 and is authorized for violation of Article of War 69 and Article of War 96.

William L. Lounds, Judge Advocate.

Carle Hepburn, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 22 JUN 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Robert V. Blue (0-1298178), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings as approved by the reviewing authority and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed and carried into execution.

3. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl. 1 - Record of trial
Incl. 2 - Dft. ltr. for sig. S/W
Incl. 3 - Form of action

(Sentence confirmed. G.C.M.O. 174, 30 Jul 1943)

WAR DEPARTMENT
Army Service Forces
In the Army of The Judge Advocate General
Washington, D.C.

APR 30 1943

SPJGH
CM 233183

UNITED STATES v. Private WILLIAM H. GRAY (34331327), 307th Technical School Squadron (Sp) (Attached).	)	THIRD DISTRICT ARMY AIR FORCES TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Keesler Field, Mississippi, February 17 and 24, and March 5, 1943. Dishonorable discharge and confinement for fifteen (15) years. Penitentiary.

REVIEW by the BOARD OF REVIEW
HILL, LYON and DRIVER, Judge Advocates

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

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private William H. Gray, 307th Technical School Squadron (Sp), did, at Biloxi, Mississippi, on or about December 18, 1942, with intent to commit a felony, viz., rape, commit an assault upon Donna Wisecup, by willfully and feloniously striking said Donna Wisecup on the eye with his fist, throwing her to the ground, and choking her with his hands.

He pleaded not guilty to and was found guilty of the Charge and Specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for fifteen years. The reviewing authority approved the sentence, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that Mrs. Donna Wisecup married Private Paul E. Wisecup at 1:45 p.m., December 18, 1942, at the Methodist church in Biloxi, Mississippi. After the ceremony the wedding party of about 25 guests went to the Victory Bar where drinks were served. Mrs. Wisecup had three or four drinks. After remaining at the bar for two or three hours, about six soldiers and the Wisecups went to the Triple X restaurant for food. Around 7:45 Mr. and Mrs. Wisecup and two soldiers started walking from the restaurant to the Crescent Bar. On the way the military police arrested Private Wisecup and the two other soldiers because each man had a bottle of liquor. Wisecup was "tight", but Mrs. Wisecup denied that she was intoxicated. The military police took Private Wisecup away, told Mrs. Wisecup that her husband would return, and directed that she await his return at the Crescent Bar. It was then 7:45 p.m. (R. 14-16, 25, 45-47).

Mrs. Wisecup entered the Crescent Bar and went to a table. She was crying because she did not know what would happen to her husband, and she was afraid to go home alone. She told Oscar Olier, owner of the bar, what had happened to her husband, and went to a table. Accused, whom she had never seen before, came uninvited to her table. Olier had sold accused four or five drinks that night. He did not believe that accused was drunk. When accused came to the table he said to Olier, "That girl didn't come to see you, she came to see me, you belong in back of the bar". Mrs. Wisecup said to accused "I beg your pardon, sir, I don't know you". Olier testified that he offered Mrs. Wisecup a drink because she was crying, and he told her it might make her feel better. Mrs. Wisecup replied that she would take "a little drink" with not too much whiskey as she felt bad. According to Olier, he gave Mrs. Wisecup the drink and did not collect for it. Mrs. Wisecup denied having the drink (R. 41-42, 44, 68-69).

Accused sat down at the table, told Mrs. Wisecup to stop crying, and that her husband would probably be put in the guardhouse. She had

informed accused of her trouble when he asked her why she was crying. After five minutes she started to leave the bar in order to call a cab. Accused followed her. Mrs. Wisecup asked him not to follow her, saying that she was a married woman, and requested Olier to make accused stop following her. Olier replied that he could ask accused, but that he could not prevent him from doing so. Accused told Mrs. Wisecup that he would call a cab, and departed. She waited for about five minutes because she believed he was interested in helping her, and at that time he had done nothing to make her afraid of him. Accused returned and told her she had better walk home. They walked toward her home. Mrs. Wisecup had not asked accused to accompany her. She was still crying. Accused told her that she "might as well shut up", because her husband would be put in the guardhouse. He told her he had a brother who was a captain and he would get her husband out. It was then about 8 p.m. and dark (R. 17-19, 26, 43).

When accused and Mrs. Wisecup reached a point near her home, where she lived with a Mrs. Strobridge, accused asked her to walk over to the sea wall which was across the street. She replied that she did not wish to do so because she was home. Accused then put his left arm around her "from the rear", held her right arm with his right hand, and, despite her resistance, pushed her across the street to some bushes, where it was dark. He then struck her left eye. Mrs. Wisecup screamed. He then hit her left temple and knocked her down. She screamed again. Accused then started to choke her, and "pressed his knee against my two knees". Mrs. Wisecup remembered nothing more until she heard accused say "There's your purse". She was then lying on her back. Mrs. Wisecup got her purse and next recalled being in the driveway beside her home. Her sweater was up around her shoulders. When she entered the house her left eye was black, the left side of her neck was swollen, and there were fingerprints on the left side of her neck. The following morning there was a blue mark just above her left knee.

At the time of the assault, she had about $15 in her purse. The full amount was in her purse after the accident. Mrs. Wisecup did not remember if accused attempted to have sexual intercourse with her, or whether he exposed any part of his person. Aside from her sweater, none of her clothing had been removed or disarranged. The back of her skirt was wet. When asked by a member of the court if she had been raped, she replied "Not that I know of". She later went to a doctor for an eye examination, but did not show the doctor the bruise on her knee. Mrs. Wisecup did not know why she did not

scream when accused began to drag her across the street. She did scream twice during the assault, but could scream no more because accused was choking her (R. 19-22, 26-28, 68-69).

About 8:16 or 8:20 p.m., Private and Mrs. Strobridge were walking toward their home. When they were about a block away from the house they heard the scream of a woman coming from the direction of the beach. It was dark and they saw no one in the bushes, nor did they hear sounds of a struggle. The distance from their house to the sea wall was about 40 yards. At about 8:30 p.m., Mrs. Wisecup entered the house, crying very hard. She had a black eye, her clothes were wrinkled, and there was some dry grass on the back of her coat. She was badly frightened, and there were red marks on her throat. She could not talk very well, and the Strobridges could not "get anything out of her". Mrs. Strobridge laid her on the bed. About ten minutes later, Private Wisecup entered the house. According to Mrs. Strobridge, Mrs. Wisecup stated that a soldier had seized and hit her. She did not say that the man had had intercourse with her, or that he made any attempt to do so. Strobridge testified that Mrs. Wisecup said that a man had pushed her across the street and had hit her four times. He gathered from the conversation that the man had "tried to make her". She said that "he had taken his knee and tried to put it in between her two knees". No part of her clothing was removed. According to Mrs. Wisecup's husband, his wife was "very shakened and her hair was mussed up". The left side of her face was badly bruised and swollen, and the left side of her throat bore red marks. There was a bruise above her knee. Mrs. Wisecup told her husband that a man had pushed her across the street, knocked her down, had choked her, and "had tried to force his knee between her legs". Strobridge did not believe that either Private or Mrs. Wisecup were then intoxicated. The house was a good ten-minute-walk from the Crescent Bar (R. 30-33, 35-40, 47-48).

Accused returned to the Crescent Bar about a half hour after he and Mrs. Wisecup had departed. He ordered a drink and said to Olier "I took her home, all right". He left after finishing his drink. At about 10 p.m. accused entered the barracks at Keesler Field, Mississippi. Private Hugh M. Herald, Air Corps, unassigned, was awakened and accused told him that "he had got laid by a girl who had just gotten married". Accused told him that the husband of the girl was in the guardhouse and that he had promised to secure his release through the brother of accused who was a captain. Herald observed no evidence that accused had been drinking (R. 43, 50; Ex. 5).

4. For the defense, accused testified that he was sitting at the Crescent Bar when Mrs. Wisecup entered and went to a table. Accused, who had never seen her before, joined Mrs. Wisecup and ordered a drink. They both drank. She made no objection, and accused paid for the liquor. He had between $60 or $65. They decided to go to the Buena Vista Hotel "and drink some more". On the way to the hotel, they turned back, sat on a bench inside a yard, and then went to a bus terminal to call a cab to go to "the Plaza". Mrs. Wisecup then decided to walk home, and accused accompanied her. On the way they walked over to the sea wall. They indulged in intercourse in the bushes. The act was entirely voluntary on the part of Mrs. Wisecup, and accused used no force of any kind (R. 54-55, 58, 60-61, 63, 67).

Accused then walked over to one side of the bushes to adjust his clothing. When he returned, Mrs. Wisecup was going down the street. Accused, who missed his billfold, overtook her and asked her to return to help him find the wallet. Mrs. Wisecup refused, saying she had to go home. Accused seized her around the body, pulled her across the street, and in doing so, felt his wallet under her dress, near her bosom. He reached in, she "hollered", and accused slapped her hard with his open hand. He then obtained his billfold, returned to the Crescent Bar, where he had a drink, and then returned to Keesler Field. During the course of the evening, Mrs. Wisecup had informed accused that she was married and that her husband had been arrested by the military police. Accused told her that he knew a captain who might help him. The officer was not related to accused (R. 55, 58-60, 64-66).

Accused, in response to questioning by defense counsel, testified that he had been convicted and imprisoned by the civil courts for making whiskey and for transporting whiskey. He had been tried but not convicted for rape and for grand larceny. Upon cross-examination by the prosecution, accused testified that he was convicted of grand larceny and of assault and battery, but that the higher court had reversed the convictions. He also admitted telling Lieutenant Scott, the investigating officer, that he did not leave Keesler Field the night "this happened" (R. 53-54, 56-58).

First Lieutenant Henry L. Beidler, Air Corps, testified for the defense that the reputation of accused was "average; not outstanding in either respect - not good or bad". Lieutenant Beidler had "no reason to not believe him under oath" (R. 52).

