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Judge Advocate General's Department

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Volume XX

including

CM 233471 to CM 234468

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

SPJGN
CM 233471

20 AUG 1943

UNITED STATES	)	3RD AIR FORCE
v.	)	Trial by G.C.M., convened at Myrtle Beach Bombing Range, South Carolina, 1, 2 and 3 July 1943. Dishonorable discharge and confinement for life. Penitentiary.
Private VERNON P. ADREON (36044466), 53rd Service Squadron.	)	

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

---

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

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

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

Specification: In that Pvt. Vernon P. Adreon, 53rd Service Squadron, did, at Thomas Manor #2, Myrtle Beach, South Carolina, on or about May 2, 1943, by force and violence and by putting her in fear, feloniously take, steal, and carry away from the presence of Mrs. Julia Banta, currency of the United States, the property of Mrs. Banta, in the amount of about Fifty ($50.00) Dollars.

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

Specification: In that Pvt. Vernon P. Adreon, 53rd Service Squadron, did, at Thomas Manor #2, Myrtle Beach, South Carolina, on or about May 2, 1943, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Julia Banta.

The accused pleaded not guilty to and was found guilty of both Charges and Specifications thereunder. Evidence of one previous conviction for absence without leave 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 at such place as the reviewing authority may direct for the term of his natural life. 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 concerning the Charges of robbery and rape as presented by the testimony of the victim of the alleged offenses shows that on Sunday afternoon, 2 May 1943, the accused entered a rooming house at Myrtle Beach, South Carolina, called Thomas Manor No. 2, where Mrs. Julia H. Banta was employed as hostess manager. The accused asked Mrs. Banta for permission to use the rooming house telephone. Mrs. Banta informed the accused that there was no telephone in the building, but that he might secure the use of a telephone at the Bell home next door. The accused thereupon left the rooming house and went to the Bell home, but returned within a few minutes with information that the telephone next door was out of order. Mrs. Banta then advised the accused to go to Thomas Manor No. 1, a rooming house a short distance away, where he might obtain the use of a telephone. The accused again left the rooming house and after a period of about fifteen minutes he returned, and stated that since he was a soldier he had not been permitted to use the telephone. After some conversation concerning the location of other telephones, the accused asked if he might procure a room for the night. When advised that he might procure a room, the accused asked to be shown to the room that was to be assigned to him. Mrs. Banta told the accused that would not be necessary and indicated the room which she had assigned to him on the second floor. (R. 7-10).

At this time Mrs. Banta realized that the accused had been

drinking and she became frightened. As she started to move nearer the entrance door, the accused seized her and threw her to the floor. In the fall her glasses were cast aside and broken. She endeavored to scream but the accused placed his hand tightly over her mouth. As the accused dragged her toward the stairway she grabbed for the window curtain, tearing it loose from the window, and seized the leg of a table near the stairway which was upset, causing several vases and other objects to crash to the floor. The accused then threw her back on a small rug in front of the couch. Mrs. Banta screamed and the accused threatened "to knock her out". The accused then attempted to have sexual intercourse with her, but she screamed and pleaded with the accused to let her go. Finally the accused dragged her across the room and into an adjoining bedroom. The accused closed the door and Mrs. Banta made an unsuccessful attempt to open it and escape. Accused then took off her short coat, ripping the sleeve and bursting off a button in the process. The accused then took off her dress, slip and pants, leaving one slip on. He then threw her on the bed and had sexual intercourse with her twice; an interval of about five minutes elapsing between the first and second sexual act during which time he held her tightly on the bed. She endeavored, during this time, to scream and the accused threatened her by saying he would stick a knife between her lips and into her ribs (R. 10-13).

After the sexual intercourse had been completed, the accused asked Mrs. Banta if she had any money and demanded $25; then stated that he had to have $50. When she told him she did not have $50, he replied that she had better get $100. About this time she heard the front door bell ring. She decided that it would be the safest plan to give the accused money so she called out to the person ringing the bell to "wait a minute". She then gave the accused her pocketbook which contained $50, and as he moved toward the window and began to open it, she jerked open the door leading into the living room and screamed "get him, John", speaking to a John Thomas who had entered the living room. At that time she also saw Mary Fleming in the living room. She ran out of the house and across the street screaming for help, to a place where a group of soldiers were gathered in front of an eating place. There she saw the accused leaving Thomas Manor No. 2. She then returned to her bedroom in a very nervous condition (R. 13-14).

At the time of the above described attack, she was 48 years of age, five feet, two inches in height, and weighed between 85 and 90

pounds. She had been a widow for 15 years and for some time had been employed as a manager of the rooming house called Thomas Manor No. 2. She had recently been ill in a hospital and at the time of the attack was convalescing from that illness (R. 14).

The Mary Fleming and John Thomas, referred to in the testimony of Mrs. Banta, testified that at approximately 8 o'clock they entered Thomas Manor No. 2. Their testimony corroborates the testimony of Mrs. Banta concerning the torn curtain, overturned table and general disorder of the room. Mary Fleming testified that Mrs. Banta ran from the bedroom, previously described, and out into the street, screaming. She described Mrs. Banta as "white as a sheet" and with her hair torn and in disorder (R. 55-58, 58-63).

Mrs. A. C. Thomas testified that she was the operator of the rooming house called Thomas Manor No. 2 and that Mrs. Banta was employed by her as a hostess manager. She described Mrs. Banta as a friend of many years who was altogether moral in her conduct and religious in her nature. She asserted that Thomas Manor No. 2 did not tolerate immorality or registration there of unmarried girls; that it had never been investigated, and that only on one occasion had she been required to expel young women because they had falsely pretended to be married. She testified that on the occasion in question, blood was running from Mrs. Banta's mouth on both sides and that she had tried to stop the blood until the doctor came. She also said that Mrs. Banta was trembling and her voice was almost gone (R. 63-71).

Two civil service employees who lived in an apartment in the rear of Thomas Manor No. 2 testified that they were both in the house at different times on the afternoon in question. One testified that she was awakened by what she thought was a scream but that she had done nothing about it because she thought the sound came from a member of a house party on the second floor. Both witnesses testified that they had heard crashing sounds in the hall (R. 74-75, 83-86).

The investigating officer of this case testified that he had interviewed the accused three days after the alleged offenses, and that the accused after having been warned of his rights relative to making a statement, had made a sworn statement wherein he had admitted that he had been drinking during the entire afternoon of 2 May. The accused in his statement asserted that he had been told that there were girls

in this Thomas Manor No. 2, that he went to this house and asked if there were any girls there, that Mrs. Banta told him that there were no girls there, but asked him "What is the matter with me". The accused then replied "you are all right". Following the conversation Mrs. Banta conducted him to a bedroom, partly undressed and he had intercourse with her. After the intercourse he asked her if she had change for a $20 bill and when she took her pocketbook from under the mattress, he grabbed it. She then started screaming and he then jumped out of the window and dropped the purse. The accused asserted that he had used no force whatsoever on Mrs. Banta and that she had consented to the act of intercourse (R. 98, Ex. 11).

Captain William D. Beasley, a medical officer, testified that he had examined Mrs. Banta on the afternoon of 3 May 1943. He testified that he had found bruises on her left upper and lower eyelids and multiple bruises and abrasions over her scalp, left arm, back, right thigh and left leg. The pelvic examination revealed an abrasion "one-fourth inch long at the forchet and a larger abrasion at the junction of the labium minorum and labia majora on the left side." In his opinion these injuries could have been produced by involuntary sexual intercourse or by the victim falling astraddle of some sharp object as a fence or been beaten, or as the result of having been kicked in that region. The witness corroborated Mrs. Banta as to her weight and size (R. 100-106).

4. The accused testified that on the afternoon of 2 May 1943, he met a soldier friend and they had drunk beer in various places. During the afternoon he had an altercation with another soldier, and several blows were passed. He asked another soldier if he knew where there were any girls and was directed to the house where Mrs. Banta was. He went there and found the place all torn up. He asked her if she had any girls and she had said no. He then told her he would give her $10. She then led him across the lobby to a bedroom and asked him for the money. He told her that the money was in his shoe. He pretended that he was taking off his shoe while she undressed. He then had sexual intercourse with her. Afterwards he asked her if she could change a $20 bill, whereupon she reached under the mattress and got her pocketbook. He then snatched the pocketbook and at about that time someone rang the outer bell and he jumped out of the window. As he jumped out of the window, he dropped the purse. He testified in detail that Mrs. Banta assented to sexual intercourse and that he used no force upon her except when he shoved her to take the pocketbook. He testified

further that she made no protest and seemed to enjoy the sexual act. The accused admitted that he did not have the $10 which he had offered Mrs. Banta. He admitted making the statement, previously referred to, but said he signed it without reading it. He also asserted that he did not have a knife on the occasion in question, that he never carried a knife, and that he never threatened Mrs. Banta (R. 109-120).

Stephen Schmaling testified for the defense and corroborated the accused's statement that he had been drinking and that the accused had had an altercation with another soldier on the afternoon in question. He testified that when the accused left him, the accused did not, in his opinion, have complete control over his faculties (R. 120-124).

Private Cecil Braziel testified for the defense that he had told the accused that Thomas Manor No. 2 was a sporting house and that he had heard this report from approximately six people, only one of whom he could remember (R. 125-126).

5. The Specification, Charge II, alleges that the accused did at Myrtle Beach, South Carolina, on or about 2 May 1943 "* * * forcibly and feloniously, against her will have carnal knowledge of Mrs. Julia Banta". This language appropriately alleges the crime of rape, one of the two crimes made punishable under Article of War 92.

Rape is defined as "* * * the unlawful carnal knowledge of a woman by force and without her consent" (M.C.M., 1928, par. 148b). The Manual for Courts-Martial, in discussing this definition, states that:

> "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.
>
> "Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and where a woman fails to take such measures to frustrate the execution of a man's design as she is able to, and are called for by the circumstances, the inference may be drawn that she did in fact consent.

> "It has been said of this offense that 'it is true that rape is a most detestable crime ***; but it must be remembered that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent'" (M.C.M., 1928, p. 165).

When the evidence is examined in the light of the above definition and with due consideration for the admonition of cause presented in connection therewith, it becomes apparent that the accused is guilty of rape as charged. The testimony of Mrs. Banta shows that at the time and place alleged the accused made a violent and brutal attack upon her and by use of force, and by threatening her life, succeeded in having carnal knowledge of her twice against her will. Mrs. Banta testified that she was overpowered by the accused and that he threatened to stab her in the mouth and the ribs, that he dragged her across the lobby of the Thomas Manor No. 2, and into an adjoining bedroom, and there accomplished by force the sexual acts described in the testimony.

The essential elements of the crime of rape concerning the use of force and the accomplishment of penetration, and honest resistance by the victim to such acts are shown not only by the testimony of Mrs. Banta but by several corroborating circumstances - by the physical evidence of the bruises on the face and body of Mrs. Banta, by the testimony of a witness who heard a scream at about the time and near the place where the act occurred, and by the medical testimony which indicated that Mrs. Banta had been subjected either to involuntary sexual intercourse or had been injured in some other way in her private parts.

Considered in its entirety the evidence shows beyond any reasonable doubt every element of the offense alleged and justifies the finding of guilty.

6. The Specification, Charge I, alleges that the accused did at Myrtle Beach, South Carolina, on or about 2 May 1943, "by force and violence and by putting her in fear, feloniously take, steal and carry away from the presence of Mrs. Julia Banta, currency of the United States, the property of Mrs. Banta, in the amount of about Fifty ($50.00) Dollars".

The offense of robbery is defined as "the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation" (M.C.M., 1928, par. 149f). The uncontradicted evidence concerning this Specification shows beyond a reasonable doubt that the accused by intimidation of Mrs. Banta, took $50 from her person with intent to deprive her permanently of her property therein.

7. Although the issue of accused's sanity and mental responsibility for the crimes charged was not raised during the trial, there is attached to the record a certificate signed by a board of three medical officers asserting that the accused is sane and is fully responsible for his actions.

8. Accompanying papers, attached to but not a part of the record, assert that the accused before entering the service had been convicted of forgery in 1935, of attempt to defraud in 1937, of which he was placed on parole which he violated in 1938, and of driving an automobile while intoxicated in 1941.

9. The charge sheet shows the accused to be 25 years of age, to have made a class "F" allotment, and to have been inducted into the service on 31 July 1941.

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. The sentence of death or imprisonment for life is mandatory upon conviction of rape in violation of Article of War 92.

(On Leave), Judge Advocate.

Abner E. Lifsecomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

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

SPJGQ
CM 233491

16 JUN 1943

UNITED STATES v. Second Lieutenant THOMAS F. SLAUGHTER, JR. (0-336173), Air Corps.	THIRD DISTRICT ARMY AIR FORCES TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Gulfport Field, Mississippi, March 19, 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. The accused was tried upon the following Charges and Specifications:

CHARGE I: Violation of the 61st Article of War. (Finding of guilty disapproved by the reviewing authority.)

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

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

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

Specification 1: In that Second Lieutenant Thomas F. Slaughter, Jr., Air Corps, 416th Technical School Squadron, was, on or about February 9, 1943, drunk in a public place, to-wit: Triple-X Cafe on Beach Street, Biloxi, Mississippi, under such circumstances as to bring discredit upon the military service.

Specification 2: In that Second Lieutenant Thomas F. Slaughter, Jr., Air Corps, 416th Technical School Squadron, did, on or about February 9, 1943,

without proper authority, in a public place, to-wit: Triple-X Cafe, on Beach Street, in Biloxi, Mississippi, wrongfully appear wearing the uniform of a Private in the Army of the United States, he being at said time and place a Second Lieutenant in the Army of the United States, to the prejudice of good order and military discipline.

Specification 3: In that Second Lieutenant Thomas F. Slaughter, Jr., Air Corps, 416th Technical School Squadron, did, at Crescent Bar, Biloxi, Mississippi, on or about February 8, 1943, drink intoxicating liquor with Private Lilburn Trease and Private Lloyd H. Jones, enlisted men in the Army of the United States, under such circumstances as to bring discredit upon the military service.

Accused pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority disapproved the findings of guilty of Specifications 1 and 2, Charge I, and of Charge I, approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The trial judge advocate, after the accused had been arraigned, offered medical testimony regarding the sanity of the accused. Upon objection to the offer by the accused's counsel, who stated, "The accused is not in the least claiming that he is insane", the objection was sustained and the court proceeded with the trial (R. 8).

4. The evidence produced by the prosecution showed that the accused, then a second lieutenant (Ex. 2 and 3), on the evening of February 8, 1943, properly dressed in the uniform of an officer, entered the "Crescent Bar", a public place in Biloxi, Mississippi, joined Private Lloyd H. Jones, 415th Technical School Squadron, also in uniform, sat down at a table with him and ordered and consumed drinks of "scotch and soda" (R. 23, 31, 35). Private Lilburn L. Trease, 415th Technical School Squadron, joined them. He testified that the accused was drinking "coke highballs" (R. 39). There were other people standing at the bar and seated at the tables. The three remained there drinking for about an hour and then went out together to the cottage of the accused (R. 31-37, 38). The following morning, February 9, 1943, the accused left the cottage dressed in Private Trease's uniform and went to the "Triple X Cafe", where he was seen by Captain John B. Luke, Air Corps (R. 13), Joan Thomas, Biloxi, Mississippi (R. 43),

Sergeant Millard L. Nicholson, 865th Guard Squadron (R. 49), First Lieutenant Clifford L. Scott, Air Corps (R. 53), and First Lieutenant Maxwell A. Gronich, Air Corps (R. 57), drinking intoxicating drinks and under the influence of liquor, still dressed in the uniform of a private. The accused was neatly dressed and was well behaved. He was in no way disorderly. Lieutenant Scott's description of the accused was: "He smelled of liquor and talked rather incoherently although he talked plain enough, but his speech was very hesitant, his eyes very bloodshot * * *" (R. 55). The other witnesses gave similar descriptions.

5. The accused elected to make an unsworn statement in answer to questions put to him by his counsel. He related his military experience and training. He said that due to his close confinement in the performance of his duties he had made very few, if any, social contacts at his station. He assured the court that, if given another opportunity, he would so conduct himself that the conduct complained of would never happen again (R. 68-73).

6. The evidence was clear, undisputed, and compelling that the accused was, as charged in Specification 1 of Charge II, drunk in a public place in Biloxi, Mississippi; that, as charged in Specification 2 thereof, he appeared without authority in a public place dressed in the uniform of a Private of the Army of the United States; and that, as charged in Specification 3 thereof, the accused was drinking intoxicating liquor with enlisted men on the evening of February 8, 1943 at a public bar in Biloxi, Mississippi. The accused produced no evidence to the contrary, but by unsworn statement offered extenuating circumstances and an assurance of good behavior in the future. Five witnesses expressed their opinion that the accused was under the influence of liquor on the morning of February 9, 1943 in the Triple X Cafe in Biloxi, Mississippi.

The Manual for Courts-Martial, p. 111, provides: "On matters within the common observation and experience of men, a witness may express an opinion; e.g., * * * as to whether or not a certain person was drunk at a certain time * * *". Drunkenness even without disorderly conduct may constitute a violation of Article of War 96 (CM 197398). Drinking with enlisted men in public by a commissioned officer is considered prejudicial to good order and military discipline and therefore a violation of Article of War 96 (CM 229412; 124799; 119492). The act of a commissioned officer wearing the uniform of an enlisted man and appearing in a public cafe thus dressed without special authority is also contrary to good order and military discipline and tends to bring discredit upon the military service. Such conduct <u>per se</u> violates Article of War 96.

7. Attached to the record of trial is the following recommendation for clemency signed by four of the ten members of the court present at the trial:

"The undersigned members recommend that the sentence by the Court that the accused be dismissed the service, be, by the proper reviewing authority, suspended.

"* * *. The reasons for this recommendation are that the undersigned members of the Court are possessed of the deepest conviction that the sentence imposed is not justified by the evidence, or by the necessities of justice and discipline (Par. 78 a, MCM); that all of the specifications and charges of which the accused was found guilty, combined, do not present a sufficiently aggravated case, on the evidence, to justify dismissal of the accused officer; and having heard the statement of the accused are firmly convinced that he will hereafter properly conduct himself as an officer, and will be, as such, of value to the military service."

8. The record shows the accused to be 30 years of age. He enlisted as Private, August 4, 1932, in the ERC, and was discharged August 3, 1935, as Private, by reason of ETS. He enlisted August 17, 1935, as Private in the ERC and was discharged on September 17, 1935, to accept a commission as Second Lieutenant, Infantry Reserve, on September 18, 1935. His service in the ERC was on an inactive status. His appointment as Second Lieutenant, Inactive Reserve, expired on September 4, 1940. He was reappointed Second Lieutenant, Infantry Reserve, effective September 5, 1940, during which appointment he was on active duty as follows: July 26, 1936, to August 8, 1936, and from July 4, 1939, to July 17, 1939. He enlisted in the Army of the United States, Regular Army, September 15, 1941, as Private, and was discharged as Corporal with character excellent on May 16, 1942, for the purpose of reporting for active duty as a Reserve Officer, Second Lieutenant, Air Corps. He entered upon extended active duty May 17, 1942, at Sheppard Field, Texas.

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 and the sentence, and to warrant confirmation of the sentence. A sentence of dismissal is authorized upon conviction of violation of Article of War 96.

William S. Lounds, Judge Advocate.

Earle Hepburn, Judge Advocate.

Herbert R. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O. 3 - SEP 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. Slaughter (0-336173), 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 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. In view of the fact that the Commanding Officer, Gulfport Field, Mississippi, reported to this office by radiogram that Lieutenant Slaughter breached his arrest on 23 June 1943 while awaiting result of trial by general court-martial on 19 March 1943 the recommendation for clemency attached to the record of trial and signed by three of the seven members who sat on the case, recommending punishment less severe than dismissal from the service, is not concurred in. Attached to the file is the report of a Board of Medical Officers convened at La Garde General Hospital, New Orleans, Louisiana, on 6 August 1943, subsequent to this trial and at accused's own request, to determine his sanity at the time of the commission of the offenses alleged and at the time of his trial. The Board finds that he, Slaughter "was able to distinguish right from wrong and was able to adhere to the right at the time of the alleged commission of offenses, at the time of his trial on March 19, 1943, and at the time of the present examination" and "is not insane".

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.

3 Incls.
1 - Record of trial.
2 - Dft. ltr. for sig. S/W.
3 - Form of action.
4 - Report of Medical Board.

(Honorably discharged 13 Nov 1943 by reason of physical disqualification, by order of the Secretary of War)

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

SPJGQ
CM 233543

16 JUN 1943

UNITED STATES v. Private MARION E. McFARLAND (36055420), Battery C, 307th Coast Artillery Barrage Balloon Battalion.	37TH COAST ARTILLERY BRIGADE (AA) Trial by G.C.M., convened at Los Angeles, California, March 9, 1943. To be hanged by the neck until dead.

OPINION of 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 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 92nd Article of War.

Specification: In that Private Marion E. McFarland, Battery C, 307th Coast Artillery Barrage Balloon Battalion, did, at Wilmington, California, on or about March 4, 1943, forcibly and feloniously, against her will, have carnal knowledge of Sharon Conner, a female, not his wife.

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 hanged by the neck until dead. The reviewing authority approved the sentence but recommended that the confirming authority commute it to life imprisonment, and forwarded the record of trial to the Office of The Judge Advocate General, where it has been examined as if forwarded for action under Article of War 48.

3. The evidence for the prosecution shows that the accused, a member of Battery C, 307th Coast Artillery Barrage Balloon Battalion, located at Wilmington, California, obtained permission and left his balloon site about 8:30 p.m. on March 4, 1943 and did not return until 1:30 a.m. the following morning, at which time he was loud and boisterous and under the influence of liquor (R. 31-37), although his speech

was coherent, he walked straight and understood what he was doing (R. 34-35, 40). He went on duty as a "winch" guard (R. 37).

On the same evening about 11 p.m., Mrs. David V. Conner left her daughter Sharon, fully dressed with shirt, panties, dress, and coat, asleep on the rear seat of an automobile parked in front of a restaurant in Wilmington, California. When she came out of the restaurant 20 minutes later the automobile and child were gone. She immediately notified the police and shortly after midnight was taken by the police to a point six blocks away and saw her automobile parked on the street and her child, clad only in her undershirt, in the home of a Mr. Arthur Villarreal, who, about 1:30 a.m., March 5, heard the cries of a child and upon investigating found Sharon on the front seat of the Conner car parked across the street from his home. She was crying and cold, dressed only in her undershirt. He put her coat on and took her to his home (R. 22-25). The child's dress, torn and soiled, was found in the back of the car, her panties on the floor of the front (R. 26-28).

A police officer who arrived at the Villarreal home about 2 a.m. described her condition: Her face was covered with blood; her hands were bloody; her clothes were missing--all but her little undershirt; and there were blood and bruises on her inner thighs. He took her to a local hospital and called in Dr. W. W. Horst (R. 30).

The doctor made an examination about 2:30 a.m. He also observed the blood about the face and hands and the upper part of the thighs. He examined her genitalia and found a cut or laceration three-eighths of an inch long, but not deep, "just on the back of the vagina" (R. 18). The doctor could not state what force had caused the laceration. It was possible for a male sexual organ to have been the cause. It was also possible, but not likely, for a finger to have caused it. It was a tear and not a scratch and therefore it was not caused by a finger nail. The doctor likened the cut to a tear resulting from something forced against a stretched area. He placed some cotton on an applicator to search for male spermatozoa in the vagina, but it was too small to enter. Only blood was found (R. 18-19).

About midnight of March 4, 1943, the accused was seen in the restaurant talking to the child's mother. He was drunk. He could not walk straight but seemed to know what he was doing. He said he was going to help the mother find her child. A soldier took him away and took him back to his post where he was placed on guard (R. 37-42).

About 8 a.m. of the same day Captain James P. Brown, Commanding Officer, Battery C, 307th Coast Artillery Barrage Balloon Battalion, of which organization accused was a member, after being informed of the alleged abuse of a 2½-year-old child (R. 54) and that the child

had said "Soldier hurt" checked the records for those off duty at that time, and sent for the accused. Upon examining the accused's clothes,he caused to be removed from the person of the accused by the first sergeant, and identified in court, a pair of shorts stained in the crotch, an undershirt stained at the bottom edge, and a stained handkerchief. He also produced and identified a pair of pants with blood stains below the left knee supplied originally by a Sergeant Warner and admitted by the accused to be his on the morning of March 5, 1943 (Exs. 2, 3, 4, 5). He questioned the accused but failed to give him any warning of any kind that whatever he might say could be used against him (R. 60). The witness was the military superior of the accused. In reply to most of the questions the accused said he did not remember; that he had been drinking. At one point the accused said "I did it", but the witness could not specify clearly or exactly what it was that the accused "did" (R. 55, 56, 57). Clyde E. Warner, First Sergeant of accused's organization, was present during this interrogating of the accused. He observed the stains on the shorts and undershirt worn by the accused on the morning of March 5, 1943 (R. 62). The accused admitted to him then that a pair of pants with bloodstains on the knee were his and that he had worn them the previous night (R. 62), but the witness could not identify Exhibit 2 as the pants (R. 63). In answer to Captain Brown's questions the accused stated he did not know how he got the stains on his clothes; he did not remember bringing the girl from the back seat to the front seat, nor completing "the act", but when "the captain asked if he did do the act, he said that he did" (R. 68). Just what "the act" was the witness was not able to state (R. 69). Neither "rape" nor "immoral conduct" was mentioned.

That afternoon about 1 o'clock a police officer, Lieutenant Thomas H. Rankin, together with police officer Lieutenant Elliott and two Army officers, Captain Brown, the accused's battery commander, and First Lieutenant Edward J. Ryan, 37th Coast Artillery Brigade, called upon the accused at his place of confinement at the Naval Base Prison on Terminal Island. Lieutenant Rankin questioned the accused in the presence of the other officers. The accused was not warned that anything he might say might be used against him (R. 75). In answer to Lieutenant Rankin's questions the accused stated that he had taken the Conner car from in front of the restaurant and drove several blocks before he discovered the presence of the child on the back seat. He drove further and stopped. He then took the child from the back to the front seat and after removing her dress and panties and placing her on his lap facing him and astraddle his legs "tried to fuck her". In explanation of the presence of blood on the child's face he said he had put his finger in the girl's privates to "make the hole bigger" and got blood on his hand. He pulled down his own pants, opened the front of his shorts. "I just set her on my dick and pushed" (R. 72-75). His penis had not gone into the little girl (R. 75). The witness stated that no threats or promises had been made to the accused (R. 76).

"Q. In your questioning of him, were the statements voluntary?

A. Yes, they were" (R. 76).

On the following day, March 6, 1943, Lieutenant Ryan, the investigating officer, questioned the accused. Because of the importance of his testimony its pertinent part is quoted at length: (R. 77)

"A. Well, when I first saw the accused I told him that I was Lieutenant Ryan, investigating officer, and it was my duty to investigate the case to determine what the facts were. I told him that it was not necessary for him to give me any information or to answer any questions, that anything that he told me could be used against him. I advised him of the nature of the charges against him, the punishment, the right to cross examine witnesses, other attendant rights as the accused, and then I asked him if he cared to tell me about it, and he said, I believe, 'Well, there isn't very much to tell,' something similar. And I asked him if he had been in the Cinco De Mayo Cafe on the evening of March 4th. He nodded, indicating that he had, and I asked him if he stayed in there long, and he said no, he went to the washroom and then he went out. I asked him what, if anything, he did then. He said, 'Well, I wanted to go for a ride.' He told me that he took a car that was out in front, and I asked him where he went, and he said he drove a ways and stopped. I asked him if he knew at the time he took it whether or not there was any one in the car, and he said he did not. I asked him when he first discovered there was some one in it, and he said that he stopped after he had proceeded a ways and turned on the dome light to see what was in the car, and that he saw a little girl laying on the back seat asleep. I asked him what, if anything, he did then. He said he just drove a little ways further and stopped. I then asked him if he took the little girl from the back seat and brought her up in the front seat, and he either said that he did or nodded to indicate that he did. I then asked him if had removed her panties or underclothing, and he said he did. I asked him if he attempted to have sexual intercourse with her, and he said that he did. I explained to him what the meaning of the term 'vagina' was. I asked him if he understood it; after explaining it to him, he said he did. Then I asked him whether or not he had inserted any part of his penis into

the girl's vagina. And he said he did not. I said to him, 'Did you place it up against the girl's vagina and push?' And he said that he did that — 'I did.' He seemed reluctant to answer anymore questions, so I abandoned that line of questioning and I asked him if he had been drinking that evening. He said that he had. I said to him, 'How much did you have to drink?' And he said, 'I drank a pint and a half.' I asked him of what, and he said whiskey. I asked him whether it was in a bottle or in what sort of container it was in, and he said there were two bottles; a pint bottle and a half pint bottle. I asked him where he got it, and he either made no answer or he said, 'Around some place.' He didn't answer my question. I asked him whether he drank it straight, and he said he drank it with beer. I asked him whether there was any of it left in the bottles, and he said no, that he had consumed it all. I don't recall anything further that was said."

On cross examination the witness explained that the accused stated that he tried to insert his penis but could not get it in. He also explained that what he meant by vagina was the extreme orifice of the girl's privates (R. 79-80).

A police chemist analyzed as blood the spots or stains on the accused's handkerchief, his shorts, his pants, and his undershirt. He also gave his privates and finger nails a benzidine test for blood. It showed the presence of blood on the foreskin and along the left side of the accused's penis, and also in the scraping from the accused's finger nails. This test was given on March 5, 1943, about 1 p.m. (R. 80-86).

It is noted that the offense occurred about midnight of March 4, 1942, and that the trial commenced at 9:25 a.m. March 9, 1943.

4. The accused having been advised of his rights elected to remain silent.

5. The following facts are undisputed: Mrs. David V. Connor left her daughter asleep and fully clothed on the back seat of her automobile parked in front of a restaurant in Wilmington, California, about 11 p.m. March 4, 1943; about 1:30 a.m. following, her daughter was found crying clad only in an undershirt on the front seat of the same car parked about six blocks from where Mrs. Connor left it. The daughter is referred to in the record as a child (R. 9, 14, 15, 17, 23), a baby, (R. 8, 24, 28, 29), a little girl (R. 22, 23), as a little

girl crying "Mummy" (R. 22) and as a 2½-year-old child (R. 54). There was no direct evidence of the child's age, but she was present before the court during the trial. When found the child had blood on her face, hands and about the upper part of the thighs. Her genitalia disclosed a tear or cut 3/8ths of an inch long "just on the back of the vagina". The vagina itself was too small to insert a doctor's applicator. Only blood was present.

The accused left his post in or near Wilmington about 8:30 p.m. that evening. He was seen about midnight in the restaurant talking to Mrs. Conner about the disappearance of the child and the auto. He was then in a drunken condition in that he could not walk straight although he seemed to know what he was doing. He was taken back to his post and put on guard duty. About 8 a.m., March 5, he was taken before an investigating officer who removed from him his shorts, shirt and handkerchief. The shorts were stained with blood in the crotch. The shirt at the bottom edge. There were blood stains on the handkerchief, and also on the lower left knee of the pants that he wore that night. There was blood caked in his finger nails. A benzidine test showed blood on the foreskin and left side of his penis.

It is a fair inference from the foregoing facts that whoever had taken the Conner car had found the child in the back, brought her up to the front seat, removed her lower clothes and carnally abused her. The accused was in the vicinity. If it was the accused, it was a fair inference that he carnally abused the child with his penis or his hand as shown by the blood on these parts. It was not shown that the blood was the same type blood as was present on the child, but the other circumstances were convincing.

The admissions or confessions of the accused supply the missing links. His explanation of the manner in which he attempted to have intercourse with the child explains the torn dress, the semi-naked child, the bloodstains on the accused as well as on the victim, and the lacerated pudendum. It should be noted that these facts were discovered before any alleged confession was obtained. Without these admissions or confessions the case was not proven beyond a reasonable doubt. The first question for the Board to determine is whether the three separate confessions made by the accused are admissible in evidence.

The Manual for Courts-Martial, paragraph 114, page 116, provides, <u>inter alia</u>:

> "It must appear that the confession was voluntary on the part of the accused. In the discretion of the court a prima facie showing to this effect may be required before evidence of the confession itself is received. No hard and fast rules for determining whether or not a confession was voluntary are

here prescribed. The matter depends largely on the special circumstances of each case. The following general principles are, however, applicable.

"A confession not voluntarily made must be rejected; but where the evidence neither indicates the contrary nor suggests further inquiry as to the circumstances, a confession may be regarded as having been voluntarily made. Thus, where all the available evidence as to the circumstances merely shows that the accused, a private, confessed to a friend, another private, the confession may be regarded as voluntary.

"The fact that the confession was made to a military superior or to the representative or agent of such superior will ordinarily be regarded as requiring further inquiry into the circumstances, particularly where the case is one of an enlisted man confessing to a military superior or to the representative or agent of a military superior."

The first alleged confession of guilt was made on the morning of March 5, 1943 to Captain Brown and Sergeant Warner. Both of these men were military superiors of the accused. Neither witness could clearly explain to what the accused referred when he said "I did it". He was not warned in any way that what he might say might be used against him. The rules of evidence quoted above relating to confessions require further inquiry into the circumstances of a confession to a military superior to clearly show its voluntary nature, otherwise it will be rejected. We are of the opinion that the testimony of both of these witnesses should, for the reasons stated, be rejected. This statement is entirely excluded from consideration by the Board of Review in acting upon this case.

With reference to the confession made to Police Officer Rankin at 1 p.m. on the same day, in the presence of two of the accused's superior officers, the same criticism can be made. There was no warning given him. While it was not shown that the Army officers participated in the questioning, the prosecution failed to show that they did not. It is a fair inference that the police officer acted for the Army officers present in obtaining this confession used in this trial within a few days. The prosecution failed to inquire into the circumstances of the confession in such a manner as to show the voluntary character thereof. While the witness stated that "the statements" were voluntary (R. 76) - a conclusion without facts to support or explain it - yet the witness did not state <u>whose</u> statements were voluntary. It is clear from the record that the accused had no sleep the entire night of March 4-5; that he was questioned most of the morning of the 5th by his commanding officer; that he had been drinking to the extent of being visibly drunk

at midnight and as late as 1:30 a.m. of the 5th. This alleged confession was obtained about 1 p.m. on the same day with four men of authority pressing him. While only the police officer apparently was doing the questioning, the others were present—two of whom were the accused's military superiors. The voluntary nature of the confession under such circumstances is doubtful. The burden of proving it to be voluntary—by showing the circumstance—was upon the prosecution. This it failed to do and therefore the confession should have been rejected from the evidence. This confession is excluded by the Board in considering this case.

With reference to the third confession obtained from the accused, it appears that it was obtained by Lieutenant Ryan, the Army officer detailed to investigate the charges in this case, on the late afternoon of March 6. It should be noted that he was also present the previous day when the accused was questioned by the police officer, Lieutenant Rankin. For the first time, the accused was given a proper warning. The confession was properly admissible in evidence and the facts obtained from it are all fully set forth in the excerpt of the record in paragraph 3 above. It connects the accused with the alleged crime. It identifies him as the one who took the car and abused the child. It supplies the missing link in the chain of the evidence, without any support from the other two rejected confessions, and therefore we feel that the improper admission in evidence of the two prior confessions did not affect the substantial rights of the accused. We are therefore satisfied that there was sufficient evidence to sustain a finding that it was the accused who took the car and committed the acts shown by his own confession upon the child. It should be noted that the confession shows only an attempt to rape and denies the consummation of the act. It denies penetration.

The Manual for Courts-Martial, paragraph 114, page 115, states: "Evidence of a confession or supposed confession can not be restricted to evidence of only a part thereof".

We now pass to the next question: Was a rape committed?

The Manual for Courts-Martial, paragraph 148b, provides:

> "Rape is the unlawful carnal knowledge of a woman by force and without her consent.
>
> "Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not.
>
> "The offense may be committed on a female of any age.
>
> "Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent."

It is clear from the evidence that the female child was of such tender years that she was incapable of realizing the nature of the act and therefore incapable of giving consent.

Wharton's Criminal Law Volume I section 702 provides:

> "Acquiescence of an infant is not consent. The consent of a female of such tender years as to be unconscious of the nature of the act, or even her aiding the prisoner in the attempt, is no defense."

It was shown that the accused used sufficient force to cause a contact to be made between the genital organs of the accused and the child.

We therefore find the following elements of rape present: (1) unlawful carnal contact, (2) with a female, (3) by force, (4) without her consent. The only element unaccounted for is penetration. The only direct evidence concerning penetration is that of the accused--that there was no penetration. He attempted to have sexual intercourse with the female child but was unable--no doubt because of the size of the child's privates--to insert his penis. The medical testimony was clearly to the effect that the child's vagina had not been entered. It was too small to even insert a medical applicator with a piece of cotton wrapped around it. The hymen was not broken.

Wharton's Criminal Law, Volume I, section 697, page 935, provides:

> "Proof of penetration is necessary in order to establish the charge of the crime of rape; that is, the proof must show beyond a reasonable doubt that there was an actual entrance of the male organ within the labia of the pudendum of the female organ."

Any penetration, however slight, is said to be sufficient. The labia of the pudendum is described by medical authority as the lips of the external genital organs of a female. It is also called the vulva. The vagina is the musculomembranous canal that extends from the vulva opening to the uterus.

Penetration is rarely, if ever, proved by an eyewitness. It is usually shown by the victim or by medical testimony. The victim in this case was apparently too young to testify. The prosecution failed to throw any light on the subject by the medical testimony it produced. The doctor's testimony indicating that the vagina could not have been entered does not preclude the possibility that the vulva was entered. The cut or laceration was undoubtedly caused by the

accused in his efforts to rape the child. Whether by his finger or by his penis, it is impossible to definitely state. Either method was possible. The penis method was the more likely--but penetration by the penis must be shown beyond a reasonable doubt. There was blood on the accused's penis as well as in his finger nails. May the court guess which caused the laceration? If his finger caused the laceration, then the force applied with the penis may not have been sufficient to penetrate. The accused said he did not penetrate. His connection with the offense was obtained solely from his own admission. Should the court accept only that which is injurious to his interest and reject that which is in his favor when there is no direct evidence to the contrary? The answer to this question is found in Lieutenant Ryan's testimony (R. 78), who stated:

> "I asked him whether or not he had inserted any part of his penis into the girl's vagina. And he said he did not. I said to him, 'Did you place it up against the girl's vagina and push?' And he said that he did that -- 'I did.' * * * 'By vagina I mean the girl's private parts'" (R. 79).

How hard he pushed, whether the accused had an erection at the time--does not appear.

> "Where the only competent evidence is circumstantial, it must, in order to be sufficient to support the conviction be of such a nature as to exclude every reasonable hypotheses except that of the accused's guilt" CM 153390; 169811; 196619; Dig. Ops. JAG 1912-40 par. 395(a).

> "The probabilities are obvious, but mere probabilities do not suffice" CM 120937.

Excluding entirely from all consideration the two incompetent confessions, the evidence is compelling that the accused was guilty of the lesser included offense of an assault with intent to rape. This offense was not only clearly proven by the evidence but also was admitted by the accused. Assault with intent to rape is among the lesser offenses which may be included in that of rape, M.C.M. par. 148b. The limitation of punishment for such an offense is dishonorable discharge, total forfeitures, and confinement at hard labor for 20 years, M.C.M. par. 104c.

The record is not sufficient to sustain a finding of guilty of the offense charged--namely, rape, but is sufficient to sustain the lesser included offense of assault with intent to rape.

6. The accused is 23 years of age. He was inducted into the service at Scott Field, Illinois on Feburary 23, 1942, to serve for the duration plus six months.

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 not legally sufficient to support the findings of guilty of the offense of rape as charged or to support the sentence, but is legally sufficient to support a finding of guilty of the lesser included offense of assault with intent to rape and a maximum sentence of dishonorable discharge, total forfeitures, and confinement at hard labor for 20 years. Confinement in a penitentiary is authorized by Article of War 42 for the offense of assault with intent to rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by section 455, Title 18, of the Criminal Code of the United States.

William A. Bounds, Judge Advocate.

Earle Stedburn, Judge Advocate.

Herbert R. Friedrich, Judge Advocate.

1st Ind.

War Department, J.A.G.O. 25 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 Private Marion E. McFarland (36055420), Battery C, 307th Coast Artillery Barrage Balloon Battalion.

2. I concur in the opinion of the Board of Review and, for the reasons stated therein, recommend that so much of the findings of guilty be vacated as involves findings of guilty of an offense by accused other than assault with intent to commit rape, at the place and time and upon the person alleged, in violation of Article of War 93; that the sentence be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for twenty years; that the sentence as thus commuted be carried into execution; and that the United States Penitentiary, McNeil Island, Washington, be designated as the place of confinement.

3. Consideration has been given to the attached letter, with inclosures, from Honorable Scott W. Lucas, United States Senate, dated April 9, 1943, addressed to The Adjutant General, urging clemency in accused's behalf.

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,
Major General,
The Judge Advocate General

4 Incls.
Incl.1-Record of trial.
Incl.2-Dft. ltr. for sig. S/W
Incl.3-Form of action.
Incl.4-Ltr. w/incls. fr. Hon. Scott W. Lucas, 4-9-43

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for twenty years. G.C.M.O. 180, 3 Aug 1943)

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

CM 233592

7 Apr 1943

U N I T E D S T A T E S

v.

Private JACK W. GIBSON

(6950530)

HOLDING by the BOARD OF REVIEW is
RESTRICTED

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

SPJGH
CM 233611

MAY 18 1943

UNITED STATES

v.

Second Lieutenant EDWARD F. ECKMAN (0-1637346), 1304th Signal Operational Training Company.

FOURTH AIR FORCE

Trial by G.C.M., convened at Army Air Base, Hammer Field, California, March 15, 1943. Dismissal.

OPINION of 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 93rd Article of War.

Specification: In that Second Lieutenant Edward F. Eckman, 1304th Signal Operational Training Company, did, at Fresno, California, on or about February 26, 1943, with intent to defraud falsely make in its entirety a certain receipt in the following words and figures, to wit: FEBRUARY 26, 1943. THIS CERTIFIES THAT I RECEIVED ONE HUNDRED AND SIXTY FIVE DOLLARS ($165.00) FROM LT. E. F. ECKMAN. J. T. EDWARDS, which said receipt was a writing of a private nature, which might operate to the prejudice of another.

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

Specification: In that Second Lieutenant Edward F. Eckman, 1304th Signal Operational Training Company, did, at

#25

> Fresno, California, on or about February 27, 1943 with intent to deceive Major Richard S. Carter, Signal Corps, officially state to the said Major Richard S. Carter, that he had paid in full a certain personal obligation in the amount of one hundred and sixty-five ($165.00) dollars to one Corporal John T. Edwards, which statement was known by the said Second Lieutenant Edward F. Eckman to be untrue in that he had never paid said personal obligation of one hundred sixty-five ($165.00) dollars.

He pleaded not guilty to Specification and Charge I, and not guilty to Specification and Charge II, but guilty of Specification, Charge II, excepting the words "with intent to deceive Major Richard S. Carter, Signal Corps, officially", substituting therefor the word "improperly", and excepting the words "the said" before the name "Major Richard S. Carter", and guilty of Charge II in violation of the 96th Article of War. He was found guilty of all Specifications and Charges, and was sentenced to be dismissed the service. The reviewing authority approved the sentence, recommended that the execution thereof be suspended, and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution shows that Captain Charles H. Leet, Commanding Officer of the organization of accused, had instructed him in November, 1942, that funds could be borrowed from the Red Cross. It was the practice of Captain Leet to approve applications for such loans. The accused was formerly at Drew Field, Tampa, Florida. His organization left Drew Field under Special Orders dated January 18, 1943 (Def. Ex. A), and he signed the Officers' Register at Camp Pinedale, California, on February 4, 1943 (Def. Ex. B). The accused stated to Captain Leet that he had purchased a 1941 Plymouth automobile after he arrived at Camp Pinedale (R. 11-14).

The accused borrowed from Corporal John T. Edwards, $25 about December 1, 1942, $40 just before Christmas, and $100 about three to five weeks before the date of trial (March 15, 1943). The accused gave him a receipt (Def. Ex. E) for the $100. These loans were made by check, and were to be repaid by check or money order so that Corporal Edwards could send the money to his bank in Mississippi for deposit. Corporal Edwards knew of no reason for the first two loans, but the last one was for a payment on a new automobile. About January 1, 1943, the accused gave Corporal Edwards a check (Def. Ex. D) for $65 drawn on a bank in Tampa, Florida, but he did not deposit it until after they came

to Camp Pinedale. The check was not paid, and on February 22, 1943, he took the matter up with the accused, who said that the bank in Tampa had beat him out of $65, and that he had wired some bank, which would send the money by telegraph to Corporal Edwards' bank in Mississippi. At that time, which was after the loan of $100 had been made, the receipt for $100 was changed to show $165, the date of March 31, 1943 was inserted to show when the money was due, and the accused initialed the change. That date was agreeable to Corporal Edwards. The accused never denied owing the money and never refused to pay it. On March 3, 1943, Corporal Edwards was paid the $165 through the Officer of the Day and executed a receipt (Def. Ex. C) to the accused (R. 15-19).

Major Richard S. Carter, Post Executive, Camp Pinedale, California, questioned the accused on February 24, 1943, as to whether he had borrowed money from men in his organization. On receiving an affirmative answer, he instructed the accused to pay the money back as quickly as possible and report that fact to him. The reason given him by the accused for borrowing money from enlisted men was that he believed it would result in his transfer from the organization. On February 27, 1943, the accused told Major Carter that he had paid up all his obligations in the company, stating that payments had been made to Corporal Edwards and two other men and that the amount paid to Corporal Edwards was $165. He handed three receipts to Major Carter, one of them showing payment of $165 on February 26, 1943, and signed "J. T. Edwards" (Ex. 1). Corporal Edwards did not sign this receipt and did not authorize anyone to sign it for him, and on the date of the receipt the $165 was still owed to him. On March 1, 1943, the accused reported to the office of Major Carter and volunteered the information that he had made that receipt out himself and stated that the debt had not been paid, but did not specifically state that he signed the name of Corporal Edwards on the receipt. The reason given by accused for making out the receipt was that he was "scared". On cross-examination, Major Carter was in doubt as to the exact language used in the three conversations. After March 1, the accused mentioned to Major Carter that he needed the money because his wife was sick (R. 6-10, 17).

4. The defense introduced Exhibits, A, B, C, D and E, during the examination and cross-examination of prosecution witnesses. The accused testified that he was born in San Antonio, Texas, December 9, 1920, finished high school there, enlisted November 6, 1939, attained the grade of Staff Sergeant, entered Officers' Candidate School at Fort Monmouth, New Jersey, July 16, 1942, was commissioned October 16, 1942, and had been

married about ten months. He is a radio specialist and specialized in radio intelligence at Fort Monmouth. He had never been given information about borrowing from the Red Cross, and did not borrow there because it takes quite a long time. The feelings of Captain Leet toward him were bad (R. 13-14, 17-18, 20-21A, 25-27).

The accused was stationed at Tampa, Florida, about three months. While there he borrowed $65 from Corporal Edwards to pay Dr. A. D. Stone, who was treating his wife during pregnancy. The receipt of the doctor was introduced in evidence (Ex. F). The accused gave Corporal Edwards a personal check for $65, dated January 6, 1943, drawn on a Tampa bank. At that time he had $253 in the bank. It was stipulated that accused had this amount in the bank on the date stated, that on January 17, 1943, he had $400 there, and that on January 18, 1943, he closed the account. When the account was closed it contained $82, as he had paid a hospital bill and various other bills. At that time he drew $126 as a half month's pay. He closed the account because he was leaving Tampa. He was unable to get his cancelled checks. The first time he knew that the check for $65 had not been honored was when Corporal Edwards presented it to him. He had borrowed the $100 on February 18, 1943, to make the final payment on his 1939 Plymouth automobile. A Western Union receipt for $86.72 sent to Commercial Credit Corporation on February 19, 1943, was placed in evidence (Ex. G). He did not own a 1941 Plymouth car, but had driven one owned by his sister-in-law. He got into financial difficulties because his wife had been ill (R. 21A-23, 25).

When he was called into Major Carter's office he was asked if he did not know that it was against Army Regulations to borrow from enlisted men, told that he could lose his commission over this, and given three days to pay his obligations. At that time he was expecting $250 from his home, and on February 25 he received $100 by telegraph. The accompanying message was introduced in evidence (Ex. H). Eighty-five dollars out of the sum received was used to pay two men other than Corporal Edwards, but he did not have money to pay Corporal Edwards at that time. He could have raised the money, but not within the time designated by Major Carter. He accordingly wrote the receipt showing that he had paid Corporal Edwards. He did this because Major Carter had threatened him with loss of his commission, he believed that he was in danger of losing his commission, and that was the only thing he could think of to do. He was ignorant of the method necessary for separation of an officer from the service. On February 27, he did not tell Major Carter that the debts had been paid, but had the receipts in his hand and laid them on the desk. All that Major Carter asked was whether there were any other outstanding debts among the enlisted men. He merely gave

the receipts to Major Carter, and did this because it was the only way he knew to attempt to comply with the order to pay the debts within three days. He figured this would give him additional time to get the rest of the money, and did not think Major Carter would have granted him additional time, because of the manner in which the time limit had been delivered (R. 23-27).

He did not tell Corporal Edwards he had made this receipt, nor did he think it would make any difference to Edwards, so long as he, the accused, knew that he owed Edwards. The $165 was not due until March 31, but he was not given an opportunity to explain this to Major Carter. He never denied to Corporal Edwards that he owed him, had no intention of defrauding him, and has since paid Corporal Edwards on March 3, out of his pay check (24, 27-28).

Major John T. Gibney, Signal Corps, Commanding Officer of Advance Stage D, Camp Pinedale, California, testified that the accused is above the average in technical qualifications, that he is one of only two officers at Camp Pinedale qualified to do certain work, and that he would be glad to have the accused in his organization (R. 28).

5. The evidence shows clearly that the accused falsely and fraudulently made the receipt in the name of J. T. Edwards (Ex. 1), without authority so to do; that he delivered it to Major Carter, at the same time falsely stating that he had paid his debt to Corporal Edwards; that he then knew that the debt had not been paid; and that he had the intent to deceive Major Carter. It appears that the accused was afraid that he would lose his commission if Major Carter was not advised on February 27, 1943, that the debt owed to Corporal Edwards had been paid, and that he felt that, since he did not then have the money to pay the debt, his only recourse was to submit the false receipt. On March 1, the accused realized his error and voluntarily gave to Major Carter the true facts, and on March 3, paid his debt to Corporal Edwards. These circumstances, however, cannot justify either the making of the false receipt, nor the false official statement, both of which were intended to, and did, deceive Major Carter.

The making of a false official statement to a superior officer is cited as an instance of conduct unbecoming an officer and a gentleman by Winthrop in violation of the 61st (95th) Article of War (Winthrop's Military Law and Precedents, Reprint, P. 713) and by the Manual for Courts-Martial in violation of the 95th Article of War (par.151, MCM,1928). The evidence clearly warrants the conclusion that the false statement was made by the accused for the purpose of misleading and deceiving Major Carter

and constitutes an offense cognizable under the 95th Article of War.

6. The accused is 22 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from November 6, 1941; 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. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 93rd Article of War, and mandatory upon conviction of a violation of the 95th Article of War.

_____, Judge Advocate

_____, Judge Advocate

_____, 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 Edward F. Eckman (0-1637346), 1304th Signal Operational Training Company.

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 having borrowed money from enlisted men, a superior officer instructed him to pay these debts promptly and report their payment to him. The accused was unable to repay money borrowed from an enlisted man within the time he understood to be allowed him by his superior officer, made a false receipt showing payment, in violation of the 93rd Article of War, and presented it to the superior officer and officially stated that the debt was paid in violation of the 95th Article of War. Two days later he voluntarily disclosed that the receipt was false and that the debt had not been paid, and promptly paid the debt. In making the false receipt and statement, he was trying to gain time to pay the debt, and feared the loss of his commission if the superior officer were not advised that the debt had been paid within the time allowed. The receipt was not used to defraud the creditor. Accused is shown to be above the average in technical qualifications. Six of the eight members of the court strongly recommended that accused be restored to duty. The reviewing authority recommended that execution of the sentence be suspended. 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.
1- Record of trial.
2- Dft. ltr. for sig. Sec. War.
3- Form of Action

(Sentence confirmed but execution suspended. G.C.M.O. 135, 2 Jul 1943)

Incl 2

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

SPJGN
CM 233623

10 JUL 1943

U N I T E D S T A T E S	)	PANAMA COAST ARTILLERY COMMAND
v.	)	Trial by G.C.M., convened at Fort Randolph, Canal Zone, 26 February 1943. Dismissal.
First Lieutenant WILSON LYDAY (0-388923) Medical Corps, 72nd Coast Artillery (A.A.)	)	

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 95th Article of War.

Specification: In that 1st Lieutenant Wilson Lyday, Medical Corps, 72nd Coast Artillery, was, on or about January 13, 1943, in public places, to wit: "International Cafe" and "Kresch's Place", Colon, Republic of Panama, drunk and disorderly while in uniform.

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

Specification: (Finding of not guilty)

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

Specification 1: (Finding of not guilty)

Specification 2: In that First Lieutenant Wilson Lyday, Medical Corps, 72nd Coast Artillery, was, at Colon, Republic of Panama, on or about January 24, 1943, in a public place, to wit: "Good Neighbor Bar", drunk and lying on the floor while in uniform.

Specification 3: (Finding of not guilty)

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

Specification: (Finding of not guilty)

He pleaded not guilty to all Charges and Specifications. He was found guilty of the Specification, Charge I, except the words "International Cafe", substituting therefor the words "National Restaurant", of the excepted words, not guilty, of the substituted words, guilty; guilty of Charge I and of Additional Charge I and of Specification 2 thereunder; and not guilty of Charge II and the Specification thereunder; not guilty of Specifications 1 and 3, Additional Charge I; and not guilty of Additional Charge II and the Specification thereunder. Evidence of one previous conviction for violation of a pledge, in violation of Article of War 96, and for absence without leave, in violation of Article of War 61, was introduced. He was sentenced to be dismissed the service. The reviewing authority approved only so much of the finding of guilty of the Specification, Charge I, as finds accused guilty of being drunk and disorderly, on the date and under the circumstances alleged, in the National Restaurant, Colon, Republic of Panama, approved the sentence and forwarded the record for action under Article of War 48.

3. a. Concerning the Specification, Charge I, the evidence for the prosecution shows that about 7 o'clock on the morning of 13 January 1943 the accused, drunk and in uniform, entered the National Restaurant at 11th Street and Central Avenue in Colon, Panama, and ordered a steak sandwich. There were three people in the restaurant, at the time, and the accused "started to carry on a conversation with everybody". He then went into the kitchen, where two female cooks were employed. There

he procured a knife, about a foot and a half long. He returned to the front of the restaurant, then went back to the kitchen, whereupon, although he was neither threatening nor bothering anyone, the cook on duty "got scared and ran out". The proprietor then went into the kitchen, put his arm around the accused "to get him in a good mood", and asked him for the knife, which the accused promptly relinquished; shortly afterward, the proprietor took the accused to Kresch's Bar next door - the National sold no intoxicants - but not before the accused had grabbed a woman patron by the arm and attempted to kiss her. "I managed to get him away from the girl", the proprietor testified, "and take him outside where he went about his own business". While in the restaurant, the accused was cursing partly in English and partly in Spanish (R. 13-18).

On that same morning, while Corporal Russell A. Mattex of the 760th Military Police Battalion was patrolling 11th Street in Colon, a man came out of the National Restaurant and told him there was a lieutenant there causing trouble. When the corporal walked in, the accused was quietly sitting at the bar. The corporal told him to "leave town". The accused said he would, whereupon Mattex departed to resume his patrolling. When he came back,

> "Captain Lewis was there and he had the Lieutenant on the street in front of the National Restaurant, and he told him to leave town. He told him he wouldn't leave at first. * * * So, Captain Lewis made him get in a command car and told the driver to take him to the Post Guardhouse * * *."

Captain Lewis was in command of the military police company of which Corporal Mattex was a member. When the Captain had arrived at the National Restaurant, the proprietor had explained to him what had happened, and told him that he had left the accused at Kresch's Bar. After Captain Lewis had taken the accused out of Kresch's Bar, the proprietor of the National Restaurant testified, "he wanted to fight with me * * * he come toward me, ready to fight and Captain Lewis got hold of him and turned him over to the military police to take him away". (R. 10-12, 14, 15, 17)

b. Concerning Specification 2, Additional Charge I, the evidence for the prosecution shows that, at 3:30 on the morning of 24 January 1943 Privates First Class Charles A. Key and Charlie E. Norsworthy, of the Military Police Battalion at Fort DeLesseps, Canal Zone, entered the Good Neighbor Bar in Colon, where they found the accused "passed out" on the floor. He was drunk to the point of insensibility. According to Private First Class Key, he had a slight scratch on the left side of his chin; according to Private First Class Norsworthy, he was bleeding from the mouth. The accused was in uniform except for his cap, which could not be located. There were four or five people in the bar. The two military policemen picked him up-he was unable to walk-and inquired what had happened. The accused said he did not know. They put him in the command car, which one of them was driving, and turned him over to the corporal of the guard. The latter testified:

> "he looked pretty drunk to me. When he came in there, his clothes were all messed up. His face was beaten a little bit; took him to the dispensary to be treated. He made a statement that one of the M.P.'s hit him. I asked him what M.P. hit him but he wouldn't tell me."

The corporal informed the accused he was detaining him until he got sober. The accused was rude and argumentative, and demanded to see the officer of the day, whom the corporal finally called about 5:20 "I got tired of listening to him talk so much", the corporal testified. When the officer of the day arrived, "he made a statement again of an M.P. hitting him and then he made a statement that no M.P. hit him". The corporal of the guard had had considerable experience with persons being drunk, having been stationed at the guardhouse for a year and three months. He testified that he would say, to the best of his ability, that, in his opinion, the accused was drunk on this occasion. (R. 25-31)

4. The evidence for the defense shows that in the opinion of Captain Murray Port, Medical Corps, Station Hospital, Fort Randolph, Canal Zone, the accused performed his professional duties in a superior manner, during the year the accused worked in the clinic of which Captain Port was in charge. The accused was under Captain Port's command at the station hospital, and he had "very much" occasion to observe the accused's work. Captain Port had also observed the effect of the tropics upon the character, disposition and work of officers and enlisted men. He characterized the tropics as having, "in some occasions a dilatorious" (sic) "effect on a man's healths and actions". (R. 49-50)

5. The accused, at his own request, after his rights as a witness had been explained to him, elected to be sworn and take the stand. He testified that he was a graduate of Emory University, School of Medicine, Atlanta, Georgia, and had one year of internship for the city of Atlanta

in a charity hospital, before entering the Army on 1 July 1940. After a year of entirely satisfactory service at Fort Jackson, South Carolina, he was transferred, in the latter part of June, 1941, to the Panama Canal Department. In October, 1941, he was detailed to a small island in the Pacific, on detached service. The night before leaving, he received a telegram informing him that his mother had died. His application for leave was denied, and he was stationed on the island for three months. There, most of the time, he was the only officer. He drank quite heavily while at that station, and during the remainder of his stay in Panama up to the time of the trial, more than he ever drank before. On 1 February 1942, he was transferred to the 72nd Coast Artillery at Fort Randolph, where, on at least three occasions prior to 1 September 1942 he was summoned before the commanding officer because of excessive drinking, and reprimanded on each occasion. On or about 1 September 1942 he again appeared before the commanding officer as the result of an incident involving drinking, and elected to accept six months' restriction to the post in lieu of a court-martial. He testified that:

> "This decision came after lengthy conversation with my commanding officer in regard to the difficulties that I had been having down here, the two major ones being a pending divorce and at one time financial difficulties. I told the commanding officer at that time that I felt that since I had come back from this island detail which I had served under rather strenuous circumstances, that I had not been able to get along in the tropics and that it seemed to me that periodically, I would become somewhat depressed and take too much alcoholic beverage. However, this plan for transfer back to the States for reassignment, was disapproved by the Department, and the court-martial referred to earlier in the trial, did take place. I feel that I have been drinking too much in the tropics in this command. I feel that I have become an individual who has taken the attitude that one must have a drink in order to stand the tropics. I do not believe that that is correct and I do not believe any of this trouble that has come upon me, would have occurred, had it not been for the fact that I have either become more allergic to alcohol here or have been drinking too much. I have had, after finishing academic college, a total of five post-graduate college years and approximately three years of military training in medicine. I feel that due to the fact that I have not gotten along in the tropics for the past year, if I were to be reassigned to some other outfit, I would be of some value to the army. I have no other points."

Before he went to the tropics he was never involved with alcohol in any way. His military record in the States was absolutely clean, and it was not until he came to the tropics that he became involved in "these straits". (R. 50-53)

The prosecution declined to cross-examine the accused.

6. a. The Specification, Charge I, as amended by exceptions and substitutions, and approved by the reviewing authority, alleges that the accused was, on or about 13 January 1943, in a public place, to wit: the National Restaurant, Colon, Republic of Panama, drunk and disorderly while in uniform.

The uncontradicted evidence shows that on the date specified the accused was grossly drunk and conspicuously disorderly while in uniform in the National Restaurant, a public place. Every element of the offense charged is clearly shown. It is true, the original specification erroneously designated the restaurant as the International Cafe, but the record indicates that the accused was neither surprised nor prejudiced by the amendment, which the evidence required and authorized under court-martial practice. "The substitution of a new date or place may, but does not necessarily, change the nature or identity of an offense" (par. 78c, p. 65, M.C.M. 1928). In this instance, the offense was clearly identified in the original specification, and the substitution of the name of the restaurant where it occurred, in no sense altered either its nature or its identity.

b. Specification 2, Additional Charge I, alleges that the accused was drunk and lying on the floor while in uniform in a public place, to wit: the Good Neighbor Bar. The uncontradicted testimony establishes every element of the offense alleged. The grossness and publicity of the "passing out" distinguish this offense from CM 114900, 121290 (1918) where the accused was found drunk in the night in the privacy of his quarters, and CM 207887 (1937), where his last conscious act was to retire to a secluded room in the officers' club. The offense proved, in the instant case, constitutes conduct unbecoming an officer and a gentleman in clear violation of Article of War 95.

c. The evidence adduced on behalf of the accused presents no defense. Its purpose appears to have been to arouse sympathy for the accused, and to explain his weakness, in extenuation of his offensive conduct. It discloses trying circumstances, and perhaps an inordinate susceptibility to the demoralizing influence of the tropics; it shows, to a certain extent, disintegration under strain, in an uncongenial - or a too congenial - environment. It discloses weaknesses of which the offenses proved are symtoms; but these very weaknesses, admitted for purposes of extenuation, manifest the accused's unfitness to continue to hold a commission in the Army of the United States.

7. The records in the office of The Adjutant General show that the accused is 29 years of age. He was appointed First Lieutenant in the Medical Reserve Corps of the Army of the United States, 6 March 1940. He was ordered to active duty on 1 July 1940 and has continued thereon until the present.

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 and to warrant confirmation thereof. A sentence of dismissal is mandatory upon conviction of a violation of Article of War 95.

Glenn L. Bresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

(44)
SPJGN
CM 233623

1st Ind.

War Department, J.A.G.O., 14 JUL 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 Wilson Lyday (0-388923), Medical Corps, 72nd Coast Artillery (A.A.).

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 of 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 foregoing recommendation, should such action meet with your approval.

Myron C. Cramer

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

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

(Sentence confirmed. G.C.M.O. 185, 4 Aug 1943)

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

SPJGQ
CM 233630

MAY 25 1943

UNITED STATES v. Privates OZZIE KING (34137910), and EUGENE W. ARMFIELD (35271926), both of Antitank Company, 364th Infantry.	)	WESTERN DEFENSE COMMAND Trial by G.C.M., convened at Phoenix, Arizona, March 12 and 13, 1943. King: Dishonorable discharge and confinement for ten (10) years - disapproved. Armfield: Dishonorable discharge and confinement for fifty (50) years. Penitentiary.

HOLDING by the BOARD OF REVIEW
ROUNDS, LYON and FREDERICK, 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 96th Article of War.

Specification: In that Privates Ozzie King, Eugene W. Armfield, Allen T. Saunders, and John A. Ward, all of Anti-Tank Company 364th Infantry regiment did, at Phoenix, Arizona, on or about November 26, 1942 attempt to commit a riot, in that they, together with certain other soldiers to the number of about six (6) did, with force and arms unlawfully and riotously and in a violent and tumultuous manner assemble in the City of Phoenix, Arizona to disturb the peace thereof.

Prior to the arraignment, motion for a severance was made in behalf of two of the accused, to wit: Privates Allen T. Saunders and John A. Ward. The motion was allowed and the trial proceeded as to the accused, Privates King and Armfield. Each pleaded not guilty to and was found guilty of the Charge and Specification. The accused King was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for ten years.

The accused Armfield was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for fifty years. The reviewing authority disapproved the sentence as to King, approved the sentence as to Armfield, designated the United States Penitentiary, McNeil Island, Washington, 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 penitentiary as the place of confinement.

Confinement in a penitentiary is not authorized in this case. Article of War 42, in pertinent part, provides:

> "Except for desertion in time of war, repeated desertion in time of peace, and mutiny, no person shall, under the sentence of a court-martial, be punished by confinement in a penitentiary unless an act or omission of which he is convicted is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by some statute of the United States, of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910, or by the law of the District of Columbia * * *."

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 limits of the United States, nor by the law of the District of Columbia (see CM 192456, Ciambrone, CM 196922, Killalea). See also CM 232961, King and Yates, in which the Board of Review has recently held that confinement in a penitentiary is not authorized for conviction of the offense of attempting to commit a riot.

4. There is no limit of punishment for the offense of 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; A. W. 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 fifty years in

a place other than a penitentiary, Federal Correctional Institution, or Reformatory.

William A. Pounds, Judge Advocate

Percy C. Lyon, Judge Advocate

Herbert B. Fredman, Judge Advocate

1st Ind.

War Department, J.A.G.O. JUN 7 1943 - To the Commanding General, Western Defense Command, Presidio of San Francisco, California.

1. In the case of Privates Ozzie King (34137910), and Eugene W. Armfield (35271926), both of Antitank Company, 364th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the sentence as to Armfield as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for fifty 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 as to Armfield.

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 233630)

Myron C. Cramer

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

RECEIVED
JUN 12 1943
HQ. WDC and
4th ARMY

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

SPJGQ
CM 233688

18 JUN 1943

UNITED STATES	FOURTH SERVICE COMMAND ARMY SERVICE FORCES
v.	Trial by G. C. M., convened at Camp Rucker, Alabama, March 10 and 11, 1943. Dishonorable discharge and confinement for life. Penitentiary.
Private LOUIS C. AIEVOLI (32356279), 10th Hospital Center, Camp Rucker, Alabama.	

REVIEW by the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, 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 Charges and Specifications:

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

Specification: In that Private Louis C. Aievoli, 10th Hospital Center, Camp Rucker, Alabama, did, at Camp Rucker, Alabama, on or about October 8, 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at Mount Kisco, New York, on or about October 30, 1942.

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

Specification: In that Private Louis C. Aievoli, 10th Hospital Center, Camp Rucker, Alabama, did, at Camp Rucker, Alabama, on or about October 7, 1942, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill one Private Raymond J. Bedard, a human being, by a means and manner unknown.

He pleaded not guilty to and was found guilty of the Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement, and forwarded the record for action under Article of War 50½.

3. The evidence of record as to Charge I and its Specification, (A.W. 58 - desertion) discloses that on Wednesday, October 7, 1942, accused and another soldier in his organization, Private Justin Pazewsiski, planned to go absent without leave together (R. 34, 35), remain "two weekends" and return about the 19th (R. 41). They left Camp Rucker and bought round trip tickets (R. 39) in Montgomery, Alabama, for New York City by way of Atlanta, Georgia (R. 38). On the train they exchanged addresses and proposed to telegraph each other so they could meet in New York and return together (R. 39). Accused gave Pazewsiski two addresses, his mother's in Mount Kisco and his wife's in Long Island (R. 42). Accused said he was going absent without leave because his wife was pregnant. The morning report of his organization, 10th Hospital Center, Camp Rucker, Alabama, discloses that accused absented himself without leave October 8, 1942 (R. 4; Pros. Ex. B). Miss Betty Braun, Chappaqua, New York, testified that she saw accused every day for 18 days in October "when he was home" (R. 58, 59). He told her at Mount Kisco (New York) (R. 61) that he was absent without leave but intended to come back. The same night he was "picked up" he had told her "he was leaving the next morning" (R. 60, 61).

The evidence as to Charge II (A.W. 92 - murder) is as follows:

The morning report of the 10th Hospital Center, Camp Rucker, Alabama, shows this entry: "Pvt. Bedard - duty to AWOL. 6:00 A.M. October 9th, 1942. LJP", which relates to Private Raymond J. Bedard (31078404), Private, 10th Hospital Center, Camp Rucker, Alabama (R. 4; Pros. Ex. A).

On October 30, 1942, the dead body (R. 7) of Raymond J. Bedard was found lying near a coal pile, about 30 yards from the road, in

the grassy wooded area near the hospital area at Camp Rucker (R. 9, 11), clothed in a military uniform (R. 17), field jacket, socks and shoes, with a rope around his neck (R. 9). The body was in a very badly decomposed state, the skin had turned black and was mummified over the entire body (R. 6, 7, 9, 10). First Lieutenant William J. Jervey, Medical Corps, of the Station Hospital at Camp Rucker, had the body brought to the hospital morgue at Camp Rucker (R. 14). Positive identification of the body was accomplished in the following manner: The same day it was found, October 30, Mr. C. T. Donaldson, Supervisor of Criminal Investigation for the State of Alabama, amputated the left finger and thumb of the body at the morgue of the Station Hospital, Camp Rucker, Alabama, in the presence of First Lieutenant Enos P. Moomau, Medical Administrative Corps (R. 10) and Mr. Gaston S. McKenzie, Jr., Chief Warrant Officer, Intelligence Department, Camp Rucker (R. 5). On November 3, 1942, Mr. Donaldson sent these two fingers, by registered mail, to the technical laboratory of the Federal Bureau of Investigation, Washington, D. C. (R. 22). Mr. Francis LaTonne, specialist in fingerprint identification, Federal Bureau of Investigation, Washington, D. C., for over 11 years, having been qualified as a fingerprint expert, testified that he had compared the prints from these two fingers, which were before the court as Prosecution Exhibit H (R. 23), with the official fingerprint record of Raymond J. Bedard on file in the Federal Bureau of Investigation (R. 22; Pros. Ex. G) and found them to be identical (R. 23).

First Lieutenant Lawrence J. Pace, Medical Corps, Detachment Commander of the 10th Hospital Center at Camp Rucker, of which unit both accused and Private Bedard were members, viewed this body at the hospital morgue on October 31 but could not identify it as the body of Private Bedard because of the advanced state of decomposition (R. 4, 5). However, he had been with this organization a very short time before October 30, 1942 (R. 4, 5) and did not "know the boys very well" (R. 4). He last saw Private Bedard about October 7 (R. 4).

An address book, a pen and pencil set, a cigarette lighter, a handkerchief, 36 cents in change (R. 13), a partly used pack of Camel cigarettes, and a prophylactic pack, were found in the clothes on Bedard's dead body (R. 14). No identification tag was found on the body but there was a "dog tag" chain. The address book was identified in court by Warrant Officer McKenzie, who was present when it was removed from the pocket of the shirt on Bedard's dead

body. It was a small blank book about an inch and a half by two inches, containing about 30 pages. Written on its pages were the names "Raymond J. Bedard, 59 Columbus St., Fitchburg, Mass." (R. 6), his mother, Mrs. Rosalie Bedard, same address, and other names and addresses in Fitchburg, Massachusetts, Camp Pickett, Virginia, and Dothan, Alabama (R. 6; Pros. Ex. C). Mr. McKenzie, in open court, identified a rope as the one removed from the body after it was taken to the morgue (Pros. Ex. E). The rope had grass on it (R. 8) and was looped "fairly tight" around the neck of the body (R. 9). Grass was hooked around two or three of the shirt buttons on the front of the body (R. 13) which, in the opinion of Lieutenant Moomau, who viewed the body when it was first discovered, indicated that the body had been dragged (R. 12, 13) and placed parallel with the road. He observed no marks on the body itself indicating that it had been dragged because "it had been too long" (R. 13). The rope was in two loops, one of which was around the neck and the second loop showed from underneath the right shoulder as the body lay on its back. The knots were more to the back. There was a small tree about 6 or 8 feet from the body and another one about 20 yards away. In Lieutenant Moomau's opinion a man could not have hanged himself from the tree (R. 12). There was a footpath leading from the road to the spot where the body was found.

Lieutenant Jervey examined the rope around the neck of the body at the place where it was originally found, felt it, and it was tight (R. 15). It was a cotton rope and "aside from the portion tied around his neck, it was approximately two feet long, and about 1/8 of an inch in diameter." In his opinion there was evidence that Bedard had been dragged by means of this rope. It was also his opinion that death was caused by strangulation, although it might have been caused by a number of other means - "he may have died of natural causes". He found no marks on the clothing which indicated a struggle (R. 15).

On October 31, 1942, First Lieutenant G. F. Archer, Medical Corps, performed a post mortem (R. 17). The body he examined was that of a man who had been dead 3 or 4 weeks. It was in a marked state of putrefaction. The skin was off the arms and the posterior two-thirds of the skull. There were no internal organs (R. 18, 29). The tongue was hanging out and "the position of his mouth hanging to the side, showed the expression that he was gasping for breath" (R. 21). He concluded that death was caused by strangulation (R. 18,

19) which was not caused by hanging (R. 20). He came to this conclusion "by the way the rope was around his neck" (R. 20). During the autopsy witness removed the rope from the neck (R. 18) by slipping it over the head (R. 9). On cross-examination he was asked, "Would you say that death could have been caused by any other means than strangulation?", to which he replied, "Yes", (R. 18) but he further testified that he did not believe the "body died a natural death" (R. 19). The vertebrae were dislocated, and the skull disjointed at the atlas vertebrae. There were wound openings in the left infra-clavicular fossa and two 1-inch openings just below the costal margin on the right at the junction of the 7th, 8th and 9th ribs (R. 18). The muscles of the neck had been frayed or chewed by the action of the rope. On cross-examination witness was asked, "If the rope was loose, how could it have caused strangulation?", to which he replied, "The only way is that some one would tighten up on it" (R. 18). He identified the rope before the court as the one he removed from the body and gave a demonstration to the court of how the rope was positioned around the neck of the body (R. 18, 19).

About November 8, 1942, Staff Sergeant Myer Langert, 10th Hospital Center, Camp Rucker, Alabama, Assistant Supply Sergeant, took charge of accused's effects to turn them over to the Quartermaster because accused was absent without leave. He removed a pair of pants and jacket from accused's barracks bag and locked them up in the organization supply room (R. 20). He identified this clothing in court as the same ones he had taken and examined. Subsequently Staff Sergeant David K. Thomas, Headquarters Detachment, Station Complement, removed this same pair of pants and jacket (Pros. Exs. I, J) from the supply room and turned them over to Major Morgan F. Simmons, Field Artillery, Provost Marshal. The khaki trousers bore, as a laundry mark, the last four digits of accused's serial number, 6279. There were dark red stains and certain dark colored soil marks on both legs of the trousers (R. 29, 30). Sergeant Thomas also secured three samples of dirt, one from the spot where Bedard's body was found, one from a spot a few feet away from that location and the third from the bank leading to the place where the body was found. He put these samples in three separate envelopes, marked them for identification, placed them in a box with the field jacket and trousers taken from accused's barracks bag, and gave them to Major Simmons to deliver to Mr. Donaldson in Montgomery (R. 23). Major Simmons turned these

things over to Mr. Donaldson (R. 30) who, in turn, forwarded them to the Federal Bureau of Investigation in Washington, D. C. (R. 31) for the purpose of having the soil specimens compared with the soil found on accused's trousers (R. 30). The same envelopes and contents were returned and introduced into evidence as Prosecution Exhibit K (Envelopes 3, 4 and 5) (R. 31). Mr. Roy H. Jevons, an agent assigned to the technical laboratory of the Federal Bureau of Investigation in Washington, having been qualified and accepted as an expert in soil and mineral examination (R. 31), testified that the soil on the knee of accused's khaki trousers was the same as that submitted to the Federal Bureau of Investigation by Mr. Donaldson in the three envelopes (R. 32, 33). Mr. Jevons also testified that he was present when a blood test was made by the blood examiner in the Federal Bureau of Investigation and the conclusion reached was that there was human blood on both the jacket and trousers. The blood on the jacket was classified as international group "A" but the blood on the trousers could not definitely be typed because of the dye on that particular type of trousers (R. 32, 33). Major Albert DeGroat, Medical Corps, Station Hospital, Camp Rucker, Alabama, visited accused in the Dothan jail in December, drew his blood for a test and on testing it found it to be type "O" (R. 34). Blood "A" is the second least common, the most common type being "O" (R. 34).

About 5:30 p.m., October 7, 1942, Private Pazewsiski met accused at the post exchange. They had planned to go absent without leave together. Pazewsiski's request for a furlough had been rejected and he had no pass. Accused did have a pass and promised to get him one (R. 35). About 6:30 accused left. Pazewsiski also left, but alone, and returned to the post exchange about 7 p.m., at which time he saw accused with Bedard (R. 35, 36). Pazewsiski could not swear that accused and Bedard left the exchange together, "but they were together in the P. X. and they started out the door together" (R. 40) - "the last I saw of him he was with the fellow Bedard" (R. 36). Pazewsiski did not see him again for over an hour. Meanwhile he sat in the exchange for a while, then went to his barracks, packed up his clothes as he "figured on leaving that night", went to the accused's barracks, asked Technician 5th Grade Myer Bloom where "Blackie" was (Blackie being a nickname for Aievoli - R. 45) and, on being told that he might be in the post exchange, returned there. He was looking for him because accusedwas "supposed to meet me with a pass" (R. 36). As he returned to the post exchange he saw accused approaching from the front of the building. Accused said to him, "Lets go, I have got the pass" (R. 37). He and accused then went to the

barracks together. While accused was washing his hands in the latrine Pazewsiski noticed that the water was red but he said nothing about it. He also noticed that there were no cuts on the accused at that time. (R. 37) Accused then went upstairs and started changing his clothes. The clothes he took off he put in a barracks bag (R. 39).

Private Bloom saw accused about 9 o'clock on the night of October 7, 1942, when accused took his bag from the barracks (R. 45).

Accused and Pazewsiski left to go to the bus station. When they got to Enterprise Road accused gave Pazewsiski a pass which had Bedard's name on it. Pazewsiski identified this pass in open court. It was introduced into evidence as Prosecution's Exhibit L (R. 38) and reads as follows:

"HEADQUARTERS 10th Hospital Center
Camp Rucker, Ala. No. 7
Date 9/30/42

Class "A" Pass

Pvt. Bedard, Raymond J. A.S.N. 31078404

The above enlisted man has permission to be absent from his station at any time his duties do not require his presence at his proper place of duty. His regular place of abode is 10th Hospital Center.
Camp Rucker, Ala.

(Signed) L. J. Pace
(Typed) L. J. Pace
1st Lt. M. C.
Det. Commander."

When he gave Pazewsiski the pass accused said "that he had to 'smack' a guy a couple of times to get it *** and I said I would not have done that, and he said 'don't worry about it, he'll be all right'" (R. 37, 67).

On January 12, 1943 (R. 62) Mr. Donaldson interviewed accused in the county jail at Dothan, Alabama. He told accused that he did not have to make any statement whatever and that whatever statement he did make could be used against him in court. Warrant Officer McKenzie was

also present and warned accused of his rights (R. 64). The pertinent testimony of Mr. Donaldson is quoted verbatim from the record (R. 64-65):

"Law Member: Subject to objection by any member of the court, the facts that the rights of the accused were explained to him, the testimony of Mr. Donaldson will be admitted as declarations against interest, subject to the rules as to its competency.

"Witness questioned further by prosecution:

"Q. The question was whether or not the accused made a statement to you regarding a watch and ring?

"A. He did.

"Q. What was it?

"A. He said that on the night of October 7, he took the watch, ring, a pass, and some money from Bedard.

"Q. Did he mention whose watch and ring it was?

"A. He said it was Bedard's

"Q. Have you ever seen the watch and ring?

"A. Yes.

"Q. Where did you see it?

"A. It was sent to me from the F. B. I., and obtained from a girl friend of Aeivoli's.

"Q. Who was that?

"A. Betty Braun.

"Q. Would you recognize the watch and ring?

"A. Yes. The ring was a gold ring with an onyx setting, and the watch was a Waltham Premier Wrist Watch, with a gold band.

"Q Is this the watch and ring you received?

"A. Yes, sir.

CROSS EXAMINATION:

None.

"Questions by Major Rich:

"Q. Mr. Donaldson, did the accused state how much money he had taken from Bedard?