5. The evidence thus shows that on December 18, 1942, Private and Mrs. Wisecup, after their marriage, went with some wedding guests to the Victory Bar, Biloxi, Mississippi, where they remained for two or three hours. Mrs. Wisecup had three or four drinks during this interval. The Wisecups and about six soldiers went to the Triple X restaurant where they had dinner. On leaving the restaurant, Private Wisecup was taken in custody by the military police, and Mrs. Wisecup was instructed to await his return in the Crescent Bar. She entered the bar, crying, and told the story of her husband's arrest to the owner of the bar, Mr. Olier, whom she had known before. The accused, a stranger to Mrs. Wisecup, came to the table, uninvited, and said to Mr. Olier, "That girl didn't come to see you, she came to see me, you belong in back of the bar". Mrs. Wisecup told accused she did not know him. She then told accused why she was crying, and accused replied that her husband would probably be put in the guardhouse. As Mrs. Wisecup started to leave, she asked accused not to follow her, and requested the owner of the bar to make accused stop following her. Accused then went to call a cab. Mrs. Wisecup waited about five minutes because she believed accused would help her, and he had done nothing at that time to make her afraid of him. Accused returned, told her she should walk home, and falsely stated that he had a brother who was a captain, who would assist in securing her husband's release. Mrs. Wisecup was still crying. When they reached a point near her home, the accused asked her to walk over to the sea wall. She refused the request. Despite her refusal and resistance, accused seized her and forced her across the street to some bushes. He struck her left eye, and Mrs. Wisecup screamed. He then hit her left temple, knocking her down. She screamed again. Accused then started to choke her, pressing his knee against her two knees. Mrs. Wisecup next recalled hearing accused say "There's your purse". She was then lying on her back. She got the purse, and next recalled being in the driveway beside her home. She was crying. Her sweater was up around her shoulders, her left eye was black, the left side of her neck was swollen and bore fingerprints. Mrs. Wisecup did not know if accused had attempted to have intercourse with her, or whether he had exposed any part of his person. Asked if he had raped her, she replied "Not that I know of". None of her clothing had been removed or disarranged, although the back of her skirt was wet.

Prior to the incident she had about $15 in her purse. The money was undisturbed. The following morning there was a bruise above her left knee. Mrs. Wisecup was examined by a doctor for her eye injury.

At about 8:17 or 8:20 p.m. on the evening in question, when

walking about one block away from the house in which Mrs. Wisecup lived, Private and Mrs. Strobridge heard a scream of a woman coming from the direction of the beach. They did not see anyone in the bushes opposite the house, nor did they hear sounds of a struggle. About ten minutes later, Mrs. Wisecup entered the house, in a bruised and shaken condition and crying very hard. She stated that a man had seized her, dragged her across the street, hit her, and had tried to put his knee between her two knees.

6. Since the court, by its findings, has rejected the incredible story of the accused, the question presented is whether, under the testimony of Mrs. Wisecup, adjudged credible by the court, the acts done by the accused are sufficient to constitute an assault with intent to rape. This is a question of law which must necessarily be considered by the Board of Review, and does not in any sense involve determining the weight of evidence or passing upon the credibility of witnesses. This was the exclusive function of the court and the reviewing authority. As was said by the Board of Review in CM 199369, Davis:

> "* * *. Intent being a mental process can only be inferred, in cases such as this, from the character and degree of the violence applied, the language, threats, demonstrations, and entire conduct of the accused, the place, time, and other circumstances of the attempt, etc. See Winthrop, 2nd Ed., page 688. * * *."

The evidence shows that on the night of December 18, 1942, the accused, a total stranger to Mrs. Wisecup, forced himself upon her at the Crescent Bar where she was awaiting the return of her husband. His remark to Mr. Olier, when the accused came, uninvited to Mrs. Misecup's table, "That girl didn't come to see you, she came to see me, you belong in the back of the bar", indicates a lewd and carnal state of mind. In furtherance of his lustful purpose, and over her protest, the accused persisted in accompanying Mrs. Wisecup as she started walking home. On the way he told her that her husband would probably be placed in the guardhouse and, falsely, that he had a brother who was a captain and that he would assist in securing her husband's liberty. Finally, as they reached a point near her house, the accused asked Mrs. Wisecup to walk with him over to the sea wall, which was across the street. When she refused his request, the accused put his left arm around her "from the rear", held her right arm with his right hand and, despite her resistance, pushed her across the street to some bushes where it was dark. He then struck her in

the face several times, knocked her down, and choked her. Mrs. Wisecup lost consciousness, but before doing so, remembered that the accused pressed his knee against her knees. When she regained consciousness, she was lying on her back, and the accused said, "There's your purse". Although Mrs. Wisecup's underclothing had not been removed or disarranged, and there was no evidence that accused at any time exposed part of his person, the Board of Review is of the opinion that the established facts and circumstances clearly warranted the finding that the assault was made with the intent to commit rape. As was said in Ware v. State (67 Ga., 352):

> "* * * What other motive could he have had? She was unknown to him, She was unprotected. * * * The fiendish flame of lust alone could impel him to such acts. In seeking the motive of human conduct, the jury need not stop where the proof ceases; inference and deductions from human conduct are proper to be considered where they flow naturally from the facts proved, and such conduct as this points with reasonable, if not with unerring, certainty to the lawless intent he had in view."

See also People v. Moore (100 Pac., 688, 689):

> "In all such cases the intent with which an assault is committed is a fact which can only be inferred from the outward acts and surrounding circumstances. It is, in other words, a question of fact for the jury, and not a question of law for the court, except in a case where the facts proved afford no reasonable ground for the inference drawn."

The fact that the accused - for some reason known only to himself - apparently abandoned the attack, makes no difference.

Paragraph 149 l, Manual for Courts-Martial, 1928, states:

> "Once an assault with intent to commit rape is made, it is no defense that the man voluntarily desisted."

In this connection, the implausible statement of the accused, that he did have sexual intercourse with Mrs. Wisecup, although he claimed that it was entirely with her consent, is a material circumstance as bearing upon the intent of the accused at the time the assault was committed.

In the light of all the evidence it is easily understood why the court rejected the testimony of the accused.

7. The charge sheet shows that the accused is 33 years of age, and that he was inducted in the military service on June 5, 1942.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence. Confinement in a penitentiary is authorized by Article of War 42, for the offense of assault with intent to commit rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by section 22-501, District of Columbia Code (1940).

Walter S. Hell Jr., Judge Advocate.

Percy E. Gyory, Judge Advocate.

Samuel M. Drewry, Judge Advocate.

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

MAY 22 1943

SPJGH
CM 233192

N.D

UNITED STATES	)	11TH ARMORED DIVISION
v.	)	
Captain ANTHONY L. WILSON (0-163343), Corps of Military Police.	)	Trial by G.C.M. convened at Camp Polk, Louisiana, March 10, 1943. Dismissal.

OPINION of the BOARD OF REVIEW
HILL, DRIVER and LOTTERHOS, Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Captain Anthony L. Wilson, Corps of Military Police, Headquarters Company, III Armored Corps, did, at Camp Polk, Louisiana, on or about February 9, 1943, render himself unfit for the performance of military duty by the excessive use of intoxicating liquor.

He pleaded not guilty to and was found guilty of the Specification and Charge. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution shows that the accused, who was assigned to duty with G-2, III Armored Corps, at Camp Polk, Louisiana, was Alert Officer for III Armored Corps Headquarters on Sunday, February 7, 1943. Early that morning he was seen working, and appeared to be

normal. Late that afternoon he came to the radio room. He did not appear well, and went behind one of the map boards, where he apparently went to sleep in a chair. He had suffered from a severe cold, and made comments that he was feeling sick. The accused did not sign the report of his tour covering a twenty-four hour period (R. 8-12).

The accused was not on duty at his regular place of duty in the G-2 conference room on Monday, February 8, 1943, and Tuesday, February 9, 1943. He did not have permission to be absent. At about seven o'clock in the evening on Monday, February 8, 1943, he was seen in Officers' Quarters No. 2, by First Lieutenant Phil C. Campbell. The accused asked what time it was, and on being advised that it was about seven o'clock, asked: "Morning or evening?" His manner was not flippant, but serious. His actions were "very unsteady--very unusual". Lieutenant Campbell was of the opinion that he was not sober, but drunk. Lieutenant Campbell had first observed accused "about seven o'clock" in Officers' Quarters No. 1, dressed in a bathrobe. Accused "picked up" two bottles of beer, and then went to Officers' Quarters No. 2 and to his room. At 7:55 a.m., Tuesday, February 9, 1943, the accused called the Chief Clerk at the G-2 section office and said that he had a cold and would not be in for a few hours. Colonel Thomas H. Davies, Assistant Chief of Staff, then requested the medical officer to visit the accused and report his condition (R. 6-8, 10-11, 18-19).

Captain Victor H. Simecek, Medical Corps, called on the accused at Officers' Quarters No. 2, on the morning of Tuesday, February 9, 1943, at the request of Colonel Davies. When he first entered the building, the accused was standing in the doorway of his room, but when he reached the room the accused was lying on the cot, clothed in underwear and bathrobe. Captain Simecek examined him, and found that he was perspiring profusely, his pulse was rapid, his face was flushed, there was the odor of alcohol on his breath, and his throat was red. Captain Simecek was of the opinion that "he was still under the effects of alcohol", and that "the redness of the throat would be the result of alcoholic consumption", that he was not able to perform his military duties because his coordination was not good and his physical condition would not warrant adequate normal judgment. Captain Simecek put down a diagnosis of acute alcoholism and nasal-pharyngitis. The latter can cause redness of the throat. The state of alcoholism was determined from the symptoms that presented themselves, from redness of face, profuse sweating, lack of coordination, and alcoholic breath. This condition could not have resulted from medicine taken for the treatment of a cold.

There were three glasses in the room of accused, one of them about one-quarter full of something having the odor of an alcoholic beverage. Captain Simecek advised that the accused be hospitalized because he was not fit for duty (R. 12-14).