"A. Yes.

"Q. How much was it?

"A. He stated that he took a ten and two fives, and I asked him if he got more than one fifty dollar bill. He said not, but he said he did get a fifty dollar bill and that it was a 'phoney'.

RE-DIRECT EXAMINATION:

"Questions by prosecution:

"Q. Did he make any statement to you about any disagreement with Bedard?

"A. He did.

"Q. What was it?

"A. He said that he and Bedard had, just before dark, gone up to the P. X., and -

"Q. The question I have in mind is with reference to the watch and ring and money?

"A. Yes, he said he had a fight and he 'beat Hell out of him'.

"Questions by Major Floyd:

"Q. Did he tell you what he did with the fifty dollar bill?

"A. No, sir.

"Questions by Major Champiny, member:

"Q. Did he make any statement to you with regard to these articles?

"A. He said he gave the watch and ring to his girl friend.

"Q. What about the pass?

"A. He said he gave it to his friend Pazewsiski who was going AWOL with him that night."

The night in October that accused and Bedard went absent without leave (R. 48-52) Technician 5th Grade Herbert Cox, 10th Hospital Center, saw them standing together in front of the theater about 6:30 p.m. Cox asked Bedard to go to the show with him but Bedard said he was going to town (R. 47-50). So far as he knows Bedard did not go into the theater (R. 51-52). This was the last time he saw either of them (R. 51). Bedard was also seen coming out of the barracks the last night he was in camp (R. 43) by Private Joe Pelman, 10th Hospital Center, who asked Bedard where he was going. Bedard replied, "I am going to meet Aievoli at the P. X. and we are going to town" (R. 43). On one occasion accused had told Corporal Cox that he was "going home, and that he was going to get the money and it didn't make any difference how he got it" (R. 50).

On the day prior to his disappearance Bedard had about $200 in his possession which he counted out in the presence of Cox (R. 51-52) and he was wearing a yellow gold ring with a black onyx set in a plain mounting (R. 48; Pros. Ex. M) and a Waltham Premier wrist watch

with an elastic plain gold band (R. 55; Pros. Ex. N). Miss Braun identified both the ring and the watch as the identical ones accused wore while he was absent without leave at his home at Mount Kisco, New York. He told her he had won them boxing at Camp Rucker. He gave Miss Braun the ring in person about a week before he was picked up and the watch was given her by Mary Aievoli about November 7. When Miss Braun received it the watch crystal was cracked on the left hand side. She had it fixed (R. 59). Miss Braun turned both the ring and the watch over to the Federal Bureau of Investigation (R. 59-60). Miss Braun was out every evening with accused when he was home for 18 days and he spent about $5 per evening (R. 59).

The rights of accused as a witness in his own behalf having been explained to him by the defense counsel, he elected to remain silent (R. 66).

4. As to Charge I and its Specification (A.W. 58 - desertion), the prosecution failed to establish by competent evidence the time, or the place, or the manner of the termination, of the desertion as alleged. The Board of Review may take judicial notice that the offense was committed in time of war (par. 489, Dig. Op. J.A.G., 1912; par. 416 (5), Dig. Op., J.A.G., 1912-1940; par. 125, M.C.M., 1928; pp. 318-319, Winthrop). The place of termination is not an essential element of the offense of desertion (par. 416 (5), Dig. Op. J.A.G., 1912-1940). The penalty for wartime desertion is not affected by the manner of termination since it then becomes a capital offense and the peacetime table of maximum punishments prescribed by Executive Order (par. 104c, M.C.M., 1928) is not applicable. The fact that accused bought a round trip railroad ticket when he went absent without leave from his station, Camp Rucker, Alabama, and planned in advance to return with another soldier who accompanied him, is not sufficient to negative the intent not to return. While he asserted, previous to his departure, that he was going because his wife was pregnant, other circumstances of the case indicate that he had another motive to remain away permanently, that is, to avoid the consequences of an admitted attack on Private Raymond Bedard for which he must have realized that, upon his return, he would have to face a trial by a military court. It is a logical inference from the testimony of Miss Braun that accused spent 18 days of his unauthorized absence at Mount Kisco, New York. This

town is 37 miles from New York City and over 800 miles from Camp Rucker, Alabama. It is also clear from the context that when this witness referred to "October" she meant October, 1942. The Specification alleges an absence of 22 days during the period from October 8 to October 30, 1942. Proof as to this allegation establishes that accused was in Mount Kisco, New York, a town over 800 miles from Camp Rucker, Alabama, his proper station. This prolonged absence at a great distance from his station is sufficient to warrant an inference of intent not to return to the service. Accordingly the record is legally sufficient to sustain only so much of the finding of guilty of the Specification of Charge I as finds the accused guilty of desertion at Camp Rucker, Alabama, on or about October 8, 1942, terminated at a place and in a manner not stated, on or about October 26, 1942.

As to Charge II and its Specification (A.W. 92 - murder) Private Raymond J. Bedard was last seen alive about 6:30 p.m., October 7, 1942, leaving his barracks to go to town in the company of accused. The morning report of his organization shows him carried as absent without leave on the morning of October 9, 1942. The significance of this entry is that he was not present with his organization on October 8. His death occurred at some time between the night of October 7, 1942, when last seen alive, and October 30, 1942, the date on which his dead body was found near the hospital area on a coal pile in an isolated spot on the military reservation of his proper station, Camp Rucker, Alabama. (Camp Rucker is located at Daleville, Alabama, 11 miles southwest of Ozark and 7 miles from Waterford, Alabama.) The identity of Private Bedard with the remains of the decomposed body found on October 30, 1942, is established beyond a doubt by the positive evidence adduced by the fingerprint test made by the Federal Bureau of Investigation at Washington and further by identification of the personal belongings, ornaments and address book, found in the clothing, or on the remains, of the body produced, as those habitually worn and used by Private Bedard. The body was observed at the original location in which it was discovered by three disinterested witnesses whose pertinent comments are as follows: Lieutenant Moomau, who is not a doctor, noted that the rope around the neck of the body was "fairly tight". He believed it was tight enough to have caused death and was fairly positive that Bedard did not commit suicide by hanging from a tree although there were some near the spot where the body was found. Because grass was found clinging to the shirtbuttons on the front of the body he

concluded that it was dragged from elsewhere to the place where found. Lieutenant Jervey, who is a doctor, examined the rope around the neck at the place where the body was found, felt it and found it "tight". His conclusion was that death was caused by strangulation and further that the body had been dragged by means of the rope around the neck. He admitted, however, that it could have been possible for death to have been caused by a number of other means and that Bedard may have died of natural causes. He found no marks on the clothing which indicated to him that there had been a struggle. Warrant Officer McKenzie saw the body lying on the ground on its back in the spot where it was found. He concluded that death was caused by strangulation because of the fact that there was a rope around the neck. The rope was fairly tight and had grass on it but because the body was so badly decomposed he could not be positive that the rope was the cause of the death. Lieutenant Archer, a medical officer, performed a post mortem on the body October 31, 1942, the day following its discovery. He believed that death had occurred from 21 to 28 days prior to the discovery of the body and concluded that death was caused by strangulation but not by hanging. He admitted that there was a possibility some other means than strangulation may have been employed but he is positive that the body did not die a natural death. He based his conclusion on the manner in which the rope was positioned around the neck of the body and also the expression of the mouth hanging to the side which indicated "that he was gasping for breath". He found the skull disjointed at the atlas vertebrae which means, in non-technical language, that the neck was dislocated but not broken at the junction of the skull with the backbone. He could not be positive that this dislocation might have been caused by a blow because the flesh had been eaten away leaving no supporting tissues. He found the rope around the neck to be loose and the only way it could have caused strangulation would have been for someone to tighten up on it. The looseness of the rope in his opinion was caused by the fact that it was left tight and loosened when the force was taken away from it. In his opinion there was a possibility the body could have been hanged "but some one would have had to cut him down", the inference being that hanging was beyond the realm of probability in this case. Other marks on the body which were significant and which he found in his post mortem were wound openings below the left

shoulder blade and two on the lower right side of the chest at the junction of the 7th, 8th and 9th ribs. Lieutenant Archer, neither in his oral testimony before the court, nor in his written report of the post mortem (introduced into evidence as Prosecution's Exhibit F) designated whose body it was to which he was referring in his testimony and report. Lieutenant Archer was questioned by the prosecution, cross-examined by the defense counsel and examined by the court and at no time during the questioning did the accused or his counsel raise any objection or seem to have any misunderstanding as to whose body he was describing or referring to in his report. At no time while he was on the stand was there any suggestion of doubt in the mind of any of the participants at the trial that either he or they had any other body in mind but that of Bedard. The surrounding circumstances plus the context of the testimony which preceded that of this witness clearly show that the autopsy which Lieutenant Archer performed was made on the body found October 30, 1942, and properly identified as that of Private Raymond Bedard. This technical error of omission did not affect the substantial rights of the accused and is not fatal (A.W. 37).

Accused admitted having had a disagreement with Bedard and "beating hell out of him" on the night of October 7, and robbing him of his pass, his ring, his watch and $70. The blood discovered on the jacket which he had on that night was not his own which is type "O". It was type "A". The clay and dirt on his trousers are established by the evidence to have come from the exact spot, or in the immediate vicinity of the place where Bedard's body was found. The pass which he gave to Pazewsiski about 7:30 or 8 p.m. on the evening of October 7, was Bedard's pass and accused admitted to Pazewsiski that he had to "'smack' a guy a couple of times to get it". The ring which he presented to Betty Braun at Mount Kisco, New York, was the same ring which he admitted he had taken from Bedard and so likewise was the Waltham wrist watch which came into the hands of Betty Braun through accused's sister at accused's request and direction. In addition to the cost of the ticket from Camp Rucker, Alabama, to Mount Kisco, New York, accused had an unusually liberal supply of spending money during his 18-day stay at Mount Kisco. According to Miss Braun's testimony he spent at least $90 entertaining her during the 18 evenings he stayed in that town. Since he was a member of the same organization as Bedard he had many occasions to observe that Bedard at all times carried on

his person large sums of money for a soldier, that is, never less than $100. Shortly prior to October 7 accused had told Corporal Cox that he intended to go home and that he was going to get enough money to make the trip no matter how he got it. All these circumstances, plus the fact that it evidently appeared to be an opportune moment to secure a pass for his friend Pazewsiski so that he could have company on his trip home, impel the logical inference that accused determined to rob Bedard and take from him the money and valuables required to make his trip successful. The evidence, including the statements made by the accused to Mr. Donaldson and to Private Pazewsiski, leaves no doubt that at the time and at the place alleged in the Specification of Charge II, accused struck, beat, choked and strangled with a rope Private Raymond Bedard and further that Bedard shortly thereafter died as the result of accused's violence and the shock attendant upon it. There was no conceivable legal justification or excuse for this attack. The assault was made with the intent primarily to commit robbery. It was brutal, malicious and felonious. Whether accused had the intent to kill as well as to rob Bedard or not, his act and the accompanying circumstances inferentially establish knowledge on his part that the violence of his assault could possibly result either in death or grievous bodily harm. The state of his mind at the time of the assault showed malice aforethought. Malice does not mean ill will, though ill will may exist, but rather conscious wrongdoing. It may exist without any purpose to commit the actual offense committed, or, it may be inferred from a specific intent to commit such an offense. The applicable rule of law is stated by the Manual for Courts-Martial as follows:

> "Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. (Clark.)

> "Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or co-existing with the act or omission by which death is caused: An intention to cause the death of, or grievious bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grevious bodily harm is caused or not or by a wish that it may not be caused; intent to commit any felony" (par. 148a). (Underscoring supplied.)

The homicide having been committed with the state of mind indicated, it was murder as denounced by Article of War 92 and as defined by paragraph 148a of the Manual for Courts-Martial as the "unlawful killing of a human being with malice aforethought".

5. The charge sheet shows that accused is 22 years of age and was inducted into the service at Fort Jay, New York, June 18, 1942, for the duration of the war and six months.

6. The court was legally constituted and had jurisdiction of the person and offenses involved. 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. Death or imprisonment for life is mandatory upon conviction of violation of Article of War 92.

William S. Pounds, Judge Advocate.

Carle Stebbins, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

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

SPJGK
CM 233689

JUN 5 1943

UNITED STATES	ARMY AIR FORCES WEST COAST TRAINING CENTER
v.	Trial by G.C.M., convened at Lemoore Army Flying School, Lemoore, California, March 20 and 22, 1943. Dismissal.
Second Lieutenant SAMUEL A. TIDWELL, JR. (0-726604), Air Corps.	

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 Charges and Specifications:

CHARGE: Violation of the 93rd Article of War.
(Finding of not guilty)
Specification I: (Finding of not guilty).
Specification II: (Finding of not guilty).

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

Specification 1: In that 2nd Lieutenant Samuel A. Tidwell, Jr., Air Corps, then Aviation Cadet, did, at or near Hanford, California, on or about March 13, 1942, willfully, unlawfully and feloniously have carnal knowledge of Bernice Rich, a female, with her consent, who was then under the age of eighteen years, to-wit, of the age of seventeen years, and not then and there the wife of the said Samuel A. Tidwell, Jr., contrary to the laws of the State of California.

Specification 2: In that 2nd Lieutenant Samuel A. Tidwell, Jr., Air Corps, then Aviation Cadet, did, at or near Corcoran, California, on or about April 5, 1942, willfully, unlawfully and feloniously have carnal knowledge

of Bernice Rich, a female, with her consent, who was then under the age of eighteen years, to-wit, of the age of seventeen years, and not then and there the wife of the said Samuel A. Tidwell, Jr., contrary to the laws of the State of California.

He pleaded not guilty to the Charges and Specifications. The court sustained a motion for a finding of not guilty of Specification 2 of the Charge, erroneously designated as a "motion for dismissal" (R.16). Accused was found not guilty of the Charge and Specification 1 thereunder, and guilty of the Additional Charge and its Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record for action under Article of War 48.

3. The evidence shows that Bernice Rich, a witness for the prosecution, was born on June 17, 1924 (R.40; Pros. Ex.B). On the evening of March 14, 1942, she was walking along the street in the company of Miss Ruby Miller and they were being followed by accused and "Cadet Rex Rice" (R.40). Accused, at that time a cadet, and Cadet Rice engaged the girls in conversation and the four of them then went for a ride in an automobile belonging to one of the cadets (R.40). They went to a restaurant, to a show, and to the "Glider Club", after which Cadet Rice and Miss Miller left the company of accused and Miss Rich. Accused and Miss Rich rode to the southeast part of Hanford and then drove off the main highway about a mile where accused stopped the car. After some advances an act of sexual intercourse took place between accused and Miss Rich (R.41-42). On or about April 7, 1942, accused met Miss Rich in a bowling alley in Hanford and they went for a ride in accused's automobile towards Corcoran (R.42). They stopped the car and again had sexual intercourse (R.43). On December 2, 1942, a child was born to Miss Rich and was still alive at the date of the trial (R.42).

On cross-examination Miss Rich testified that accused used some force on the night of March 14, that she did not consent, that she was not a virgin, and that she had had sexual relations with other men three times before, but that the last such act occurred several months prior to her intercourse with accused (R.43). She had had no intoxicants during the evening of March 14, 1942, or at the time of the second intercourse, and accused made her no promises of marriage on either occasion (R.44). On the day following the first act, the witness

told Miss Miller of her intercourse with accused, but she never told her parents who found out from other sources and complained to the authorities on May 5, 1942 (R.45-46). When she went out with accused on the second occasion she knew that intercourse might be expected (R.46). She frequently visited the A.B. Cafe which was subsequently closed as a disreputable restaurant, and she was a witness in the proceedings to close it (R.46).

Ruby Miller testified that she saw accused and Bernice Rich together on March 14, 1942 (R.48). She did not remember seeing them together on or about April 5, 1942 (R.48). She stated that Miss Rich's reputation for chastity was not good (R.48).

For the defense there was received in evidence a stipulation that Roger Walsch was District Attorney in Kings County, State of California, and had been continuously for eight years prior thereto; that, if present, he would testify that he knew Bernice Rich; that he had known her prior to March, 1942; that he knew her reputation for chastity as it existed prior to March, 1942, and that it was not good; that he had seen her at various times prior to March, 1942, at bars and restaurants of low repute at late hours of the night; that during March, 1942, he had, in his official capacity, warned her parents to exercise parental supervision over her or run the risk of relinquishing her to civil authorities (R.49).

First Lieutenant George B. Erwin, Air Corps, testified that he knew Bernice Rich, that she had spoken to him one evening early in March, 1942, and that he had taken her for a short automobile ride (R. 50-51). He met her again at a public dance on or about March 9, 1942. They went outside and sat on a bench and "had a kind of petting party" during which he put his hands on her vital parts (R.51). At her suggestion they went to the A.B. Cafe, a rough place, and on the way home "the same thing happened as on the concrete bench" (R.51). She did not resist his advances (R.51,52).

Accused did not testify or make an unsworn statement.

4. The evidence clearly shows that at the places and on the dates alleged the accused had carnal knowledge of Bernice Rich, a female not his wife with her consent, and that on the dates alleged, she was seventeen years of age. Under section 261, subparagraph 1 of the Penal Code of California carnal knowledge of a female under the age of eighteen years

constitutes rape. Both acts of intercourse between accused and Miss Rich took place in the State of California.

Miss Rich's reputation for chastity was not good at the time the acts occurred and she was not a virgin at the time of accused's first act of intercourse with her.

The offenses charged and proved constituted statutory rape under the laws of the State of California, and were properly chargeable under Article of War 96, being conduct of a nature to bring discredit upon the military service (par. 152 b, M.C.M.).

5. Accused is 23 years of age. He graduated from the Fairfield High School, Fairfield, Alabama, in 1938. He is single. He enlisted as an aviation cadet, December 15, 1941. He was appointed a second lieutenant, Army of the United States, on June 23, 1942.

6. The court was legally consituted 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 authorized upon conviction of violation of Article of War 96.

Irving E. Gray, Judge Advocate.

Wm Trumbull, 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 Samuel A. Tidwell, Jr. (0-726604), 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 but commuted to a reprimand to be administered by the reviewing authority and that the sentence as thus modified be carried into execution.

3. Consideration has been given to a letter dated April 1, 1943, from Roger R. Walch, District Attorney, Kings County, California, to the Commanding General, Army Air Forces, West Coast Training Center, recommending clemency.

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.Dis.Atty. Kings County,Calif., 4-1-43.

(Sentence confirmed but commuted to reprimand. G.C.M.O. 166, 27 Jul 1943)

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

SPJGH
CM 233717

MAY 21 1943

UNITED STATES v. Privates PAUL P. NEFF (33135453), Company C, 22nd Infantry, and DONALD M. PORTELLA (31072625), Company L, 12th Infantry.	)))))))))	4TH MOTORIZED DIVISION Trial by G.C.M., convened at Camp Gordon, Georgia, February 17, 1943. As to each: Dishonorable discharge. As to Neff: Confinement for five (5) years. As to Portella: Confinement for four (4) years. As to each: Disciplinary Barracks.

HOLDING 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 soldiers named above.

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

CHARGE: Violation of the 96th Article of War.

Specification 1: (Finding of Not Guilty as to both Neff and Portella).

Specification 2: In that Private Paul P. Neff, Company "C", 22nd Infantry, and Private Donald M. Portella, Company "L", 12th Infantry, did, at Augusta, Georgia, on or about January 26, 1943, wrongfully solicit Miss Betty Brown to commit acts of prostitution for hire or reward with persons to be directed to her by the said Private Neff and Private Portella and to pay to the said Private Neff and Private Portella a part of the monies to be received as the proceeds thereof.

ADDITIONAL CHARGES AGAINST PRIVATE NEFF

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

Specification 1: In that Private Paul P. Neff, Company "C", 22nd Infantry, did, at Augusta, Georgia, on or about November 29, 1942, wrongfully and unlawfully solicit three (3) soldiers whose names are unknown, to have illicit sexual intercourse for hire or reward with one Alberta Anderson, and did thereafter receive money therefor.

Specification 2: (Finding of Not Guilty).

Specification 3: (Finding of Not Guilty).

Specification 4: (Finding of guilty disapproved by reviewing authority).

Specification 5: (Finding of guilty disapproved by reviewing authority).

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

Specification: In that Private Paul P. Neff, Company "C", 22nd Infantry, did at Camp Gordon, Georgia, on or about January 2, 1943, wrongfully and unlawfully offer to direct Private Paul R. Smith, Company "C", 22nd Infantry, to a place at which he could obtain illicit sexual intercourse for hire or reward.

ADDITIONAL CHARGES AGAINST PRIVATE PORTELLA

ADDITIONAL CHARGE: Violation of the 96th Article of War. (Finding of guilty disapproved by reviewing authority).

Specification 1: (Finding of Not Guilty).

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

The accused Neff and Portella each pleaded not guilty to all Charges and Specifications. Neff was found not guilty of Specifications 1 and 2 of the Charge, and of the Charge; not guilty of Specifications 2 and 3, and guilty of Specifications 1, 4, and 5, Additional Charge I, and

guilty of Additional Charge I; and guilty of Additional Charge II, and the Specification thereunder. Neff was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for twenty years. As to Neff, the reviewing authority disapproved the findings of guilty of Specifications 4 and 5, Additional Charge I, approved only so much of the sentence as involves dishonorable discharge, total forfeitures, and confinement at hard labor for five years, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. Portella was found not guilty of Specification 1, and guilty of the Charge and of Specification 2, thereunder; and not guilty of Specification 1, and guilty of Specification 2, Additional Charge, and guilty of the Additional Charge. Portella was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for twenty years. As to Portella, the reviewing authority disapproved the finding of guilty of Specification 2, Additional Charge, approved only so much of the sentence as involves dishonorable discharge, total forfeitures, and confinement at hard labor for four years, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The joint record of trial was forwarded for action under Article of War 50½.

3. As to accused Neff, the only approved findings of guilty are of Additional Charge I and of Specification 1 thereunder, and of Additional Charge II and the Specification thereunder.

a. Specification 1, Additional Charge I, alleges that on or about November 29, 1942, Neff solicited three soldiers, names unknown, to have sexual intercourse for hire or reward with one Alberta Anderson, and thereafter received money therefor. The only witness upon this Specification was Miss Alberta Anderson. She testified that she first met Neff about three and one-half months before the date of trial, in the county jail. At some time between November 20 and December 1 "Tony"- who is not otherwise identified - asked her to go up to the Richmond Hotel but she refused. She did go there on a Sunday, near Christmas, when she was drunk. A girl in the hall took her into a room and locked her up. Tony then came up and hit her. Later Tony came in and mentioned bringing "some guys in". Neff, Al, Tony, and some other fellow came in. She later engaged in sexual intercourse with "three guys", and received pay. Afterward the money which was paid to her was split up by Tony between himself, herself, Al, and Neff (R. 11-14).

Upon the question whether Neff sent up any "date", her testimony is conflicting. She stated that Neff did not send anyone up as far as

she knew; that one guy was all she knew of, and that he said that Neff sent him up; she did say to "Puss Conners" that Neff sent up one, and Tony sent up some; and finally testified on cross-examination that all she knew about Neff sending someone up to her, was the statement of the "guy" that Neff had sent him (R. 14-17).

Taking the testimony of Miss Anderson as a whole, the Board of Review finds, in the record of trial, no competent evidence in support of the a llegation that Neff solicited any soldiers or other persons to have sexual intercourse with Miss Anderson. The Board, accordingly, is of the opinion that the record is legally insufficient to support the findings of guilty of Specification 1, Additional Charge I, and of Additional Charge I.

b. The Specification, Additional Charge II, alleges that on or about January 2, 1943, Neff wrongfully and unlawfully offered to direct Private Paul R. Smith to a place at which he could obtain sexual intercourse for hire. The only witness upon this Specification was Private Smith. He testified that he and the accused were once talking about girls in the barracks when the accused made an offer to him that "any time you want a piece of tail, I could get it for you for five dollars". Smith also stated the remark of accused in this manner, "any time I wanted a piece of tail, I could get it for five dollars" (R. 6-7).

There is no allegation in the Specification, nor is there any reasonable inference from the testimony that the accused was to receive a portion of the $5 fee to bring the Specification within the purview of section 22-2707 of the Code of the District of Columbia, 1940, denouncing a procurer.

While the proof shows no calendar date upon which this offer was made, Private Smith testified that it was "in the barracks", and it is apparent from the context of his testimony that he had reference to the barracks at Camp Gordon, Georgia, occupied by the infantry company of which he and accused were members. Since, however, judicial notice may be taken of the act of Congress under which the land was acquired and the orders of the Secretary of War establishing the camp, all of which were less than two years prior to February 17, 1943, the date on which accused was arraigned, it is circumstantially established that the offense alleged in the Specification, Additional Charge II, was committed within the two year period of the statute of limitations.

The Specification does, however, allege a wrongful and unlawful offer at Camp Gordon, and the evidence shows that the statement was made in the barracks. By such conduct, the accused was disorderly under such circumstances as to bring discredit upon the military service. The maximum authorized punishment for this offense is confinement at hard labor for four months, and forfeiture of two-thirds pay per month for a like period.

4. As to accused Portella, the only approved finding of guilty is of the Charge and of Specification 2 thereunder.

This Specification alleges, in so far as it concerns Portella, that on or about January 26, 1943, he wrongfully solicited Miss Betty Brown to commit acts of prostitution for hire, and to pay a portion of the proceeds to him. The only witness upon this Specification was Miss Betty Brown. She testified that she met Portella at some time earlier than the last of January, when a girl named Helen asked Miss Brown to her room to meet a couple of her pals. Portella, on that night, made an offer to her. He said that she would "hustle" for him; she would get business, and he would get a cut. She understood that by "hustle" was meant to engage in sexual intercourse for hire. She did not accept his offer, as she was not interested (R. 7-8).

There is no limit of punishment stated in the Executive order (par. 104c, MCM, 1928) for this offense. The pandering section of the Code of the District of Columbia (sec. 22-2705, D.C. Code 1940) provides confinement for not more than five years, for one who attempts to induce any female to engage in prostitution.

In the opinion of the Board, the record supports the finding of guilty of the Charge and of Specification 2 thereunder as to Portella, and the sentence.

5. For the reasons stated the Board of Review holds the record of trial in the case of Private Neff, legally insufficient to support the findings of guilty of the Additional Charge I and Specification 1 thereunder, legally sufficient to support the findings of guilty of Additional Charge II and the Specification thereunder, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for four months and forfeiture of two-thirds pay per month for a like period; and in the case of Private Portella legally sufficient to support the findings of guilty of the Charge and Specification 2 thereunder, and legally sufficient to support the sentence.

Martin E. Fitzell Jr., Judge Advocate

Samuel M. Driver, Judge Advocate

H. Fetterhoff, Judge Advocate

1st Indorsement.

War Department, J.A.G.O. MAY 27 1943 To the Commanding General, 4th Motorized Division, Camp Gordon, Georgia.

1. In the case of Privates Paul P. Neff (33135453), Company C, 22nd Infantry, and Donald M. Portella (31072625), Company L, 12th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial as to Private Neff is legally insufficient to support the findings of guilty of Additional Charge I and Specification 1 thereunder, legally sufficient to support the findings of guilty of Additional Charge II and the Specification thereunder, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for four months and forfeiture of two-thirds pay per month for a like period; and as to Private Portella is legally sufficient to support the findings of guilty of the Charge and Specification 2 thereunder, and legally sufficient to support the sentence; which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence in the case of Private Portella. Upon disapproval of the findings of guilty of Additional Charge I and of Specification 1 thereunder and approval of only so much of the sentence as involves confinement at hard labor for four months and forfeiture of two-thirds pay per month for a like period, you will have authority to order the execution of the sentence in the case of Private Neff.

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 233717)

Myron C. Cramer

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

MAY 27 4 PM

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

RECEIVED
MAY 31 1943
Hq. 4th Motorized Division

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

SPJGQ
CM 233722

24 JUN 1943

UNITED STATES	)	9TH ARMORED DIVISION
v.	)	Trial by G.C.M., convened at Fort Riley, Kansas, March 27, 1943. Dismissal, total forfeitures, and confinement for one (1) year.
Lieutenant Colonel JOHN S. GROWDON (0-19737), 14th Armored Regiment.	)	

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

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

Specification 1: In that Lt. Colonel John S. Growdon, 14th Armd Regt, did, at Camp Funston, Kansas, on or about the 11th of February, 1943, with intent to deceive Colonel Ira P. Swift, Commanding Officer, 14th Armd Regt, officially state to the said Colonel Swift, that "My Father will be in Kansas City tonight and I would like permission to be absent from duty this afternoon for the purpose of visiting him. I expect to return in time for the Command Post Exercise tomorrow morning", or words to that effect, which statement was known by the said Lt. Colonel Growdon to be untrue in that his father did not expect to be in Kansas City on or about the 11th of February, 1943.

Specification 2: (Finding of not guilty.)

Specification 3: (Finding of not guilty.)

Specification 4: (Finding of not guilty.)

Specification 5: In that Lt. Colonel John S. Growdon, 14th Armd Regt, did, at New Orleans, Louisiana, on or about

March 1, 1943, with intent to defraud, wrongfully and unlawfully make and utter to St. Charles Hotel a certain check in words and figures as follows, to wit:

THE FIRST NATIONAL BANK of Junction City, Kansas
Pay to the order of St. Charles Hotel----------$40.00
Forty---------- and no/100 Dollars

John S. Growdon
Lt. Col., Cav.

and by means thereof, did fraudulently obtain from St. Charles Hotel, the sum of $40.00, he, the said Lt. Col. John S. Growdon, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Junction City, Kansas, for the payment of said check.

Specification 6: In that Lt. Colonel John S. Growdon, 14th Armd Regt, did, at New Orleans, Louisiana, on or about March 2, 1943, with intent to defraud, wrongfully and unlawfully make and utter to St. Charles Hotel a certain check in words and figures as follows, to wit:

THE FIRST NATIONAL BANK of Junction City, Kansas
Pay to the order of St. Charles Hotel----------$101.66
One Hundred One---------- and 66/100 Dollars

John S. Growdon
Lt. Col., Cav.

and by means thereof, did fraudulently obtain from St. Charles Hotel, the sum of $101.66, he, the said Lt. Col. John S. Growdon, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Junction City, Kansas, for the payment of said check.

Specification 7: In that Lt. Colonel John S. Growdon, 14th Armd Regt, did, at New Orleans, Louisiana, on or about March 2, 1943, with intent to defraud, wrongfully and unlawfully make and utter to Hotel Roosevelt a certain check in words and figures as follows, to wit:

THE FIRST NATIONAL BANK of Junction City, Kansas
Pay to the order of Hotel Roosevelt----------$50.00
Fifty---------- and no/100 Dollars

John S. Growdon
Lt. Col., Cav.

and by means thereof, did fraudulently obtain from Hotel Roosevelt, the sum of $50.00, he, the said Lt. Col. John S. Growdon, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Junction City, Kansas, for the payment of said check.

Specification 8: In that Lt. Colonel John S. Growdon, 14th Armd Regt, did, at New Orleans, Louisiana, on or about March 2, 1943, with intent to defraud, wrongfully and unlawfully make and utter to the Leon Godchaux Clothing Company a certain check in words and figures as follows, to wit:

THE FIRST NATIONAL BANK of Junction City, Kansas
Pay to the order of The Leon Godchaux Clothing Company---$50.00
Fifty---------- and no/100 Dollars

John S. Growdon
Lt. Col., Cav.

and by means thereof, did fraudulently obtain from The Leon Godchaux Clothing Company, the sum of $50.00, he, the said Lt. Col. John S. Growdon, then well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Junction City, Kansas, for payment of said check.

Specification 9: (Finding of not guilty.)

Specification 10: In that Lt. Colonel John S. Growdon, 14th Armd Regt, did, at Kansas City, Missouri, on or about March 5, 1943, with intent to defraud, wrongfully and unlawfully make and utter to the Hotel Continental a certain check in words and figures as follows, to wit:

GUEST'S DRAFT 5 March 1943

Pay to the order of Hotel Continental----------$40.00
Forty---------- and no/100 Dollars
To First National Bank
Junction City, Kans.

John S. Growdon
Lt. Col., Cav.

and by means thereof, did fraudulently obtain from the Hotel Continental, services and currency in the amount of $40.00, he, the said Lt. Col. John S. Growdon, then

well knowing that he did not have and not intending that he should have sufficient funds in the First National Bank of Junction City, Kansas, for payment of said check.

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

Specification: In that Lt. Colonel John S. Growdon, 14th Armd Regt, did, at Fort Riley, Kansas, on or about February 16, 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Kansas City, Missouri, on or about March 7, 1943.

Accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Specifications 2, 3, 4, and 9 of Charge I, and guilty of the remaining Specifications and the Charge. He was found guilty of the Specification, Charge II, 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 Charge II, but guilty of a violation of the 61st Article of War. 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 at such place as the reviewing authority may direct for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence of record is summarized herein below in the chronological order in which the offenses alleged were committed, as follows:

Charge I - 95 AW.
Specification 1 - False official statement.

About noon on February 11, 1943, accused, in person, called on his regimental commander, Colonel Ira P. Swift, the 14th Armored Regiment at Camp Funston, Kansas, and requested permission to be absent from duty that afternoon for the purpose of visiting his father in Kansas City. He stated that his father would be in Kansas City that evening. Colonel Swift's response was, "Certainly, go ahead". (R. 9-10)

By stipulation, signed by accused and his counsel, Colonel James P. Growdon (A.U.S.), testified, "I am the father of the accused. I reside at Washington, D. C. I was not in Kansas City on Thursday, February 11, 1943, nor did I intend to be there, nor did I inform, in any way my son, Lieutenant Colonel John S. Growdon, 14th Armored

Regiment, that I intended to be there on that date, nor did I request that my son, Lieutenant Colonel John S. Growdon, 14th Armored Regiment, meet me there on that date". (R. 9; Pros. Ex. A)

Charge II - 58 AW.
Desertion.

By exceptions and substitutions, accused was found not guilty of desertion as charged but guilty of absence without leave from February 16, 1943 until he was apprehended at Kansas City, Missouri, on or about March 7, 1943—a period of 19 days. The accused's regimental commander, Colonel Ira P. Swift, authorized him to be absent one day, from February 11 to February 12 (R. 10). This was a twenty-four hour leave by "verbal authority of the commanding officer". When accused did not return on February 12, Colonel Swift, assuming that some emergency had detained him and, without any request or other action on accused's part, voluntarily granted accused a further leave of absence of four days. Accused had not informed Colonel Swift that he expected to be absent beyond the length of time originally requested. Colonel Swift received no information from him between February 11 and March 7--the whole period of his absence. Accused had no authority from his regimental commander, or higher authority, to be absent from his organization from February 16 to March 7, 1943 (R. 11). Major William F. Matschullat, District Intelligence Officer of the Seventh Service Command, having ascertained that accused was registered as a guest at the Hotel Muehlbach in Kansas City, Missouri, went to that hotel, found accused occupying room 815, and placed him under arrest on March 7, 1943. Accused was then dressed in the proper uniform of his grade and identified himself to Major Matschullat as Lieutenant Colonel John S. Growdon (R. 9; Pros. Ex. B, stipulation signed and agreed to by accused). Accused was returned to military control with his organization about 9:30 p.m. on March 7 (R. 10). The court directed the trial judge advocate to secure and present a copy of the pertinent morning report as documentary evidence of accused's alleged absence without leave, whereupon in order to "save time", the defense counsel in open court entered into the following oral stipulation with the prosecution,

> "It is orally stipulated by and between the prosecution, the accused and his counsel, that the accused was absent without proper authority from his organization and from his duties, from on or about February 16, 1943, to on or about March 7, 1943" (R. 31).

Charge I - 95 AW and 5 Specifications thereunder. (Specifications 5, 6, 7, 8, 10 therein). Making and uttering checks without sufficient funds.

The five allegedly fraudulent checks in question were issued as follows:

To the St. Charles Hotel, New Orleans, La., on March 1, 1943, one check for $40 and on March 2, 1943, another check to the same hotel for $101.66 (Specifications 5, 6); a check dated March 2, 1943 to the Hotel Roosevelt at New Orleans, La. (Specification 7); on March 2, 1943, a check in the amount of $50 to the Leon Godchaux Clothing Company at New Orleans, La. (Specification 8) and, on March 5, 1943, a check in the amount of $40 to the Hotel Continental at Kansas City, Mo. (Specification 10).

Five separate stipulations, each in writing and signed by accused and his counsel, were admitted into the evidence wherein accused voluntarily admitted, in open court, drawing the various checks as alleged (Specifications 5, 6, 7, 8, and 10, Charge I) at the times and places and for the amounts set forth in each of those five Specifications, respectively, and further admitted that the five checks in question were presented by him for cashing as alleged, and that he received as consideration therefor, the specified amount in cash set forth in words and figures on each of these five checks, respectively (R. 11, 12; Pros. Exs. F, G, H, I and K). By stipulating these facts, the necessity of calling witnesses or of obtaining depositions to prove the drawing, uttering, presentation and cashing of the checks in question was obviated. However, by these stipulations, accused does not admit that any of the checks in question were issued with intent to defraud, or wrongfully or unlawfully, or that he fraudulently obtained money, services, or goods, or, that he well knew that he did not have, or that he did not intend that he should have, sufficient funds in the bank on which they were drawn, to pay these checks, as alleged.

Mr. E. J. Denver, Vice President of the First National Bank, Junction City, Kansas, on which the checks in question were drawn, testified that on February 11, 1943 (the date accused left Camp Funston) he had a credit balance with the First National Bank, Junction City, Kansas, of $183.83 (R. 13). On February 19 he was overdrawn in the amount of $49.50, on March 8, in the amount of $223.87, and on March 10 the total amount of his overdraft was $234.87 (R. 14). During the months of February and March, 1943, this bank returned accused's checks marked "insufficient funds" in the total amount of $730.00 (R. 15). The bank refused to honor these checks and returned them marked "insufficient funds" because "there wasn't sufficient money to take care of them" (R. 15). On February 22, 1943, this bank received a telegram from accused, sent from Fort Smith, Arkansas (R. 28), which reads as follows: "Please credit account five hundred. Will sign note twenty-seventh Growdon" (R. 17).

Mr. Denver testified that the bank considered that a loan had been granted on the basis of this telegram, but $500 was not

actually placed to accused's credit (R. 16) because "there is no way in our banking system to have that done without signing a note". Accused did not appear on February 27, or on any later date, to sign such note. The fact that he did not sign the note was not the reason why his checks were returned (R. 17). The bank paid his checks out of this irregular loan up to $234 (R. 18), although the checks actually had no cash backing or collateral or monetary backing (R. 20). The only security which the bank had was the accused's promise to repay, as stated in his telegram (R. 20). The bank treated these checks as overdrafts, which is, in fact, an "irregularity" (R. 23) but because this officer's business had been very satisfactory, the bank is"in the habit of stretching a point if it is necessary to take care of our customers" (R. 22). However, when the bank learned on February 27 that accused was absent without leave (R. 17, 18), they started returning his checks (R. 29). The bank had no promise to pay from accused covering the $234.87 drawn by him over and above the $500 which they were allowing him to draw against in the nature of an irregular loan (R. 20). The state and Federal banking laws require that a bank hold a signed note prior to crediting a loan to an individual account and the First National Bank at Junction City was carrying Colonel Growdon irregularly under the banking laws but through no fault of his (R. 22). Accused made no deposits between February 11 and March 7 (R. 23), but on March 16 the bank received a check in the amount of eight hundred and some dollars (R. 29) forwarded by accused's father from Washington and this check was credited to accused's account on March 17, 1943 (R. 22). On the date of the trial (March 27, 1943) accused had to his credit at the First National Bank of Junction City, Kansas, $370.93 (R. 29) and all of the checks which had been issued by him as set forth in Specifications 2 to 10 inclusive of Charge I had been paid (R. 30). Mr. Denver did not bring with him any of the checks which the bank had paid prior to February 27 (the date they began returning accused's checks as insufficient) and had carried against the accused's account as an overdraft, but he refreshed his memory from copies that were made of these checks. The bank after receiving accused's telegram did not notify him that he would not be granted a loan because it was not considered necessary that an answer be given, but, after the bank began returning accused's checks to the various payees marked "insufficient funds", Mr. Denver put through a long distance telephone call to accused in a hotel in New Orleans where the last check had come from, and was advised by the manager of the hotel that accused had checked out (R. 28). A list of those checks which were returned to the various payees by the bank and marked "insufficient funds", as set out in full in the pertinent Specifications of the Charge, including Specifications 5, 6, 7, 8 and 10, was read by the prosecution to the court, stating the name of the payee, the date the check was drawn and the amount for which it was drawn (R. 30), to establish conclusively that no check included in the Specifications of these court-martial charges was counted in the amount of the overdraft against accused or as returned by the bank for insufficient funds.

Accused's commanding officer, Colonel Ira P. Swift, as a character witness testified that in his opinion the accused was one of the best Army officers he ever saw. He has observed him daily while under his command for the past seven months. He has never given accused any duty to perform that he did not perform better than expected. Colonel Swift has no reason to believe that accused is anything but completely honest and, prior to the commission of these offenses, there was nothing that would indicate that he was not entirely and completely honest in all of his dealings with other people. So far as he knows, accused was in no official difficulties at the time he went AWOL. He was commanding a tank battalion and doing a fine job and Colonel Swift had promised accused that when the opportunity presented itself he should become the regimental executive and operations officer. He had the utmost confidence in accused for the seven months prior to February 11. Accused had worked long, hard hours and usually seven days a week. The fact that accused gave as a reason for his request for leave that he wanted to go to Kansas City to see his father had no bearing whatever upon the Colonel's approval of that request. He would have approved it regardless of the reason given. Accused did not procure the hours off duty because of the fact that he wanted to use them for any particular purpose. After accused left, Colonel Swift ordered an investigation of his quarters and appearances indicated that accused had left in uniform with no baggage. The personal effects in his quarters were distributed as they would be for normal routine occupancy and there was nothing which would lead Colonel Swift to believe that accused had any intention of remaining absent for more than twenty-four hours (R. 23, 24, 25).

The accused having been fully warned of his rights as a witness elected to remain silent (R. 26).

4. Application by an officer to his superior to authorize a change in his status from duty to absent with leave is an official matter, and the superior in disposing of the application is acting within the scope of his official duties and in the execution of his office. In this case accused volunteered to state the reason on which his request for leave was based. The reason so stated was a falsity clearly established by the stipulated testimony of accused's father. The fact that accused's superior, after the event, testified that the false statement was, from his point of view, unnecessary and superfluous and did not affect his exercise of judgment and discretion in granting the request in any manner whatsoever, does not alter the fact that the statement was known to accused at the time he made it to be a deliberate lie or that it was being made to a superior in an official matter. So far as the accused could have known when he made the statement it was relevant because it formed the plausible and reasonable basis for granting the leave requested. It is not necessary to prove that the fraud and deceit embodied in a false official statement were successful in deceiving the person to whom it is made, or that some specific result or advantage was obtained by reason of it. It is sufficient to constitute an offense under the 95th Article of War if the

statement, as in this case, is shown to have been both official and false. The evidence is sufficient to sustain the finding of guilty as to Specification 1, Charge I.

Violation of Article of War 61, of which, by exceptions and substitutions, accused stands convicted under Charge II (AW 58), was admitted by him through oral stipulation in open court and the legal sufficiency of the evidence requires no extended discussion here. The finding of guilty of the Charge and Specification under Article of War 61 is legally sufficient. That an officer of the regular Army in the grade of Lieutenant Colonel should be found AWOL in war time for 19 days, hundreds of miles from his proper station and require apprehension and return to military control, are sufficiently damaging circumstances to compel the inference that he has no sense of responsibility in any manner proportionate to the obligations he owed the Army, the Government or the men under his command.

No extenuating circumstances in mitigation of this offense are found in the record or with the allied papers.

As to Specifications 5, 6, 7, 8 and 10 of Charge I (making checks with insufficient funds), the only question requiring legal consideration here is, whether or not accused, at the time he made and cashed the five checks described in these Specifications, had guilty knowledge that there were no funds to his credit in the First National Bank of Junction City, Kansas, out of which these checks could be paid, and further that he did not intend that he should have such funds.

On February 19, 1943, seven days after leaving Camp Funston accused was overdrawn at his bank in the sum of $49.50. Notwithstanding, between February 22 and February 26 he drew four additional checks totaling $65, as disclosed by the evidence of record relative to Specifications 2, 3, 4, and 9 of Charge I. That he fully realized he had no funds in bank to meet the checks which he made and cashed between March 1 and March 5, 1943, inclusive, (Specifications 5, 6, 7, 8, 10) is obvious from his action on February 22 in telegraphing the bank to put $500 to his credit, plus the further fact that he also realized he could not establish credit at the bank without signing a note to the bank as security for this loan. This inference is justified by the fact that he specifically assured the bank in that same telegram that he would appear there on February 27, five days later and sign such note as is required by the Federal and State banking laws to be deposited as security for the loan. The telegram was sent from the city of Fort Smith, Arkansas. He made no effort either on February 27 or subsequently to appear at the bank and sign the note or in any other manner to furnish the bank with collateral security for the proposed loan. But eight days after he sent the telegram he was in New Orleans, where he issued four more worthless checks to three hotels and a clothing store in the total amount of $281.66. Accused had no

right to assume that the bank would honor his checks after his account had been overdrawn by adopting the simple device of wiring the bank instruction to place money to his credit. The legal inference to be drawn from these circumstances, as disclosed by his actions, was that he never seriously intended to cover his overdrafts by borrowing $500 from the bank and placing it in his account. If he had acted in good faith in the matter he would have pursued one of two courses of action; he would have signed the note or he would have stopped drawing and issuing more checks. Nevertheless he did continue making and uttering worthless checks between March 1 and March 5, 1943 in the total amount of $281.66. After February 27, the date on which the bank learned he was AWOL and commenced returning to the payees the five checks issued by him in New Orleans, marked "insufficient funds", it becomes obvious that any previous promises which he had made to furnish the bank with funds out of which to pay these checks were not made in good faith. From the facts disclosed by the evidence no other hypothesis than that of guilt is possible. The fact that accused's father subsequently (March 16, 1943) made good the losses sustained by the bank and the various payees by reason of accused's worthless checks, is no defense to this Charge or the five pertinent Specifications thereunder. It is noted that witness Denver's testimony is evasive and inconsistent. He first denies that the bank credited accused's account with a loan of $500 (R. 16) but shortly thereafter admits that, although irregular, the bank paid accused's overdrawn checks as if a loan had been granted. He finally admitted that all of the checks issued by accused and returned by the bank marked "insufficient funds" had no financial backing whatever and had been paid prior to learning on February 27 that accused was AWOL, only because he was a customer of the bank and his business with them had "been very satisfactory" (R. 22). The evidence is legally sufficient to sustain the findings of guilty of Charge I and Specifications 5, 6, 7, 8 and 10 thereunder.

6. The Army Register shows the service of accused as follows:

> "Capt. A.U.S. 9 Sept. 40; accepted 8 Oct. 40; maj. A.U.S. 1 Feb. 42; lt. col. A.U.S. 21 Oct. 42.-Cadet M.A. 2 July 31; 2 lt. of Cav. 12 June 35; 1 lt. 12 June 38."

War Department records show that accused is 29 years of age. During his service as an officer 22 efficiency reports upon him have been rendered. One report, covering a period of about 7½ months, shows a general rating of excellent. Twenty-one reports, covering aggregate periods of about 5½ years, show general ratings of superior. The efficiency reports contain numerous remarks attesting to accused's general efficiency and devotion to duty. He has been specially commended on three occasions. His 201 file contains nothing of a derogatory nature.

7. 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 thereof. Dismissal is authorized upon conviction of violation of Article of War 61 and is mandatory upon conviction of violation of Article of War 95.

William L. Lounds, Judge Advocate.

Earle Stephens, Judge Advocate.

Herbert R. Frederick, Judge Advocate.

War Department, J.A.G.O., 29 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 Lieutenant Colonel John S. Growdon (0-19737), 14th 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 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-Dft. ltr. for sig. Sec. of War.
Incl.3-Form of action.

(Sentence confirmed but confinement remitted. Execution suspended. G.C.M.O. 221, 8 Sep 1943)

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

SPJGN
CM 233733

APR 26 1943

UNITED STATES	)	BOSTON PORT OF EMBARKATION
	)	
v.	)	Trial by G.C.M., convened at Boston, Massachusetts, March 31, 1943. Dismissal.
	)	
First Lieutenant HAROLD F. MURRAY (0-499028), Adjutant General's Department.	)	

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 Charge and Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that 1st Lt. Harold F. Murray, AGD—A.P.S., Boston Port of Embarkation, Army Base, Boston, Massachusetts, did, without proper leave, absent himself from his station at Boston Port of Embarkation, Army Base, Boston, Massachusetts, from on or about January 18, 1943, to on or about January 27, 1943.

He pleaded not guilty to and was found guilty of the Charge and its Specification except the word "18" substituting therefor, the word "19", of the excepted word not guilty, of the substituted word guilty.

He was sentenced to be dismissed the service. The reviewing authority approved the sentence, and forwarded the record of trial for action, inadvertently under Article of War 50½. The record has been considered as if forwarded under Article of War 48.

3. The evidence for the prosecution consisted of two documents, admitted in evidence without objection (R. 6), consisting of a stipulation of facts entered into by the accused, his counsel, and the prosecution (Ex. A) and an extract of the officers' morning report. (R. 6; Ex. A, B) It appears from the stipulation, corroborated by the morning report, that the accused was absent from duty without authority or leave from January 19, 1943, to January 27, 1943. It further appears therefrom that the accused was subject to military law; that, at the time, he was stationed at the Boston Port of Embarkation, Army Base, Boston, Massachusetts, assigned to duty with the port postal officer; that on January 7, 1943, he was admitted to the Station Hospital, Fort Banks, Massachusetts, for bronchitis; and that on January 18, 1943, he was discharged from the hospital to duty. Instead of returning to his station and duty he absented himself from that time until he was apprehended on January 27. It also appears by the stipulation that if certain witnesses had been present they would have testified that the accused was seen at Stevens Cafe in Pawtucket, Rhode Island, on January 25, 1943, and on January 27, 1943, he was apprehended there by an agent of the Investigation Division of the Provost Marshal General's Office.

4. The defense introduced evidence solely in extenuation of the offense. This evidence consisted of the clinical records of the accused while confined in the station hospital, a record of the proceedings of a board of medical officers, extracts from medical treatises, and some supporting testimony of a medical officer (R. 14). The evidence shows that the accused was suffering from a mild but chronic case of duodenitis (duodenal ulcers) of unknown origin disqualifying him for full military duty. The purpose of this medical testimony was to show a possible cause for the exercise of bad judgment on the part of the accused in absenting himself from duty. It was not offered as evidence of any insanity (R. 7). The accused did not elect to testify but read an unsworn statement (R. 13) to the court in which he related a family medical history of cancer and ulcers. He stated that during the fifteen years prior to his induction into the Army in June, 1941, he suffered from numerous attacks of severe stomach pains which, because of his family history, caused him much worry and sleeplessness, resulting in a nervous condition. In explanation

of his presence at the Stevens Cafe in Pawtucket, Rhode Island, he stated that the owner thereof was a friend of his and that he, the accused, was living there with him. During the fifteen years prior to his induction he worked as a post office clerk.

5. Although the accused pleaded not guilty to the Charge and the Specification, he admitted that he was absent without leave from January 19, 1943, to January 27, 1943. This is corroborated by the morning report of the officers, Headquarters Boston Port of Embarkation (Ex. B), and by further facts in the stipulation (Ex. A) showing the apprehension of the accused in Pawtucket, Rhode Island.

6. The accused is 38 years of age. The records of the Office of The Adjutant General show enlisted service in the Army from January 15, 1941, to October 12, 1942, upon which latter date he was appointed a first lieutenant, Adjutant General's Department, Army of the United States.

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 of the sentence. A sentence of dismissal is authorized upon conviction of violation of Article of War 61.

Elias S. Bresson, 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 Harold F. Murray (0-499028), 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 the sentence, and to warrant confirmation thereof. Although the offense of going absent without leave for approximately nine days involves a serious breach of discipline, the record does not show any aggravating circumstances. In view of the nature of the offense and the relative inexperience of the accused as an officer, I recommend that the sentence be confirmed but 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 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 execution suspended. G.C.M.O. 124, 22 Jun 1943)

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

SPJGH
CM 233752

-8 JUL 1943

UNITED STATES N.D.	THIRD AIR FORCE
v.	Trial by G.C.M., convened at Drew Field, Tampa, Florida, 2 and 3 March 1943 and reconvened in revision proceedings 3 May 1943. Dismissal and total forfeitures.
Second Lieutenant FREDERICK W. LEWIS (O-1639308), Signal Corps.	

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 Charges and Specifications:

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

Specification: In that 2d. Lieutenant Frederick W. Lewis, Jr., Plotting Company, 501st Signal Aircraft Warning Regiment did, without proper leave, absent himself from his organization at Drew Field, Tampa, Florida, from about January 23, 1943, to about February 11, 1943.

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

Specification 1: In that 2d Lieutenant Frederick W. Lewis, Jr., Plotting Company, 501st Signal Aircraft Warning Regiment, did, at or near Saint Petersburg, Florida, on or about February 10, 1943, with intent to deceive the Provost Marshal, Army Air Force Basic Training Center Number 6, Fifth District, Saint Petersburg, Florida, officially state to the said Provost Marshall, that he

(2d Lieutenant Lewis) was not absent without leave, which statement was known by the said 2d Lieutenant Frederick W. Lewis, Jr., to be untrue.

Specification 2: (Finding of Not Guilty).

Specification 3: In that 2d Lieutenant Frederick W. Lewis, Jr., Plotting Company, 501st Signal Aircraft Warning Regiment, having received a lawful order from 2d Lieutenant Robert O. Love, Plotting Company, 501st Signal Aircraft Warning Regiment, to report immediately to Lieutenant Colonel Edward A. Everitt, the said 2d Lieutenant Robert O. Love being in the execution of his office, did, at Drew Field, Tampa, Florida, on or about February 5, 1943, fail to obey the same.

He pleaded not guilty to all Charges and Specifications, and was found not guilty of Specification 2, Charge II, and guilty of the Charges and all other Specifications. 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:

a. The Specification, Charge I and Specification 3, Charge II: The accused was assigned to Plotting Company, 501st Signal Aircraft Warning Regiment about the middle of December 1942. The regimental commander was Lieutenant Colonel Edward A. Everitt, and the company commander was Second Lieutenant Robert O. Love. At a time prior to 3 January 1943, the accused was "on special duties, not on orders" with Communications Company, which had asked Lieutenant Love to "lend them a few officers for a few days". On 2 January an order or memorandum came out directing certain officers, including the accused, to go on a field problem at Bradenton. On 3 or 4 January Lieutenant Love called the commanding officer of Communications Company, to find where the accused was, and was told that he (the commanding officer) had "sent all the officers back to the company". On 5 January Lieutenant Love was informed that the accused was not present on the field problem, and made an entry on the morning report that the accused was absent without leave as of 2 January. Subsequently, he learned that the accused was on the field problem, and he then on 21 January cancelled the entry. The field problem ended about 22 January, and all of the officers on it, except the

accused, reported to Lieutenant Love on 23 January. Lieutenant Love could not locate the accused. He was informed that the accused was not attending an officers' school or orientation class to which most of the officers who had been on the Bradenton field problem had been assigned. He did not receive an order directing these officers to attend the course, and only heard by telephone a list of those who were to attend. On 29 January Lieutenant Love made an entry in the morning report (Ex. A) showing the accused from duty to absent without leave as of 23 January. About 28 or 29 January Colonel Everitt was informed that the accused was absent without leave, and he instructed Lieutenant Love to look for the accused until he found him, and have him report to Colonel Everitt immediately. Colonel Everitt did not see the accused until 11 February. On 29 or 30 January, Lieutenant Love saw the accused in a private automobile "down near the company", advised him that he was being carried as absent without leave, and suggested that he get in touch with Colonel Everitt. The accused stated that he was attending the orientation class. On 5 February Lieutenant Love went to the orientation school, examined the roster, did not find the name of the accused, called the name of the accused in the classroom, found that the accused was not there, and received information that the accused was living in barracks T-127. He went to that barracks about eleven o'clock and found the accused. He stated to the accused "you are to report to Lt. Col. Everitt immediately" and "You better go right on up". The accused stated that "he would go right up". Lieutenant Love was informed that the accused did not report to Colonel Everitt, and about 6 February he left a note on the bed of the accused stating that the accused was to report to Colonel Everitt at once. On 8 February, someone had removed the note. Lieutenant Love then placed another note on the bed, and fastened it to the blanket with a large paper clip. Each day until 11 February, Lieutenant Love, in person or by another officer, went to the barracks, and the note was still fastened to the blanket. On 11 February Lieutenant Love was told that the accused was at his quarters, and he found the accused there. He then took the accused to Colonel Everitt, who placed the accused under restrictions. An entry was made in the morning report (Ex. A) 11 February showing the accused from absent without leave to arrest in quarters. Lieutenant Love was present for duty with the company from 23 January to 11 February, and the accused did not report to him during that period (R. 6-9, 11-18).

In the Plotting Company, regular formations of the company including the officers were not held. All officers were required to

"be in the company" and report to Lieutenant Love each morning between 7:30 and 7:45. He checked to see who was there so they could plan the training for the next day. Colonel Everitt had issued an order that officers were to report to their orderly rooms daily at 7:30 a.m. If the company commanders could find nothing for them to do, the extra officers would be released for the day, but they were to report every morning (R. 13, 19).

After being advised that he could elect whether he should make a statement and that anything he said could be used against him, the accused stated to Second Lieutenant Judson M. Waugh, investigating officer, "I was not AWOL at any time for more than two days" and "Nothing that I can say will keep me from being court-martialed anyhow", or words to that effect (R. 23-24).

b. Specification 1, Charge II: Major Walter Stemple, Provost Marshal, St. Petersburg, Florida, was informed that the accused was "being carried AWOL in his organization". On 10 February before midnight, he was advised by a sergeant by telephone that the accused had been located in that city, he talked to the accused by telephone, and had the accused come to his office. Major Stemple at his office asked the accused "if he was AWOL from Drew Field" and the accused informed Major Stemple that "he was not". Major Stemple "checked with Drew Field and he called me back after about fifteen or twenty minutes and told me he was not AWOL". Major Stemple held the accused about an hour and fifteen minutes and then released him. Major Stemple testified that about fifteen minutes after the accused was released, the Officer of the Day called and stated that the accused was absent without leave (R. 21-22).

4. Defense: John Bell, a "striker, in the 127th" barracks, testified that the accused moved into the building the latter part of January, and that he saw the accused there every day except three when Bell was working principally in another building. He saw a note on or under the pillow about three days, and left it there. He did not make up the bed of the accused "very much because he would be in it". Second Lieutenant E. C. Keefer lived in the same barracks with the accused after they came back from Bradenton about 22 January. He saw the accused there "about every day", but he left for school early in the morning and could not be positive that the accused was there at the time. He saw the accused there quite often. Second Lieutenant Titus A. Crocker, Assistant Officer in Charge of Bachelor Officer Quarters,

testified that the records showed that the accused moved into Barracks 127 on 29 January and had lunch that day. Lieutenant (sic) Edwin G. Bensing moved into this barracks on 17 or 18 January 1943 and the accused came in later, he saw the accused there in the morning or evening, and as far as he knew the accused had been there some time during every day. Second Lieutenant Stephen E. Korpanty came back to Drew Field from Bradenton in the same truck with the accused the latter part of January. He attended the orientation school but did not see the accused there. The course was divided into four groups and the roll call was taken in the sub-group in the classroom. He lived in the same barracks as the accused (R. 24-32, 34).

The accused testified that he was at the United States Naval Academy for nearly three years, in Reserve Officers' Training Corps in 1922 and 1923, in the Army of the United States by enlistment for the past two or three years, and was commissioned 16 November 1942. At the time of his birth his father was an instructor at the United States Military Academy, and retired about 1924 as a brigadier general. His grandfather also was a brigadier general. About 3 January 1943, the accused "reported to the company" after a six days leave and found that he was to go on a special trip to Bradenton on 5 January. He went to Bradenton, took the training, and returned to Drew Field by truck between 24 and 28 January. He found that the barracks where he had formerly lived had been vacated. He went first to Communications Company, where he was assigned before he left for Bradenton, and asked the first sergeant if there were any orders, and received some mail. He then went to regimental headquarters to see if there were any orders. He stated that he had not been notified that he had been recalled to Plotting Company, and in the meantime the company had been moved. After going to regimental headquarters, he returned to barracks. From then on he went to Communications Company at least once each day to request mail and talked to the first sergeant. On these occasions he did not report directly to anybody, there would be a number of officers present, and they would "just wait to see if anything was doing". He would look at the training schedule, and he saw the company commander of Communications Company several times. He never went to Plotting Company at all, except once in search of mail right after his return from Bradenton. He did not look for orders there. He did not know what company he was in. During this time, he received no orders to attend the orientation course, and understood that until he received specific orders he could remain in barracks. He went to the orientation course about two days, found he was not carried on the roll, and stopped going. Shortly after returning from

Bradenton he learned that his father was seriously ill at Bay Pines Hospital, St. Petersburg, Florida. Thereafter he went to visit his father about 6:30 in the afternoon a number of times. He would return to Drew Field each time about 9:30 p.m., except on one occasion when on account of lack of gasoline he did not return until about 6 a.m., and twice when he did not return until after one o'clock in the morning. He had no written pass or special permission for these absences, but stated that none was needed between 4:30 p.m. and 7:30 a.m. (R. 38-45, 51-59, 61).

The accused testified further that at the time when his status of absent without leave at Bradenton was cleared up, he did not read the letter of inquiry from the commanding officer of the Plotting Company, and did not know what company was making the inquiry. The accused did not remember the details of the conversation on the occasion when Lieutenant Love saw him in the company area, but stated that he told Lieutenant Love that he "had been going to the Communications Company" and was informed that Lieutenant Love had "recalled his officers" verbally. With reference to his conversation with the Provost Marshal at St. Petersburg, the accused stated that he told Major Stemple by telephone that he knew nothing about being absent without leave, and stated that so far as he knew he was not in that status. This was subsequent to his conversation with Lieutenant Love in the company area. With reference to the investigation by Lieutenant Waugh, the accused stated that what he told Lieutenant Waugh was that he "couldn't have been AWOL because I hadn't been away even for two days", and that he implied that he had never been away in the daytime. He testified that after receiving an order from Lieutenant Love to report to Colonel Everitt, he went directly to regimental headquarters, Colonel Everitt was not there, the sergeant major did not know when he would be back, the accused returned that afternoon, and Colonel Everitt was again not there. The accused was taken to Colonel Everitt's office by Lieutenant Love the next day, he thought, but he was not certain of the dates. He did not see the note left on his bed by Lieutenant Love. On cross-examination he stated that a big difficulty at Drew Field was "the huge influx of officers with no available facilities for schools or for other purposes". There were "too many with nothing to do" (R. 42-47, 49-51, 56, 58).

5. In rebuttal for the prosecution First Lieutenant Herman M. Farmer testified that he commanded the Communications Company between 23 January and 11 February 1943 and was present during that period

except that he took one day off a week. During that time he did not see or speak to the accused. The accused had been on special duty with the Communications Company for about sixteen days in December, ending on 29 December when Lieutenant Farmer told the accused they did not need him any more and "sent him back to report to Lt. Love". Second Lieutenant William A. Wright testified that about 28 or 29 December the officers borrowed by the Communications Company, including the accused, were told verbally that they were "to report back to the Plotting Company for duty". First Sergeant Ernest M. Votto, Communications Company, could not recall seeing the accused between 23 January and 11 February. Lieutenant Love testified that the accused did not report to him between 23 January and 11 February, and again fixed the dates of his conversations with the accused as shown in his original testimony. Between the dates stated above, there were about sixteen officers in Plotting Company and they were required to report informally daily to Lieutenant Love except when excused. All of the officers who were verbally ordered for duty with the Communications Company in December, reported back to the Plotting Company with the exception of the accused (R. 63-76).

6. Although the morning report entry showing the accused absent without leave 23 January was based on hearsay information and therefore was not of probative value, it was clearly shown by other competent evidence that the accused was absent without leave from his organization, the Plotting Company, from 23 January to 11 February 1943 (Spec., Chg. I). His presence at Drew Field, except during the evening or night on certain occasions, was not the equivalent of presence with his organization at Drew Field. It was shown without contradiction that he did not report to Plotting Company during this period, except to the extent of inquiring for his mail on one occasion.

It was also clearly shown that the accused failed to comply with a lawful order given him by Lieutenant Love on 5 February to report to Colonel Everitt immediately (Spec. 3, Chg. II). Colonel Everitt did not see the accused until 11 February, when the accused was brought to him by Lieutenant Love. Even if the accused, as he testified, tried twice on the date of the order to see Colonel Everitt, the order remained in effect thereafter and no further effort to comply was shown.

As to Specification 1, Charge II, the evidence does not show beyond a reasonable doubt that the accused knowingly made a false statement to Major Stemple when he stated that he was not absent without leave "from Drew Field". It appears from the evidence that officers were

allowed to leave Drew Field at night without special permission when not on duty. Even though the accused was absent without leave from his organization and had knowledge of that fact, yet it is not shown that he was absent without leave "from Drew Field", at the time of his statement to Major Stemple.

7. The accused is 37 years of age. The records of the Office of The Adjutant General show his service as follows: Midshipman, U.S.N.A., 5 June 1925 to 30 August 1928; enlisted service from 9 October 1940; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty, 16 November 1942.

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 trial is legally insufficient to support the finding of guilty of Specification 1, Charge II, legally sufficient to support the findings of guilty of all other Specifications and the Charges, and 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 96th Article of War.

_____, Judge Advocate

Samuel M. Diver, Judge Advocate

F. J. Lotthus, Judge Advocate

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NAVY DEPARTMENT

1st Ind.

War Department, J.A.G.O., 27 JUL 1943 - To the Acting 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 Frederick W. Lewis (0-1639308), Signal Corps.

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 1, Charge II, legally sufficient to support the findings of guilty of all other Specifications and the Charges, and legally sufficient to support the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed, that the forfeitures be remitted and that the sentence as thus modified be carried into execution.

3. I am confirmed in my opinion that the sentence to dismissal should be executed by the statement of five of the seven members of the court of their reasons for adhering to the original sentence when the record was returned to the court for reconsideration of the sentence. These members stated that the dishonesty and lack of integrity disclosed in this case by an accused, who came from an Army family and whose military training included three years at the Naval Academy, were such deficiencies of character as cannot be corrected by disciplinary action and that an individual exhibiting such deficiencies of character was not worthy of holding a commission.

The Commanding General, Third Air Force, has informed me that Lieutenant Lewis has been reported absent without leave from Drew Field, Florida, since 10 July 1943.

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 made above.

Myron C. Cramer

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

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

(Finding of guilty of Specification 1, Charge II disapproved. Sentence confirmed but forfeitures remitted. G.C.M.O. 213, 2 Sep 1943)

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

SPJGK
CM 233762

14 JUN 1943

U N I T E D S T A T E S	)	NINTH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at APO #9, French Morocco, February 1, 1943. Dismissal.
	)	
Second Lieutenant JAMES A. WILSON (O-1012393), 70th Provisional Tank Battalion.	)	

OPINION of the BOARD OF REVIEW
LYON, HILL and ANDREWS, 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 64th Article of War.

Specification: In that 2nd Lt. James A. Wilson, 70th Provisional Tank Battalion, having received a lawful command from 1st Lt. John E. Mullen, his superior officer, to "Don't take that Jeep", did, at the bivouac area of the 70th Provisional Tank Battalion, near Port Lyautey, French Morocco, on or about January 19, 1943, wilfully disobey the same.

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

Specification: In that 2nd Lt. James A. Wilson, 70th Provisional Tank Battalion, did, at the bivouac area of the 70th Provisional Tank Battalion, near Port Lyautey, French Morocco, on or about January 19, 1943, knowingly and wilfully apply to his own use and benefit one 1/4 ton truck, U.S. registration number 20105997, of the value of about $1027.50, property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. 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: First Lieutenant John E. Mullen was the acting commanding officer of the 70th Tank Battalion stationed near Port Lyautey, French Morocco (R. 5). The accused was the platoon leader of Company "B", 70th Tank Battalion. Lieutenant Mullen was responsible for all vehicles in the battalion (R. 6). On January 18, 1943, Colonel De Rohan, Commanding Officer of the 60th Infantry which included the 70th Tank Battalion, called a meeting of all officers of the 60th Combat Team and stated that no officer could use Government transportation for his personal use and that except in extreme emergency all vehicles would be off the highway before dark. The accused was present at this meeting (R. 7). On the evening of January 19, 1943, accused approached Lieutenant Mullen in the bivouac of the 70th Tank Battalion near Port Lyautey and told him that he was going to use a Government jeep for a trip "to town" and would return about 10 or 11 o'clock that night. Lieutenant Mullen explained to accused that current orders prohibited the use of Government transportation for personal use, that all vehicles had to be off the highway before dark, and furthermore that jeeps were for official use only. After some discussion accused stated in substance that he had never read any written order attaching him to Company C (of 70th Battalion), and until such time he "did not give a good God damn" what Lieutenant Mullen thought, that he (accused) was going to do as he "God damn pleased". Up until this time Lieutenant Mullen

had given no direct order to the accused as to the use of the jeep but immediately thereafter as accused turned and walked 5 or 6 feet away, Lieutenant Mullen specifically stated, "Don't take that jeep" (R. 6, 7, 10). This incident occurred in the presence of First Sergeant Charles K. Carmen and Private First Class Clyde W. Rogers, both of the 70th Tank Battalion (R. 7, 8, 9). Lieutenant Mullen knew of no duties of accused which required the use of the jeep at that time. The jeep had been assigned to accused's platoon (R. 10). Lieutenant Mullen saw the accused and Private Edward J. Gossler, Company B, 70th Tank Battalion, enter the car and leave the area — Gossler doing the driving (R. 11). The car (No. 20105997), was driven to Port Lyautey, where accused met Captain Hilton. At some hour after 9 o'clock and after dark, accused returned to the car and proceeded from Port Lyautey to the bivouac area. After accused got out of the car in Port Lyautey, Gossler drove the jeep to the "showers" of the 36th Engineers and waited there until accused returned (R. 12, 13). Major Thomas G. Taylor, 9th Infantry Division Headquarters, Division Automotive Officer, testified that all ¾-ton trucks similar to the vehicle described in the Specification, Charge II, are purchased by the Government at a value of $1027.50 (R. 4).

For the defense there was introduced in evidence Field Order No. 2, Headquarters 9th Infantry Division, dated January 13, 1943, the pertinent part of which provides: "Co B 70th Tk Bn Lt will move to bivouac area near Co C 70th Tk Bn Lt and will be attached to 60th Inf for Adm.***" (R. 7; Def. Ex. 1); also a copy of Special Orders No. 17, 9th Infantry Division, dated January 21, 1943, paragraph 2 of which provides: "Eff 18 Jan 1943 the 1st and 2nd Plat reinforced, of Co 'B' 70 Tank Bn are atchd to Co 'C' 70 Tank Bn for qrs rations adm tng and duty" (R. 7; Def. Ex. 2).

The accused testified that on January 19, 1943, he "remarked" to Lieutenant Mullen that he was leaving the bivouac area and would return about 10 o'clock. Lieutenant Mullen inquired what means of transportation would be used, "* * * I told him I was going in my jeep * * *". Lieutenant Mullen asked accused how he would return. Accused stated that he would return in the jeep. Lieutenant Mullen then said, "'That jeep will not come back after you'. And I replied 'I won't let the jeep come back to the area'". Lieutenant Mullen later remarked:

> "'You will not keep that jeep, Wilson', and I told him that I was. So far as I knew I had no orders attaching me to Company C, that I only received one order and that was to move into the 60th Infantry

> area and be attached for rations and until I received some definite orders I would continue to do as I pleased in running my transportation. I turned around and walked off and Lt. Mullen called after I had gone and said, 'Don't keep that jeep'".

Accused stated that he had received no orders to the effect that he was a part of the Provisional Tank Battalion, and that as superior officer of attachment of B Company he was responsible for all transportation. In effect accused admitted stating to Lieutenant Mullen that if anything went wrong with respect to his use of the jeep, he (accused) would suffer the consequences. He did not deny saying that he would do as "He God Dam please". He admitted taking the vehicle to Port Lyautey where he met Captain Hilton of the 47th Infantry and later had dinner with a French family (R. 20, 21). He stated that his reason for taking the jeep was to return some ammunition that was not needed. Although the ammunition was placed in the truck, before leaving the bivouac area, accused made no effort to deliver it but stated that he had given instructions to the driver as to the delivery. When asked if he told the driver where to take the ammunition he answered "Sir, he knew where to take it" (R. 21). Accused stated that the ammunition was left in the jeep after returning from Port Lyautey and denied that it was placed in the jeep merely as an excuse to visit the French family (R. 20, 21). Gossler stated that there was a part of a case of ammunition in the car and he thought that it was being returned. When asked where it was to be taken, replied "I don't know Sir, somewhere in the 47th Area". He stated that the ammunition was delivered the next day (R. 12, 13).

Major Fred C. File, 47th Infantry, stated that several days prior to January 18, as Plans and Training Officer of the 47th Infantry he notified accused that he (accused) was to move to the 60th Infantry area near Company C. Witness stated that the order came through that a platoon of the 70th Tank Battalion would be attached to the 60th Infantry for administration. Accused raised the question in regard to his training. Upon inquiry at division headquarters, witness was advised by higher authority that the platoon (presumably of accused) was attached to the 60th Infantry for administration with Company C and would receive training with the 70th Tank Battalion — that orders would be transmitted to the accused (R. 15). Major File stated that he had known accused three months. Accused at one time had been attached

to his Battalion. Witness stated that when with his command, accused received and carried out orders in an excellent spirit (R. 15).

Second Lieutenant Walter T. Anderson, Company B, 70th Tank Battalion, testified that he was present on the afternoon of January 19 and heard the controversy between Lieutenant Mullen and accused regarding the use of the jeep. According to the witness accused approached Lieutenant Mullen and said:

> "'* * *Lt. Mullen I knew this was coming. You are the superior now. I haven't seen any written orders attaching me to you. All I have seen is Field Order No. 2, telling me I am attached to the 60th Infantry and I was to move near Company C, and until I get such orders attaching me to you I'll do just as I God dam please * * *'. When Lt. Wilson (accused) walked away, Lt. Mullen called after him and said, 'We are not going to send a jeep back after you'. Lt. Wilson continued to walk and Lt. Mullen said, 'Don't keep that jeep in town'".

Witness stated that Lieutenant Mullen did not say "Don't take that jeep", and further stated that he had seen no order authorizing C Company to take over for maintenance vehicles of Company B (R. 18).

First Lieutenant Richard Greene, 70th Tank Battalion, stated that while the investigation was being made he heard Lieutenant Mullen say that the statements (presumably of the witnesses) did not agree and that it would be necessary for them to agree "to make the charges stick". Witness stated that the remark was not made in the presence of any of the witnesses (R. 17).

4. It clearly appears from the evidence that Lieutenant Mullen was the acting commanding officer of the 70th Tank Battalion and that effective, January 18, 1943, the accused, by paragraph 2 of Special Orders No. 17, Headquarters, 9th Infantry Division, was transferred to the 70th Tank Battalion for quarters, rations, administration, training and duty (Ex. 2). On January 18, the accused was present at a called meeting of all officers of the 60th Combat Team at which meeting Colonel De Rohan, the Commanding Officer, stated that no officer should use Government transportation for his personal use and that all vehicles, except in extreme emergency should be off the roads before dark. On

the afternoon of January 19, 1943, the accused, in recognition of the authority of Lieutenant Mullen, the Acting Commanding Officer of the 70th Tank Battalion, stated to Lieutenant Mullen that he contemplated the use that evening of a certain Government vehicle, for the purpose of going to Port Lyautey. When accused was reminded of the standing orders with respect to personal use of Government vehicles, accused stated that he knew the orders and would be the one to suffer. While Lieutenant Mullen was trying to reason with accused and dissuade him from his expressed purpose, accused questioned the authority of Lieutenant Mullen and stated that he had never read a written order attaching him to Company C and until such time he would "do as he God dam pleased". Thereupon Lieutenant Mullen gave to accused the order, "Don't take that jeep". The vehicle referred to was Government property, furnished and intended for military service, and its cost to the Government was $1027.50. The accused proceeded to take the vehicle and had an enlisted man drive him to Port Lyautey. While in Port Lyautey accused met Captain Hilton and later had dinner with a French family. The hour of his return to the bivouac area is not clear; however, it definitely appears that it was dark and after 9 o'clock when he left Port Lyautey.

5. In the light of all the facts and circumstances as disclosed by the record, the Board of Review is convinced that the evidence fully warranted the court in finding the accused guilty as charged. With respect to Charge I and its Specification, the defense contended first, that accused had received no written orders attaching him to the 70th Tank Battalion, and, that therefore, he was not subject to the orders of Lieutenant Mullen and, second, that Lieutenant Mullen did not say "Don't take that jeep" but said, "Don't keep that jeep". In answer to the first proposition, while the evidence clearly shows that accused had been attached to the 70th Tank Battalion, and supports the inference that accused knew he had been so attached, it is the opinion of the Board of Review that the legality of the order did not depend upon such transfer or attachment. The mere fact that accused had threatened to use the jeep in plain violation of standing orders, with which he was familiar, not only vested Lieutenant Mullen with the legal authority, but imposed upon him the military duty, as a superior officer, to issue the order in an effort to prevent flagrant breach of discipline. The second proposition is wholly untenable. It makes no difference whether the order was, "Don't take that jeep", as testified by Lieutenant Mullen, or, "Don't keep that jeep", as testified by accused. The evidence shows, that accused not only took the jeep, but kept it until a late hour. In either case he disobeyed the order of his superior officer.

The disrespectful language of the accused, and other attendant circumstances surrounding the incident, unmistakably show a willfull disobedience.

With respect to Charge II and its Specification, it is undisputed that the vehicle was owned by the Government, that it was furnished and intended for the military service, that its cost to the Government was $1027.50, and that it was used by accused at the place and time alleged. It was contended however, that the vehicle was taken for the purpose of transporting amunition, and not for the personal use and convenience of accused. The court by its findings, and justifiably so, has rejected this specious contention. It is inconceivable that the accused would have conducted himself in such an unbecoming and insubordinate manner, if his proposed use of the vehicle had been in furtherance of an official duty. The evidence conclusively shows a temporary and unauthorized use of the jeep as a means of transporting the accused to Port Lyautey for his own personal convenience and pleasure. The fact that he used the vehicle in violation of standing orders and in disobedience of the command of his superior officer, warrants the inference that the act was willfull. Such use is a misapplication within the meaning of Article of War 94 (CM 193003 Simpkins).

6. The accused is 20 years and 9 months of age. The records in the Office of The Adjutant General show that he was graduated from Woodrow Wilson High School, Dallas, Texas, in 1940. He was commissioned a temporary second lieutenant, Army of the United States, Armored Force Officer Candidate School, Fort Knox, Kentucky, and ordered to active duty August 22, 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. Dismissal is authorized upon conviction of violation of Article of War 64 and 94.

_____, Judge Advocate.

_____, Judge Advocate.

Fletcher R. Andrews, 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 James A. Wilson (0-1012393), 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 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. 153, 21 Jul 1943)

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

SPJGN
CM 233763

8 JUL 1943

UNITED STATES	)	9TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Port Lyautey, French Morocco, 25 January 1943. Dismissal.
	)	
Second Lieutenant JOHN W. LOWTHER (0-1633377), 9th Signal Company.	)	

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 Charge and Specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Second Lieutenant John William Lowther, 9th Signal Company, was at Port Lyautey, French Morocco, in a public place to wit: "Lux Bar," on or about January 18, 1943 so drunk and disorderly while in uniform in the presence and hearing of several persons as to disgrace the military service.

Specification 2: In that Second Lieutenant John William Lowther, 9th Signal Company, at Port Lyautey, French Morocco, on or about January 18, 1943, in a public place to wit: "Lux Bar," Port Lyautey, French Morocco, did wilfully and unlawfully brandish a 32 caliber automatic pistol, Guernica make.

He pleaded not guilty to the Charge and both Specifications and was found guilty of Specification 1; of Specification 2, guilty except the words "A 32 caliber automatic pistol, Guernica make", substituting therefor the words, "An automatic pistol", of the excepted words, not guilty, of the substituted words guilty; and guilty of the Charge. 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 the issuance of the following order:

"HEADQUARTERS FIRST PROVISIONAL BRIGADE
WESTERN TASK FORCE

A. P. O. #9
19 December 1942

DAILY ORDER)
:
NUMBER 28) EXTRACT

* * * * *

4. Previous orders issued by this headquarters, reference all officers carrying weapons at all times, are revoked.

Officer will carry weapons only when on duty with troops or when so instructed otherwise.