First Lieutenant Orin J. Farness, Medical Corps, saw the accused at the hospital, about noon on Tuesday, February 9, 1943. According to the hospital record, a blood test had been made at 10:50 a.m. that day, which showed one milligram of alcohol in one centimeter of blood. This is not a normal level, and means that a person has taken alcohol into his system either by drinking or having it injected. Alcohol in the blood cannot come from food. There is no set level of alcohol in the blood that produces drunkenness, but it is generally assumed that a milligram and a half will cause a person to be unable to execute his normal functions. There is quite a variance in the individual's ability to handle alcohol. Lieutenant Farness thought that an individual with one milligram of alcohol would be able to perform his duties. Acute alcoholism would disappear within a day. The accused was sent in with two medical tags - one for alcoholism and the other for nasal-pharyngitis. Without the diagnosis slip, Lieutenant Farness would not have taken a blood test, nor thought that the accused was suffering from acute alcoholism. A person suffering from sore throat may have no unusual symptoms, his throat may be sore and red, if it is severe he may have chills and fever, and he would perspire. In the opinion of Lieutenant Farness the accused was able to perform his duties except for nasal-pharyngitis. The accused was admitted to the hospital on February 9, 1943, and was discharged on February 22, 1943. When he arrived he had a temperature of ninety-nine and a half degress, and he had a temperature the whole time he was there. Temperature could not be solely due to intoxicants (R. 15-18).

4. For the defense Sergeant Paul McDaniel, testified that he was on duty as alert noncommissioned officer, III Armored Corps Headquarters, from nine o'clock a.m., Sunday, February 7, 1943, to nine o'clock a.m., Monday, February 8, 1943; that on the morning of Monday, February 8, 1943, between three and four o'clock, while the accused was on duty as Alert Officer, accused appeared to be ill and said that he felt ill. The accused was not at headquarters during all of the period, but was in his quarters part of the time. He stated that he did not feel well, and then left, although he was required to be at Corps Headquarters except for meals. The accused did not sign the Alert Report prepared by Sergeant McDaniel (R. 22-23).

On the morning of Monday, February 8, 1943, about eight or eight-thirty, the accused was seen shaving, by the room orderly at

Officers' Quarters. He seemed all right at that time. The orderly did not know whether or not he was drunk, but thought that he was ill. The accused said he was feeling bad. About nine o'clock, the accused was still in his quarters (R. 23-25).

Second Lieutenant Hazel Denmon, Army Nurse Corps, was present in the ward when accused was admitted between ten-fifteen and ten-thirty. She "would not say" that the accused was under the influence of alcohol. He was a little nervous, but talked quietly.. In her opinion, he was not suffering from "alcoholic beverage". (R. 20-21).

The accused made an unsworn written statement, as follows:

> "I was Alert Officer at the III Armored Corps Headquarters from Sunday, March 7, 1900 to Monday, March 8, 1943, 0000 and that at about 5:00 AM, Monday morning, I felt ill and left the headquarters after advising the Alert Non-Commissioned Officer that I was going to my quarters and could be reached there. Upon reaching the Officers' Quarters, I was seized with cramps and vomiting and layed down on my bed to relieve nausea and illness. About 8:00 I went into the latrine and cleaned myself, taking a wash and shaving as I intended to go back to headquarters and was moving around I was again taken ill. I layed down again. Because of the fact I had been up all night I just fell asleep. Tuesday morning, March 9th, about 0800, I 'phoned Sergeant Roberts at G-2, III Armored Corps and asked him to tell Colonel Davies when he came in that I was ill in quarters. Captain Simecek of the Medical Corps came to my quarters and had me taken to the Station Hospital where I was treated for thirteen days." (R. 27)

5. Captain Simecek, when recalled as a witness for the court, testified that he called on the accused about nine-thirty or a quarter to ten on Tuesday morning, and sent the accused to the hospital about ten-thirty. He stated that when an officer is absent from his duties and considers himself too ill to perform his duties, he should report to the medical officer. Captain Simecek considered the accused not fit to perform military duty (R. 26-27).

6. The evidence shows that the accused was absent from duty on February 8 and 9, 1943, that on the evening of the eighth he appeared to

be drunk, that on the morning of the ninth it was necessary to hospitalize him, that at that time he was not fit for military duty, and that he remained in the hospital until February 22, 1943. Although there is some evidence that the unfitness of the accused for military duty was caused by nasal-pharyngitis, yet the evidence that the cause was alcoholism fully supports the findings of guilty.

7. All of the members of the court joined in a request to the reviewing authority that the accused be permitted, because of his World War I service, to resign from the service rather than have the sentence of dismissal executed.

8. The accused is 47 years of age. The records of the Office of The Adjutant General show his service, as follows: Commissioned service Second Lieutenant to Captain, Infantry, January 25, 1918 to June 9, 1919; appointed temporary Captain, Army of the United States, August 31, 1942; active duty September 17, 1942.

9. The court was legally constituted. 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 sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 96th Article of War.

Thomas E. Hill, Jr., Judge Advocate

Samuel M. Drivers, Judge Advocate

F. Fullerton, Judge Advocate

1st Ind.

War Department, J.A.G.O., MAY 27 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Captain Anthony L. Wilson (O-163343), Corps of Military Police.

2. I concur in the opinion of the Board of Review 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 accused rendered himself unfit for the performance of military duty by the excessive use of intoxicating liquor, in violation of the 96th Article of War. On the occasion when the accused was found unfit for duty, he was examined in his quarters by a medical officer, who made a diagnosis of acute alcoholism and nasal-pharyngitis, and sent him to the hospital, where he remained for nearly two weeks. In the opinion of another medical officer the accused was able to perform his duties except for the nasal-pharyngitis. The accused is forty-seven years of age. All members of the court joined in a request to the reviewing authority that the accused be permitted, because of his World War I service, to resign from the service rather than have the sentence of dismissal executed. In view of all of the circumstances, I recommend that the sentence to dismissal be confirmed, but that the execution thereof, be suspended during the pleasure of the President.

3. Inclosed herewith are the draft of a letter for your signature, transmitting the record of trial to the President for his action, and a form of Executive action carrying into effect the recommendation made above.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl. 1- Record of trial.
Incl. 2 -Drft. ltr. for sig. Sec. of War.
Incl. 3- Form of Executive action.

(Sentence confirmed but execution suspended. G.C.M.O. 137, 1 Jul 1943)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D.C.

SPJGN
CM 233196

12 JUN 1943

U N I T E D S T A T E S	)	THIRD AIR FORCE
v.	)	Trial by G.C.M., convened at Morris Field, Charlotte, North Carolina, February 19, 1943. Dismissal.
Second Lieutenant ROBERT H. BELL (0-730847), Air Corps.	)	

OPINION of the BOARD OF REVIEW
CRESSON, LIPSCOMB and SLEEPER, Judge Advocates

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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 Judge Advocate General.

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

CHARGE I: Violation of the 83rd Article of War.

Specification: In that 2nd Lt. Robert H. Bell, 106th Observation Squadron, 66th Observation Group, did, near Sanibel Island, Florida, on or about January 15, 1943, through neglect suffer an A-20 B Airplane of the approximate value of $150000.00 Military Property belonging to the United States to be destroyed by wrongfully flying the same into a crash boat about 200 yards off Sanibel Island, Florida.

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

Specification 1: In that Second Lieutenant Robert H. Bell, 106th Observation Squadron, 66th Observation Group, did, at or near Sanibel Island, Florida, on or about January 15, 1943, feloniously and unlawfully kill Sergeant Alvin J. Brewer by negligently causing an airplane, in which the said Sergeant Alvin J. Brewer was riding, to crash.

Specification 2: In that Second Lieutenant Robert H. Bell, 106th Observation Squadron, 66th Observation Group, did, at or near Sanibel Island, Florida, on or about January 15, 1943, feloniously and unlawfully kill Sergeant Brooks Higginbotham, by negligently causing an airplane in which the said Sergeant Brooks Higginbotham was riding to crash.

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

Specification: In that Second Lieutenant Robert H. Bell, 106th Observation Squadron, 66th Observation Group, did, near Sanibel Island, Florida, on or about January 15, 1943, willfully and wrongfully violate the order of his group Commander not to fly below an altitude of 1000 feel above the surface of the earth except when landing or taking off or as designated by a Flight Commander in connection with a military mission or when authorized by higher authority by unnecessarily flying an A-20B Airplane so low that it struck a crash boat about 200 yards off Sanibel Island, Florida.

He pleaded not guilty to and was found guilty of all Charges and Specifications. 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. On the morning of January 15, 1943, the accused, accompanied by Sergeants Alvin J. Brewer and Brooks Higginbotham, took off from

Page Field, Fort Myers, Florida, in an A-20B airplane for a scheduled "instrument" flight. Soon thereafter the accused flew this plane at an altitude of 25 or 30 feet over a "crash" boat which was operating near Sanibel Island. The accused then circled Sanibel Island and returned to the location of the "crash" boat, flying his plane at a gradual descent directly toward the boat. As the plane passed over the boat its right wing struck the stern of the boat, and plunged into the water. From the sound of the motors of the plane, they appeared to be working properly during both flights over the boat. Although the boat was seriously damaged in this collision, it was successfully beached, and its crew went in another boat to the rescue of the accused. Efforts, however, to rescue the two sergeants failed (R. 8-9, 10-11, 12-22; Ex. 2).

Later, the body of Sergeant Higginbotham was found in the wrecked plane. His skull and vertebra were fractured. Captain Joseph F. Melancon, the medical officer who examined the body of Sergeant Higginbotham, ascribed his death to his fractured vertebra (R. 32). The body of Sergeant Brewer was found floating near Sanibel Island. His body was attached to the radio operator's seat, his safety belt and parachute were intact. First Lieutenant Robert Landesman, the medical officer who examined Sergeant Brewer's body, attributed his death to brain injuries (R. 31).

By a stipulation it was shown that the value of the A-20B airplane flown by the accused on the occasion in question was in excess of $150,000, and that it was "completely damaged with the exception of the salvage" (R. 7).

The prosecution read to the court the provisions of paragraphs 16a, (a), AAF Regulation 60-16, dated September 9, 1942, and 4j, AAF Regulation 60-4, dated December 8, 1941, and asked the court to take judicial notice of these regulations. These regulations provide respectively as follows:

(1) " * * *

"16. Minimum altitudes of flight.