By command of Brigadier General TRUSCOTT:

DON L. CARLETON,
Colonel, Cavalry
Chief of Staff.

OFFICIAL:

s/ O. T. Sanborn, Jr.

O. T. SANBORN, Jr.,
1st Lieut. Inf.
Adjutant."

This is apparently the order the defense counsel referred to when he inquired of Captain John Charles Liggett, the accused's company commander, whether or not the accused "was present at the time this order was issued"; to which inquiry Captain Liggett's response - "He was on DS at this time and so far as I know he has not seen --" - was interrupted by the court's sustaining the prosecution's objection (R. 15; Ex. 2).

Prior to the commission of the alleged offenses, the Assistant Division Commander, 9th Infantry Division, of which the accused's organization was a component, held a meeting of the special staff officers and commanders relative to the conduct of officers, which the Assistant Division Commander said had to be improved. Lieutenant Colonel Eugene A. Kenney, Signal Corps, 9th Infantry Division, was present, and later "talked to Captain Liggett and covered the points that were brought out by the Assistant Division Commander, and directed Captain Liggett to inform all the officers of the 9th Signal Company of what the Assistant Division Commander had said" (R. 16).

In pursuance of these instructions, on the same date, and prior to the commission of the alleged offenses, Captain Liggett cautioned the officers of his organization, including the accused, relative to their conduct in town, advising them that the Assistant Division Commander had held a conference, and mentioned the facts of the officers' misconduct in town; further that the General was dissatisfied with it and "the bad influence it was setting" (R. 17).

The Lux Bar is a drinking establishment in Port Lyautey and open to the public. After the bar closes at 1830, the management serves French civilians until about 1900, "but there are some purchases on the side". Between 2000 and 2100 on the evening of 18 January 1943, the accused was in the Lux Bar trying to purchase a bottle of wine, and the waiter was trying to tell him they were out. There was a crowd of eight or ten people, around the accused - civilians, American soldiers, French soldiers and officers - and he "seemed to have been

causing some disturbance", when the Shore Patrol, consisting of Bennie Pierce Strickland, Yeoman, 3rd Class, and his assistant, entered the Lux Bar in the course of its regular rounds. The Shore Patrol's orders with reference to officers, according to Strickland's testimony required that "when we find them in a drunken condition we only try to quiet them down which we always try to do, then carry them back to their station". Strickland asked the accused to quiet down. The accused responded by telling Strickland "Allez, Allez". Strickland repeated his request, stating, if it was not complied with, the Shore Patrol would have to take further steps in the matter. The accused turned around "and saw that we were M.P.'s or Shore Patrol" and began to quiet down. Strickland and his assistant started out. They had reached the door, when an outburst of noise caused them to look around. The accused had drawn a pistol and was brandishing it in the direction of some soldiers, sailors and French officers. The Patrol "immediately took steps to make him put his gun away, which he did". The yeoman's testimony continues:

> "He then made the remark to one of the M.P.'s that 'If I kill one of Lieutenant Lafferty's men I will get a ten day leave'. One of the M.P.'s ran outside and blew his whistle two times and a Lieutenant Watch Officer appeared and the case was turned over to him * * *".

To the best of Strickland's judgment, the accused was drunk (R. 5-7).

During the period of time covered by Strickland's testimony, Private First Class Walter S. Smotherman of the Military Police Platoon, 9th Infantry Division, was at the Lux Bar making his regular round. He and his assistant were near a table at the end of the bar, talking, in line of military police duty, to another soldier, a friend of theirs. The accused came into the bar "with a pack or something in his hand". He looked at Smotherman and his assistant, and made some motion with his mouth as if saying "Allez", directing them to get out. "He looked like he was drinking", Smotherman testified, "so I didn't say anything or didn't move". Then the accused came over to the military policemen and made the remark, "Lt. Lafferty would not like for one of his men to be in the Lux Bar" telling them to get out and get to their posts where they belonged. Smotherman remarked, "Sir, you have given me a

direct order to get out", and obeyed it; but soon returned with his assistant to check further. When he entered the bar the second time, the accused, who was "waving a pistol in the air", came over to Smotherman, asserting, "Lt. Lafferty has given me permission to shoot any of his men and if I shoot one of them, I'll get a 10 day leave". This prompted Smotherman to go to the door and blow his whistle, whereupon Lieutenant Scott - "the Lieutenant on Patrol" - came over and started talking to the accused (R. 8-10).

Smotherman's experience with the military police had taught him, "If you can drink ten bottles of beer, it will make you drunk". He would say, he testified, that the accused was eight-tenths drunk; following this testimony, he responded in the affirmative to the defense counsel's suggestion, "Then you would say that he had had eight bottles of beer or the equivalent?" It was his duty, Smotherman also testified, to arrest the accused under the circumstances; instead he went out and got Lieutenant Scott - the Watch officer - and turned the case over to him (R. 10).

Second Lieutenant Jesse D. Scott, Company A, 60th Infantry, was on patrol duty for his battalion in Port Lyautey, on the night of the offense. This duty consisted of "seeing that men were properly dressed, and maintaining discipline". At approximately 2030, he heard two loud whistle blasts, the signal for the military policemen. A quarter of a minute later, a military policeman came running over to him and reported "an officer in the Lux Bar causing some trouble and flashing a pistol around", at the same time requesting Lieutenant Scott to "come over and straighten it out". Lieutenant Scott immediately proceeded to the Lux Bar where the accused was pointed out to him. He walked up to the accused and said "Lieutenant, I hear you have a pistol on you and you might get into some serious trouble", also mentioning "that there is an order out against carrying a weapon in town". He referred to Daily Order Number 28, Headquarters First Provisional Brigade, Western Task Force, 19 December 1942, already quoted in full. The accused made no response but accompanied Lieutenant Scott across the room away from the bar, while Scott tried unsuccessfully to get the gun away from him, asserting; "No, I'd rather give up drinking than to give up my pistol". Then Scott persuaded him to go outside, telling him it was best to get out of town and stop drinking, to which the accused agreed; but refused a ride to his organization which Scott offered him, in the quarter-ton truck in which Scott followed slowly as the accused walked up the

street, staggering slightly, until he disappeared behind the telephone exchange building (R. 11-13).

Lieutenant Scott testified, with reference to the accused, "I would say he was drinking pretty heavily but I couldn't swear to the exact degree of drunkenness". He did not see the accused with the pistol, but he "saw a bulge on his blouse that could have been a gun or it could have been some other object" (R. 11-12).

That same night, as Captain Liggett, the accused's company commander, was driving away from the PTT Building, the accused hailed his vehicle and requested "transportation back to the bivouac area". Captain Liggett could not determine whether the accused was drinking or drunk when he entered the vehicle. About 2400, that same evening, Captain Liggett accompanied the Division Signal Officer to the accused's tent for an interview, in which the Provost Marshal, 9th Division, also participated. The accused was asked if he was in town that night "about 2300", and if he had a gun. He said he did have, but that he had misplaced it and did not know where it was. Before the interview was concluded, however, it was found "outside the tent in some sand" (R. 13-14, 16).

Upon cross-examination it developed that the Division Signal Officer had originally charged the accused under Article of War 96. The charge was changed to violation of Article of War 95 upon the advice of the division judge advocate (R. 16-17).

4. The evidence for the defense shows that on the day of the offense, coffee was late arriving at the switchboard in the PTT Building, and the accused telephoned to ascertain when it would be sent. Staff Sergeant Dale R. Roush, 9th Signal Company, took the call. The accused instructed him to get the coffee ready, and Sergeant Roush advised the accused that he had the coffee "on the way". Sergeant Roush could not say that, at any time during this telephone conversation, the accused seemed rational. Sergeant Roush did not see the accused at all, in the evening (R. 18).

First Lieutenant Henry W. Blanchard, 9th Signal Company, was appointed investigating officer with reference to the offenses alleged in the Specifications in this case, which were then charged under Article of War 96. He did not at any time investigate any charges under Article of War 95 (R. 18-19).

5. The accused, having been properly advised of his rights as a witness, elected to "remain mute" (R. 19).

6a. Specification 1 of the Charge alleges that the accused, while

in uniform and in the presence and hearing of several persons, was so drunk and disorderly in a public place as to disgrace the military service.

The uncontradicted evidence shows that, after creating a disturbance in a public bar, with eight or ten persons - "civilians, American soldiers, French soldiers and officers" - surrounding him, he ordered away the members of the military police and shore patrol who were performing their duty in attempting to quiet him; and, waving a loaded pistol, announced that he had permission to shoot military policemen and, if he shot one, would get a 10 day leave. His language and conduct were such as to cause uncontradicted witnesses to characterize him as "drunk", "eight-tenths drunk" and "drinking pretty heavily". While Lieutenant Scott "couldn't swear to the exact degree of drunkenness", the record indicates it was sufficient, in connection with the words and actions proved, on the occasion in question, to reflect disgracefully upon the military service, and to constitute conduct unbecoming an officer and a gentleman.

b. Specification 2 of the Charge alleges that the accused willfully and unlawfully brandished a pistol in a public place. The evidence that he willfully brandished the pistol in a public place is uncontroverted. The basis of the illegality appears to be the violation of Daily Order # 28, Headquarters First Provisional Brigade, Western Task Force, 19 December 1942, involved in carrying the pistol off duty. There is no evidence that the accused was a member of this brigade. However, the brandishing of the pistol was part and parcel of the drunken disorder alleged in Specification 1, and, as such, was unlawful. The two Specifications in fact reflect two phases of the same offense; or rather the "disorder", referred to generally in Specification 1, comprised and included the brandishing of the pistol, described specifically in Specification 2. As both Specifications are drawn under Article of War 95, no prejudice resulted to the accused, either from the multifariousness of the pleading - indeed, as already suggested, Specification 2 amplifies and clarifies Specification 1 - or from the finding of guilty of both Specifications under the one Charge.

7. The changing of the Charge, at the suggestion of the staff judge advocate from violation of Article of War 96 to violation of

Article of War 95, after the case had been investigated, did not require a second investigation, since the investigation already made was concerned with the identical offense, and should properly have covered all matters essential to determining the necessity of a trial. This one investigation, therefore, constituted compliance with Article of War 70; in further compliance with which Article, the charge was properly referred to the staff judge advocate for consideration and advice before trial was directed. It was upon the staff judge advocate's advice that the change was made, without, in any manner, depriving the accused of any statutory right, but rather is clear furtherance of the purport of the statute (par. 35, pp. 24-26, M.C.M., 1928).

8. Immediately after the arraignment, and before pleading to the Charge and the Specifications, the defense moved for a two-day postponement of the trial, "due to lack of time and the seriousness of the charge, and the defense has not had sufficient time to secure the necessary witnesses to present its case as the charges in this case were served today * * *". The court complied with the prosecution's suggestion to proceed with the trial "and if at any time it becomes necessary for the defense, the court will grant a recess for the purpose". The defense voiced no objection to this arrangement, and made no subsequent motion for continuance, postponement or recess, but, when the prosecution rested, stated, "We desire to call two witnesses that are now available * * *", proceeded to introduce evidence, and, following the prosecution's argument, made one on behalf of the accused, based entirely on the evidence adduced on the trial. The provision of Article of War 70 that in time of peace, no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges against him, does not apply in time of war. Article of War 20 leaves to the discretion of the court the granting of a continuance for reasonable cause. The record, in this case, discloses no abuse of the court's discretion in proceeding with the trial.

9. The accused is 26 years of age. War Department records show enlisted service from 17 February 1941, terminated by honorable discharge 2 June 1942, to accept commission as Second Lieutenant, Signal Corps, Army of the United States, effective 3 June 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 mandatory upon conviction of a violation of the 95th Article of War.

Charles Gresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

SPJGN
CM 233763

1st Ind.

War Department, J.A.G.O., 12 JUL 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 W. Lowther (0-1633377), 9th Signal Company.

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, but in view of the youth of the accused and his inexperience as an officer, that the sentence be suspended during the pleasure of the President.

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 directing that the sentence as thus modified be carried into execution.

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 but suspended. G.C.M.O. 199, 12 Aug 1943)

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

SPJGH
CM 233766

MAY 26 1943

UNITED STATES v. Second Lieutenant JOHN M. NICHOLL (0-1302174), 322nd Infantry.	81ST INFANTRY DIVISION Trial by G.C.M., convened at Camp Rucker, Alabama, March 22, 1943. Dismissal.

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 Charge and Specification:

CHARGE: Violation of the 95th Article of War.

Specification: In that Second Lieutenant John M. Nicholl, 322nd Infantry, did at Camp Rucker, Alabama, on or about February 28, 1943, conduct himself in a manner unbecoming an officer and a gentleman by getting drunk together with and in the presence of an enlisted man, to-wit: Staff Sergeant Ivan L. Medley, Anti-Tank Company, 322nd Infantry, this to the prejudice of good order and military discipline.

Accused pleaded not guilty to and was found guilty of the Charge and Specification thereunder. 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 on the evening of February 28, 1943, when Major Chester A. Lively, 322nd Infantry, returned to his barracks at about 2200 o'clock, he went to the latrine before retiring and found there a sergeant, whom he later learned was Sergeant Medley in "pretty bad shape" and intoxicated. Major Lively followed the sergeant into the room of Lieutenant Wade and the accused. The sergeant stated that he belonged to Company C. Accused was lying face down on his bunk, fully dressed with his blouse and pink uniform, and was very seriously under the influence of liquor. He failed to stand on his feet when Major Lively entered the room, his eyes were blurred, his face flushed and he had nothing to say. Major Lively "could not say positively" whether the accused and the sergeant had been drinking together. The sergeant had a bottle of beer in his hand when Major Lively entered the room. There was no indication that the accused had given to the sergeant the bottle which the sergeant was holding in his hand (R. 4-6). Major Lively informed the regimental commander Colonel B. W. Venable, of what he had seen, and as directed, ordered the sergeant to leave the barracks immediately and told accused that he was under arrest and confined to his quarters.

Second Lieutenants Jack T. Garrett and Norvin E. Ingram occupied a room next to the room of accused. Major Lively came to the door and asked Lieutenant Garrett to come to the next room as a witness. Lieutenant Garrett found the accused and a staff sergeant in the room. He saw the accused lying on his bed, with his face flushed and his eyes "kind of watery". The accused was slow to respond in talking. Lieutenant Garrett testified on direct examination that accused had a bottle in his hand but on cross-examination stated that he was afraid that he could not swear that accused did have a bottle in his hand. He did not observe whether the sergeant had a bottle of beer. There was a case of beer in the middle of the floor and some beer bottles all around the room. In the opinion of Lieutenant Garrett the accused was under the influence of liquor and the sergeant was thoroughly under the influence of liquor. Lieutenant Garrett then returned to his room (R. 7-9).

Upon the return of Lieutenant Garrett, Lieutenant Ingram went to the room of accused. He saw the accused lying on the bed and a staff sergeant on the opposite bunk. Upon cross-examination Lieutenant Ingram stated that before he came into the room, the sergeant had left the room with a beer bottle in his hand. The accused was on his back on the bed, had a "kind of a glassy stare" in his eyes, did not appear to know that Ingram was in the room, and seemed to be in an intoxicated

condition. In his opinion, the accused was drunk. He could not say whether the case of beer on the floor contained empty or full bottles. He did not observe the accused drinking beer (R. 6-7).

4. No testimony was introduced by the defense. The accused elected to remain silent.

5. The evidence shows that Major Lively found Sergeant Medley in the latrine of the officers barracks and followed him into the room of accused. The accused was lying on his bunk fully dressed. His eyes were blurred, his face was flushed, he had nothing to say and did not stand when Major Lively came in. The sergeant had a bottle of beer in his hand in the room, but there was no indication that the accused had given it to him. There was a case of beer bottles on the floor but it was not shown whether they were empty or full, and some beer bottles were around the room. Major Lively believed that the accused was very seriously under the influence of liquor, Lieutenant Garrett expressed the opinion that he was under the influence of liquor, and in the opinion of Lieutenant Ingram the accused was drunk.

The record clearly demonstrates that the accused was drunk in his quarters. There is, however, no direct proof that the accused became drunk with and in the presence of Sergeant Medley. There is no direct proof that Sergeant Medley had been in the room of the accused prior to the time Major Lively followed Medley into that room and found the accused lying on his bunk. The circumstances that Sergeant Medley went from the latrine to the room of the accused, that Medley had a bottle of beer in his hand, that there was a case of beer bottles in the room and beer bottles were around the room, and that both the accused and Sergeant Medley were intoxicated do raise a suspicion that the accused and Sergeant Medley became drunk together in the room of accused.

It is well established that all of the elements of an offense may be proven by circumstantial evidence (16 C.J. 766). It is equally well established that mere conjecture or suspicion does not warrant a conviction. With respect to circumstantial proof, the following has been heretofore quoted with approval by the Board of Review (CM 197408, McCrimon; CM 206522, Young; CM 207591, Nash et al; CM 228831, Wiggins).

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

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

The Board of Review is of the opinion that the proof fails to establish that accused became drunk together with and in the presence of Sergeant Medley, but does establish that the accused was guilty of the lesser included offense of being drunk in Camp Rucker in violation of the 96th Article of War.

6. The accused is 29 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from January 20, 1941; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty, December 2, 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 only so much of the findings of guilty as involve findings of guilty of being drunk in camp by accused at the time and place alleged, in violation of the 96th Article of War, the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violation of the 96th Article of War.

Martin S. Kee Jr., Judge Advocate

Samuel M. Drivers, Judge Advocate

J. 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 Second Lieutenant John M. Nicholl (0-1302174), 322nd Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty as involves findings of guilty of being drunk in camp at the time and place alleged, in violation of the 96th Article of War, and the sentence, and to warrant confirmation of the sentence.

The record fails to support the findings of guilty of getting drunk together with and in the company of an enlisted man in violation of the 95th Article of War but does show the accused guilty of the lesser included offense of being drunk in camp in violation of the 96th Article of War. The offense, in my opinion, does not require execution of the sentence of dismissal, but warrants commutation thereof to a reprimand and forfeiture of $25 per month for six months. I recommend that only so much of the findings of guilty be approved as involves findings of guilty of being drunk in camp in violation of the 96th Article of War, that the sentence be confirmed but commuted to a reprimand to be administered by the reviewing authority and a forfeiture of $25 per month for six months, and that the sentence as thus modified be carried into execution.

3. Inclosed are a draft of 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.
Incl. 1-Record of trial.
Incl. 2-Drft. ltr. for sig. Sec. of War.
Incl. 3-Form of Executive Action.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but commuted to reprimand and forfeiture of $25 per month for six months. G.C.M.O. 131, 1 Jul 1943)

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

SPJGQ
CM 233780

MAY 25 1943

UNITED STATES	)	FORT KNOX, KENTUCKY
	)	
v.	)	Trial by G.C.M., convened at Fort Knox, Kentucky, January 21 and February 5, 1943. Dismissal, total forfeitures, and confinement for fifty (50) years. Disciplinary Barracks.
	)	
Second Lieutenant CECIL J. BENTLEY (0-1010470), 13th Armored Division	)	

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 61st Article of War.

Specification: In that 2nd Lieutenant Cecil J. Bentley, 13th Armored Division, Camp Beale, California, attached to the Student Officers Group, Armored Force School, Fort Knox, Kentucky, did, at Fort Knox, Kentucky, without proper leave, absent himself from his station from about August 21, 1942, to about August 25, 1942.

CHARGE II: Violation of the 58th Article of War.
(Finding of guilty disapproved by reviewing authority).

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

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

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

Specification 1: In that 2nd Lieutenant Cecil J. Bentley, 13th Armored Division, Camp Beale, California, attached

to the Student Officers Group, Armored Force School, Fort Knox, Kentucky, being indebted to the Hollywood Plaza Hotel, Hollywood, California, in the sum of one hundred forty five dollars and fifty cents ($145.50), which account became due and payable on or about August 20, 1942, did, at Hollywood, California dishonorably fail and neglect to pay said debt.

Specification 2: In that 2nd Lieutenant Cecil J. Bentley, 13th Armored Division, Camp Beale, California, attached to the Student Officers Group, Armored Force School, Fort Knox, Kentucky, being indebted to Rodes-Rapier Company, Louisville, Kentucky, in the sum of one hundred fifty five dollars and thirty five cents ($155.35) which account became due and payable on September 1, 1942, did, at Louisville, Kentucky, dishonorably fail and neglect to pay said debt.

Specification 3: In that 2nd Lieutenant Cecil J. Bentley, 13th Armored Division, Camp Beale, California, attached to the Student Officers Group, Armored Force School, Fort Knox, Kentucky, being indebted to the Gibson Hotel, Cincinnati, Ohio, in the sum of thirteen dollars, eleven cents ($13.11) which account became due and payable on August 29, 1942, did at Cincinnati, Ohio, dishonorably fail and neglect to pay said debt.

Specification 4: In that 2nd Lieutenant Cecil J. Bentley, 13th Armored Division, Camp Beale, California, attached to the Student Officers Group, Armored Force School, Fort Knox, Kentucky, being indebted to the Netherlands Plaza Hotel, Cincinnati, Ohio, in the sum of ninety eight and 30/100 dollars (98.30) which account became due and payable on or about August 29, 1942, did, at Cincinnati, Ohio, dishonorably fail and neglect to pay said debt.

Specification 5: In that 2nd Lieutenant Cecil J. Bentley, 13th Armored Division, Camp Beale, California, attached to the Student Officers Group, Armored Force School, Fort Knox, Kentucky, being indebted to the Brown Hotel, Louisville, Kentucky, in the sum of one hundred and one dollars and thirty-four cents (101.34) which account became due and payable on or about August 25, 1942, did, at Louisville, Kentucky, dishonorably fail and neglect to pay said debt.

Specification 6: In that 2nd Lieutenant Cecil J. Bentley, 13th Armored Division, Camp Beale, California, attached to the Student Officers Group, Armored Force School, Fort

Knox, Kentucky, did, at Louisville, Kentucky, on or about September 1, 1942, with intent to defraud wrongfully and unlawfully make and utter to Rodes-Rapier Company, Louisville, Kentucky, a certain check in words and figures as follows, to wit: "Louisville, Kentucky, September 1, 1942, Name of Bank-Bank of America, City-Lompoc, California, Pay to Rodes Rapier Company or order Ninety dollars. I assert that the above amount is on deposit in said bank in my name subject to this check. Lieutenant Cecil J. Bentley, then well knowing that he, the said 2nd Lieutenant Cecil J. Bentley, did not have and did not intend to have and not intending that he should have any account in the Bank of America, Lompoc, California, for payment of said check.

Specification 7: In that 2nd Lieutenant Cecil J. Bentley, 13th Armored Division, Camp Beale, California, attached to the Student Officers Group, Armored Force School, Fort Knox, Kentucky, did, at Hollywood, California on or about August 7, 1942, conduct himself in a manner unbecoming an officer and a gentleman by registering at the Hollywood Plaza Hotel, Hollywood, California, a woman, as his wife, well knowing the said woman was not his wife, this to the prejudice of good order and military discipline.

Specification 8: In that 2nd Lieutenant Cecil J. Bentley, 13th Armored Division, Camp Beale, California, attached to the Student Officers Group, Armored Force School, Fort Knox, Kentucky, being indebted to the Friedman Company, Louisville, Kentucky, in the sum of eighty eight dollars and fifty cents ($88.50), which account became due and payable on or about October 10, 1942, did, at Louisville, Kentucky, dishonorably fail and neglect to pay said debt.

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

Specification 1: In that 2nd Lieutenant Cecil J. Bentley, 13th Armored Division, Camp Beale, California, attached to the Student Officers Group, Armored Force School, Fort Knox, Kentucky, having received a lawful command from Major Frank G. Lumpkin, Jr. (Cav) Armored Force, his superior officer to remain in the Armored Force Area, did, at Fort Knox, Kentucky, on or about August 25, 1942, willfully disobey the same.

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

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

Specification: In that 2nd Lieutenant Cecil J. Bentley 13th Armored Division, Camp Beale, California, attached to the Student Officers Group, Armored Force School, Fort Knox, Kentucky, having been duly placed in arrest at Pittsburgh, Pennsylvania, on or about October 8, 1942, did, at Pittsburgh, Pennsylvania, on or about October 10, 1942, break said arrest before he was set at liberty by proper authority.

Accused pleaded guilty to Charges I and III and the Specifications thereunder and not guilty to the remaining Charges and Specifications. He was found guilty of all Charges and Specifications. 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 fifty years. The reviewing authority disapproved the findings of guilty of Charge II and its Specifications and of Specification 2, Charge IV, approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record for action under Article of War 48.

3. Charge I, AW 61- Accused went absent without leave on August 21, 1942 (R. 11; Pros. Ex. B), and remained absent until he was apprehended on August 25, 1942, in Room 527 of the Brown Hotel at Louisville, Kentucky, by Sergeant James A. Garrison of the 1550th Military Police Company, who brought him back to Fort Knox on the evening of August 25 and, following instructions he had previously received from The Provost Marshal, Fort Knox, (R. 28) turned him over to the charge of quarters at Headquarters, Student Officer Group (R. 25-27) and notified Major Lumpkin, accused's commanding officer, by telephone, that he was back. Accused pleaded guilty to this offense.

Charge IV, AW 64, Specification 1: Major Frank G. Lumpkin, Commanding Officer of the Student Officer Group, Training Group, Armored Force School, Fort Knox, Kentucky, of which organization accused was then a member, about 10 p.m. on August 25, over the telephone ordered accused to go to his room and not to leave the area and to report to him at his office the next morning instead of reporting to class. Accused replied that he understood the orders (R. 29, 30; Pros. Ex. 1). Major Lumpkin also transmitted this same order to the accused through Sergeant Lester Bentman, the charge of quarters, over the telephone and the latter repeated it to accused (R. 29; Pros. Ex. 2) in the presence of Sergeant Garrison, who as described in the preceding paragraph, had just returned accused in arrest from an absence without leave. About 10:30 p.m. that same night, Major Lumpkin went to accused's quarters and found he was not there. He also made a thorough search of the barracks where accused was quartered, checked the AFS branch of the officers' club, and searched the Student Officer Group area, but could not find accused (Pros. Exs. 1 and 2, -depositions introduced with "no

objection" by accused as to 1, R. 33, and his consent as to the other, R. 35). The morning report of the Student Officer Group, AFS, bears an entry on October 9, 1942, as follows: "2nd Lt. Bentley, C. J., AWOL to desertion 8-26-42" (Pros. Ex. B).

Charge III, AW 95 - Accused pleaded guilty to all eight Specifications under this Charge and to the Charge. Arranged chronologically according to the dates of the commission of the various offenses, the pertinent evidence of record is as follows: As to Specifications 1 and 7: Mr. John J. Garrity, Jr., Manager of the Hollywood Plaza Hotel, Hollywood, California, testified that accused registered at that hotel on August 1, 1942, and occupied Room 719 at the rate of $65 per month. He later notified the management that his wife was coming to join him. On August 7, a lady whom accused represented and registered as his wife under the name of Mrs. C. J. Bentley joined him in the occupancy of Room 719. She was Rachael Pace, a waitress in Post Exchange #12, Civilian Barracks, Camp Cooke, California. She was not legally married to accused on August 7 and did not authorize him to register her as his wife. She brought her own baggage, consisting of two pieces, to the hotel. Mr. Garrity testified that accused left the hotel on August 16, 1942, but Miss Pace did not leave until August 23. Miss Pace testified that accused left at 5:30 p.m. August 8 and that she did not occupy the same room with him but moved in after he left. When both of them left, the amount of the hotel bill then due and unpaid was $165.50. On August 20, 1942, accused sent the hotel by Western Union a money order for $20 from Fort Knox and stated he was returning and would repay the balance on arrival. Miss Pace testified that accused left no funds with her to pay the accrued hotel bill when he left (Pros. Exs. 8 and 9). The balance of $145.40 for rooms and services for both of them was still due and unpaid to the hotel. The hotel is still holding two bags containing only civilian clothing belonging to accused.

Specification 5, Charge III - Mr. A. R. Tilmer, Assistant Manager of the Brown Hotel, Louisville, Kentucky (R. 17), testified that accused registered there on August 12, 1942 and remained until August 25 (R. 18, 19) during which period a charge for room and services amounting to $101.34 had accrued and was still due and unpaid (R. 19-20, 26; Pros. Exs. F to U). Accused was personally requested by Mr. Tilmer to pay the bill. He did not deny the obligation but stated he would take care of it within the next few days upon receipt of an expected expense check and travel orders from California (R. 21-22). This promise was never fulfilled. Accused was arrested by the military police at this hotel on August 25, 1942, as absent without leave, and returned to Fort Knox, Kentucky.

Specification 3, Charge III: Mr. Charles C. Miller, the Credit Manager of the Hotel Gibson, Cincinnati, Ohio, deposed that accused registered at that hotel on August 28, 1942, and occupied

Room 1035 at the rate of $3 per day. The room was found vacated the next day, August 29. At no time since then has accused paid the bill of $3 for the room and 11 cents for a local telephone call made while he was a guest. On August 28 the Gibson Hotel, as a personal service for his convenience, cashed accused's check in the amount of $10 drawn on the Bank of America at Lompoc, California, signed by accused as a member of "Troop A, 81st A.R., Camp Cooke". Accused received the cash but the check was not paid and was returned by the drawee bank with the notation "No Account" (R. 44; Pros. Ex. 10 with copy of this check attached).

Specification 4, Charge III: Mr. Charles J. Cronin, Credit Manager for the Netherland Plaza Hotel in Cincinnati, Ohio, deposed that accused registered at that hotel on August 26, 1942, paying $5 in advance for two days' occupancy of a room at the rate of $2.50 per day. Two days later, August 28, he informed the hotel management that he intended to remain longer and requested, and was assigned, a more expensive room at $6 per day. Up to that time he had become obligated to the hotel for room, accomodations and various services in the amount of $103.30, on which he paid the sum of $5. On August 29, Mr. Cronin went to accused's room about 11:30 a.m. and demanded payment of his account up to date, which at that time amounted to $98.30. Accused then and there wrote out, signed and gave Mr. Cronin a check payable to the Netherland Plaza in the amount of $110 drawn on the Bank of America, Lompoc, California. At 2:30 that same day Mr. Cronin, accompanied by two city detectives, again confronted accused and told him that the check previously given was drawn on a bank in which he did not have an account and showed him a telegram from the Lompoc bank which read: "Unable to locate account Lt C J Bentley". Accused's only reply was, "the money should have been in that bank". He said he was on a "sort of a party" and had a $200 check coming to him from Fort Knox, Kentucky. He attempted to call the finance officer at Fort Knox but before the call was completed he stated that a request to send this check to Cincinnati would subject him to embarrassment and might cause him to lose his commission. Mr. Cronin agreed to let him go to Louisville to get his check and either to forward the money or to return and pay his obligations in person. Accused said he had no money so Mr. Cronin advanced him $5 to proceed to Louisville. Accused then left the hotel (Pros. Ex. 11).

Specifications 2 and 6, Charge III: Mr. Hanford Smith, Vice-President of the Rodes-Rapier Company, Louisville, Kentucky, testified that accused was indebted to that company in the amount of $155.35 (February 5, 1943, the date of this trial) for various articles of uniform clothing and other merchandise purchased by him during August and September, 1942 (R. 12, 13; Pros. Ex. D). This amount has never been paid. It having been brought to the witness' notice on September 1

that accused, who then owed $142.85 to the company, was purchasing additional merchandise, Mr. Smith called accused by telephone at the Henry Clay Hotel in Louisville, Kentucky, and told him "we couldn't charge it" (R. 13). An understanding was then reached over the telephone that if accused would give the employee of the company, who would bring the merchandise to the hotel, a check for $90, this agent would then deliver the goods to the accused (R. 14). Accordingly, accused received the merchandise and gave the messenger his personal check, dated September 1, 1942, for $90, payable to the Rodes Rapier Company and drawn on the Bank of America, Lompoc, California. This check was made out on a blank countercheck of the Henry Clay Hotel which contains the printed statement on the face of the check just above the maker's signature, "I assert that the above amount is on deposit in said bank in my name subject to this check". The payee, Rodes-Rapier Company, within an hour after it received the check, deposited it in the Citizens Union Bank of Louisville and asked that an inquiry be wired to the Lompoc Bank whether or not it would be honored (Pros. Ex. C). The answer reads: "Has not been paid, unable to locate this account". The indorsement of the Lompoc bank on the back of the check is canceled out in red (R. 15; Pros. Ex. E). This $90 has never been paid.

Specification 8, Charge III: Mr. David F. Katz, Assistant Manager of the Friedman Company, testified that on August 24, 1942, he personally sold merchandise to the accused amounting to $88.50. There was introduced into evidence the regular sales slip signed by accused at the time of the purchase (Pros. Ex. X). As shown on the slip, this was a charge transaction with the understanding as noted thereon that it was to be paid September 10, 1942 (R. 23). The prosecution also offered in evidence as Exhibit Y a true copy of the ledger sheet of the Friedman Company showing the pertinent entry made thereon relative to this transaction in the regular course of business (R. 24, 25; Pros. Ex. Y). The account was not paid by accused September 10, 1942, and has not been paid in whole or in part since then (R. 24).

Mr. W. Frazer Dunlap, City Tax Receiver for the City of Louisville, Kentucky, who had had 30 years in the banking business and who had operated a branch bank for over 9 years (R. 44), was qualified as a handwriting expert. For 10 or 12 years he has testified as such in the Louisville courts, criminal and civil divisions, and is so employed by the Louisville police department at the present time. He testified that after comparing a signature of Lieutenant Bentley, identified by a previous witness on the stand at this trial, (Mr. Katz of the Friedman Company), as the accused's true authentic signature written in the presence of such witness, that the checks given to the Rodes-Rapier Company in the amount of $90, the Netherland Plaza Hotel in the amount of $110, the Gibson Hotel in the amount of

$10 and the Brown Hotel charge slips, were all written and signed by the same party who signed this original sales slip (R. 44, 45, 46).

Charge V: About 1 a.m. on the morning of October 8, 1942 accused was apprehended in Pittsburgh, Pennsylvania, by Captain William W. Carroll of the Pittsburgh Military Police Detachment on suspicion of having issued bad checks. Accused produced his commission as a second lieutenant and his discharge papers to establish his identity. Captain Carroll placed him in arrest and advised him that until such time as he could establish his true status he was "under strict arrest in these quarters and was not to leave the confines of this building". Accused was required to have the supervision of a noncommissioned officer when he left the building for his meals (R. 38; Pros. Ex. 3). Corporal John C. Gantt, Military Police Service Unit Detachment, Pittsburgh, deposed that, on October 10, 1942, while detailed as an armed guard and escorting accused to dinner in the latter's car, he permitted accused to visit a girl. While the girl came out of her house and sat in the car with accused, Gantt, having removed the ignition keys from the car, went up and sat on the porch of the girl's house. Shortly thereafter accused drove off in the car (R. 41; Pros. Ex. 4). He was apprehended by the military police at St. Louis, Missouri, on October 16, 1942 (Pros. Ex. 5).

His rights as a witness in his own behalf having been explained to him, accused elected to make an unsworn statement which reads as follows:

> "I am not trying to make any excuses. I am going to tell you just exactly how I feel as far as my case is concerned. About three years ago, the tenth of this month, was when I joined the army. I joined with the intent that soldiering would be my career. Well, after a little over two years in the ranks I made O.C.S. at Fort Knox and graduated from O.C.S. and went to California where I was stationed until this occurrence -- until this started. Now, most of this is instituted entirely through drink. I don't use that as an excuse. That is merely a statement. You will find that if you look over these hotel bills as itemized that probably fifty per cent of all items purchased or more are for intoxicating liquors and drinks in all of the hotels.. I am telling this as a story and somewhat as a plea to the court because I know that I have been accused and that I am guilty of some of these crimes and I also know that it will cost me my commission and probably much more. Well, whatever the verdict is of this court, I know I have punishment coming and I can take it, because I have had to live with myself for four months now in solitary confinement. When I lose my commission, I lose my self respect, dishonor my uniform and

my family. So, regardless of the outcome, even though I walked out of here a free man, I would not have much to look forward to. In the three years I have been in the army, the army has spent thousands of dollars on my training. They sent me to various schools where I studied and graduated from and my only regret now is that I can't serve the government any longer. The plea I wish to enter to the court is that in some way if it were possible that I would be allowed to go to combat duty as a private in any capacity to at least partly clear this case that is being held against me. That is all I have to say, sir." (R. 48, 49)

4. Findings: As to Charge I and its Specification, A.W. 61, and Charge III and the 8 Specifications thereunder, A.W. 95, the accused pleaded guilty. A plea of guilty is a judicial confession made in open court and is the highest form of confession known to the law. It admits all the facts set forth as to each and every allegation in the specifications of the charges to which it is offered. After a plea of guilty it is not necessary for the prosecution to make out a case (CM 118766, CM 134185, par. 378(3), p. 189, Dig. Ops. JAG 1912-40). None of the testimony of record offered by either the prosecution or the defense relative to the Charges and Specifications to which accused pleaded guilty is inconsistent with the plea or indicates that such plea was improvidently made.

Charge IV, Specification 1 - A.W. 64: The evidence is clear that the accused received a command from his superior officer, Major Lumpkin, to go to his room and not to leave the area (Pros. Ex. 1). The exact wording of the allegation as set forth in the Specification is, as to the order: "to remain in the Armored Force area". The substance of the order as recited in the evidence of record is the same, although not phrased in the identical words set forth in the Specification. However, accused admits that he got the order and understood it. The variance does not affect the substantial rights of accused and is not fatal. The order was not one to be executed in the future but rather immediately, in the present. The reasoning that because accused was not found either in his room or in the area by the officer who gave the order within one half hour after he had given it, therefore the offense becomes a mere failure to obey in violation of Article of War 96 is not applicable under these circumstances. Major Lumpkin's order was express, personal and specific and he was obviously then acting in the execution of his office, that is, he was acting in the performance of his official duty as accused's commanding officer. There is competent evidence of record sufficient to sustain this finding.

Charge V - A.W. 69, breach of arrest: The evidence establishes that accused was in "strict arrest" in the military police barracks in

Pittsburgh and that the officer, Captain Carroll, who lawfully placed him in such arrest fixed the limits of his restraint to the barracks building with one exception - the accused was allowed to go under guard of a noncommissioned officer to a downtown restaurant to eat his meals. Before being set at liberty by proper authority, he transgressed the limits of his arrest and restrictions. The evidence as to this Charge and Specification is clear and conclusive.

5. War Department records disclose that accused is 23 years of age. He graduated from the North Bennington, Vermont, High School in 1938 and attended one year, 1939, the College of Methods, Ocean Park, Maine. He was a salesman for one year. From July 17, 1939 to the date of Federal recognition, February 24, 1941, he was a member of Company I, 172nd Infantry, National Guard of Vermont. He served as a private and noncommissioned officer in this organization from February 24, 1941 to December 12, 1941. He attended the Armored Force Officer Candidate School, Fort Knox, Kentucky, and was commissioned a temporary second lieutenant, Infantry, Army of the United States, on May 23, 1942.

6. 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 Articles of War 61, 64 and 69, and is mandatory upon conviction of violation of Article of War 95.

William A. Pounds, Judge Advocate.

Percy E. Gow, Judge Advocate.

Herbert R. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O. JUN 12 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 Cecil J. Bentley (0-1010470), 13th Armored Division.

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 confinement be reduced to five years, that the sentence as thus modified be carried into execution, and that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

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 confinement reduced to two years. G.C.M.O. 160, 24 Jul 1943)

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

SPJGH
CM 233806

APR 17 1943

UNITED STATES	)	NINTH SERVICE COMMAND
	)	
v.	)	Trial by G.C.M., convened at
	)	Presidio of San Francisco,
General Prisoner JOHN McCASLIN.	)	California, March 8 and 23,
	)	1943. Dishonorable discharge
	)	and confinement for five (5)
	)	years. Disciplinary Barracks.

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

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

2. The accused was found guilty of desertion at the Presidio of San Francisco, California, on or about November 26, 1942, terminated by apprehension at El Centro, California, on or about February 4, 1943, in violation of the 58th Article of War; and escape from confinement on November 26, 1942, in violation of the 69th Article of War.

3. The only question requiring consideration is whether the record of trial is legally sufficient to support the sentence.

The accused was sentenced "to be confined at hard labor at such place as the reviewing authority may direct for five (5) years". The president announced the findings and sentence, and the court adjourned on March 8, 1943 (R. 16). The record is authenticated by the signatures of the president and of the trial judge advocate. The assistant defense counsel signed a statement that he had examined the record. The letter of the trial judge advocate transmitting the record of trial to the convening authority is dated March 20, 1943.

The court thereafter reconvened on March 23, 1943, pursuant to the call of the president. All members of the court present at

the close of the previous session in this case, the assistant trial judge advocate and the assistant defense counsel, were present. The accused and the reporter were not present.