* * *

"(a) 1,000 feet above any building, house, boat, vehicle, or other obstructions to flight."

(2) " * * *

"j. Airplanes will not be flown with the hood closed at altitudes lower then 3,000 feet when the passenger accompanying the airplane as a safety observer is not a rated pilot or when the responsibility of the safety observer is assumed by personnel of an accompanying airplane."

Evidence was also introduced showing that Captain James B. Henson, the operations officer, 106th Observation Squadron, had discussed with the accused the necessity of observing flying regulations on December 27, 1942, and that on January 13, 1943, he had discussed particularly with him the hazards of low flying and "buzzing". On each occasion there was also a discussion of the breach of a particular regulation by the accused which had been reported to Captain Henson (R. 34).

Captain Robert W. Mierman, who was Group Flying Safety Officer at Fort Myers during January, 1943, testified that during that month he reprimanded the accused for the manner in which he had on one occasion taken off and landed his plane. On January 15, he had also discussed at a general meeting the dangers involved in low altitude flying (R. 37-40).

Captain Henry C. B. Clagett, Jr., former commanding officer of the 106th Observation Squadron, testified that a day or two before the accident in question he had talked with a group of officers, including the accused, about minimum altitudes to be observed in flying. At this meeting the witness warned the group that they were responsible for "* * * individually complying with published regulations * * *". He testified that there were four conditions when a pilot might deviate from any set minimum altitude regulations, as follows:

> "* * * The first one is when you are actually on the firing line; second, in accordance with operations order; third, is in the event of no radio contact with control tower on a landing field and in the event of an emergency landing and you can buzz the tower at 500 feet and the fourth is in the interest of safety" (R. 46).

He testified further that there were no circumstances under which the "buzzing" of a boat would be authorized (R. 44-51).

4. The accused testified that he was 21 years of age, that he had been in the Army for 2½ years, that he had 282 hours in the air as a pilot, and that about 65 hours of that time had been in an A-20 airplane which he had flown under all conditions (R. 52-53).

Concerning his flight on January 15, the accused testified that he was "supposed to take off at eight o'clock and land at nine-thirty o'clock and fly instruments during this time". After he had completed his problem, he was approximately 20 miles from his base and had a few minutes during which time he "could not do much of anything" so he "went down and simulated strafing". After completing his strafing problem he was flying at an altitude of 300 or 400 feet when he sighted the crash boat. He then lowered his plane to within 50 feet of the water to pass over the top of the boat. He then pulled up in a steep climb to a fairly safe altitude, circled around to the south end of the Island, a distance of about three-fourths of a mile and pulled up into a rather steep bank. When he rolled out of the bank he felt a tingling sensation or "blackout approach". He saw the crash boat ahead and the next he knew he found himself in the water. He testified further that he knew that he was not permitted to go below the altitude of 1000 feet when buzzing or strafing a boat (R. 52-63).

5. Specification 1, Charge I, alleges that the accused did, on January 15, 1943, through neglect suffer an airplane, type A-20B, the property of the United States Government, and of the value of about $150,000 to be destroyed.

The value of the airplane in question, and its destruction are shown by a stipulation by and between the accused, the defense counsel and the trial judge advocate. Although there is no direct proof that the airplane belonged to the United States Government, the circumstances showing that the plane was of a type and kind used in the military service, and that it was so used, warrants such inference (par. 143, M.C.M., 1928). The evidence showing that the accused twice flew his plane within 20 or 30 feet of the boat into which he crashed in violation of existing regulations and instructions which had been given to him, clearly shows a failure to use that degree of care and caution in the operation of his plane which an ordinary pilot should have observed. Such conduct clearly shows negligence, and since such negligence resulted directly in the destruction of the plane, the findings of guilty

under Charge I and its Specification are sustained by evidence beyond a reasonable doubt.

6. Specification 1, Charge II, alleges that the accused did, on January 15, 1943 " * * * feloniously and unlawfully kill Sergeant Alvin J. Brewer by negligently causing an airplane, in which the said Sergeant Alvin J. Brewer was riding, to crash". Specification 2 makes the same allegation concerning the death of Sergeant Brooks Higginbotham.

As stated in the preceding paragraph, the negligent operation by the accused of the plane in which Sergeants Brewer and Higginbotham were riding was the direct cause of its destruction. Similarly, this negligence is shown to be the proximate cause of the death of the two sergeants. The involuntary killing of a human being by culpable negligence in performing a lawful act is manslaughter and a violation of Article of War 93 (par. 149, M.C.M., 1928).

Every element of the offense, including the death of each sergeant, is established beyond a reasonable doubt.

7. The Specification, Charge III, alleges that the accused, did, on January 15, 1943, willfully and wrongfully violate the order of his group commander not to fly below an altitude of 1000 feet by unnecessarily flying an A-20B airplane so low that it struck a crash boat about 200 yards off Sanibel Island, Florida. The evidence clearly shows that such an order was given to the accused by his group commander and that it was unnecessarily violated. Such an act was clearly to the prejudice of good order and military discipline, in violation of Article of War 96.

8. It should be observed that although the negligent act which is alleged in the Specification, Charge I, and Specifications 1 and 2, Charge II, involves the same transaction, the multiplication of the offenses has in no sense resulted in the assessment of multiple or duplicitous punishment, or to the prejudice of the rights of the accused.

9. The accused is 21 years of age. The records of the Office of The Adjutant General show that the accused enlisted as an aviation

cadet on March 30, 1942, and was commissioned a second lieutenant, Army Air Forces, on September 29, 1942.

10. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 83, 93, or 96.

Chas. L. Bresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

1st Ind.

War Department, J.A.G.O., JUN 18 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Robert H. Bell (O-730847), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed and carried into execution.

3. Consideration has been given to the attached letter, and indorsements thereon, dated March 29, 1943, addressed to the Commanding Officer, 66th Observation Group, Morris Field, Charlotte, North Carolina, from Captain James B. Henson, Air Corps, with reference to the accused's conduct subsequent to trial.

4. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation should such action meet with approval.

Myron C. Cramer.

Myron C. Cramer,
Major General,
The Judge Advocate General.

4 Incls
Incl 1 - Record of trial
Incl 2 - Draft of ltr for sig. Sec. of War
Incl 3 - Form of Executive action
Incl 4 - Ltr from Capt. Henson, 3/29/43, w/ Inds.

(Sentence confirmed. G.C.M.O. 149, 17 Jul 1943)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGN
CM 233326

APR 16 1943

UNITED STATES v. Private HAROLD L. MERRITTE (38378150), 362nd Aviation Squadron (Separate).	2ND DISTRICT, ARMY AIR FORCES TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Truax Field, Madison, Wisconsin, March 19, 1943. Dishonorable discharge and confinement for one (1) year. Reformatory.

HOLDING by the BOARD OF REVIEW
CRESSON, LIPSCOMB, and SLEEPER, Judge Advocates.

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private Harold L. Merritte, 362nd Avn Sq (Sep) did at TS, AAFTTC, Truax Field, Madison, Wisconsin, on or about March 2, 1943, feloniously receive, have and conceal fifty cents (.50), lawful money of the United States, of the value of fifty cents (.50), of the goods and chattels of Private Wilbert Brown, then lately before stolen, taken and carried away, he the said Private Harold L. Merritte then and there well knowing the said goods and chattels to have been so feloniously stolen, taken and carried away.

Specification 2: In that Private Harold L. Merritte, 362nd Avn Sq (Sep) did, at TS, AAFTTC, Truax Field, Madison, Wisconsin, on or about March 2, 1943, feloniously receive, have and conceal One Dollar and fifty cents ($1.50), lawful money of the United States, of the value of One Dollar and fifty cents ($1.50), of the goods and chattels of Private J. T. Henry, then lately before stolen, taken and carried away, he the said Private Harold L. Merritte then and there well knowing the said goods and chattels to have been so feloniously stolen, taken and carried away.

Specification 3: (Finding of not guilty.)

The accused pleaded guilty to, and was found guilty of the Charge and Specifications 1 and 2 of the Charge, and pleaded not guilty to and was found not guilty of Specification 3 of the Charge. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for one year. The reviewing authority approved the sentence, designated the Federal Reformatory, El Reno, Oklahoma, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution is not discussed as the accused pleaded guilty to the Charge and Specifications 1 and 2, of which he was found guilty.

The offenses alleged in Specifications 1 and 2 occured at the same time and place and are substantially one transaction, even though the sums of moneys received by the accused had been stolen from different persons. The Manual for Courts-Martial provides that one transaction shall not be made the basis of an unreasonable multiplication of charges (par. 27), and with respect to larceny, an offense closely related to the offenses here involved, provides that the taking of property in a room, belonging to various persons, constitutes "but one larceny, which should be alleged in but one specification" (par. 148g, M.C.M., 1928).

The acts of which the accused was found guilty should have been alleged in but one Specification. He may not legally be punished for more than one offense.

Maximum limits of punishment for the offense of receiving stolen property are not listed in the table of maximum punishments set forth in paragraph 104c of the Manual for Courts-Martial. This offense is, however, closely related to that of larceny and the maximum limitations prescribed for that offense are applicable. The total value of the property received being less than twenty dollars, the maximum punishment authorized is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for six months (par. 104c, M.C.M.).

4. The offense of receiving stolen property of which accused was found guilty, of value less than twenty dollars, is not recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by any statute of the United States or by the law of the District of Columbia. Confinement in a penitentiary (Federal reformatory) is not, therefore, authorized by Article of War 42.

5. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for six months at a place other than a penitentiary, Federal reformatory or correctional institution.

Chas. L. Dresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

1st Ind.

War Department, J.A.G.O., APR 17 1943 - To the Commanding General, 2nd District, Army Air Forces Technical Training Command, St. Louis, Missouri.

1. In the case of Private Harold L. Merritte (38378150), 362nd Aviation Squadron (Separate), I concur in the foregoing holding by the Board of Review, and, for the reasons therein stated, recommend that only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for six months at a place other than a penitentiary, Federal reformatory or correctional institution. Upon compliance with this recommendation you will have authority to order the execution of the sentence.

2. In view of the nature of the offense and in order that the accused may be held in the Army for possible further military service, it is recommended that the execution of that part of the sentence adjudging dishonorable discharge be suspended until the soldier's release from confinement and that the place of confinement be changed to a detention and rehabilitation center (W.D. Cir. No. 6, 1-2-43).

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

(CM 233326).

APR 17 '43 PM

DISPATCHED
WAR DEPARTMENT
SERVICES OF SUPPLY
J.A.G.O.

2nd DIST. HQ. AFTTC 48337 APR 19 1943 RECEIVED

E. C. McNeil,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

2nd DIST. HQ. AAFTTC JA APR 19 1943 RECEIVED

WAR DEPARTMENT
Army Service Forces
In the Offi e of The Judge Advocate General
Washington, D. C.

SPJGQ
CM 233393

MAY 25 1943

UNITED STATES	)	12TH ARMORED DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Camp Campbell, Kentucky,
Second Lieutenant GEORGE F.	)	March 23, 1943. Dismissal
COLBURN (01299995), 56th	)	and total forfeitures.
Armored Infantry.	)	

OPINION of the BOARD OF REVIEW
ROUNDS, LYON and FREDERICK, Judge Advocates.

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1. The record of trial in the case of the officer above named has been examined by the Board of Review, and the Board submits this, its opinion, to 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 Second Lieutenant George F. Colburn, Fifty-Sixth Armored Infantry Regiment, Camp Campbell, Kentucky, did, without proper leave, absent himself from his station at Camp Campbell, Kentucky, from about 0800 o'clock March 6, 1943 to about 1730 o'clock March 8, 1943.

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

Specification 1: In that Second Lieutenant George F. Colburn, Fifty Sixth Armored Infantry Regiment, Camp Campbell, Kentucky, did, at Nashville, Tennessee, on or about March 5, 1943, with the intent to deceive Major John E. Chamberlain, Inf., officially state to the said Major John E. Chamberlain that he was Regimental Adjutant of the Fifty-Sixth Armored Infantry Regiment, Camp Campbell, Kentucky, which statement was known by the said Second Lieutenant George F. Colburn to be false.

Specification 2: (Finding of not guilty.)

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

Specification 1: (Finding of not guilty.)

Specification 2: In that Second Lieutenant George F. Colburn, Fifty-Sixth Armored Infantry Regiment, Camp Campbell, Kentucky, did, at Nashville, Tennessee, on or about March 5, 1943 and on or about March 6, 1943, wrongfully assume a rank superior to his own, as Lieutenant, the rank of Captain.

He pleaded guilty to Charge I and its Specification, and not guilty to Charges II and III and their respective Specifications. He was found guilty of Charge I and its Specification, of Charge II and Specification 1 thereunder, and of Charge III and Specification 2 thereunder. He was found not guilty of Specification 2 of Charge II and of Specification 1 of Charge III. No evidence of previous convictions was introduced in the trial. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution is substantially as follows:

Charge I: Ray E. Hervey, 1st Sergeant, Company H, 56th Armored Regiement, Camp Campbell, Kentucky, identified the morning report of H Company for the months of February and March, which was received in evidence (R. 5, 6). A duly certified extract copy of the morning report is attached to the record of trial and contains the following entries:

"Feb. 6, 1943 - 2nd Lt. Colburn asgd Fr Regt'l Hqs Per SO #24.
Mar. 8, 1943 - Lt. Colburn fr VOCO lv to AWOL, eff Mar 6 0800 JJZ
Mar. 10,1943 - Lt. Colburn AWOL to duty eff Mar 8, 1943 1730 JJZ"

The accused was apprehended at the Andrew Jackson Hotel in Nashville, Tennessee, on March 8, 1943, at which time he admitted that he was absent without leave (R. 8, 11).

Charges II and III, alleging respectively false official statements in violation of Article of War 95, and "wrongfully assuming" a rank superior to his own in violation of Article of War 96: On March 5, 1943, Major John E. Chamberlain, Commanding Officer, Military Police Detachment, Nashville, Tennessee, went to the Andrew Jackson Hotel for the purpose of delivering an address to the Federal Bureau of Investigation. Major Chamberlain was in uniform and wearing a

military police brassard, belt and pistol. While at the hotel he saw the accused in the lobby and observed that he was wearing the insignia of the rank of a captain. Major Chamberlain stated that since he had apprehended the accused around the first of February for absence without leave, drunkenness and for wearing the bars of a first lieutenant, he was "amazed" that accused should be a captain in so short a time.

> "I stepped up to him and said, 'Do you remember me?' and he replied that he did remember me and I said, 'I see you are promoted to the grade of a captain' and he admitted that he was and I said, 'What do they have you doing in the Regiment?' and he said, 'I'm Regimental Adjutant', and I stated 'Well, I'll be damned' and I continued on my way" (R. 7).

On the afternoon of March 8, 1943 Major Chamberlain was requested by the Adjutant of accused's regiment to apprehend accused as he was absent without leave. Major Chamberlain, together with Sergeants Friedrich and Corporal Fallia, went to the Andrew Jackson Hotel and was there advised by the Assistant Manager, Mr. Murrell, that accused was a registered guest of the hotel. Major Chamberlain, the two noncommissioned officers, and Mr. Murrell went to the room of the accused but the accused was not in.

Corporal Fallia was stationed in the room and the door was relocked. Major Chamberlain went to the lobby (R. 8) and Sergeant Friedrich to the Drum Room to await the return of accused. Later the sergeant went to the latrine in the hotel and while there the accused came in. After the sergeant had identified himself as 1st Sergeant of Military Police in the City of Nashville, he asked accused if he was absent without leave. Accused said that he was. Whereupon the sergeant informed him that his orders were to place him in custody (R. 11). The accused accompanied the sergeant to his (accused's) room in the hotel where, after being fully advised of his rights under the 24th Article of War, he was further questioned by Major Chamberlain in the presence of Sergeant Friedrich, Corporal Fallia, and Mr. Murrell. The accused admitted that he was absent without leave. Major Chamberlain stated:

> "* * * I then asked him if he was a captain and his reply was in the negative and I asked him if I had seen him wearing captain's bars on March 5 and he replied in the affirmative. I asked him if he was or was not Regimental Adjutant and he replied in the negative".

He also admitted stating to Major Chamberlain on March 5 that he was Regimental Adjutant (R. 8, 11, 13). Major Chamberlain testified that

the baggage of the accused was searched and in his suit case were found toilet articles, one .44 caliber revolver, holster and belt, his personal 201 file and several sheets of regimental stationery with the regimental seal affixed thereon (R. 9).

On cross examination Major Chamberlain stated that he entered the room of accused in his absence and without his authority but that the baggage of accused was searched in his presence and with his permission (R. 9, 10, 14).

Sergeant Friedrich and Corporal Fallia each stated that when the accused was apprehended on March 8 he was not wearing any insignia of rank (R. 12, 13).

The prosecution introduced in evidence the deposition of Mr. Len J. Murrell, Assistant Manager of the Andrew Jackson Hotel, who testified that the accused was a registered guest of the hotel from 1651 March 4, to 1815 March 8, 1943. Mr. Murrell stated that on March 6, 1943 accused asked him to cash his personal check in the amount of $35.00. The accused, at the time, was wearing captain's bars and when asked for his identification card stated that he had just been promoted and had turned in his card to have a new picture and new rank placed on it. The check was signed "George F. Colburn", without any indication of rank. The check was cashed and was duly honored by the drawee bank (R. 15, Pros. Ex. B).

At the close of the case for the prosecution the defense moved for findings of not guilty of Specifications 1 and 2 of Charge II and of Charge II upon the ground that the evidence introduced was legally insufficient to support findings of guilty. The motion was sustained as to Specification 2, but was denied as to Specification 1, and as to the Charge (R. 15).

4. For the defense the accused testified that he had been in the military service of the United States more than five years, and was commissioned as a second lieutenant November 16, 1942. He recalled meeting Major Chamberlain in the lobby of the Andrew Jackson Hotel on March 5, 1943.

> "I was standing at the cigarette counter * * * and I was approached by a girl I had met there formerly and at the same time Major Chamberlain approached from my right and I was in conversation with this girl and Major Chamberlain said, 'I see you got a promotion' and I nodded assent, I didn't speak, I nodded. At the same time the girl was speaking to me and she distracted my attention from Major Chamberlain. He said something about an assistant adjutant and I shook my head and he said, 'I'll be damned' and then walked away * * *" (R. 16).

Accused expressly denied stating to Major Chamberlain that he was

Regimental Adjutant of the 56th Infantry.

With reference to Specification 2, Charge III, accused admitted wearing captain's bars at the place and time alleged. He stated that the bars were purchased on the afternoon of March 5 and worn because of a challenge and a bet by some girls that he would not dare wear them (R. 16, 17).

6. As to Charge I and its Specification, to which the accused pleaded guilty, the entries in the morning report show the accused absent from his organization from 0800 March 6 to 1730 March 8, 1943, as alleged. His unauthorized absence for this period is further established by the testimony of Major Chamberlain and Sergeant Friedrich that accused when apprehended on March 8, admitted that he was absent without leave (R. 8, 11).

With respect to Specification 2 of Charge III, the proof clearly shows that the accused, a second lieutenant, wrongfully assumed "a rank superior to his own" by wearing the bars of a captain. Proof of this is established not only by the testimony of Major Chamberlain and Mr. Murrell, but by the testimony of the accused.