The following proceedings were then had:

"The court was closed and amended the record by inserting on line 9 of page 16, after the word 'years', 'and to be dishonorably discharged the service, and to forfeit all pay and allowances, due or to become due'.

"The court then, at 1714 on March 23, 1943, adjourned to meet at the call of the president."

The record of the reconvened session is authenticated by the president and the assistant trial judge advocate, and was examined by the assistant defense counsel.

The reviewing authority, on March 31, 1943, 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.

4. Article of War 40 provides in part:

"No authority shall return a record of trial to any court-martial for reconsideration of -

* * *

"(d) The sentence originally imposed, with a view to increasing its severity, unless such sentence is less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction has been had.

"And no court-martial in any proceedings on revision, shall reconsider its finding or sentence in any particular in which a return of the record of trial for such reconsideration is hereinbefore prohibited.".

In CM 152731, Ross, the President, on August 24, 1922, approved the opinion of the Acting Judge Advocate General that -

"When the record of a court-martial is 'finally approved and adopted by the court as a body and authenticated by the signature of its president and the trial judge advocate', the accused is entitled as of right to have it forwarded to the appointing authority. Until the 'legal record' is thus brought into existence, the

court has plenary power over it for the purpose of making it 'speak the truth' and for the further purpose of revising its sentence in accordance with truth and justice. * * *."

In CM 166782, Berry (1925), in which the court on the next day after it had adjudged findings and sentence, revoked the old and adjudged new findings and sentence, the Board of Review quoted with approval the paragraph quoted above from the Ross case, and held, in part, that the new sentence adjudged was legal. The Judge Advocate General concurred in the opinion of the Board in the Berry case "in so far as it holds that the action of the court was legal in revising its findings and sentence, on its own motion, prior to the completion of the record of trial and its transmission to the convening authority."

It follows that the reviewing authority could not legally have returned this record of trial to the court for revision proceedings and for the increase in severity of the sentence adjudged by the court at its session on March 23, 1943, and that the court likewise was without authority to increase, by amendment, the severity of the sentence in that manner on March 23, 1943, after the record of the court-martial had been finally approved and adopted by the court as a body, authenticated by the signatures of its president and the trial judge advocate, and transmitted, on March 20, 1943, to the convening authority. It is to be noted that the court did not purport to revise the record to make it "speak the truth" with respect to the sentence stated to have been adjudged on March 8, 1943, but that it "amended the record by inserting" words increasing the severity of the sentence. The action taken on March 23, 1943, with respect to modifying the sentence adjudged on March 8, 1943, was accordingly void and of no effect.

5. In the case of a general prisoner whose prior sentence to dishonorable discharge had been suspended, the Board of Review held that a sentence including only confinement at hard labor for twelve years was legal (CM 202416, Deskins).

6. 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 confinement at hard labor for five years.

Arthur S. Hill, Judge Advocate.

Percy G. Eyer, Judge Advocate.

Samuel M. Driver, Judge Advocate.

SPJGH
CM 233806

1st Ind.

War Department, J.A.G.O., MAY 13 1943 - To the Commanding General, Ninth Service Command, Fort Douglas, Utah.

1. In the case of General Prisoner John McCaslin, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the sentence as involves confinement at hard labor for five years, which holding is hereby approved. Upon the approval of only so much of the sentence as involves confinement at hard labor for five years 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 233806).

Myron C. Cramer

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

MAY 14 43 PM

RECEIVED MAY 18 1943 H.Q. 9th S.C.

RECEIVED MAY 18 1943 9th SERVICE COMMAND CORPS. AREA

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

SPJGK
CM 233812

12 JUN 1943

UNITED STATES v. Second Lieutenant KERMIT M. BILL (0-1308587), 187th Glider Infantry.	11TH AIRBORNE DIVISION Trial by G.C.M., convened at Camp Mackall, North Carolina, April 5, 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 Charge and Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that 2nd Lieut. Kermit M. Bill, Inf., Army of the United States (Temporary), Hq. Co., 1st Bn., 187th Glider Inf., did without proper leave absent himself from his station at Camp Mackall, Hoffman, N.C., from about 7:00 A.M., March 22, 1943 to about 7:30 P.M., March 26, 1943.

He pleaded guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced "to be dismissed the service, and 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 five years". The reviewing authority approved only so much of the sentence as provides for dismissal and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows:

By a properly authenticated extract copy of the morning report, Headquarters Company, 1st Battalion, 187th Glider Infantry, submitted at Camp Mackall, North Carolina, it was shown that the accused, as a

member of that organization, absented himself without leave from 0700 o'clock, March 22, 1943, to 1800 o'clock, March 26, 1943 (R.3,4; Ex. A).

Colonel Harry B. Hildebrand, 187th Glider Infantry, testified that the accused, in order that he might visit his wife, in Raleigh, North Carolina, was given a pass, good from Friday night, March 19, 1943, until Monday morning, March 22, 1943. Witness stated that accused did not return Monday morning. About 7:30 P.M., March 26, 1943, Colonel Hildebrand was in his quarters and saw the accused going to the latrine. The Colonel immediately sent for the accused who reported promptly. Colonel Hildebrand spoke to accused relative to his unauthorized absence, warning him that he did not have to make any statement but that any statement made might be used against him. The accused replied "I have no excuse to offer" and was then placed in arrest by Colonel Hildebrand (R.4-5).

4. For the defense, Major Lyle J. Arnold, 187th Glider Infantry, stated that he had known accused for five weeks and as the regimental supply officer, he had worked with the accused who was one of the Battalion Supply Officers. With respect to the character, qualifications and efficiency of the accused, Major Arnold stated:

> "Throughout his service with me he has been a very excellent officer and extremely efficient and has done his work well. * * * I believe he has a continued value in the service and I would be glad to use him under my command at any time" (R.7).

Accused made the following unsworn statement:

> "I was granted permission by my Commanding Officer, Col. Hildebrand, to be absent from my duties at Camp Mackall, North Carolina, on Saturday, March 20, 1943 in order that I might visit my wife in Raleigh, North Carolina.
>
> "My wife is an officer in the Women's Auxiliary Army Corps, having been commissioned on January 23, 1943 at Fort Des Moines, Iowa, three days after my own graduation from THE INFANTRY SCHOOL, Class 156, Fort Benning, Georgia.
>
> "We have been married since March 15, 1940. I enlisted as a Volunteer Officer Candidate on June 25, 1942, was 'Recommended with Confidence' for Officer Candidate School by Colonel Don M. Scott, Commanding Officer of the 19th Infantry Training Regiment, Camp Roberts, California: entered Officer Candidate School on October 21, 1942 and was commissioned on

January 20, 1943. I was sent first to Camp Croft, South Carolina, and then here, to Camp Mackall. My wife has been stationed in Detroit, Michigan.

"For some time this separation has upset me, and I have been requesting of my wife that she obtain a transfer to some station less distant from Camp Mackall if possible, or ask for an Indefinite Leave of Absence in order that she might be near me.

"When she wrote to me that she would be passing through Raleigh on Saturday, March 20, I was overjoyed, as I thought that I might be better able to persuade her to ask for a transfer by talking to her personally than I had been able to do by mail or telephone.

"I left Camp Mackall on Friday night, March 19 with every intention of returning to my duties on Monday morning March 22. I proceeded to Raleigh as planned, but my wife was not on the train Saturday morning, to my very great surprise and chagrin. The fact that she was not on the train and had not communicated with me troubled me emotionally, and I had more to drink than I should have.

"The rest of the relevant facts are already before the Court. I returned to Camp Mackall Friday evening, March 26th, reported to my Commanding Officer, was placed under arrest, confined to quarters, and was charged with being absent without leave for four days. I have pleaded guilty to this charge. There is no doubt that I have done wrong. I deeply regret this occurrence and wish to atone for it. However, I ask the Court to consider that I was emotionally upset and that I had no desire to avoid or shirk my military duty. On the contrary, I still feel as strongly as at the time I volunteered, that I want to continue in the Military Service, and I beg the Court to impose any punishment which will allow me to return to, and continue at, my work here, or at some new station where I can make a fresh start."

5. Although accused pleaded guilty and confirmed his plea by his unsworn statement, the unauthorized absence of the accused as alleged in the Specification, was conclusively shown by the morning report (Ex. A) and by the testimony of Colonel Hildebrand.

6. Although the maximum sentence authorized upon conviction of an officer of absence without leave, in violation of Article of War 61, is such punishment as a court-martial may direct, the President of the court, in response to a statement by the accused that he was not familiar

with the maximum punishment imposable, erroneously stated that the maximum punishment was dismissal. In view of the competent evidence establishing the guilt of the accused, coupled with the action of the reviewing authority approving only so much of the sentence as provides for dismissal, the substantial rights of the accused were not injuriously affected by the erroneous explanation (Dig. Ops. JAG 1912-40, par. 378 (2), CM 144220 (1921)).

7. The accused is 34 years of age. The records in the Office of The Adjutant General show that he was commissioned temporary Second Lieutenant, Infantry, Army of the United States, January 20, 1943, and by paragraph 1, S.O. 17, Headquarters, The Infantry School, dated January 20, 1943, ordered to active duty as of that date.

8. There is attached to the record of trial, a communication from the accused to the reviewing authority inviting attention to the severity of the sentence imposed, and based upon his excellent record, requesting clemency.

9. 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 as approved by the reviewing authority. Dismissal is authorized upon conviction of violation of Article of War 61.

Jerry G. Lyon, Judge Advocate.

Wm Wainwright, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., JUN 1 4 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 Kermit M. Bill (0-1308587), 187th Glider 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 as approved by the reviewing authority and to warrant confirmation of the sentence as thus approved. 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 hereinbefore 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 as approved by reviewing authority confirmed but execution suspended. G.C.M.O. 155, 23 Jul 1943)

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

SPJGQ
CM 233817

10 JUN 1943

UNITED STATES	)	13TH ARMORED DIVISION
v.	)	Trial by G.C.M., convened at Camp Beale, California, March 11-12, 1943. Dismissal and total forfeitures.
Second Lieutenant JOSEPH R. TILLOTSON (0-1292617), 59th Armored Infantry Regiment.	)	

OPINION of the BOARD OF REVIEW
ROUNDS, HEPBURN 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 96th Article of War.

Specification 1: (Finding of not guilty).

Specification 2: In that Second Lieutenant Joseph R. Tillotson, 59th Armored Infantry Regiment, having received a lawful order on November 10, 1942, from Colonel Gordon P. Savage, 59th Armored Infantry Regiment, his commanding officer, not to borrow money from enlisted men, the said Colonel Savage being in the execution of his office, did, at Camp Beale, California, on or about January 15, 1943, fail to obey the same.

Specification 3: In that Second Lieutenant Joseph R. Tillotson, 59th Armored Infantry Regiment, being indebted to Staff Sergeant John B. Kilgore, Company I, 59th Armored Infantry Regiment, an enlisted man, in the sum of $15.00 for a personal loan which amount became due and payable within a reasonable time after December 20, 1942, did at Camp Beale, California from about December 20, 1942 to February 12, 1943, dishonorably fail and neglect to pay said debt.

Specification 4: In that Second Lieutenant Joseph R. Tillotson, 59th Armored Infantry Regiment, being indebted to Sergeant William R. Shepherd, Company I, 59th Armored Infantry Regiment, an enlisted man, in the sum of $20.00 for a personal loan which amount became due and payable within a reasonable time after December 20, 1942, did at Camp Beale, California from about December 20, 1942 to February 12, 1943, dishonorably fail and neglect to pay said debt.

Specification 5: In that Second Lieutenant Joseph R. Tillotson, 59th Armored Infantry Regiment, being indebted to Private First Class Charles J. Womack, Company I, 59th Armored Infantry Regiment, an enlisted man, in the sum of $90.00 for a personal loan which amount became due and payable within a reasonable time after January 15, 1943, did at Camp Beale, California from about January 15, 1943 to February 12, 1943, dishonorably fail and neglect to pay said debt.

CHARGE II: Violation of the 93rd Article of War. (Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification 1: In that Second Lieutenant Joseph R. Tillotson, 59th Armored Infantry Regiment, did, at Camp Beale, California, on or about January 11,

1943, with intent to deceive Major Aloysius E. McCormick, Jr., 59th Armored Infantry Regiment, his battalion commander, officially state to the said Major McCormick that he had paid certain delinquent accounts to Mrs. Eula Poole and to Mr. M.F. Adams, both Merchants of Marysville, California, which statement was made by the said Lieutenant Tillotson as true when he did not know it to be true in that said accounts had not been paid by him or by anyone in his behalf.

Specification 2: (Disapproved by reviewing authority).

Specification 3: In that Second Lieutenant Joseph R. Tillotson, 59th Armored Infantry Regiment, being indebted to Melvin F. Adams in the sum of Thirty-One and 50/100ths Dollars ($31.50) for the balance due on the purchase of flowers and decorations, which amount became due and payable on or about December 5, 1942, did, at Marysville, California, from about December 5, 1942 to February 12, 1943, dishonorably fail and neglect to pay such debt.

Specification 4: (Finding of not guilty).

He pleaded not guilty to all Charges and Specifications and was found guilty of Specifications 2, 3, 4 and 5 of Charge I and Charge I; Specifications 1, 2, and 3 of Charge III and Charge III. He was found not guilty of Specification 1 of Charge I; of the Specification and Charge II; and of Specification 4 of Charge III. The finding of guilty of Specification 2, Charge III, was disapproved by the reviewing authority. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge (subsequently changed by revision to "dismissal"), forfeiture of all pay and allowances due or to become due, and to confinement at hard labor for three years. The reviewing authority approved only so much of the sentence as provided for dismissal and total forfeitures and forwarded the record of trial for action under Article of War 48.

3. The evidence bearing upon Specification 2, Charge I, may be summarized as follows:

On November 10, 1942, Colonel Gordon P. Savage, the regimental commander of the accused, caused to be posted on the officers' bulletin board a memorandum containing, among other things, an order "under no circumstances is an Officer to borrow money from an enlisted man". (R. 7, 8; Ex. A). A check list of officers to be initialed by them daily to indicate that they had read all material posted upon the bulletin board was also posted on the same date and was initialed by the accused (R. 8, 13; Ex. B). Colonel Savage had previously explained to his officers, including the accused, the purpose and meaning of initialing a check list (R. 106). The records showed that the accused was not absent from a lecture given by Colonel Savage on November 9, 1942, in which he discussed the prohibition against officers borrowing money from enlisted men (R. 13).

During January, 1943, the accused borrowed $40 from Sergeant James J. Conner (R. 23) an enlisted man in his command. On or about the same date, at short intervals, the accused borrowed altogether $50 from Private First Class Charles J. Womack (R. 28, 29, 30) another enlisted man of his command.

The accused testified that he had no recollection of having read the posted order of Colonel Savage (R. 72). He admitted initialing the check list but stated that he saw nothing on the bulletin board pertaining to himself, and did not observe the order mentioned above (R. 76). He did not know that by initialing the check list he certified that he had read all material posted on the board (R. 84, 85, 93). He admitted borrowing money from the enlisted men named and claimed that he repaid the money thus borrowed on or about March 1, 1943, after he had been served with a copy of the charges (R. 90, 95).

4. The evidence bearing upon Specifications 3, 4, 5, Charge I, may be summarized as follows:

On or about December 20, 1943, the accused borrowed $15 from Staff Sergeant John B. Kilgore (R. 15), and at or about the same time he borrowed $20 from Sergeant William R. Shepherd (R. 19), which sums were still due and unpaid on February 12, 1943 (R. 16, 21).

The accused borrowed from Womack, during the latter part of January, 1943, the sum of $30 (R. 28) and within a few days thereafter an additional $20 (R. 29, 30). The $40 that the accused had borrowed from Conner earlier in January was in turn borrowed by Conner from Womack.

Accused learned of this transaction between Conner and Womack, and recognized the total indebtedness of $90 to Private Womack, which he repaid in full on March 1, 1943 (R. 31). About the 1st of February, 1943, the accused was told he had been selected for overseas duty and would be leaving on short notice (R. 9).

The accused, as a witness in his own behalf, admitted that he had borrowed the various sums mentioned from the enlisted men (R. 49, 90, 95); that he had never specified to the enlisted men any date upon which he was to repay the borrowed funds, and for that reason he had not repaid them as late as February 12, 1943 (R. 72, 97). Even though he was placed in arrest on February 10, 1943, because of his failure to repay these and other obligations and had received, on that same afternoon, a money order in the sum of $100, he did not repay any of his obligations from this fund but waited until he received his monthly pay on March 1, and made payment in the presence of his superior officers (R. 93, 95).

5. The evidence relating to Specification 1, Charge III, may be summarized as follows:

Lieutenant Colonel Aloysius E. McCormick received letters from two creditors of the accused about January 11, 1943 (Pros. Exs. D, F) and on that date, in his capacity as accused's commanding officer (R. 110), sent for the accused and asked for an explanation (R. 39, 40). The accused stated that the bills of the claimant's had been paid (R. 40, 41, 43) and promised to bring the receipts to Lieutenant Colonel McCormick showing the payment. On January 13, the accused admitted to Lieutenant Colonel McCormick that these bills had not been paid and promised to pay them (R. 40, 43). The bills had not been paid at the time of the trial (R. 56, 60).

The accused denied that he told Lieutenant Colonel McCormick that the bills had been paid, claiming that he said that he would pay them (R. 74, 83). He testified that he had told Lieutenant Colonel McCormick that he had sent a check in payment, which check was never received by the claimant nor was an envelope containing the check ever returned to the sender (R. 77).

6. The evidence relating to Specification 3, Charge III, may be summarized as follows:

Mr. Melvin P. Adams maintains a florist's shop at Marysville,

California. On October 31, 1942, the accused called at his shop and ordered flowers in the amount of $51.50 to be delivered on November 5. At the time he paid $20 on account and requested credit for the balance, promising to pay the balance in installments commencing December 1, 1942 (R. 52). The accused failed to make such further payment, notwithstanding several bills sent to him by the florist and a personal demand made upon him by Adams when he met the accused emerging from another florist's shop in the town. On January 7, 1943, Mr. Adams wrote to the accused's commanding officer relating the foregoing circumstances and asking his assistance to compel the accused to pay this balance (Ex. D). Accused, upon at least three occasions, had sufficient money with which to make payment of this bill but failed to do so (R. 88, 110).

The accused testified that he made numerous efforts to pay the florist's bill. He mailed a check to the florist on December 29, 1942, by posting it in the company mail box (R. 75, 77), but the florist had not received the check nor had the latter been returned to the accused (R. 78). While the accused customarily kept his check stubs (R. 83), he destroyed them on February 1, 1943, when his check book was used up (R. 84). His wife, upon two occasions, had tried to pay this florist's bill after working hours but found the store closed (R. 79, 88). On January 13, he gave $55 in cash to a woman taxi driver to pay this bill and a jeweler's bill (which totalled $62.58) but obtained the money back from the taxi driver when Lieutenant Colonel McCormick expressed doubt concerning this transaction (R. 75, 79). He had arranged for an allotment to be made out in the favor of his wife in the sum of $200, to be deposited in the bank for the purpose of paying his creditors (R. 73), but could not sign the application for the allotment because he went on a vacation February 7 (R. 80). He related other excuses for not paying these bills, principally his inability to get into town due to restrictions and duty (R. 42, 73, 81, 88).

7. With reference to Specification 2 of Charge I, the only questionable element of proof was whether the accused received the order. In this connection it was shown that the accused apparently attended a lecture given by Colonel Savage on the night of November 9 during which this very order was discussed; that on the following day Colonel Savage caused to be posted on the bulletin board a summary of this lecture containing the order in question; that the accused was required to examine all bulletins and notices posted on this bulletin board daily and to indicate that he

had examined these documents by initialing a check list; and that on the date on which this particular order was posted the accused did initial the check list. A reasonable inference from these circumstances could, therefore, properly be drawn that the accused was fully aware of and did receive the order in question.

The Manual for Courts-Martial, 134b, p. 149, provides, "Failure to comply with the general or standing orders of a command * * * is * * * an offense * * * under A.W. 96". Also,

"The form of an order is immaterial, as is the method by which it is transmitted to the accused." The Board is, therefore, of the opinion that there was sufficient evidence to sustain a finding of guilty of this particular Specification.

With reference to Specifications 3, 4, and 5 of Charge I, The Judge Advocate General in numerous opinions has held that the act of an officer borrowing money from an enlisted man is an offense under Article of War 96, CM 221833; CM 122920; CM 130989; CM 117782. The relationship of debtor and creditor between a superior officer and his military subordinate is prejudicial to good order and military discipline. The Specifications under discussion, however, do not charge the accused with borrowing money from an enlisted man but of dishonorably failing and neglecting to repay such debts. This act has also been recognized as a violation of Article of War 96. If the relationship of debtor and creditor between a superior and his military subordinate is prejudicial to good order and military discipline in its inception, it follows that a continuation of that relationship is equally prejudicial to good order and military discipline and also a violation of Article of War 96. This should be so whether the continuation of the relationship is upon a dishonorable basis, in so far as the superior is concerned, or not. However, the Specifications charge a dishonorable failure to repay and, therefore, it must be proved (CM 220760 (1942)).

It was clearly shown that the accused was a commissioned officer; that he borrowed various sums of money from numerous enlisted men; and that he failed to repay any of these debts or any part of them for a considerable period of time, and then not until after he was placed under arrest for the offense. The first occasion of borrowing money from enlisted men by the accused was December 20, 1942. From that date until March 1, 1943, he had received at least two pay checks and on February 10,

1943, had received $100 for the very purpose of repaying his obligations. About the first of February he had been informed that he was to be transferred to overseas duty almost immediately. Notwithstanding his ability to pay and the fact that he was about to leave the vicinity for a distant point, he made no effort to pay any of his obligations. It is, therefore, a fair inference from these circumstances that the accused dishonorably failed and neglected to pay these obligations.

The issue involved under Specification 1 of Charge III, was purely one of fact. Lieutenant Colonel McCormick testified that the accused deliberately stated that he had paid the bills in question. The accused testified to the contrary. The court, however, accepted as correct the testimony of Lieutenant Colonel McCormick. This it had a right to do. This Board is of the opinion that there was sufficient evidence to sustain this finding. Knowingly making a false official statement constitutes a violation of Article of War 95 (M.C.M., sec. 151).

With reference to Specification 3 of Charge III, accused claimed that he didn't have the opportunity to pay this bill and described his many efforts to do so. There was substantial evidence, however, to the contrary, that he did have the opportunity and the means and that he evaded payment in the face of his pending departure to a foreign country. Dishonorable neglect to pay debts is a violation of Article of War 95 (M.C.M., sec. 151).

8. The records of the office of The Adjutant General show that the accused was born in Spartanburg, South Carolina, on April 7, 1920; that he enlisted September 16, 1940, was discharged September 3, 1942, was commissioned 2nd Lieutenant of Infantry, A.U.S., September 4, 1942 and assigned to the 13th Armored Division, Camp Beale, California.

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 of guilty of the Specifications and Charges and the sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of violation of Article of War 95, and authorized upon conviction of violation of Article of War 96.

William A. Pounds, Judge Advocate.

Dale Hebbrun, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., JUN 12 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 R. Tillotson (0-1292617), 59th Armored Infantry 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 as approved by the reviewing authority and to warrant confirmation thereof. I recommend 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. Consideration has been given to the attached letter from the accused, dated April 9, 1943, addressed to the President, urging clemency in his behalf.

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. from accused, 4-9-43.

(Sentence as approved by reviewing authority confirmed but forfeitures remitted. G.C.M.O. 148, 17 Jul 1943)

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

SPJGQ
CM 233822

16 JUN 1943

UNITED STATES v. Second Lieutenant JOSEPH D. EASLEY (O-1288371), Air Corps.	)	ARMY AIR FORCE SOUTHEAST TRAINING CENTER Trial by G.C.M., convened at Fort Myers, Florida, March 11, 1943. Dismissal.

OPINION of the BOARD OF REVIEW
ROUNDS, HEPBURN 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: Violation of the 61st Article of War.

Specification 1: In that Second Lieutenant Joseph D. Easley, Air Corps, unassigned, attached to 719th Flexible Gunnery Training Squadron, Army Air Forces, Flexible Gunnery School, Fort Myers, Florida, did without proper leave, absent himself from his organization and station at Army Air Forces Flexible Gunnery School, Fort Myers, Florida, on or about September 16, 1942, and did remain in that status until, or about, September 18, 1942.

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

Specification 3: In that Second Lieutenant Joseph D. Easley, Air Corps, unassigned, attached to 719th Flexible Gunnery Training Squadron, Army Air Forces Flexible Gunnery School, Fort Myers, Florida, did, without proper leave, absent himself from his organization and station at Army Air Forces Flexible Gunnery School, Fort Myers, Florida, on or about, October 19, 1942, and did remain in that status until, on or about, October 22, 1942.

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

Specification 4: In that Second Lieutenant Joseph D. Easley, Air Corps, assigned to 328th Base Headquarters and Air Base Squadron, Buckingham Army Air Field, (Flexible Gunnery School) Fort Myers, Florida, did without proper leave, absent himself from his organization and station at Buckingham Army Air Field, (Flexible Gunnery School), Fort Myers, Florida, on or about December 25, 1942, and did remain in that status until, on or about, January 4, 1943.

He pleaded not guilty to Specification 1; not guilty to Specification 2 "except as to October 7 and 8, 1942"; not guilty to Specification 3 "except as to October 20 and 21, 1942"; guilty to Specification 4; and not guilty to the Charge. He was found guilty of all Charges and Specifications. 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 disapproved the finding of guilty of Specification 2; approved only so much of the finding of guilty of Specification 3 as involves a finding of guilty of absence without leave from October 20, 1942, to October 22, 1942; approved only so much of the sentence as provides for dismissal from the service; and forwarded the record of trial for action under Article of War 48.

3. The evidence shows that accused, a member of the Second Student

Squadron, Buckingham Army Air Field, Fort Myers, Florida, was absent without leave from his post and classes on September 16, 17 and 18, 1942, as shown by the morning report (Ex. B), the testimony of two of his instructors and his squadron commander (R. 14), to the effect that he was absent from classes during those days (R. 5, 7). He was transferred to the Third Student Squadron and was absent without leave from his post and classes on October 20 and 21 as shown by the morning report (Ex. C), and the testimony of his squadron commander (R. 18).

With reference to Specification 4, the morning report of the accused's organization showed the accused to be absent without leave from December 24, 1942, to January 4, 1943 (Exs. E, F), verified as correct by First Sergeant Thomas J. Golightly, 328th Base Headquarters and Air Base Squadron (R. 20), and Captain Alvin M. Hutchinson, Air Corps (R. 21). On December 23, 1942, a telegram was received purportedly from the accused (Ex. G) requesting 10 days' leave. On the same day the accused telephoned headquarters and orally requested 10 days' leave. He was told by Major Harry W. Alexander, Post Adjutant, that his request was refused and to return to the post (R. 23). On January 4, 1943, a wire was received, purportedly from the accused, to the effect that he was returning that date (Ex. H). He returned on that date at 6:30 p.m. (R. 24).

4. The accused elected to be sworn as a witness and testified, in substance, that he was sick on September 16, 17 and 18, 1942, in his hotel room in Fort Myers; that, with reference to Specification 4, when his request for 10 days' leave was refused, he left Sebring, Florida, where he was at the time, and went to Tampa, Florida, intending to return to his post at Fort Myers. There he was unable to board a bus for Fort Myers because of the congestion of travel so he went to the home of Mrs. Frank J. Lyons - a woman about 60 years of age, whom he had known for many years, intending to take a bus for Fort Myers the following morning. He was invited to attend a social function and sent his only uniform to be pressed. His bag containing his other clothes had already been sent to Fort Myers. He fell asleep and didn't awaken until the following morning. He had no clothes. His pocketbook had disappeared. Mrs. Lyons could not locate his uniform, so three days later she went out to purchase him another uniform. She purchased the uniform and sent it to her home for the accused. She herself continued on to Miami. The uniform never arrived. The accused remained in the apartment for a week until Mrs. Lyons returned and brought him the uniform and a bus ticket. He then left for and arrived at Fort Myers. There was a telephone in the apartment, but he made no attempt to communicate with the post.

Captain Roscoe G. Kincaid, Air Corps, was called as a witness for the defense and testified that he roomed with the accused during September 1942; that on September 16, the accused told him he was sick and asked him to report that fact, which he did; and that the accused remained in the room September 16, 17 and 18 (R. 26-29). On cross-examination, the witness admitted that he had told the investigating officer that September 18, 1942, was the first day that the accused was sick, and that the accused was not in his room on September 16 or 17. Captain Kincaid claimed he made a mistake as to dates in his statement to the investigating officer.

5. The evidence clearly showed that the accused was absent from his post and organization September 16, 17, 18, October 20, 21, December 24 to 31, 1942, and January 1 to 4, 1943. This was admitted by the accused. He had no authority to be absent. The accused claimed no authority but testified solely regarding possible extenuating circumstances concerning his guilt of being absent from December 24, 1942, to January 4, 1943. Notwithstanding his admissions and pleas of guilty, the prosecution provided ample evidence to support the findings of guilty.

6. The accused is 36 years of age. The record shows enlisted service in the Army from February 17, 1937, until July 21, 1942, when he was commissioned as a Second Lieutenant, Air Corps, A.U.S.

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 of the sentence. A sentence of dismissal is authorized upon conviction of violation of Article of War 61.

William H. Parnell, Judge Advocate.

Carlos Hepburn, Judge Advocate.

Herbert B. Hudnell, 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 Joseph D. Easley (0-1288371), 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 as approved by the reviewing authority 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 as approved by reviewing authority confirmed. G.C.M.O. 146, 17 Jul 1943)

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

SPJGK
CM 233833

2 JUL 1943

UNITED STATES v. Private JOHN PARIHUS (33021006), Company H, 1st Armored Regiment, alias Private JOHN J. URBAN (15103862), Company C, 8th Armored Replacement Battalion, Armored Force Replacement Training Center.	FORT KNOX, KENTUCKY Trial by G.C.M., convened at Fort Knox, Kentucky, February 17, 1943. Dishonorable discharge and confinement for life. Disciplinary Barracks.

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 Charges and Specifications:

CHARGE I: Violation of the 54th Article of War.

Specification: In that Private John Parihus, Company H, 1st Armored Regiment, Fort Dix, New Jersey, alias Private John J. Urban, Company C, 8th Armored Replacement Battalion, did, under the name of John J. Urban, at Fort Benjamin Harrison, Indiana, on June 27, 1942, by willfully concealing the fact he was then a private in said Company H, 1st Armored Regiment, Fort Dix, New Jersey, procure himself to be enlisted in the military service of the United States by 2nd Lieutenant H.V. Chichester, Field Artillery, and did thereafter at Fort Knox, Kentucky, receive pay under the enlistment so procured.

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

Specification: In that Private John Parihus, Company H, 1st Armored Regiment, Fort Dix, New Jersey, alias Private John

J. Urban, Company C, 8th Armored Replacement Battalion, did, at Fort Dix, New Jersey, on or about May 4, 1942, desert the service of the United States and did remain absent in desertion until on or about October 20, 1942.

The accused pleaded not guilty to and was found guilty of all Charges and the Specifications thereunder. 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 at such place as the reviewing authority may designate for the term of his natural life. 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.

3. Inasmuch as the Charges and Specifications involve strictly military offenses, and since the review of the staff judge advocate contains a fair and comprehensive statement of the evidence, the Board of Review deems it unnecessary to incorporate in this review a restatement of the evidence. Suffice it to say that the undisputed evidence, including the testimony of the accused himself, shows:

The accused, a member of Company H, 1st Armored Regiment, left his organization without leave at Fort Dix, New Jersey, on 4 May 1942 (R.21, Ex. H). He went to Louisville, Kentucky, rented a room in a private home, wore civilian clothes and accepted private employment (R.15,16). On 18 May 1943 he registered with Selective Service Board No. 75 of Louisville, Kentucky, under the name of Jack Urban, giving his age as 21, and Beaumont, Texas, as the place of his birth, applied for and was given a release to join the Army (R.11, Exs. A and B). On 27 June 1942, and before he had been discharged from his former enlistment, accused reenlisted in the Army at Fort Benjamin Harrison under the name of John Urban (Urban being the family name of his mother), and was assigned to Company C, 8th Battalion, Fort Knox, Kentucky (R.8, Exs. D and E). Accused drew pay and allowances under his false enlistment (R.24). His false enlistment was definitely determined and he was arrested and confined in Post Stockade, Fort Knox, Kentucky, on 4 November 1942 (R.22-24).

4. The Charge Sheet shows that accused was 25 years of age as of 11 November 1942 and that he was inducted in the military service 1 March 1941.

5. The court was legally constituted and had jurisdiction of the

person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

25 AUG 1943

SPJGH
CM 233879

UNITED STATES v. Corporal CHARLES ELLISON (39681439) and Privates First Class JAMES W. HEARD (14079314), TERRY JONES (38074091), ROBERT L. WILLIAMS (18102806) and ELLIOTT CLEM (38058372), all of the 364th Infantry.	WESTERN DEFENSE COMMAND Trial by G.C.M., convened at Phoenix, Arizona, 17, 19, 21, 22, 23, 24 and 25 February 1943. As to each: Dishonorable discharge and total forfeitures. As to Ellison and Williams: Confinement for fifty (50) years; and as to Heard, Jones and Clem: Confinement for twenty (20) years. Disciplinary Barracks.

HOLDING of the BOARD OF REVIEW
HILL, DRIVER and LOTTERHOS, 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 on the following Charge and Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that Corporal Charles Ellison, Company I, Private Leon D. Harris, Service Company, Privates First Class James Heard, Company C, Terry Jones, Anti-Tank Company, Robert Williams, Company M, and Elliott Clem, 3rd Bn. Hdqrs. Company, all of the 364th Infantry, did, at Phoenix, Arizona, on or about November 26, 1942, attempt to commit a riot, in that they, together with certain other soldiers to the number of about four (4) did, with force and arms unlawfully and riotously and in a violent and tumultuous manner assemble in the City of Phoenix, Arizona, to disturb the peace thereof.

Each accused pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of two previous convictions of accused

Clem, one by special court-martial for stealing $10.00 in cash in violation of the 93rd Article of War and the other by summary court-martial for being disorderly in uniform in public in violation of the 96th Article of War was introduced. The accused were sentenced to dishonorable discharge and forfeiture of all pay and allowances due or to become due as to each of them, and to confinement at hard labor, accused Ellison and Williams each for 50 years, and accused Heard, Jones and Clem each for 20 years. The reviewing authority as to each accused, 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.

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

All of the accused were assigned to military police duty with the 364th Infantry Regiment at Papago Park, Phoenix, Arizona. First Lieutenant Charles F. White was officer in charge of the military police detachment, in addition to his regular duties as Assistant Personnel Officer. Sergeant Clark Mayo was the noncommissioned officer in charge "of everything concerning the MPs". Next under him was Sergeant George W. Mitchell, and then the accused, Corporal (Acting Sergeant) Ellison. The detachment had three fixed posts and, under orders of 5 October 1942 (Def. Ex. E), two motor patrols. Patrol No. 1 went to Phoenix in the daytime to enforce traffic regulations, and Patrol No. 2 went into the area around the camp at night to enforce discipline. In practice, Patrol No. 2 went to Phoenix frequently to take Sergeant Mayo to his home and for similar purposes. Lieutenant White did not give any orders with reference to the motor patrol going into Phoenix, and had not defined the routes for Patrol No. 2 (R. 83, 111, 115, 118, 124, 179, 185-186, 222, 225-227).

For some time prior to 26 November 1942 military policemen of the 364th Infantry had been on general duty in Phoenix, and then on such duty jointly with the 733rd Military Police Battalion. At one time or another all of accused had been on this general duty in town. On Monday before 26 November 1942 (Thanksgiving), Lieutenant White learned that the 364th Military Police were to be relieved of "walking duties" in Phoenix, and on Tuesday he had a meeting of the men of the detachment not then on duty and informed them that they had been relieved from duty in town and that henceforth "the 733rd was to run the MP detail in Phoenix". His instructions referred only to the walking patrols, and the duties of the motorized patrols were not changed (R. 116, 185, 223-226, 228).

On account of other duties, Lieutenant White was able to give very little attention to the Military Police detachment, and the noncommissioned officers were left in almost complete control. The sergeant in charge controlled the night patrol. When Lieutenant White took charge in the first part of October he instructed Sergeants Mayo and Mitchell to call him by telephone in an emergency or if they did not know what to do (R. 116-117, 243-245, 247).

Shortly before 7:00 p.m. on 26 November the Patrol No. 2 took Sergeant Mayo from the camp to his home in Phoenix. Accused Ellison was in the patrol jeep and Private Leon D. Harris (found not guilty) was driving. Sergeant Mayo could not definitely recall whether or not accused Williams was in the car, but thought that he might have been (R. 118).

There was a disturbance that night at the Savoy Cafe in Phoenix, in which a member of the 733rd Military Police shot his pistol into the ground, the bullet ricocheted and struck a soldier in the leg. A crowd quickly gathered before the Cafe and accused Williams was observed in the forefront of the crowd. It was then between 9:30 and 10:00 p.m. The military police closed the Savoy Cafe and, as there was "ganging" outside of the "USO" it was closed also and the men were directed to go to the bus station near Mae's Place (R. 33-35, 38-39, 42, 118).

At about 11:00 p.m. the same night, Private Walter Moore, of the 364th Military Police, who had been on sentry duty from 6:00 to 10:00 p.m. was in his tent when accused Ellison and Williams entered, asked the men there to go to town "to shoot some of the 733d MPs", and said they were going to town and "raise sand with the 733d MPs". Moore replied that he "wasn't going without no orders". Accused Ellison was doing the talking. Ellison and Williams then entered the tent of Sergeant Mayo (the orderly tent) next door where the ammunition and spare guns were kept locked up in a large wooden box. Another soldier in Moore's tent heard "feets, stomping", "two or three licks" and "Pryzing (sic)"—"like you pry something off" in the orderly tent. A large crowd had gathered in front of this tent. Ellison and Williams emerged from the tent with little red boxes, like boxes of ammunition in their hands, got in the jeep and left. At about the same time the noises were heard in the orderly tent accused Jones came into Moore's tent to get a light bulb (R. 74, 76-78, 83-84, 89-94).

Sergeant Mayo kept the key to the ammunition box in his tent and, when he was away, left it with the noncommissioned officer in charge. Lieutenant White had given no instructions to Sergeant Mayo as to the

ammunition and no limit had been fixed as to the amount to be issued. However, when a member of the detachment went on duty he was given one clip of seven shells and no more than that amount had ever been issued to any of them. Sergeant Mayo needed no permission to open the box and issue ammunition. On the night of 26 November he had the key as he had forgotten to give it to accused Ellison. When Sergeant Mayo returned to his tent after dinner on 27 November the ammunition box was torn open (R. 113-114, 118-119, 121, 125).

Private Alphons Kincey was on sentry duty at the west gate of Papago Park Camp from 10:00 p.m., 26 November until 2:00 a.m., 27 November. Accused Clem who was on sentry duty with him, reached the post a few minutes after 10:00 p.m. In about 20 to 40 minutes a jeep came up, and accused Ellison, the only occupant whom Kincey recognized, got out, went into a little shed near the gate and made a telephone call. Ellison came out and got into the jeep, accused Clem got in with him and they drove off away from camp (R. 102-106).

The jeep was next seen when it stopped at the house of Sergeant Mitchell in Phoenix. Accused Ellison knocked on the door and upon being admitted said that there were two cars of "our men" going to town, he had tried to stop them before they got to town but "hadn't" and asked Sergeant Mitchell to go along and "help stop them". Sergeant Mitchell accompanied Ellison as requested. All of the accused, armed with pistols, were in the jeep, and Private Harris was driving. On cross-examination Sergeant Mitchell stated that he was the senior non-commissioned officer in the jeep and was in command of the group (R. 179-182, 189).

The patrol car was then driven to the Savoy Cafe (corner of Washington Street and 13th Street) in Phoenix and parked on 13th Street facing south toward the intersection. Two colored policemen, on duty at the corner, were talking to a white motorcycle policeman who had stopped there. The area had been cleared following the earlier disturbance in the cafe and no one else was present. The occupants of the jeep got out with pistols in their hands, two of them "raced" around one side of the Savoy, two of them went around it another way and others went to a place across the street. When one of the colored policemen asked Ellison if he was the man in charge Ellison answered that he was one of the men. Upon being asked to exercise better control over his men Ellison stated that there was nothing he could do as the men were "sore" and "it had just completely went over him"; that his men were "like crazy men, like wild men" and he could do nothing with them. Williams, who had two pistols, waved one of them in front of the civilian policemen and said "We are tired of this God Damn shit; we are

going to blow up this fucking town". "When a man shoots one of our men, he is going too far, and we are going to get him". When one of the policemen asked, "sort of demanded", Sergeant Mitchell to make Williams put his gun away, Mitchell directed him to do so and Williams complied (R. 136-138, 163-164).