The only question for consideration is whether or not the evidence is legally sufficient to support the findings of guilty of Specification 1 of Charge II and of Charge II alleging false official statement in violation of Article of War 95. The evidence shows beyond any reasonable doubt that the accused was wrongfully and publicly masquerading as a captain. Such conduct was manifestly improper and highly unbecoming an officer of the United States Army. Major Chamberlain, seeing the accused wearing the insignia of a captain and knowing that he had been only a second lieutenant a month prior to this time, had the right, in the execution of his office, and under the circumstances of his case, to question the accused as to his rank and official status. The accused knew that Major Chamberlain was the commanding officer of military police in that area. He had reason to apprehend that if he told the truth he would in all probability be arrested in the presence of his girl friend. Under these circumstances the accused stated that he was Regimental Adjutant. The falsity of the statement is clearly and convincingly shown. In the opinion of the Board of Review the court was fully warranted in finding accused guilty of Specification 1, Charge II and of Charge II, alleging a false official statement in violation of Article of War 95 (CM 153703 (1922); CM 217538, Kelly; CM 218415, Bethard).

The record of trial contains no evidence in support of Specification 2 of Charge II. It follows that the action of the court in

sustaining the motion of the defense for a finding of not guilty of this Specification was right and proper.

The testimony of Major Chamberlain to the effect that he had previously apprehended the accused for absence without leave, for drunkenness and for wearing the bars of a first lieutenant was improper and incompetent. Although its admission was not objected to by the defense, the court, ex mero motu, should have ordered it stricken from the record. In view, however, of the other competent and compelling evidence supporting the findings of guilty and in the light of all the facts as shown by the entire record, the Board of Review is of the opinion that the error was not prejudicial to the substantial rights of the accused within the meaning of the 37th Article of War.

7. The accused is 29 years of age. The records in the office of The Adjutant General show his service as follows: Enlisted service January 1, 1938 to November 16, 1942; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School and ordered to extended active duty November 16, 1942. The application of accused for appointment states that he was a sergeant, Headquarters and Headquarters Squadron, 7th Interception Command (AC) Fort Shafter, T.H., during the Japanese attack on the Island of Oahu, December 7, 1941. The indorsement of his Squadron Commander attached to his application for appointment to the Officer Candidate School refers to the character of accused as "excellent", and states that he has demonstrated outstanding qualities of leadership.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence. Dismissal is authorized upon conviction of violation of Articles of War 61 and 96, and is mandatory upon conviction of violation of Article of War 95.

William A. Pounds, Judge Advocate.

Percy E. Gen, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., JUN 17 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant George F. Colburn (0-1299995), 56th Armored Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence and to warrant confirmation thereof. The views and recommendations of the reviewing authority, the Commanding General, 12th Armored Division, were requested relative to suspension of the sentence during the pleasure of the President. His reply recommends that the sentence be executed as approved. He further states that this officer,

> "frequently drinks to excess and when drunk is utterly irresponsible. His actions before and after trial show that he is incapable of trust and is unable to command the respect or confidence of either subordinates or superior officers this division does not desire this man".

Accordingly, I recommend that the sentence be confirmed, but that the forfeitures be remitted and that the sentence as thus modified be carried into execution.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls.
Incl. 1 - Record of trial
Incl. 2 - Dft. ltr. for sig. S/W
Incl. 3 - Form of action

(Sentence confirmed but forfeitures remitted. G.C.M.O. 159, 24 Jul 1943)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGN
CM 233454

APR 21 1943

UNITED STATES	)	THIRD AIR FORCE
v.	)	Trial by G.C.M., convened at Myrtle Beach, South Carolina, February 2 and March 1, 1943. Dismissal and forfeiture of all pay and allowances to become due.
Second Lieutenant KENNETH A. SAWYER (0-792315), Air Corps.	)	

OPINION of the BOARD OF REVIEW
CRESSON, LIPSCOMB AND SLEEPER, Judge Advocates.

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its opinion, to The 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 Second Lieutenant Kenneth A. Sawyer, 455th Bombardment Squadron (M), did, without proper leave, absent himself from his proper station at Myrtle Beach Bombing Range, Myrtle Beach, South Carolina, from about December 7, 1942, to about December 14, 1942.

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

Specification 1: In that Second Lieutenant Kenneth A. Sawyer, 455th Bombardment Squadron (M), did, at Lafayette Manor, Myrtle Beach, South Carolina, on or about December 1, 1942, behave himself with disrespect toward First Lieutenant (Chaplain) William H. Branyan, Jr., his superior officer, by use of opprobrious epithets and denunciatory language, to wit: that he was a tale bearing son of a bitch or words to that effect, both in and out of his presence in a public place, to wit, Lafayette Manor, Myrtle Beach, South Carolina, and in the presence of civilians, said conduct being such as to reflect discredit upon the military service.

Specification 2: In that Second Lieutenant Kenneth A. Sawyer, 455th Bombardment Squadron (M), did, at Lafayette Manor, Myrtle Beach, South Carolina, on or about December 1, 1942, wrongfully use defamatory and provoking speech, to wit: "You dirty whore -- you old bitch", or words to that effect, against Mrs. Sam Houston.

Specification 3: (Nolle Prosequi)

Specification 4: (Nolle Prosequi)

Specification 5: (Nolle Prosequi)

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

Specification 1: (Nolle Prosequi)

Specification 2: In that Second Lieutenant Kenneth A. Sawyer, 455th Bombardment Squadron (M), having received a lawful command from Captain William W. Brier, his superior officer, to move his place of abode from the Lafayette Manor, Myrtle Beach, South Carolina, to the Bachelor Officers' Quarters, Myrtle Beach Bombing Range, Myrtle Beach, South Carolina, did, on or about December 1, 1942, willfully disobey the same.

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

Specification: (Nolle Prosequi).

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

Specification 1: (Nolle Prosequi)

Specification 2: In that 2nd Lieutenant Kenneth A. Sawyer, 455th Bombardment Squadron (M) AAF, having been duly placed in arrest in quarters on or about December 14, 1942 did at Myrtle Beach Bombing Range, Myrtle Beach, South Carolina on or about December 31, 1942 break his said arrest before he was set at liberty by proper authority.

Specification 3: In that 2nd Lieutenant Kenneth A. Sawyer, 455th Bombardment Squadron (M) AAF, having been duly placed in arrest in quarters on or about December 14, 1942 did at Myrtle Beach Bombing Range, Myrtle Beach, South Carolina on or about January 5, 1943 break his said arrest before he was set at liberty by proper authority.

Specification 4: In that 2nd Lieutenant Kenneth A. Sawyer, 455th Bombardment Squadron (M) AAF, having been duly placed in arrest in quarters on or about December 14, 1942 did at Myrtle Beach Bombing Range, Myrtle Beach, South Carolina on or about January 6, 1943 break his said arrest before he was set at liberty by proper authority.

Specification 5: In that 2nd Lieutenant Kenneth A. Sawyer, 455th Bombardment Squadron (M) AAF, having been duly placed in arrest in quarters on or about December 14, 1942 did at Myrtle Beach Bombing Range, Myrtle Beach, South Carolina on or about January 11, 1942 break his said arrest before he was set at liberty by proper authority.

He pleaded guilty to and was found guilty of all Charges and Specifications except Charge II to which he pleaded and was found not guilty but guilty of violation of Article of War 96. The prosecution withdrew Specifications 3, 4, and 5 of Charge II, Specification 1, Charge III, Specification 1, Charge IV, and Specification 1, Additional Charge I. The accused was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the sentence as provides for dismissal and forfeiture of all pay and allowances to become due, and forwarded the record of trial for action under Article of War 48.

3. Following the pleading of guilty by the accused to the Charges and Specifications as explained above, no evidence was presented either by the prosecution or by the defense. The law member, however, then explained to the accused the meaning and effect of each of his separate pleas of guilty. The accused in turn acknowledged an understanding of the consequences of each plea, and stated that he did not wish to change his pleas of guilty.

4. Specification 5, Additional Charge I, alleges that the accused, having been duly placed in arrest in quarters on December 14, 1942, did on January 11, 1942, break his said arrest before he was set at liberty by proper authority. It is obvious that the latter date, "1942", should have been written "1943", and that no surprise or injustice could have injuriously affected the substantial rights of the accused as a result of this error.

Each Specification, including Specification 5 as amended, alleges an offense within the purview of the Article of War under which it is alleged, and the pleas of guilty, in the absence of any evidence by the prosecution, are legally sufficient to sustain the findings of guilty and the sentence (CM 216046, Roff).

5. The accused is 26 years of age. The records of the Office of The Adjutant General show that he has served in the Army since January 6, 1942. He was discharged as an aviation cadet in the Army Air Corps on September 5, 1942, and commissioned a second lieutenant in the Air Corps on September 6, 1942.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. A sentence of dismissal is authorized upon conviction of Article of War 61, 96, 64, or 69.

Charles Dressow, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

1st Ind.

War Department, J.A.G.O., MAY 1 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Kenneth A. Sawyer (0-792315), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and sentence, and to warrant confirmation thereof.

The conduct of the accused in absenting himself without leave from December 7, 1942, to December 14, 1942; of willfully disobeying a lawful order of his superior officer; of breaking his arrest on four separate occasions, of using grossly vulgar and denunciatory epithets toward his superior officer, and toward a woman reveals serious breaches of military duty, defiant and repeated disregard for authority and insults to an officer and to a woman. In view of these many offenses, I believe the accused is unworthy to remain an officer. The forfeitures appear to be unnecessary. I recommend, therefore, that the sentence as approved by the reviewing authority be confirmed, but that the forfeitures be remitted, and that the sentence as thus modified be carried into execution.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation should it meet with approval.

Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.

3 Incls
Incl 1 - Record of trial
Incl 2 - Draft of ltr. for sig. Sec. of War
Incl 3 - Form of Executive action

(Sentence as approved by reviewing authority confirmed, but forfeitures remitted. G.C.M.O. 121, 18 Jun 1943)

WAR DEPARTMENT
Army Service Forces
In the Office of The Judge Advocate General
Washington, D. C.

SPJGQ
CM 233461

JUN 8 - 1943

SECOND DISTRICT
ARMY AIR FORCES
TECHNICAL TRAINING COMMAND

UNITED STATES	Trial by G. C. M., convened at Scott Field, Illinois, March 16, 1943. Dishonorable discharge and confinement for twenty-five (25) years. Penitentiary.
v.	
Private ANDREW V. BINNINGER (35352777), 367th Technical School Squadron, Air Corps.	

REVIEW by the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, Judge Advocates.

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

2. Accused was tried upon the following Charges and Specifications:

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

Specification: In that Private Andrew V. Binninger, 367th Technical School Squadron, did, at Scott Field, Illinois, on or about November 26, 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at Detroit, Michigan, on or about January 28, 1943.

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

Specification 1: In that Private Andrew V. Binninger, 367th Technical School Squadron, did, at Indianapolis, Indiana, on or about January 7, 1943, with intent to defraud, falsely alter a certain United States Postal Money Order issued by the Indianapolis, Indiana (Fountain Square Sta.) Post Office, under date of January 7, 1943, Serial Number 436737, by changing the words and figures designating the amount thereon from $2.00 to $20.00, which said United States Postal Money Order was a writing of a public nature which might operate to the prejudice of another.

Specification 2: In that Private Andrew V. Binninger, 367th Technical School Squadron, did, at Indianapolis, Indiana, on or about January 8, 1943, with intent to defraud, falsely alter a certain United States Postal Money Order issued by the Indianapolis, Indiana (Station 18) Post Office, under date of January 8, 1943, Serial Number 114203, by changing the words and figures designating the amount thereon from $2.00 to $20.00, which said United States Postal Money Order was a writing of a public nature which might operate to the prejudice of another.

Specification 3: In that Private Andrew V. Binninger, 367th Technical School Squadron, did, at Indianapolis, Indiana, on or about January 9, 1943, with intent to defraud, falsely alter a certain United States Postal Money Order issued by the Indianapolis, Indiana (Fountain Square Sta.) Post Office, under date of January 9, 1943, Serial Number 437113, by changing the words and figures designating the amount thereon from $2.00 to $20.00, which said United States Postal Money Order was a writing of a public nature which might operate to the prejudice of another.

Specification 4: In that Private Andrew V. Binninger, 367th Technical School Squadron, did, at Indianapolis, Indiana, on or about January 12, 1943, with intent to defraud, falsely alter a certain United States Postal Money Order issued by the Indianapolis, Indiana (Fountain Square Sta.) Post Office, under date of January 12, 1943, Serial Number 437483, by changing the words and figures designating the amount thereon from $5.00 to $50.00, which said United States Postal Money Order was a writing of a public nature which might operate to the prejudice of another.

Specification 5: In that Private Andrew V. Binninger, 367th Technical School Squadron, did, at Indianapolis, Indiana, on or about January 14, 1943, with intent to defraud, falsely alter a certain United States Postal Money Order issued by the Indianapolis, Indiana (Station 18) Post Office, under date of January 14,

1943, Serial Number 114478, by changing the words and figures designating the amount thereon from $2.00 to $20.00, which said United States Postal Money Order was a writing of a public nature which might operate to the prejudice of another.

Specification 6: In that Private Andrew V. Binninger, 367th Technical School Squadron, did, at Detroit, Michigan, on or about January 25, 1943, with intent to defraud, falsely alter a certain United States Postal Money Order issued by the Detroit, Michigan Post Office, under date of January 25, 1943, Serial Number 29334, by changing the words and figures designating the amount thereon from $8.00 to $80.00, which said United States Postal Money Order was a writing of a public nature which might operate to the prejudice of another.

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

Specification 1: In that Private Andrew V. Binninger, 367th Technical School Squadron, did, at Indianapolis, Indiana, on or about January 8, 1943, with intent to defraud, willfully, unlawfully and feloniously utter and pass as true and genuine, a certain United States Postal Money Order issued by the Indianapolis, Indiana (Fountain Square Sta.) Post Office, under date of January 7, 1943, Serial Number 436737, a writing of a public nature, which might operate to the prejudice of another, which said United States Postal Money Order, as he the said Private Andrew V. Binninger then well knew, was falsely altered and forged, in that the amount of said money order had been changed in words and figures from $2.00 to $20.00.

Specification 2: In that Private Andrew V. Binninger, 367th Technical School Squadron, did, at Indianapolis, Indiana, on or about January 9, 1943, with intent to defraud, willfully, unlawfully and feloniously utter and pass as true and genuine, a certain United States Postal Money Order issued by the Indianapolis, Indiana (Station 18) Post Office, under date of January 8,

1943, Serial Number 114203, a writing of a public nature, which might operate to the prejudice of another, which said United States Postal Money Order, as he the said Private Andrew V. Binninger then well knew, was falsely altered and forged, in that the amount of said money order had been changed in words and figures from $2.00 to $20.00.

Specification 3: In that Private Andrew V. Binninger, 367th Technical School Squadron, did, at Indianapolis, Indiana, on or about January 9, 1943, with intent to defraud, willfully, unlawfully and feloniously utter and pass as true and genuine, a certain United States Postal Money Order issued by the Indianapolis, Indiana (Fountain Square Sta.) Post Office, under date of January 9, 1943, Serial Number 437113, a writing of a public nature, which might operate to the prejudice of another, which said United States Postal Money Order, as he the said Private Andrew V. Binninger then well knew, was falsely altered and forged, in that the amount of said money order had been changed in words and figures from $2.00 to $20.00.

Specification 4: In that Private Andrew V. Binninger, 367th Technical School Squadron, did, at Indianapolis, Indiana, on or about January 13, 1943, with intent to defraud, willfully, unlawfully and feloniously utter and pass as true and genuine, a certain United States Postal Money Order issued by the Indianapolis, Indiana (Fountain Square Sta.) Post Office, under date of January 12, 1943, Serial Number 437483, a writing of a public nature, which might operate to the prejudice of another, which said United States Postal Money Order, as he the said Private Andrew V. Binninger then well knew, was falsely altered and forged, in that the amount of said money order had been changed in words and figures from $5.00 to $50.00.

Specification 5: In that Private Andrew V. Binninger, 367th Technical School Squadron, did, at Indianapolis, Indiana, on or about January 14, 1943, with intent to defraud, willfully, unlawfully and feloniously utter

and pass as true and genuine, a certain United States Postal Money Order issued by the Indianapolis, Indiana (Station 18) Post Office, under date of January 14, 1943, Serial Number 114478, a writing of a public nature, which might operate to the prejudice of another, which said United States Postal Money Order, as he the said Private Andrew V. Binninger then well knew, was falsely altered and forged, in that the amount of said money order had been changed in words and figures from $2.00 to $20.00.

Specification 6: In that Private Andrew V. Binninger, 367th Technical School Squadron, did, at Detroit, Michigan, on or about January 27, 1943, with intent to defraud, willfully, unlawfully and feloniously utter and pass as true and genuine, a certain United States Postal Money Order issued by the Detroit, Michigan Post Office, under date of January 25, 1943, Serial Number 29334, a writing of a public nature, which might operate to the prejudice of another, which said United States Postal Money Order, as he the said Private Andrew V. Binninger then well knew, was falsely altered and forged, in that the amount of said money order had been changed in words and figures from $8.00 to $80.00.

Accused pleaded guilty to the Specification of Charge I excepting the words "desert" and "in desertion", substituting therefor the words "absent himself without leave from" and "without leave", of the excepted words not guilty and of the substituted words guilty, not guilty to Charge I but guilty of a violation of Article of War 61, and not guilty to all other Charges and Specifications. He was found guilty of all Charges and Specifications. Evidence of one previous conviction for absence without leave, in violation of Article of War 61, was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for 35 years. The reviewing authority approved the sentence, remitted 10 years of the confinement, designated the United States Penitentiary, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. It was shown by the evidence for the prosecution that accused absented himself without leave from his station at Scott Field,

Illinois, on November 26, 1942 (R. 7; Ex. A) and remained so absent until he was apprehended by civil authorities at Detroit, Michigan, on January 28, 1943 (R. 8; Ex. B), at which time he was returned to military control (R. 21). At the time of his apprehension he had in his possession a chauffeur's license No. 4342 for the State of Indiana in the name of James Blake, 1129 English Avenue, Indianapolis, Indiana (R. 8; Ex. B) (Specification, Charge I).

On January 7, 1943, a person purporting to be "Charles Huels, 1631 South East Street, Indianapolis, Indiana", presented to the clerk in the Fountain Square Post Office Station in Indianapolis application No. 436737 for a postal money order in the amount of $2, payable to Andrew Binninger, 1007 Elm Street, Indianapolis (R. 8; Ex. D). The clerk filled out money order No. 436737 in the amount of $2, payable as requested, writing the figure "2" on both the stub retained in his office (R. 8; Ex. G) and on the money order itself (R. 8; Ex. F) and the word "two" upon the coupon for the paying office (Ex. E) as well as cutting the margin of the office stub and the money order to indicate the maximum amount payable upon the order. The clerk was unable to recall who tendered the application or to whom the money order was delivered (R. 8; Ex. C) (Specification 1, Charge II).

On January 8, 1943, a clerk in Sablosky's Department Store in Indianapolis made a sale of sundry articles for a purchase price of $2.24. The clerk could not recall whether the purchaser tendered a bill, a check or a money order in payment but at her request for his name and address he did write "Andrew Binninger, 1007 Elm Street" upon the salesslip (R. 8; Ex. H) and thereupon she gave him $17.76 in change. She remembered having seen accused in the vicinity of the store but was unable to state that he was the person who purchased the articles and received the money (Ex. C) (Specification 1, Charge III).

On January 8, 1943, a person purporting to be "Carl Beck, 303 South Auburn Street, Indianapolis, Indiana", presented to a clerk in the postal substation at the drug store of Mr. W. J. Henderson in Indianapolis application No. 114203 for a postal money order in the amount of $2, payable to Andrew Binninger, 1007 Elm Street, Indianapolis (R. 9; Ex. J). The clerk filled out money order No. 114203 in the amount of $2, payable as requested, writing the figure "2" on both the stub retained in his office (R. 9; Ex. L) and on the

money order itself (R. 13; Ex. II) and the word "two" upon the coupon for the paying office (Ex. II) as well as cutting the margins of both the retained stub and the money order to indicate the maximum amount payable upon the order. This clerk was also unable to identify the accused as the person who presented the application and received the order (R. 9; Ex. I) (Specification 2, Charge II).