At about the time the patrol car parked near the Savoy, or within a minute thereafter, a black Ford sedan stopped at the intersection headed west on Washington Street. The sedan was full of soldiers armed with pistols or guns. They got out with their weapons in their hands and asked where were the "God damned 733d MPs". One of the soldiers from the sedan who had a rifle in his hands approached one of the colored policemen and said "Aw, we don't have to take that God damn shit off of them, let's bump them off now". Sergeant Mitchell and accused Ellison told him to get back in the car but he stood and glared at the policeman. Sergeant Mitchell caught his rifle, pushed it up against him and "half pushed" him into the car. Sergeant Mitchell then stated "We are going to Mae's Place, where the 733d MPs were (sic)". "We are going to get the God damn 733d MPs. We don't want these men * * * come on, men let's go to Mae's Place". The men all "piled" into the cars and the jeep led the way. Williams got into the sedan before the jeep left. The two cars left "simultaneously". The colored civilian policemen did not identify any of accused except Williams and Ellison (R. 136-139, 150-151).

The jeep proceeded to Mae's Place (corner of Washington Street and 17th Street), the black sedan in which Williams was riding, followed and both cars parked behind two busses. A soldier by the name of "King" was driving the sedan. A large number of soldiers, who were orderly, were lined up waiting to get on the busses. There were also "a lot" of 733rd Military Police around Mae's Place--it looked as if the whole detachment was out that night. When the jeep drove up the men in line shouted "Our boys are here, now, you won't dog us any longer". Accused Williams alighted from the sedan, ran up to Corporal (Private at the time of the trial) William Herrod, 733rd Military Police, stuck his pistol in Herrod's side and said "Stick your hands up, you black son of a bitch, before I shoot you". Herrod dropped his gun but immediately thereafter shooting broke out at the front of the busses and the crowd, including the accused, scattered. Some time later upon finding accused Williams at the side of Mae's Place, Herrod disarmed and arrested him. When the shooting started Sergeant Mitchell who had drawn his pistol was disarmed by another member of the 733rd Military Police. In the process Mitchell's gun discharged and slightly wounded the military policeman in the finger (R. 35-37, 68, 182, 203, 210, 257).

Sergeant Mitchell was told by First Lieutenant Charles A. Swarts, in charge of the 733rd Military Police that the 364th Military Police Detachment had no duty in town any more, that Lieutenant Swarts would send for them if he needed them and that they should go back to camp. Private Harris, Sergeant Mitchell and accused Heard got into the jeep, Sergeant Mitchell was driven to his home in Phoenix and the other two returned to camp. Accused Ellison volunteered to and did ride back to camp on one of the busses when a 733rd Military Police corporal announced that he considered it unsafe for any of his men to ride the bus on account of the "feuding" (R. 55, 183, 199, 257, 259-260).

After each of them had been advised that he need make no statement, and that any statement he made could be used against him in a trial by court-martial, accused Ellison, Williams and Jones each made two sworn statements and accused Clem and Heard each made one sworn statement, all of which were received in evidence (R. 269-281; Exs. 4, 5, 7, 8, 9, 10, 13, 14).

In his first statement, dated 1 December 1942, accused Ellison asserted that shortly before 10:00 p.m. on 26 November as he drove up to the "Non Coms club" a soldier ran up to the jeep and told him that "they're trying to start a riot in town * * * Two cars have gone already, and you had better try to cut them off". Ellison, who then had all the other accused and Private Harris with him, turned the jeep around and went to the west gate, where he telephoned to the sergeant of the guard, informed him of the riot, asked for the officer of the day who was not in, and was told by the sergeant of the guard to do all that he could. All of the men in the jeep had pistols. Ellison had seven rounds of pistol ammunition. They drove to the home of Sergeant Mayo, who was not in, called at the house of Sergeant Mitchell, who joined them, went to the Servall (Savoy) which was closed, and proceeded on to Mae's Place. Ellison went up and down the line of men waiting for the bus, three or four shots were fired and most of the men scattered. Ellison rode back to camp on the bus as he "figured the MPs would tie up the jeep". At camp he met Lieutenant White and they went from tent to tent, gathered up all the pistols and ammunition and took them to the officers' mess (R. 269, Ex. 4).

The later statement of accused Ellison dated 8 December 1942, in pertinent part, was to the effect that Ellison and Harris were on motor patrol on the night of 26 November when they came upon a Ford coupe with a crowd of soldiers about it, parked in front of the 364th Military Police orderly tent. The men were excited and were saying that the "733d boys had shot up some 364th boys" and they were going downtown

and do something about it. Later on, Ellison saw three men get into the coupe with rifles and told them "they shouldn't do that" but they paid no attention to him. He then went to the "NCO club" and a black Ford sedan driven by Ozzie King drove up and stopped. He knew Ozzie King and noticed him particularly that night because he had something white tied around his neck. Accused Williams came up, remarked that the "733d men" were shooting up "our boys" and "we are not going to stand for it". When Ellison said he did not know what could be done about it Williams replied "The Hell it is! * * * We can go down there and stop it". Williams told Ellison that he (Williams) had just ridden out from town with Ozzie King. Ellison saw some men, two of whom had rifles, get into the sedan with Ozzie King and drive away. Williams got into the jeep and they went back to the orderly tent. At that time all of accused and Private Harris were in the party. Ellison and Williams went into a tent beside the orderly tent. Privates Moore, Brown and some others were there. Williams told them that the "733d boys" were shooting up "our boys" and asked them to get up and go to town "with us". They would not go. Ellison and Williams went into the orderly tent where it was dark. Accused Jones "rushed out" and came back with a light bulb. "During the darkness" the box where the ammunition was kept was broken open. The ammunition was "pulled out on the floor", they took some and put it in their pockets or held it in their hands. They all entered the jeep and drove out through the west gate to Phoenix (R. 270, Ex. 5).

According to the statement of accused Williams, dated 1 December 1942, when he returned to camp about 9:30 p.m., on 26 November, from a ride with a motor patrol he "got word" that "some of the boys" had been in a riot in town. Accused Ellison said that they would go into Phoenix and see about it and help stop it and they drove out the west gate. There were four in the "peep", all of whom had pistols. Williams had 81 rounds of .45 calibre ammunition, which had been in his possession for "quite a long time". When the men in the jeep arrived in Phoenix they stopped at the home of Sergeant Mayo but he was not in so they picked up Sergeant Mitchell and then drove to Mae's Place. The "364th boys" there shouted to the 733rd Military Police "Now you wont run over us, here's our boys". The 733rd "MPs" ran to the opposite side of the line of men, started to shoot, everyone ran, and there were "a lot of shots". Williams tried to get on the bus. He had his pistol in his hand in the pocket of his overcoat but did not shoot. Eventually he was disarmed, arrested and taken to jail in Phoenix (R. 274, Ex. 8).

In the later statement which he made on 8 December 1942, accused Williams admitted that he entered the orderly tent at Papago Park

on the evening of 26 November, that Ellison came in shortly afterward and that after Jones had gone out and brought back a light bulb with which to light up the tent, he (Williams) took a jack handle and broke open the box containing the .45 calibre pistol ammunition. They all took some, then got into the jeep and drove to town. They stopped for Sergeant Mayo, who was not at home, then picked up Sergeant Mitchell and drove to the Savoy Cafe. Shortly afterward a black Ford sedan, driven by Ozzie King, came up and stopped. Two colored civilian policemen were talking with Ellison and Sergeant Mitchell and Williams became excited, walked up to them, drew his pistol from his pocket and waved it around. When Ellison told him to put the gun away Williams put it back in his overcoat pocket. After the jeep drove off and left Williams, he got in the black sedan and rode to Mae's Place. He had not ridden from Phoenix to Papago Park with Ozzie King the night of 26 November and never told anyone that he had (R. 275, Ex. 9).

It appears from the respective statements of accused, Jones, Clem and Heard that each of them rode in the jeep from Papago Park to the Savoy Cafe and to Mae's Place in Phoenix; that they had been directed or requested to go by Ellison (Clem stated that he had been asked to go by two other men in the jeep and that Ellison had said all of them had been told to go by the sergeant of the guard); and that they had been informed the purpose of the trip was to stop some trouble or to see what could be done about some trouble in Phoenix resulting from the shooting of one of "our boys". No other material admission was made by these accused in any of their statements (R. 273, 277, 280-281, Exs. 7, 10, 13, 14).

4. For the defense Lieutenant White testified that on the night of 26 November he left camp about 6:30 p.m. and did not return until about 1:00 a.m. the following day. He had been at home where he had a telephone but did not believe that the number was in the telephone directory. He had given his telephone number to Sergeants Mayo and Mitchell but did not remember having given it to accused Ellison. Shortly after his return to camp at 1:00 a.m., Lieutenant White was instructed to check the arms of his detachment to ascertain what was missing. He went with Ellison to the detachment quarters and began taking up the pistols from the men. Lieutenant White then went to the orderly tent and discovered that the ammunition box had been torn open. The lock was not broken but the hasp had been pulled off. All of the pistols were gone from the box and "quite a bit" of ammunition had been taken out. He put the pistols he had gathered up into the box and, with the assistance of Ellison, carried it to the officers'club and left it with the officer of the day (R. 333-336).

On cross-examination Lieutenant White stated that his instructions were to issue the men seven rounds of ammunition for which they would sign and that there never had been occasion to issue additional ammunition for any specific mission. He also testified that Ellison had not i formed him about having the ammunition box broken open. However, Lieutenant White could not remember whether, when he went into the orderly tent and discovered that the box had been opened, Ellison was with him (R. 340, 341).

Accused Ellison testified that on the evening of 26 November he took Sergeants Mayo and Mitchell to their homes in Phoenix in the patrol jeep. At one time on this trip the jeep was parked back of the Savoy Cafe and accused Williams, who was one of the party, went to the home of "Mr. Vaugn" the owner of the cafe. After Ellison returned to camp he saw a civilian car with women and soldiers in it, ordered it off the post, then started to check upon a coupe on the road near the "MP tent" when a soldier came running up to him and said "MP, there is trouble down town and if you don't go down and stop it, we are going down there and do something about it". Ellison replied to the effect that he did not think anything could be done about it and directed the soldier to return to his company. Ellison went to the "NCO" club where a sergeant was having difficulty starting a civilian car. Another soldier ran up and said to Ellison "You better go to town and try to stop this trouble, or we're going to stop it". Ellison went into the club and told accused Williams, who was watching a card game, that "the boys are raising hell", that Ellison was going to town to "see can I stop it", and that Williams should "come along with me". They then drove to the orderly tent and accused Jones went out to get a light bulb. Ellison told Williams "Let's pull the lock off the box". Ellison then screwed in the bulb which Jones had brought, the light came on, Williams had the box open and the tent was full of soldiers. Ellison ordered them all to go back to their companies, he and Williams took some ammunition, accused Heard joined them, they entered the jeep and drove to the west gate where Ellison telephoned to the guardhouse and asked for the officer of the day. Someone who called himself the sergeant of the guard answered that the officer of the day was not in. Ellison then stated "Sergeant, there is some trouble has occurred in town, and I learned some of the boys have gone down there to start more trouble, and I'm going to see can I stop it". The other party replied "Go ahead, and do all you can to stop it" (R. 390, 392-394).

Accused Ellison further testified that he "collected" Clem, went to the home of Sergeant Mayo but found that he was not in and then drove to Sergeant Mitchell's house. Ellison told Sergeant Mitchell that there was trouble in town and that the whole camp was "chewing the

rag and raising sand about it". Mitchell joined the party in the jeep and they proceeded to the Savoy Cafe where two colored policemen were on duty. Ellison talked with them. They tried to tell him something about one of the soldiers getting excited and displaying his pistol and asked Ellison to "corral" or do something with the soldier. Ellison told them he could do nothing "right now" as he was trying "to put some calls over". Ellison's group then got into the jeep and drove to Mae's Place where Ellison alighted. He heard three or four shots and the men waiting in line scattered. When a loaded bus started to pull out he volunteered to ride on it to keep order. Ellison had seven rounds of ammunition in a clip and seven rounds in his field jacket pockets. He did not know Ozzie King on 26 November 1942. Ellison stated that he had not, earlier that evening, seen the civilian sedan that drove up to the Savoy when the patrol jeep was parked there (R. 395-397).

On cross-examination when his attention was directed to a number of discrepancies between his testimony and his prior sworn statements, Ellison testified that in several particulars the statements were not true. He had been in jail when he made them, he had never been in jail before and was frightened and he "figured" that if he told the officer who interrogated him "something" he would be released. He had not mentioned breaking into the ammunition box in the earlier statement because he was frightened and it slipped his "remembrance". When asked by a member of the court what was his purpose in picking up the men and going to town Ellison answered that he was trying to "cut off" a little coupe with "a mother in law seat in the back of it" and a blue looking car, an Oldsmobile or Chevrolet in which there were some civilian women and soldiers (R. 401-412, 443).

Accused Williams testified that in the early evening of 26 November he went to Phoenix with Sergeants Mayo and Mitchell, accused Ellison, and Private Harris. After the two sergeants had been left at their respective homes, Harris drove the jeep to the Savoy Cafe where Williams went in and borrowed some money. He rode back to Papago Park in the jeep but got off at the west gate where he assisted a civilian man and some women to get into camp. At about 10:00 p.m., when he was at the "NCO" club, accused Ellison came in and said to him "Private Williams, come on with me downtown". They went to the Military Police Detachment orderly tent, after Williams had gone to his own tent for his overcoat and pistol, and Ellison ordered Williams to open the ammunition box. Williams opened it by pulling the staples out with a hammer and took some ammunition. They then got into the jeep and drove to the west gate where Ellison made a telephone call. When he came out of the telephone

booth Ellison stated that he had been unable to get the officer of the day but had talked to the sergeant of the guard who had told him to "go ahead on down and see what he could do about it". They drove to Sergeant Mayo's house but he was not at home, picked up Sergeant Mitchell at his residence and proceeded on to the Savoy Cafe. There Williams walked up to the two colored policemen who were talking with Ellison, took his pistol out of his overcoat pocket and held it in his hand, raised "at an angle". Williams did not say anything to the policemen and did not point the pistol at them. He did not know why he drew the pistol but his guess was that he must have been "frightened like". He put the pistol back in his pocket when Ellison told him to do so (R. 570-572).

Accused Williams also testified that when the jeep went off without him, he climbed into the black sedan and asked Ozzie King, the driver, to take him to Mae's Place. When the sedan parked there, behind the jeep, Williams got out. There was a line of waiting men and he heard someone "holler" that the "boys are here from the 364th * * * And the M.P.s won't run over us any more". As he walked toward the line he heard a burst of shots, the line "busted" and he ran to get on the bus, with his pistol in his hand. In making an unsuccessful dash for the bus door he shoved aside Corporal Herrod who was in his way. He had drawn his pistol because he "got excited". Some time later, Corporal Herrod with the assistance of a white civilian police officer disarmed Williams and Herrod struck Williams in the mouth with a pistol, breaking one of his teeth. Williams was then placed in arrest and taken to jail in Phoenix. Williams had on an overcoat, "overseas" cap, and "OD" shirt and trousers (R. 572-574, 591).

Accused Heard testified that after he had completed his tour of sentry duty, which was from 6 to 10 p.m. at the south gate on 26 November and was walking toward his tent, he met Ellison who stated that he (Ellison) was on his way downtown to try to stop some trouble there. Heard offered to go along. He was dressed in "OD" uniform with white helmet, pistol belt and shoulder straps. Private Harris and all the other accused were in the jeep at that time. At the Savoy Cafe Heard got out of the jeep but did not remove his pistol from the holster. At Mae's Place, when he heard some shots fired he went around to the rear of the building and stayed there until some civilian policemen told him it was safe to come out. He rode back to camp in the jeep with Private Harris (R. 501-506).

Accused Jones testified that on 26 November he went to the military police tents at the expiration of his tour of sentry duty

(6 to 10 p.m. at the west gate) and, at the orderly tent, met Ellison, who mentioned the trouble he was having and sent Jones for a light bulb. When Jones returned with a bulb from a nearby tent, the ammunition box was open and he took out five rounds. He entered the jeep which proceeded to the west gate where Ellison made a telephone call and Clem joined the party. They went on to Phoenix where Jones got out of the jeep at the Savoy and stood about three feet from it until he heard Sergeant Mitchell say "Let's go down to Mae's Place". At Mae's Place Jones went to the end of the line of men waiting to board the busses. There was a burst of shots near the head of the line, everybody scattered and he went behind Mae's Place. A civilian policeman disarmed Jones and hit him on the head with "a little old billy stick". The blow broke the skin and it bled "all over" his jacket front. Jones was placed in arrest and taken to jail. Both at the Savoy and at Mae's Place Jones had kept his pistol in the holster at all times (R. 518-522, 616-617).

Accused Clem testified that when he went to the west gate to go on sentry duty at 10:00 p.m., 26 November, a jeep was standing there. Ellison was talking on the telephone in a shed at the gate and the other accused and Private Harris were in the jeep. They told Clem there had been some trouble in town and they were going down there to see about it. When Ellison came up he said to Clem, "Come on, get on, let's go. Go along with us". Clem entered the jeep and went with them to Phoenix. He was wearing an "O.D." suit and white helmet, shoulder strap and pistol belt. When they drove up to the Savoy he alighted, walked over to the entrance of the cafe, stood there two or three minutes, then returned to the jeep and got in. He saw Sergeant Mitchell and Ellison talking to the colored policemen but did not remember seeing Williams. Shortly after a black sedan drove up and stopped, the jeep proceeded to Mae's Place where Clem got out and stepped up on the curb. The men in line yelled "The M.P.s are here now and you won't mistreat us anymore", he heard two or three shots fired and ducked behind the crowd. When someone shouted "You better get that white hat out of here if you don't want to get it creased" Clem took off the hat. He then solicited and secured a ride back to camp in a civilian car. He had left his pistol and ammunition in his tent and did not have a firearm at any time on the trip to Phoenix (R. 592-599).

Corporal Charles Simmons, corporal of the second relief of the guard at Papago Park on the evening of 26 November, was in the guard tent shortly after 10:00 p.m. The sergeant of the guard had stepped out, and when the telephone rang Simmons picked up the phone and announced

that it was "Corporal Simmons speaking". The other party asked for the officer of the day and upon being informed that he was not there, directed Simmons to tell the officer of the day that the "First Sergeant of the M.P. Company" said that "we was going into town to break up some of this shit". Simmons reported the call to the officer of the guard (R. 538-542).

Earl Irving, a motorcycle patrolman (white), Phoenix police department, testified that on 26 November 1942 he came off duty at 11:00 p.m. and on his way home stopped at the Savoy Cafe corner to "pass the time of day" with two colored policemen. An army jeep drove up and parked about ten or fifteen feet from his motorcycle. Some soldiers got out of the vehicle and walked around the Savoy. He could not say whether they had pistols in their hands but did not believe so. After one of the colored officers conversed for a while with a soldier from the jeep, the men got back into the vehicle and drove away. Irving did not see any of the soldiers from the jeep make any threatening gesture and they did nothing to arouse his suspicions except that he was curious as to why they went around the building. After the jeep left, a civilian sedan drove up and stopped. A colored soldier alighted from the car holding a .45 automatic pistol in an upright position and "there was a fellow with a rifle standing at the--right--kind of at the rear of the sedan". The soldier with the "45" started arguing with "one of the boys" and they almost had to "throw him back in the car" (R. 548-558).

On 26 November 1942 Private Ozzie King drove a car from Phoenix to Papago Park and arrived there about 8:30 or 9:00 p.m. He parked the car for a short time in front of the dispensary near the "NCO" club. Prior to 27 November he did not know accused Ellison but was acquainted with accused Williams. The latter did not ride out to Papago Park from Phoenix with King on the trip "around 8:30" (R.562-565).

First Lieutenant Charles A. Swarts, 733rd Military Police Battalion, arrived at Mae's Place in Phoenix between 10:30 and 10:45 p.m. on 26 November. As the situation looked serious he went to a telephone to tell the bus company to send busses to expedite the moving of the men. When he returned some "364th M.P.s" were at Mae's Place with a jeep. The only ones Lieutenant Swarts knew were Sergeants Mitchell and Ellison who had been disarmed by the 733rd Military Police. He asked them what they were doing and Ellison said he heard there was trouble and came in to see if "he couldn't help out". Lieutenant Swarts told Ellison that the 733rd had been designated as the exclusive military

police function in Phoenix, that the help of the 364th Military Police would not be required and that they should get in their jeep and go back to camp. He restored their guns to them, they got into the jeep and drove away. When his attention was directed to the accused in the courtroom Lieutenant Swarts was unable to identify Ellison (R. 618-624).

Shortly after the departure of accused from Mae's Place there was serious shooting in the vicinity, a lieutenant was killed and several other persons were wounded. At this time a jeep appeared with four occupants and two of them got out and fired with "long guns" (R.621, 629, 638-641, 662-663).

The 364th Military Police detachment used the same jeep, from the motor pool, for both Motor Patrol No. 1 and Motor Patrol No. 2. Mesa, Tempe and Phoenix were placed on the trip tickets for this jeep. The purpose of putting Phoenix on the trip tickets was to cover Patrol No. 1, the transportation patrol (R. 645-646).

Sergeants Mayo and Mitchell testified that all of the accused performed their duties in a satisfactory manner. Their respective company commanders testified that the accused were good soldiers and had excellent characters. Lieutenant White also testified that accused Ellison had an excellent character (R. 337, 365-367, 383, 647-648, 650-652).

5. When the sergeant of the guard at Papago Park camp on the evening of 26 November was called as a rebuttal witness for the prosecution and was questioned concerning telephone calls which he had received, defense counsel stipulated that the sergeant of the guard did not receive "the [telephone] call" and that "Corporal Simmons did" (R. 666).

6. It appears from the evidence that on the evening of 26 November 1942, in the course of a disturbance at the Savoy Cafe in Phoenix, a soldier was shot in the leg by a member of the 733rd Military Police. Accused Williams was observed in the forefront of the crowd that gathered outside the cafe immediately following this incident.

According to the sworn statement of accused Ellison made on 8 December 1942, as he was riding around camp in a motor patrol jeep later that evening he met Williams who stated that the 733rd Military Police were "shooting up our boys"(all the accused were members of a military police detachment of the 364th Infantry) and that "we are not going to stand for it". When Ellison remarked that he knew of nothing that could be done about it Williams replied "The Hell it is! * * * We can go down

there and stop it". During the conversation with Williams, Ellison saw some men, two of them armed with rifles, get into a black Ford sedan operated by Ozzie King, and drive away.

Ellison and Williams then went to the military police detachment tents, entered the tent of Private Walter Moore and asked the soldiers present to go to town with them to shoot some of the 733rd "MPs". Ellison, who was the spokesman, stated that they were going to town to "raise sand" with the 733rd "MPs". None of the occupants of the tent accepted the invitation. Private Moore stated that he would not go "without no orders".

Ellison and Williams then went to the orderly tent next door where the spare pistols and the pistol ammunition were kept locked up in a large wooden box and Williams broke into the box by pulling off the hasp with a hammer. Each of them then took some ammunition from the box. When he left the tent Williams had 81 rounds. Lieutenant White, the officer in charge of the detachment and Sergeants Mayo and Mitchell, the ranking noncommissioned officers were absent from camp that night leaving Ellison (acting sergeant) in charge. Sergeant Mayo carried the key to the ammunition box and would have left it with Ellison had he not forgotten to do so. In accordance with instructions from Lieutenant White each man on military police duty had been issued 7 rounds of pistol ammunition for which he signed, and there had never been any occasion to issue a greater number for any special mission.

Ellison and Williams together with the other accused and Private Harris, who was driving, rode to Phoenix in the jeep. After calling for Sergeant Mayo and finding him not at home they went to the home of Sergeant Mitchell. Ellison told Mitchell that two carloads of armed soldiers of the 364th Infantry had gone to Phoenix, that Ellison had tried to stop them but had not been successful and asked Mitchell to come along and help stop them. Mitchell joined the group which proceeded in the jeep to the Savoy Cafe where two colored, civilian police officers were on duty.

The occupants of the jeep got out and "raced" around the Savoy with pistols in their hands. When one of the civilian policemen protested at the lack of control exercised over the men Ellison stated that they were "sore"--like crazy men, and were completely out of hand. Williams, who had two pistols waved them in front of the civilian policemen and announced that "we are going to blow up this fucking town"

and "get" the man who had shot one of "our men". Very soon after the jeep arrived at the Savoy, Ozzie King drove up with his black sedan full of soldiers armed with pistols and rifles. One of them with a rifle in his hands came up to the civilian policemen, used vulgar and profane language and threatened to "bump them off now". Sergeant Mitchell caught hold of the soldier's rifle and "half pushed" him back into the sedan but at the same time made the significant declaration that "We don't want these men [the civilian policemen] * * * We are going to get the God damn 733d MPs" and urged them to "come on, men lets go to Mae's Place," where they would find the 733rd "MPs".

The men from both the jeep and the sedan immediately acted upon the suggestion of Sergeant Mitchell. They all got into their cars (Williams rode in the sedan with Ozzie King) and drove off, the jeep leading the way. When the cars reached Mae's Place, a line of men, who up to that time had been orderly, were waiting to board busses. The occupants of the jeep were conspicuous as at least two of them were wearing white helmets, white pistol belts and white shoulder straps. When they came up the men in line shouted that "Our boys are here, now, you won't dog us any longer". Many of the occupants of both vehicles alighted and mingled with the crowd. A number of 733rd Military Police were present. Williams held his pistol against the side of one of them and said "Stick your hands up, you black son of a bitch, before I shoot you". The military policeman dropped his gun but just then several shots were fired and the crowd scattered. Williams and Jones were arrested, Ellison volunteered to go back to camp with a bus load of men to keep order. Clem caught a ride in a civilian car and Heard and Private Harris drove to camp in the jeep after first taking Sergeant Mitchell home.

The circumstances just related are such as reasonably to support an inference that on the night of 26 November 1942, accused Ellison and Williams, inflamed by reports that the 733rd Military Police were "shooting up" enlisted men of the 364th Infantry, went from their camp at Papago Park to the City of Phoenix to do physical harm to or by physical violence to interfere with the 733rd Military Police in the performance of their duties. Immediately following the declaration made in the tent of Private Moore that they were going to town to shoot some of these "MPs" they broke open the ammunition box in the orderly tent and not only took out ammunition for themselves, but left the box, containing pistols and ammunition, open and unguarded with a large crowd of excited soldiers milling about the tent. The testimony of Sergeant Mayo indicated that Ellison, in the absence of his superiors, was authorized to open the box but apparently Ellison and Williams did not then think so as each, in his statement of 1 December avoided any mention of the incident and Ellison falsely stated that he had only 7 rounds of ammunition on Thanksgiving night.

Accused Ellison, in the absence of his superiors, was in charge of the 364th Military Police Detachment. The limits of Motor Patrol No. 2 had not been specifically defined and in practice it often went to Phoenix to take some noncommissioned officer to his home but it clearly appears that neither by orders nor by custom was Patrol No. 2 authorized to go into that city to maintain order or to enforce discipline of military personnel. Furthermore, it does not appear that any of the men who accompanied Ellison to Phoenix, other than Private Harris, had been detailed to Patrol No. 2. Williams stated that he had not been assigned to it and Heard, Jones and Clem each were detailed to sentry duty on fixed posts at the camp.

According to the testimony of Sergeant Mitchell accused Ellison told Mitchell that two carloads of men of the 364th Infantry had gone to Phoenix, asked Mitchell to go along in the jeep to help stop them, Mitchell complied with this request, and from then on was in command of the party. However, there is other evidence from which it may be inferred that neither Ellison nor Mitchell went to Phoenix to stop or restrain the men of their own regiment. When the jeep parked near the Savoy and Ozzie King (whom Ellison had seen leaving camp) drove up with his sedan full of men armed with pistols and rifles neither Ellison nor Mitchell made any effort to stop them or to send them back to camp but, on the contrary, Mitchell invited them to "come on" to Mae's Place "to get the God damn 733d MPs". Apparently the men in the jeep were not under military control. Each time the jeep stopped they got out and each of them went his own way. No one gave them any orders except that Mitchell, at the demand of a civilian policeman, told Williams to put away a pistol which the latter was waving around. Ellison admitted that his men were out of control, stated that they were like wild men, that he could do nothing with them, yet no effort was made to get them back to camp and they were taken to Mae's Place where the "733d MPs were". Williams demonstrated by his declarations and by his conduct at the Savoy and at Mae's Place that he was not acting under the lawful direction or control of anyone.

With reference to accused Heard, Jones and Clem, however, there is no substantial evidence that any of them were present in the tent of Private Moore when Ellison and Williams announced their unlawful purpose in going to Phoenix. It was not shown that any of them were present when the ammunition box was broken open or, with the exception of Jones, that they took any ammunition out of the box. While there is testimony to the effect that all of the occupants of the jeep got out of it at the Savoy with drawn pistols it does not appear that Heard, Jones or Clem

heard any of the profane and inflamatory statements of Williams, of the soldier from Ozzie King's sedan who threatened to "bump off" the civilian policemen, or of Sergeant Mitchell. Moreover, there is no evidence that any of these three accused, either at the Savoy or at Mae's Place made any inflamatory utterances or were guilty of any unlawful, violent, or improper conduct. As to such accused, the Board of Review is of the opinion that the evidence is not legally sufficient to support the findings of guilty.

A riot has been defined as "a tumultuous disturbance of the peace by three or more persons assembled together of their own authority, with the intent mutually to assist one another against anyone who shall oppose them in the execution of some enterprise of a private nature, and who afterwards actually execute the same in a violent and turbulent manner, to the terror of the people, whether the act intended was of itself lawful or unlawful" (MCM 1928, par. 147d).

An attempt is an act done with intent to commit a crime, and forming part of a series of acts which will apparently, if not interrupted by circumstances independent of the doer's will, result in its actual commission (MCM 1928, par. 152c).

Since at common law a riot cannot be committed by less than three persons, if the jury acquit all but two of several indicted for riot, they must acquit those two also, unless it is charged in the indictment and proved that they committed the riot with some other person not tried in that indictment (46 Am. Jur. 135; see also Notes at 2 Am. Dec. 622 and 10 Am. Dec. 693).

In the present case the Specification of the Charge alleges that accused attempted to commit a riot, acting together with certain other soldiers to the number of about four. When Ozzie King's sedan was parked in front of the Savoy one of the occupants alighted with a rifle in his hands and asked "where were the God damned 733d MPs?" thereby indicating that he had in mind much the same purpose as accused Ellison and Williams. When this soldier threatened to kill the two civilian policemen then present, Sergeant Mitchell reminded him that it was not these civilians that they wanted but the 733rd "MPs" and suggested that they all go to Mae's Place to "get" the 733rd "MPs". Immediately following that suggestion both the jeep and the sedan proceeded to Mae's Place, the jeep leading the way, and accused Williams before the jeep started, got into the sedan and rode with its occupants to Mae's Place, where, with his pistol, he assaulted Corporal Herrod of the 733rd Military Police. There is, therefore, substantial evidence to support the inference that Sergeant Mitchell and one or more of the occupants of the sedan shared the unlawful

purpose of accused Ellison and Williams to interfere by violence with the lawfully constituted military police authorities in the City of Phoenix and acted in concert with such accused in furtherance of that purpose.

In the instant case (A.W. 50½) it is not the function of the Board of Review to weigh evidence, pass upon the credibility of witnesses, or determine controverted questions of fact. The law gives that function to the court-martial and the reviewing authority exclusively. If the record of trial contains any evidence which, if true, is sufficient to support the findings of guilty the Board of Review and The Judge Advocate General are not permitted by law, for the purpose of finding the record not legally sufficient to support the findings, to consider as established such facts as are inconsistent with the findings even though there be uncontradicted evidence of such facts (C.M. 152797; MCM 1928, p. 216).

7. The Board of Review has given consideration to a letter directed to whom it may concern, dated 25 March 1943, signed by Mr. Landon Risenger, in behalf of accused Ellison, and two letters written by Mrs. Katie Lewis, the mother of accused Williams, dated 9 April 1943 and 2 June 1943, respectively, all of which letters are attached to the record of trial.

8. Accused Ellison is 36 years of age. The charge sheet shows that he was inducted on 23 January 1942. Accused Williams is 22 years of age. The charge sheet shows that he was inducted on 30 January 1942.

There is no maximum limit of punishment for attempting to commit a riot (CM 232961, King and Yates).

9. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty as to accused Heard, Jones and Clem, and legally sufficient to support the findings of guilty and the sentence as to accused Ellison and Williams.

Carlos S. Field Jr., Judge Advocate

Samuel M. Drewry, Judge Advocate

F. J. Lotthus, Judge Advocate

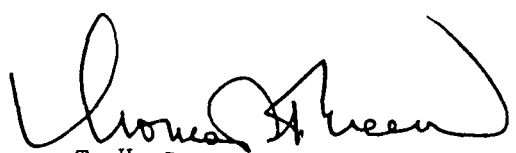
1st Ind.

War Department, J.A.G.O., 4 - SEP 194 - To the Commanding General, Western Defense Command, Presidio of San Francisco, California.

1. In the case of Corporal Charles Ellison (39681439) and Privates First Class James W. Heard (14079314), Terry Jones (38074091), Robert L. Williams (18102806) and Elliott Clem (38058372), all of the 364th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentences as to accused Heard, Jones and Clem, and legally sufficient to support the findings of guilty and the sentences as to accused Ellison and Williams, which holding is hereby approved. For the reasons therein stated, I recommend that the findings and sentences as to accused Heard, Jones, and Clem be disapproved. Under the provisions of Article of War 50½ you now have authority to order the execution of the sentences of accused Corporal Charles Ellison and Private First Class Robert T. Williams.

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 233879).



T. H. Green,
Brigadier General, U. S. Army,
Assistant The Judge Advocate General.

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

SPJGK
CM 233900

25 JUN 1943

UNITED STATES v. First Lieutenant JAY SHELDON BAKER, JR. (0-1166661), 31st Infantry Division Artillery.	31ST INFANTRY DIVISION Trial by G.C.M., convened at Camp Shelby, Mississippi, 23 and 25 March 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 Charge and Specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that First Lieutenant Jay Sheldon Baker, Jr., Headquarters 31st Infantry Division Artillery, did, at or in the vicinity of Geiger Field, Washington, and at or in the vicinity of the Davenport Hotel, in the City of Spokane, Washington, being public places, on or about January 15, 1943, appear in the improper uniform, and with intent to deceive did falsely represent himself to be Aide-de-Camp to a Major General of the United States Army and to be an aviation combat observer of the United States Army by wearing the insignia of Aide-de-Camp to a Major General of the United States Army and by wearing the aviation badge of combat observer of the United States Army, he, the said Lieutenant Baker, well knowing that he was not authorized to wear said insignia of Aide-de-Camp to a Major General of the United States Army and said aviation badge of combat observer of the United States Army.

Specification 2: In that First Lieutenant Jay Sheldon Baker, Jr., Headquarters 31st Infantry Division Artillery, did, at Geiger Field Washington, on or about January 15, 1943, with intent to deceive Major Erwin F. Goldman, S-2, Geiger Field, Washington, officially represent to the said Major Goldman that he, the said Lieutenant Baker, was then an officer on special duty with the Military Intelligence Section, G-2, War Department, Washington, D. C., which representation was known by the said Lieutenant Baker to be untrue.

Specification 3: In that First Lieutenant Jay Sheldon Baker, Jr., Headquarters 31st Infantry Division Artillery, did, at or in the vicinity of the Davenport Hotel, in the City of Spokane, Washington, on or about January 15, 1943, with intent to deceive, wrongfully and unlawfully represent to James A. McClusky, Manager of said Davenport Hotel, that he, the said Lieutenant Baker, was an officer on special duty with the Military Intelligence Section, G-2, War Department, Army War College, Washington, D. C., the said Lieutenant Baker then well knowing that said representation was false.

Specification 4: In that First Lieutenant Jay Sheldon Baker, Jr., Headquarters 31st Infantry Division Artillery, did, at or in the vicinity of the Davenport Hotel, in the City of Spokane, Washington, on or about January 15, 1943, with intent to deceive, wrongfully and unlawfully represent to Colonel Bernard J. Tooher, Air Corps, United States Army, that he, the said Lieutenant Baker, was an officer on special duty with the Military Intelligence Section, G-2, War Department, Army War College, Washington, D. C., the said Lieutenant Baker then well knowing that said representation was false.

Specification 5: In that First Lieutenant Jay Sheldon Baker, Jr., Headquarters 31st Infantry Division Artillery, did, at or in the vicinity of Camp Shelby, Mississippi, on or about December 31, 1942, with intent to deceive, falsely make in its entirety a certain writing as follows, to-wit:

CONFIDENTIAL

WAR DEPARTMENT

Office of the Adjutant General

December 31, 1942

SUBJECT: Identification of Special Duty Officer.

TO : Whom It May Concern.

1. This will serve to identify, with proper support of War Dept., A.G.O. Form #65, 1st Lieutenant Jay S. Baker, Jr., as an officer on special duty with Military Intelligence Section, G-2, War Department, Army War College, Washington, D. C.

2. Any and all authorities, military or civil, are hereby directed to give to said Lt. Baker any assistance possible upon request and with the support of this document. The duties of this officer being of such nature that revealing of his mission might seriously endanger the war effort, no particular details will be asked or divulged.

By order of the Secretary of War:

(Signed) J A ULIO

J.A. Ulio
Major General, U.S.A.
The Adjutant General

CONFIDENTIAL

which was a writing of a nature which might operate to the prejudice of another.

Specification 6: In that First Lieutenant Jay Sheldon Baker, Jr., Headquarters 31st Infantry Division Artillery, did, at or in the vicinity of Geiger Field, Washington, on or about January 15, 1943, with intent to deceive Major Erwin F. Goldman, S-2, Geiger Field, Washington, officially present to said Major Goldman the following written instrument, to-wit:

CONFIDENTIAL

WAR DEPARTMENT
Office of the Adjutant General

December 31, 1942

SUBJECT: Identification of Special Duty Officer.

TO : Whom It May Concern.

1. This will serve to identify, with proper support of War

Dept., A.G.O. Form #65, 1st Lieutenant Jay S. Baker, Jr., as an officer on special duty with Military Intelligence Section, G-2, War Departmant, Army War College, Washington, D. C.

2. Any and all authorities, military or civil, are hereby directed to give to said Lt. Baker any assistance possible upon request and with the support of this document. The duties of this officer being of such nature that revealing of his mission might seriously endanger the war effort, no particular details will be asked or divulged.

By order of the Secretary of War:

(Signed) J A ULIO

J.A. Ulio
Major General, U.S.A.
The Adjutant General

CONFIDENTIAL

he, the said Lieutenant Baker, then well knowing that said instrument was false.

Specification 7: In that First Lieutenant Jay Sheldon Baker, Jr., Headquarters 31st Infantry Division Artillery, did, at or in the vicinity of the Davenport Hotel, Spokane, Washington, on or about January 15, 1943, with intent to deceive Colonel Bernard J. Tooher, Air Corps, United States Army, officially present to said Colonel Tooher the following written instrument, to-wit:

CONFIDENTIAL

WAR DEPARTMENT

Office of the Adjutant General

December 31, 1942

SUBJECT: Identification of Special Duty Officer.

TO: Whom It May Concern.

1. This will serve to identify, with proper support of War

Dept., A.G.O. Form #65, 1st Lieutenant Jay S. Baker, Jr., as an officer on special duty with Military Intelligence Section, G-2, War Department, Army War College, Washington, D. C.

2. Any and all authorities, military or civil, are hereby directed to give to said Lt. Baker any assistance possible upon request and with the support of this document. The duties of this officer being of such nature that revealing of his mission might seriously endanger the war effort, no particular details will be asked or divulged.

By order of the Secretary of War:

(Signed) J A ULIO

J.A. Ulio
Major General, U.S.A.
The Adjutant General.

CONFIDENTIAL

he, the said Lieutenant Baker, then well knowing that said instrument was false.