On January 9, 1943, Mrs. Sarah Borman, operator of a dry goods store, sold accused a sweater for $2.98. He tendered in payment postal money order No. 114203 in the amount of $20, stating he was the payee. He further stated that he lived in the neighborhood of the store and was acquainted with Mrs. Borman's sons. She accepted the money order and gave accused $17.02 in change, indorsed the money order which already bore the indorsement "Andrew Binninger" and deposited it in her bank for credit to her account (Ex. I) (Specification 2, Charge III).

On January 9, 1943, a person purporting to be "Carl Beck, 1632 South East Street, Indianapolis, Indiana", presented to a clerk in Fountain Square Post Office Substation in Indianapolis application No. 437113 for a postal money order in the amount of $2, payable to Andrew Binninger, 1007 Elm Street, Indianapolis (R. 10; Ex. U). The clerk filled out money order No. 437113 in the amount of $2 as requested, writing the figure "2" on both the stub retained in his office (R. 10; Ex. W) and on the money order itself (R. 13; Ex. HH) and the word "two" upon the coupon for the paying office (Ex. HH) as well as cutting the margins of both the retained stub and the money order to indicate the maximum amount payable upon the order. The clerk was unable to identify the person who made the application and received the order (R. 10; Ex. T) (Specification 3, Charge II).

On the same day, January 9, 1943, the manager of a branch store of Standard Grocery Company, Indianapolis, Indiana, cashed money order No. 437113 for a person who presented it at his store and who received either cash or merchandise in return. He identified the money order in court by the penciled notation "703" which he had written on the back of the order indicating the street number of the store (Ex. HH). His store received credit for the money order from the parent Standard Grocery Company in the sum of $20. He could not, however, identify the person who cashed the order (Ex. T) (Specification 3, Charge III).

On January 12, 1943, a person purporting to be "Gene Sanders, 1613 South East Street, Indianapolis, Indiana", presented to a clerk in the Fountain Square Post Office Substation in Indianapolis application No. 437483 in the amount of $5, payable to James Blake, 1129 English Street, Indianapolis (R. 9; Ex. N). The clerk filled out money order No. 437483 in the amount of $5, payable as requested, writing the figure "5" on both the stub retained in his office (R. 9; Ex. Q) and on the money order itself (R. 9; Ex. P) and the word "five" upon the coupon for the paying office (R. 9; Ex. O) as well as cutting the margins of both the retained stub and the money order to indicate the maximum amount payable on the order. The clerk was unable to identify the person who presented the application and received the order (R. 9; Ex. M) (Specification 4, Charge II).

Mr. Arthur G. Efroymson, manager of a clothing store in Indianapolis, testified that on January 13, 1943, he sold a suit of clothes to a person who identified himself by writing the name of "James Blake" on the sales slip (Ex. R) and by tendering in payment for the suit money order No. 437483 in the amount of $50, payable to James Blake, and by showing a chauffeur's license, No. 4342, in the name of James Blake. The purchaser wrote the indorsement "James Blake, 1129 English Avenue" and the numerals "4342" on the reverse side of the money order in witness' presence, whereupon witness gave the purchaser $36 in cash and the suit of clothes in return for the money order. The order was banked by witness at the Indiana National Bank, the store receiving credit for $50. Witness could not identify accused as the person making the purchase and receiving the money (Ex. M) (Specification 4, Charge III).

On January 14, 1943, a person purporting to be "Gene Sanders, 303 Auburn Street, Indianapolis, Indiana", made application No. 114478 to a clerk in contract station No. 18 of the United States Post Office at Indianapolis for the issuance of a money order in the amount of $2, payable to James Blake, 1129 English Street, Indianapolis (R. 10; Ex. Y). The clerk issued the order as requested, writing the numeral "2" upon the stub retained in his office (R. 10; Ex. AA) and the word "two" upon the coupon for the paying office (R. 10; Ex. Z) as well as cutting the margin of the retained stub so as to indicate the maximum amount payable on the order. She could not remember who had made the application and received the order (R. 10; Ex. X) (Specification 5, Charge II). At the same office application was made on January 19, 1943, for a money order by a person whom the

clerk identified as accused. Upon this occasion accused signed the application as "Gene Sanders, 303 Auburn Street, Indianapolis, Indiana", and requested that the order be made in the amount of $6, payable to Andrew Binninger, 1107 Elm Street, Indianapolis (R. 10; Ex. BB). The clerk had been warned to be on the lookout for anyone presenting applications for money orders payable to "Andrew Binninger" and accordingly, when she had written the order but before delivering it to accused, she attempted to inform the Postal Inspector by telephone. When she returned from the rear of the office accused had gone and she marked the application "Not Issued" (Ex. X).

On January 25, 1943, a person purporting to be "Don Ashby, 1085 Sheridan Street, Detroit, Michigan", made application for a money order to the clerk in the Detroit, Michigan, Post Office. The order requested was in the amount of $8 and payable to Andrew Binninger, 2102-4th Street, Detroit. The clerk issued the order, writing the figure "8" upon the stub retained in his office (R. 11; Ex. EE) and the word "eight" upon the coupon for the paying office (Ex. DD) as well as cutting the margins of the money order and stub to indicate the maximum amount payable on the order (R. 11; Ex. FF) (Specification 6, Charge II).

By stipulation it was agreed that the records of the Indiana Bureau of Motor Vehicles disclose that chauffeur's license No. 4342 for the year 1943 was issued in the name of James Blake, 1129 English Avenue, Indianapolis, Indiana (R. 9; Ex. S).

On January 30 and February 1, 1943, accused was interviewed at Detroit Police Headquarters by a post office inspector. On both occasions accused's answers to questions were taken down and later typed and signed by him. They were introduced in evidence with certain restrictions (R. 16-18; Exs. KK, LL). In the first statement (Ex. KK) accused admitted going to Detroit from Indianapolis for the reason that the police were looking for him because he had deserted from the Army and that he had stayed in various hotels in order to elude the police until arrested on January 28, 1943. When apprehended he had in his possession $225 in currency of which about $180 or $190 had been obtained by the raising of money orders in Indianapolis and Detroit. He further admitted using different assumed names as remitter and that the orders were made payable either to "Andrew Binninger" or "James Blake". He explained how he had

raised the orders by adding zeros to the numerals and by erasing part of the words indicating amounts and adding letters to show larger amounts. In order to destroy the maximum amount check he had cut off the margins of the money orders. He stated that he was unwilling to make restitution because if he was obliged "to go back to the Army and do time and get a dishonorable discharge" he would not "have a dime left" for himself.

In the second statement (Ex. LL), when shown the stub and paying office coupon of money order No. 29334 (Exs. DD, EE) he admitted applying for it, raising it and cashing it for $80.

About the middle of February and on March 3, 1943, Second Lieutenant Ralph S. Cramer, Air Corps, the investigating officer, after thoroughly advising accused of his rights on each occasion, obtained from him two statements. In the first (Ex. GG) he admitted leaving Scott Field, Illinois, on November 26, 1942, on a 24-hour pass. He went to his parents' home in Indianapolis, staying there a month, during which time he always wore his uniform. From there he went to his brother's home in Detroit where he remained, wearing civilian clothes, until apprehended. He excused his absence as follows:

> "I went AWOL because I had been refused a furlough and they had refused to give me a supplemental payroll like the other fellows got and I could not get any pay. Also, I had been advised that my wife had left our baby with her mother, Mrs. Charles Curtsinger, 303 South Auburn Street, Indianapolis, and had gone off and left it. I was searching for her part of the time while I was gone. I intended to come back to the Army after I had seen my wife but I had not set any definite time for return."

He admitted purchasing money orders Nos. 437113 and 114203 for $2, raising each to $20 and cashing them.

In the second statement (Ex. JJ) accused admitted purchasing money orders Nos. 436737 and 114478 for $2, raising each to $20 and cashing them; purchasing money order No. 437483 for $5, raising it to $50 and cashing it; and purchasing money order No. 29334 for $8, raising it to $80 and cashing it. When shown the statements made by him to the Postal Inspector on January 30 and February 1, 1943, he admitted he had signed them, that they were voluntarily made and he affirmed that they were true.

Accused elected to remain silent.

4. The evidence clearly establishes the unauthorized absence of accused from November 26, 1942, to January 28, 1943, and it requires no strained inference to conclude that he had the intention to desert the service when he embarked upon the series of forgeries of which he stands convicted and, in order to escape detection went from the home of his parents in Indianapolis to Detroit where he was apprehended in civilian clothes 63 days after leaving his station.

It is equally clear that accused not only altered each of the money orders described in the six Specifications of Charge II so that they were payable in much higher amounts but that he fraudulently cashed them and received the excess amounts in each case.

There is no merit in the contention of counsel for the defense that accused should not be found guilty of Specifications 4 and 5 of Charge III for the reason that, without proof of the corpus delicti, he could not be convicted upon his unsupported confession. True, the court may not consider the confession of an accused as evidence against him unless there be in the record other evidence, either direct or circumstantial, that the offense charged has probably been committed (par. 114a, M.C.M., 1928), but the corpus delicti need not be proved aliunde the confession beyond a reasonable doubt, or by a preponderance of evidence, or at all, but some evidence corroborative of the confession must be produced and such evidence must touch the corpus delicti (CM 202213, Mallon).

In this case the money orders in question, which were properly admitted in evidence, show upon their face that they were cashed through clearing houses after they had been altered and it would be absurd to contend that they had not been fraudulently uttered for the purpose of obtaining payment. This was amply sufficient evidence to warrant the admission of the confession in which accused admits the purchase, alteration and cashing of every money order described in the Specifications of Charges II and III.

5. Accused is 23 years of age. He was inducted April 22, 1942, at Indianapolis, Indiana, and has had no prior service.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during

the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence. Confinement in a penitentiary is authorized by Article of War 42 for the offenses of forgery and uttering a forged instrument, recognized as offenses of a civil nature and so punishable by penitentiary confinement for more than one year by section 1401, Title 22, Code of the District of Columbia.

William A. Rounds, Judge Advocate.

Paul Stephens, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

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