The defense moved the court to strike the charge of violation of Article of War 95. This motion was denied. He pleaded not guilty to and was found guilty of the Charge 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 competent evidence shows that accused is a first lieutenant, Headquarters, 31st Infantry Division Artillery (R. 23). In the early afternoon of January 15, accused called on Major Erwin F. Goldman, Air Corps, 41st Headquarters and Air Base Squadron, Geiger Field, Washington, at the base headquarters where Major Goldman was on duty as executive officer (R. 85, 86). Accused was dressed as a first lieutenant in the United States Army and wore the insignia of an aide-de-camp to a major general (R. 87; Pros. Ex. 1, Pros.Ex. 8, incl. 1).

(All of the evidence for the prosecution was contained in depositions. Reference is made therein to a photograph of accused and to a purported letter of Major General James A. Ulio, The Adjutant General. Prosecution's Exhibit 2 is a stipulation which refers to this photograph and the letter and their use in and identification by the

depositions. The Stipulation provides that the letter and photograph shall be referred to as "Inclosure No. 1" and "Inclosure No. 2", respectively. Inasmuch as the depositions use the reverse order of these numbers to identify these two exhibits, and in order to avoid the possibility of confusion, this opinion will hereafter refer to the photograph and to the letter as "the photograph of accused" and "the purported letter of General Ulio", respectively.)

At the time of his call on Major Goldman on 15 January 1943, accused was dressed as he appears in the photograph of accused attached to the record, marked "inclosure 2", except that he did not have on observers' wings. He stated to Major Goldman that he was General Ulio's aide-de-camp on a confidential mission. He also stated that he was an officer on special duty with Military Intelligence Section, G-2. He presented to Major Goldman the purported letter of General Ulio, the original of which is attached to "Prosecution Exhibit 3". The purported letter of Major General Ulio read as follows:

"CONFIDENTIAL

WAR DEPARTMENT

Office of The Adjutant General

December 31, 1942

SUBJECT: Identification of Special Duty Officer.

TO : Whom It May Concern.

1. This will serve to identify, with proper support of War Dept., A.G.O. Form #65, 1st Lieutenant Jay S. Baker, Jr., as an officer on special duty with Military Intelligence Section, G-2, War Department, Army War College, Washington, D.C.

2. Any and all authorities, military or civil, are hereby directed to give to said Lt. Baker any assistance possible upon request and with the support of this document. The duties of this officer being of such nature that revealing of his mission might seriously endanger the war effort, no particular details will be asked or divulged.

By order of the Secretary of War:

(Signed) J A ULIO
J.A. Ulio
Major General, U.S.A.
The Adjutant General

CONFIDENTIAL"

Accused requested an official car to take him to the City of Spokane to accomplish his alleged mission and the use of the car for several hours. The use of the car for such long period was denied. Then accused requested transportation to town only, which was granted (R. 86-88).

At about 7 p.m. on the evening of January 15, accused introduced himself to James Alexander McClusky, Manager, Davenport Hotel, Spokane, Washington. He was dressed and wore the insignia as shown in the photograph of accused. To Mr. McClusky accused represented himself as aide-de-camp to General Ulio and presented the purported letter of General Ulio. He stated that he was on special detail for the General and that it was necessary for him to get into the Early Birds' Breakfast Club, a private club located in the basement of the Davenport Hotel (R. 30); that there was somebody there he had to "cover". Mr. McClusky refused accused admittance to the club. Finally he called Colonel Bernard J. Tooher, Air Corps Station, Spokane, Washington, a member of the club who might approve accused's admittance (R. 22, 81, 82). Colonel Tooher asked the manager to bring accused to his quarters in the Davenport Hotel, which was done (R. 22, 30). Accused was dressed in a uniform as shown in the photograph of accused, and was wearing aide-de-camp insignia on his lapels. He also wore the badge of aviation observer in addition to the usual insignia of rank. He stated to Colonel Tooher that he was aide-de-camp to Major General J. A. Ulio; he presented the purported letter from General Ulio; and he stated that he was an officer on special duty with Military Intelligence Section, G-2, War Department, Army War College, Washington, D. C. (R. 22, 24, 25). Colonel Tooher took accused to the club. Accused had told Colonel Tooher that he was on the trail of someone suspected of plotting destruction and that this person had been seen by one of his operatives entering the club. Arriving at the club, accused was unable to find the person for whom he was looking. Accused was also unable to locate his operative and stated that he would make contact with him through the telephone in his room. Accused proceeded upstairs by elevator. Colonel Tooher then went to his quarters and called the office of General Ulio. As a result of this telephone call he proceeded to accused's room and, accused being absent, continued to Mr. McCluskey's office. While he was there, accused entered the office and thanked Mr. McCluskey and Colonel Tooher for their assistance. Colonel Tooher thereupon demanded accused's credentials. After some further conversation, Colonel Tooher told accused he believed him an imposter. In the meantime Major Goldman had arrived in response to a telephone message from Colonel Tooher. Colonel Tooher, finally, at about 3 o'clock a.m., 16 January 1943 requested accused to telephone to his division adjutant at the former's home station at

Camp Shelby, Mississippi. At this point accused stood up and said, "Sir, you have me". Colonel Tooher placed accused under arrest in quarters and at 8 o'clock that morning took him to Fort Wright (R. 30, 31, 78, 83, 88).

At about 2:30 on the afternoon of January 16, accused was questioned by Lieutenant Colonel Warren L. Williams, Air Corps, Base Commander, Fort George Wright, Washington. Present were Major William J. Wilkins, J.A.G.D., Assistant Judge Advocate, Headquarters, 2nd Air Force, Fort George Wright, Washington, and Miss Louise Gardner, Spokane, Washington, reporter (R. 33, 34, 52, 58, 67). The photograph of accused had been taken at Base Headquarters, Fort George Wright on 16 January 1943. At the time of the questioning, accused was dressed as portrayed in the picture of accused and was wearing the insignia that appears in that picture (R. 34, 52, 67). At this time and place accused made a statement voluntarily and after being fully advised of his rights. "He was told that he could make or refuse to make a statement but that if he did make a statement it could be used against him in any later proceeding that may be brought against him" (R. 35, 53, 68, 73). The statement was taken down stenographically and recorded by Miss Gardner (R. 58-67). In this statement, accused said that he was attached to the 31st Division Artillery, stationed at Camp Shelby, Mississippi, Colonel Sumter L. Lowry, Commanding Officer. Accused was born 3 November 1918. He was drafted 9 January 1942 and went to Officers' Candidate School from which he was graduated July 21. He was commissioned as second lieutenant. He did not mention the fact that he had since been promoted to first lieutenant. At the time specified in the Charge he was the Division Artillery Adjutant. On January 4, accused left Camp Shelby on a 15 - day leave of absence. He stated that he had 15 days to get to his home and back again, that perfect train connections and travel by airplane were impossible. He drew up the purported letter of General Ulio for the purpose of facilitating his travel to and from Camp Shelby. He endeavored to get a plane out by use of that letter but did not succeed. He went to Portland, Oregon, and from there to Spokane, Washington, where his brother was in the service. He used the purported letter of General Ulio on three occasions; first, unsuccessfully to get air transportation west, second, when he secured transportation to Spokane from Geiger Field, by presenting the letter to Major Goldman, and third, when he endeavored to gain admission into the Early Birds' Breakfast Club. The distance from Geiger Field to Spokane for which he secured transportation was 8 miles. Accused's brother was with him at the time. Accused stated that when he showed the letter to Mr. McCluskey he was under the influence of alcohol. Accused elaborated on his statement to Colonel Williams. He said that when he prepared the purported letter of General Ulio he did not have General Ulio's signature before him. He stated that the signature

on the purported letter was in his own handwriting. With reference to the air observers' wings, accused explained that another officer who had just completed the air observers' course left the wings in the pocket of accused's blouse which he had borrowed, and that when accused was seeing his brother, he "put on the dog a little bit, just bragging a little" for the purpose of impressing his brother. Accused stated that with reference to the insignia of aide-de-camp he had been aide-de-camp previous to becoming adjutant, but that he was not authorized to wear the insignia at that time. Accused stated that before going into the Army he had been with General Motors Parts Division at Portland, Oregon, and before that he had worked a short time for Montgomery-Ward in Portland. Accused attended Reed College in Portland, San Mateo Junior College in San Mateo, California, and had been at school at Stanford University (R. 73-79).

Major General James A. Ulio, The Adjutant General, testified that he did not prepare, direct or authorize the preparation of the letter purporting to have been signed by him, nor did he sign, direct or authorize anyone to sign it for him; that on or about 15 January 1943 accused was not, nor for any time prior thereto had accused been, on special duty with Military Intellignece Section, G-2, War Department, Army War College, Washington, D. C.; that accused was not, on or about 15 January 1943 or at any time prior thereto, assigned as Aide-de-Camp to him; and that from 21 January 1943 to 26 January 1943 accused was rated as a combat observer of the United States Army as Acting Reconnaissance Officer at Camp Shelby, but that accused on 15 January 1943, was not authorized to wear the aviation badge of combat observer.

Colonel Homer W. Hesterly, Executive Officer, 31st Division Artillery, Camp Shelby, Mississippi, the accuser, testified for accused. He stated that he had known accused approximately 6 months, during which time witness had been executive officer and that he, in his official capacity, had rated accused for performances of duty as "excellent". (R. 91, 92). The defense introduced in evidence a certificate of "Honorable discharge from the Army of the United States" issued to accused at the time of his appointment as second lieutenant. This certificate described the character rating and the efficiency rating of accused as "excellent" (R. 92, 94).

Accused made an unsworn statement. He said:

> "Gentlemen, I would like to try to tell you in so many words, if I can, just what I was thinking about at the time, and the reason for * * *. As I was beginning to say, I would like to try and tell

you gentlemen, in so many words, what I was thinking about at the time. On January 9, 1942, I had been drafted into the Army. That was immediately after Pearl Harbor. When war was declared in December, everyone was excited, naturally, and I was at first undecided as to just what I should do. I wanted to fight, and I made up my mind that I would make something of myself while in the Army. I knew I would be in the Army soon and I determined to make the best of the situation. I finished my basic training and was given the opportunity to go to officer candidate school. I went to Fort Sill, Oklahoma, to attend the Field Artillery school. Upon graduation there on July 21, 1942 - I believe that was the date - I went to Camp Roberts, California. After being there only a few days, I was sent to Camp Bowie, and then to Camp Claiborne, Louisiana. I hadn't been at Camp Claiborne but about four or five days when I left to go on maneuvers, as the evidence has shown. I worked like the devil for my commission, and I appreciated it. Shortly after becoming a member of the Dixie Division, I was assigned as Aide to General Sumter L. Lowry, and I served in that capacity for two months and a half. During my time with the General as his Aide, the division had permanently changed stations and had come to this camp. The officers were being given leaves and the General told me to plan mine. When the time came for my leave, it was Christmas time, and travel was very difficult. I had put in for my leave to become effective the 4th of January. After looking into the matter of train schedules, I discovered that I had the choice of only two routes by rail, one of which was by Chicago. Either way would require many days because of the necessity to wait, several times, as many as two hours or more between trains, and because of the long distance that I had to go. Another Lieutenant had succeeded in making reservation for travel on a plane. I handled the papers for him myself. He later told me that if he had gone by rail he probably would have made better connection than by air. General Lowry told me personally - and General Parsons had announced that in his opinion it was likely that many of us officers might be overseas by the first part of this year - 1943. I was a long way from home and

was naturally very anxious to see my folks again, especially in view of the possibility of going overseas so soon. I began thinking what the devil I could do to get home.

"I figured out that by rail I might get there. As I said, I looked into the schedules and at last I visualized- as the rumors became more persistent - that with that letter I could travel by air and get there in time. But then I thought about it more, and my better judgment told me that it was a crazy idea, and I put it out of my mind. However, just before I left camp to go on my leave, I did write that letter and tried to get air travel at Jackson, but was unable to do so. So I got the next train out of Jackson going to California. One of my reasons for wanting to get home as soon as possible, was that my father was there and I wanted to see him. Also, I have two brothers, one in Seattle, and the other in the Army, stationed at Geiger Field, and both were to be home at the same time. Later I found that my brother, the one in the Army, would not be able to get home, so I arranged through his commanding officer that he be given leave for the day. I met him in Spokane, Washington, and we drank a little whisky together. We had been away from each other for eight months, and, of course, were glad to see each other. We talked about everything, and I happened to have the air observer's insignia in my pocket. I took them out. He looked at them and said, you've got the wrong insignia. Another officer had left the insignia in the pocket of my blouse when he had borrowed it a short time before that. The fellow's name was Sam. We talked a lot and I did a little bragging and showing off, just for the fun of it. I put on the wings and showed them to my brother. Later on we met some girls we knew and I decided we would take them out and show them a good time. We went to the Davenport Hotel in which the Early Birds' Club is located, and I attempted to gain admittance to the club, but was informed that, unless I was a member, it was impossible to get in there. I asked to see the manager of the hotel and talked to him. He is Mr. McClusky . The two girls waited down in the lobby while I was talking to the manager. Mr. McClusky told me I could not go in the club, and, as I had this letter in my pocket, I showed it to him. He insisted that only members could enter and told

me that if I knew a member, I could get in with him. So he tried to contact a few officers by telephone. Finally he got in touch with Colonel Tooher, who lived in the hotel. Colonel Tooher asked us to him room. While in his room the Colonel wanted to know about the insignia I was wearing and I explained about the whole matter. He took me down stairs to the Early Birds' Club, where we stayed for a while and he bought me a drink. The Colonel happened to be a member. During all that time the girls whom we had brought to the hotel were waiting in the lobby. After leaving the club, I looked for the young ladies, but apparently they had left as I was unable to locate them. I returned then to my room and read. After reading a little bit, I remembered that I had not thanked the manager and the Colonel for what they had done for me. So I went to Mr. McClusky's office, where they both happened to be, and thanked them.

"While in the office, Colonel Tooher questioned me about the letter I had. I explained to him about the whole thing, and then I returned to my room to get some rest. The matter finally went round and round, and Colonel Williams and Major Wilkins took a statement from me, after which I was told to return here. Since that time I have been under arrest.

"I know, gentlemen, that it was wrong as the devil, and I hope that you will try to understand what I was thinking about, the reasons why I did such a foolish thing; and, if it is at all possible for you to accept what I have said, and to understand, I ask that you punish me in any other way at all except by releasing me from the service. I thank you."

4. As to Specification 1:

Accused appeared on 15 January 1943, in improper uniform at Geiger Field, Washington, and in the Davenport Hotel, Spokane, Washington. He was wearing without authority the insignia of aide-de-camp to a major general and the aviation badge of a combat observer, United States Army. The Specification alleges that accused by wearing this unauthorized insignia falsly represented himself as an aide-de-camp to a major general and as an aviation combat observer, and also that accused intended to deceive thereby. Since insignia is worn for the purpose of

indicating a soldier's true military status with respect to grade, duty and assignment, the willful wearing of unauthorized insignia will be presumed to be for the purpose of representing a false status and to be worn for the purpose of deception. No oral misrepresentation need be shown. The insignia speaks for itself. Every element of the Specification was proven. The only question is as to whether the Specification is properly laid under Article of War 95. The important allegation in Specification 2 lies in the words "with intent to deceive". To appear in improper uniform is a military offense under Article of War 96. If this offense is committed with intent to deceive, to mislead, to misrepresent for some personal gain or advantage, not necessarily pecuniary, or for personal aggrandizement, social or otherwise, then does the conduct violate the standards and code of a gentleman and then is the offender, as here, guilty under Article of War 95.

With respect to the remaining Specifications of the Charge, each allegation was proved.

With intent to deceive, accused falsely represented to Major Goldman, Mr. McCluskey and to Colonel Tooher, as alleged in Specifications 2, 3 and 4, respectively, that he was an officer on special duty with the Military Intelligence Section, G-2. Whether the representation was made officially, as charged in the case of Major Goldman, or unofficially, is immaterial. The proven purpose in each case was to obtain for himself a privilege, at the very least, special consideration. From Major Goldman he endeavored to obtain, and in part did obtain, special Army transportation facilities. From Mr. McCluskey and Colonel Tooher he endeavored to obtain admission into a private club. For this purpose he assumed an unauthorized military status to enhance himself personally and to advance his private interests. This conduct, as stated above, combined a military offense and conduct unbecoming a gentleman. A gentleman does not misrepresent his business connections, his standing, or his importance, in business or social relationships.

For the same purpose, and with intent to deceive, accused prepared and then presented to Major Goldman and Colonel Tooher the purported letter of The Adjutant General of the Army. The preparation of this letter for a deceptive purpose, to say nothing of its deceitful use, was a most flagrant military offense, unworthy of an officer and shocking to all gentlemanly sensibilities.

It is realized that accused is nowhere charged "with intent to

defraud". Nor is it alleged or attempted to be proven that his purpose was to improve his financial position by his unworthy acts. However, as stated, the unauthorized use of military insignia, the false representation as to his duty assignment with Military Intelligence, and the preparation and his use of the letter purportedly from The Adjutant General, each in itself constituted a military offense, a violation of Article of War 96, and at the same time offended good taste and transgressed the first rules of gentlemanly conduct. The conduct of accused falls squarely within the definition of "conduct unbecoming an officer and a gentleman", in violation of Article of War 95, as stated by Winthrop in his Military Laws and Precedents, Second Edition, page 711:

> "THE MISCONDUCT CONTEMPLATED.-.....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."

It is the opinion of the Board of Review that the Charge, violation of Article of War 95, was properly laid and that the findings of guilty of the Specifications and the Charge were supported by the evidence.

5. War Department records show that accused is 24 years of age. His parents were born in the United States. His residence is Portland, Oregon. He graduated from high school and attended San Mateo Junior College one year and Reed College two years. He specialized in political science. He speaks and reads French fluently and translates and reads Spanish. He was inducted into service 9 January 1942. Thereafter he was highly recommended by his commanding officer for officer candidate school on the grounds that he had demonstrated outstanding qualities of leadership and that his character was excellent. He was commissioned Second Lieutenant Field Artillery, Army of the United States, on 21 July 1942. He was recommended by his commanding general for promotion on 2 October 1942 on the ground that during Louisiana maneuvers he had demonstrated unusual ability and leadership. He was promoted to the grade of first lieutenant on 22 October 1942. At the time of his promotion he was Acting Aide-de Camp to the Commanding General, 31st Infantry Division Artillery. His promotion was requested on the ground that he was to fill the position of Reconnaisance Officer.

He is single and his pay is $167.67 per month.

The court was legally constituted and had jurisdiction of the person and 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 and to warrant confirmation thereof. Dismissal is mandatory upon conviction of violation of Article of War 95.

Judge Advocate.

Judge Advocate.

Fletcher R. Andrews Judge Advocate.

1st Ind.

War Department, J.A.G.O., - 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 Jay Sheldon Baker, Jr. (O-1166661), 31st Infantry Division Artillery.

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 to dismissal be confirmed, but commuted to a reprimand, 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. to President.
Incl.3-Form of action.

(Sentence confirmed but commuted to reprimand. G.C.M.O. 209, 2 Sep 1943)

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

SPJGN
CM 233906

APR 19 1943

UNITED STATES v. Private BENJAMIN F. JENKINS (32436799), Company A, 257th Quartermaster Service Battalion.	II ARMORED CORPS Trial by G. C. M., convened at Fort Ord, California, March 30, 1943. Dishonorable discharge and confinement for ten (10) years. Disciplinary Barracks.

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

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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 Charges and Specifications:

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

Specification: In that Private Benjamin F. Jenkins, Company A, 257th Quartermaster Service Battalion, having received a lawful command from 2nd Lt John R. Morris, his superior officer, to get his pack on and fall out with the company, did at Fort Ord, California, on or about March 9, 1943, willfully disobey the same.

CHARGE II: Violation of the 65th Article of War.

Specification: In that Private Benjamin F. Jenkins, Company A, 257th Quartermaster Service Battalion, did, at Fort Ord, California, on or about March 9, 1943, use the following threatening and insulting language toward Sergeant Charles W. Wheeler, a noncommissioned officer who was then in the execution of his office "You big lipped motherfucking son of a bitch, if you go to sleep tonight I'll cut your throat", or words to that effect.

The accused pleaded not guilty to and was found guilty of all Specifications and Charges. Evidence of one previous conviction by summary court-martial 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 twenty years. The reviewing authority approved the findings except so much of the findings of the Specification, Charge II, as involves findings of guilty of the words "threatening and" and "if you go to sleep tonight I'll cut your throat", approved the sentence but remitted ten years of the confinement imposed, 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.

3. a. Concerning the Specification, Charge I, the evidence for the prosecution shows that on March 9, 1943, a road march was scheduled for Company A, 257th Quartermaster Service Battalion, to begin with a formation in the company street at 1 o'clock in the afternoon. At 5 minutes to 1, Second Lieutenant John R. Morris came to the street and gave the accused a direct order to get his pack on and fall out with the company. The accused stated that he had a slip from a captain in the Medical Detachment showing why he should not make the hike, and that he would not make it because of his feet. He also stated there was something wrong with his knee (R. 2, 4, 7).

The accused did not tell Lieutenant Morris he would not obey the order, but stated if the lieutenant expected him to fall out with the company the lieutenant must know more than the Medical doctor. Lieutenant Morris did not ask the accused to let him see the slip, and did not personally check to find out if there was anything to hinder the accused from going on the march. He did, however, identify a slip shown him on cross-examination as "the one that Jenkins had", explaining that "Lieutenant Monte gave it to him to go to the hospital for a request for foot treatment." (R. 3, 4-5)

After the accused made the statement testified to by Lieutenant Morris, the latter testified that he neither said nor did anything until about five minutes later. The following testimony as to what happened then was elicited from Lieutenant Morris by questions propounded to him by the court:

"Q. Tell the court what you said or did five minutes later.
"A. I told him to go get his pack on and fall-out with the company.
"Q. What did he do to constitute lawful disobedience?
"A. Nothing, he started up the stair steps to get his pack and never stated to my knowledge that he would not fall out with the company.
"Q. Did the accused tell you at anytime that he would not obey your order?
"A. No, Sir."

Reverting to the original order, the court then elicited the following testimony from Lieutenant Morris:

"Q. At Five minutes to One you gave the accused a direct order to fall-out with his company, is that correct?
"A. Yes, Sir.
"Q. Did he refuse to do that by just failing to do so or did he tell you that he would not, or had no intention of obeying your order?
"A. He made no statement.
* * * * * *
"Q. After you gave the order did the accused give you any reason why he should not fall-out or something to that effect?
"A. Yes, Sir, he said he didn't have to because he had a slip from the doctor in regards to a sore knee." (R. 5-6)

Second Lieutenant William D. Miller was in charge of the road march formation, which was scheduled to begin at 1 o'clock but actually took place about 1:40. When he arrived in the company street he saw the accused arguing with Lieutenant Morris. Lieutenant Miller told the accused to go upstairs and put his pack on. Two sergeants repeated the order, and the accused "began using threatening and insulting language toward the non-commissioned officers and" Lieutenant Miller. The battalion commander (who did not testify) had to come down to make the accused fall in (R. 7).

Lieutenant Miller then testified as follows:

"Q. You stated that this hike took place about 1:45 P.M. Did Jenkins go on the hike?
"A. Yes, Sir.
"Q. Did he make any statement to you while he was on the hike?
"A. Yes, Sir, Private Jenkins told me that I had better put him in the guardhouse because he was going to get some people, and that he had some people on his list.
* * * * *
"Q. Did you hear Lieutenant Morris at any time give the accused a direct order to fall-out with his company?
"A. I could not say, there was so much argument going on at the time I came to the barracks.
"Q. Did, at any time, you hear the accused state that he refused to fall-out?
"A. He said that he did not intend to fall-out in formation.
"Q. * * * To whom was he addressing?
"A. It was to Lieutenant Morris." (R. 7-9)

Sergeant Wheeler heard Lieutenant Morris tell the accused to put on his field pack and fall out. When the accused failed to do as he was ordered, Lieutenant Morris told Sergeant Wheeler to take the accused upstairs and put his field pack on. "When I gave the order", Sergeant Wheeler testified, "he told me he was not going to fall-out, and said the same to Lieutenant Morris when he gave the order." (R. 10-11) On cross-examination, the following testimony was elicited from Sergeant Wheeler:

"Q. Did you see Jenkins at all, that day, in formation with his pack?
"A. No, Sir.
"Q. Did you make a roll call?
"A. Before we left and after we came back." (R. 11)

Staff Sergeant William Jenkins testified that he heard Lieutenant Morris tell the accused to fall out, and that the accused refused (R. 12).

b. Concerning the Specification, Charge II, the evidence for the prosecution shows that the accused applied to Sergeant Wheeler, face to face, while the latter was in the execution of his office, the obscene epithet alleged, using the identical eight first words attributed to him in the Specification (R. 1, 10).

4. The defense introduced no evidence, and the accused stated that he fully understood his rights and that he elected to remain silent.

5. a. The Specification, Charge I, alleges that the accused "having received a lawful command from 2nd Lt John R. Morris, his superior officer, to get his pack on and fall out with the company, did *** willfully disobey the same."

> "The willful disobedience contemplated is such as shows an intentional defiance of authority, as where a soldier is given an order by an officer to do or cease from doing a particular thing at once and refuses or deliberately omits to do what is ordered ***. Where the order to a person is to be executed in the future, a statement by him to the effect that he intends to disobey it is not an offense under A.W. 64, although carrying out such an intention may be" (par. 134b, p. 148, M.C.M., 1928).

The evidence clearly shows that the order alleged to have been willfully disobeyed was given at 5 minutes to 1 o'clock, and contemplated compliance in the future - albeit the very near future - to wit, at 1 o'clock. While isolated excerpts from the testimony of each of the prosecution's witnesses might seem to substantiate the findings of guilty of the Charge and Specification, each such excerpt - with the exception of one from Sergeant Wheeler's testimony, discussed later - manifests, upon closer scrutiny, a mere conclusion of the witness, inconsistent with the facts established by the testimony of both the commissioned officers. This factual - as contradistinguished from the opinion - account of what happened shows that at 5 minutes of 1 o'clock Lieutenant Morris gave the accused a direct order to fall out with his company at the formation scheduled for 1 o'clock. The accused said he was not required to because he had a slip from the doctor in regard to sore feet (or a sore knee). Lieutenant Morris did not ask the accused to let him see the slip, or personally check to find out if

there was anything to hinder the accused from going on the march, but neither spoke nor acted further with reference to the matter until 5 minutes later when he told the accused to get his pack and fall out with the company. The accused did nothing, according to Lieutenant Morris (whose command he was charged with willfully disobeying), to constitute "lawful disobedience", but started up the stair steps to get his pack, and never stated, to Lieutenant Morris' knowledge, that he would not fall out with the company; nor did he tell Lieutenant Morris at any time that he would not obey his order. Lieutenant Miller, who was in charge of the march, testified that the accused not only went along, but made a statement to Lieutenant Miller "while he was on the hike".

In the light of this testimony, Sergeant Wheeler's failure to see the accused, in formation with his pack, becomes immaterial. It is perhaps significant that Sergeant Wheeler omitted to testify that he did not hear the accused as well, or that the accused did not answer at the roll calls which the sergeant testified he made before the company left and after its return. Moreover, the opinion testimony of Lieutenant Miller and the two sergeants that the accused refused to obey Lieutenant Morris' order to fall out must be deemed to reflect their erroneous construction of the demurrer which Lieutenant Morris testified the accused at first interposed to an order which, when his demurrer was overruled, he afterwards obeyed. Lieutenant Miller's further testimony that the battalion commander had to come down to make the accused fall in is another conclusion, neither developed nor explained, which is wholly inadequate to controvert Lieutenant Morris' explicit factual testimony of what the accused said and did.

In the opinion of the Board of Review the evidence shows neither willful disobedience nor failure to obey, and is, therefore, insufficient to sustain the findings of guilty of Charge I and its Specification, or to show commission by the accused of any lesser included offense.

b. The Specification, Charge II, omitting the words excepted by the reviewing authority in approving the finding of guilty thereof, alleges that the accused used the following insulting language toward Sergeant Charles W. Wheeler, a noncommissioned officer who was then in the execution of his office, "You big lipped motherfucking son of a bitch", or words to that effect.

The uncontradicted testimony of Lieutenant Morris and Sergeant Wheeler establishes beyond a reasonable doubt every element of the offense alleged in the Specification, and clearly sustains the approved finding of guilty thereof in violation of Article of War 65.

6. The accused is about 30 years of age. He was inducted at Fort Jay, New York, August 25, 1942. His record shows no prior service.

7. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Charge II and its Specification, as approved by the reviewing authority; legally insufficient to support the findings of guilty of Charge I and its Specification, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for two months and forfeiture of two-thirds of accused's pay per month for a like period.

Thos. L. Jessson, Judge Advocate.
Abner E. Lipscomb, Judge Advocate.
Benjamin P. Sleeper, Judge Advocate.

(212)

1st Ind.

War Department, J.A.G.O., APR 26 1943 - To the Commanding General, II Armored Corps, San Jose, California.

1. In the case of Private Benjamin F. Jenkins (32436799), Company A, 257th Quartermaster Service Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty of Charge II and its Specification, as approved, legally insufficient to support the findings of guilty of Charge I and its Specification, and legally sufficient to support only so much of the sentence as involves confinement at hard labor for two months and forfeiture of two-thirds pay per month for a like period, which holding is hereby approved. Upon disapproval of the findings of guilty of Charge I and its Specification and upon vacation of so much of the sentence as is in excess of confinement at hard labor for two months and forfeiture of two-thirds pay per month for a like period, 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 233906).

Myron C. Cramer

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

1 Incl - Record of trial

RECEIVED MAY 2 JUDGE ADVO. GEN.

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

SPJGN
CM 234008

22 JUL 1943

UNITED STATES	)	82ND AIRBORNE DIVISION
	)	
v.	)	Trial by G.C.M., convened at Fort Bragg, North Carolina, 1 April 1943. Dismissal.
	)	
Second Lieutenant EDMUND E. GRUBB (0-1283945), 504th Parachute 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 Charge and Specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Second Lieutenant Edmund E. Grubb, 504th Parachute Infantry, was, at Fayetteville, North Carolina, on or about March 6, 1943, in a public place, to wit, Martel Tourist Home, disorderly while in uniform.

Specification 2: (Finding of not guilty).

Specification 3: In that Second Lieutenant Edmund E. Grubb, 504th Parachute Infantry, did, at Fayetteville, North Carolina, on or about March 6, 1943, conduct himself in a manner unbecoming an officer and a gentleman by using abusive language toward Sergeant Vincent Christina and Private First Class James T. Dunn, Military Police, by saying to them "they hang a pistol on these 4F Sons-of-bitches, and they think they're God Almighty".

He pleaded not guilty to the Charge and all the Specifications and was found guilty of the Charge and of Specifications 1 and 3, and not guilty of Specification 2. 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.

3a. Concerning Specification 1, the evidence for the prosecution shows that Mr. E. B. Dunlap operated his home at Fayetteville, North Carolina, as a licensed rooming house, calling it the Martel Tourist Home. All of his nine revenue-producing rooms were rented - but only one, in addition to the accused's, actually occupied - when, late in the afternoon, on 6 March 1943, motivated by an undisclosed statement made to him by his wife, who was then weeping and hysterical - she has some sort of nervous trouble, - Mr. Dunlap, who had just drunk a bottle of beer on his way home from work, telephoned the office of the military police in Fayetteville, to tell them that he "wished them to take a man out". Two privates responded. Mr. Dunlap met them on the front porch, informed them that an officer upstairs was causing a disturbance, and conducted them to the door of the room where the accused and his wife were residing as Dunlap's tenants, a status which they had occupied for the past four weeks (R. 16-21, 23-26).

In response to the M.P.'s knock, the accused's wife came to the door and wanted to know what was wrong. One of the M.P.'s stated that Mr. Dunlap wished to have them removed from the place. Entering, the M.P.'s found the accused in proper uniform, on the bed, his wife sitting beside him; also two sergeants. Having closed the door behind them, the M.P.'s asked the accused to come down to the station, telling him that the captain wanted to talk to him. At first the accused demurred, but after one of the sergeants had suggested he had better go along "he said he would go, sure we'll go" (R. 27, 33, 36).

In the meantime, Mr. Dunlap, having "waited for some hit", downstairs, knocked on the door. He inquired of the M.P. who opened the door, what the trouble was, and was told, "nothing". Having then asked the accused, in rather an insulting manner, to vacate the room, saying he needed it right away, Dunlap walked back into the hall. The accused, the two sergeants and the two M.P.'s followed, whereupon Dunlap told the M.P.'s he wished they would take the accused out, and keep him out of his place (R. 18, 20, 29, 34).

"They first said", Dunlap testified, "I couldn't put them out, that I had to give them a notice, * * *". On cross-examination, after stating that he should have been more specific, Dunlap admitted it was not the accused "that said that, one of the boys with him said that. I didn't say anything to any of them", he added, "I knew the laws relating to that, I called the M.P.'s to take them out". The accused, he testified, "didn't start any argument at all" (R. 18, 21-22).

Talking to the M.P.'s "right aside him", however, the accused called his landlord a "four eyed yellow son-of-a-bitch, then a chicken shit;" and, according to one M.P., "made one step forward as if to strike him, so I took hold of his arm to keep him from it, in case he did;" the accused made no effort to jerk loose, nor any further show of violence. The other M.P. testified that when the accused started to curse, he caught his arm before he had time to attempt to strike Mr. Dunlap; "whether or not he was going to strike him I don't know". Mr. Dunlap testified "he started to sock at me"; asked, on cross-examination, what the accused did, he replied, "He threw his hands back;" as for stepping towards him, "He started to, but an M.P. caught him. * * * No, he didn't move, I was about four or five feet away" (R. 19, 21, 27, 31, 33, 35).

Though the accused offered no resistance, an M.P. kept a hand on his arm, escorting him down the steps. When the accused, the sergeants and the two M.P.'s had left, Mr. Dunlap ordered the accused's wife to move. "How long did you give her to get out?" inquired the defense counsel. "Thirty minutes", Dunlap replied (R. 18, 22, 23, 27, 33, 35).

b. Concerning Specification 1, the evidence for the defense shows that on the afternoon in question, the accused who was communications officer, first battalion, 504th Parachute Infantry, invited two

sergeants of his organization to his room to dicuss communications. One, a sergeant in the communications section, had been on a furlough, and had had no time to talk with the accused, who was his communications officer, about communications in the first battalion and the problem they were beginning in Maxton Field. The accused, incidently, was characterized by his immediate superiors, as an excellent communications officer who had the full cooperation of his men, excellent ability as a leader, and "a lot of good ideas in communication" (R. 50, 53-58).

The accused and two sergeants, entering the Martel Tourist Home, encountered Mrs. Dunlap. After they had gone to the accused's room, they again met her in the hall. She asked the accused "if it would be a drinking party". He said no and that ended their conversation. They went into the accused's room, and did not leave until the M.P.'s arrived. During the time they were there, no disturbance was created, and there was no loud boisterous talk (R. 44-45, 51).

The accused, in the course of his oral unsworn statement to the court said:

> "During the entire time I was with First Sergeant Currans and Sergeant Houk, we were talking about military affairs in general, parachute jumping, as all parachutists talk when they get together, and about communications in our battalion and as we seen it in other branches of the service. At the time there was a big problem, known as "X" problem to us, coming up and one of my sergeants, Sergeant Houk, was my message center chief, and he had just returned from furlough and it is hard to get time off when you have to work out of one section. * * * While we were in the room there was no disorderly conduct, I can assure you that. The two sergeants walked in the room and took two chairs by the window and I sat on the bed with my wife on a chair next to the bed. There was no boisterous talking or laughing whatsoever. The arrival of MP's was a complete surprise to me. * * * They told me to come to the station and of course I might have objected but anyway we left. As we got outside the door Mr. Dunlap

was there * * *. He was rather insulting and I might add, he said get out of this room right away, in about 20 or 30 minutes, and of course, that disturbed me, I knew that the MP's were taking me to the station and I was worried about my wife, she had no living quarters and a lot of things to pack, all the burden was on her. It's hard to find a room in Fayetteville, I might have said some improper remarks to him but just what I said I don't remember. I don't believe I meant to strike the man, I don't believe I did." (R. 58-59).

c. Specification 1 alleges that the accused was disorderly in uniform, in a public place, to wit, Martel Tourist Home. Whether the upstairs hall of a home, licensed as a rooming house, in which nine rooms are rented, is a public place, particularly with no one present except the accused and his two guests - who might be termed professional associates, - the owner, and the M.P.'s whom the owner had summoned, is extremely doubtful, but presents a question which need not be determined in this case. According to the record, the only acts of the accused susceptible of being classified as disorderly were his cursing of his landlord and his abortive - and highly speculative - attempts to strike him. Discounting all evidence adduced by the defense, the evidence for the prosecution shows that the accused and his wife had been occupying a room at the Martel Tourist Home, Fayetteville, North Carolina, for some four weeks prior to 6 March 1943, when the accused was evicted by military police at the insistence of his landlord, who, when he had rid himself of the accused by this unusual method, gave the accused's wife thirty minutes to get out. As the accused was leaving, escorted by the M.P.'s, acting, in this instance, for and on behalf of the owner, the latter, in a manner characterized by one of the M.P.'s as "insulting", demanded that the accused vacate his room immediately, stating that he - the owner - needed it right away. In the opinion of the Board of Review the accused's brief outburst, though not couched in language ordinarily appropriate for an officer's use, was provoked by the landlord's inflammatory words and conduct, which - as far as the record shows - were wholly unwarranted. The evidence is not sufficient to show any disorder which, under the circumstances, might properly be said to constitute conduct unbecoming an officer and a gentleman, as charged; nor was it conduct prejudicial to good order and military discipline, constituting as such, an offense of

which the conviction might properly be sustained in a violation of Article of War 96.

4a. Concerning Specification 3, the evidence for the prosecution shows that while the accused was waiting for the arrival of the officer of the day at the military police station, a discussion arose between the accused and Sergeant Curran, who had accompanied him there, with reference to Army Regulations, in the course of which Sergeant Curran addressed an inquiry to one of the two M.P.'s in the office - Sergeant Vincent Christina - who, in response, testified, "I told him I'm not sure about that, and the Lieutenant " (the accused)

> "said 'what the hell do you know about it, they put a gun on your side and you think you're God Almighty'. * * * Then the Lieutenant kept talking to the Sergeant and then he turned and looked at me and said 'A bunch of kids playing cops and robbers', * * * and later on he called us 4F son-of-bitches".

The accused was conversing with Sergeant Curran when he made this remark, but he looked directly at Sergeant Christina, who was five or six feet away. Private First Class James T. Dunn, the desk clerk, also testified that the accused "made reference to M.P.'s being 4F Sons-of-bitches. * * * That statement wasn't made directly to me" he explained. "I was there at the time, but * * * I don't know who it was made directly to" (R. 37-42).

b. Concerning Specification 3, the evidence for the defense shows that while the two parachute sergeants were at the M.P.'s office, where the accused was waiting for the officer of the day, they saw a soldier brought in, who was hit and pushed up against the wall by an M.P. in the hall, just outside the open door leading into the office. "The MP looked about six feet and he hit the Private in the mouth two or three times, and in the stomach with his fist," one of the sergeants testified (R. 46, 48).

In his unsworn verbal statement to the court, the accused explained:

> "Well, after we left and went down to the MP station, I felt very disturbed, after all a man's home is his

castle, and being picked up that way, after the MP's said there had been a disturbance, when there wasn't no disturbance. I asked one MP where the officer of the day was and he didn't know. I asked another one where the officer of the day was, I think it was a Sergeant, I don't know, anyway he said he was at his quarters. * * * Then there was a discussion about the Army Regulations but I didn't interfere because I'm not too familiar with Army Regulations. Sergeant Curran and I talked back and forth about it. At that time the MP's brought in a soldier, a very small chap and he wasn't too drunk but they started patting him over, they figured he had a bottle of whiskey, one big bruiser pushed him up against the wall and smacked him several times. My temper was somewhat aroused at that, so I said to Sergeant Currans something about calling these men, I think it was giving them a pistol on their hips and they think they're God Almighty, some statement as that, and a few remarks passed between Sergeant Curran and myself. I might have looked at Sergeant Christina but in no way was my remark directed at him." (R. 59).

c. Specification 3 alleges use of abusive language toward the M.P. sergeant and desk clerk by saying "they hang a pistol on these 4F Sons-of-bitches, and they think they're God Almighty". The proof shows that the accused said "they hang a gun on your side and you think you're God Almighty", and, later, in his conversation with a third party, used the term 4F sons-of-bitches in such a manner that the M.P. sergeant thought he and the desk clerk were being so characterized, while the desk clerk apparently received the impression that the reference was to M.P.'s in general. Despite the variance between Specification and proof, the language attributed to the accused by the prosecution's witnesses is sufficiently similar, in form and substance, to the language alleged, to sustain the finding of guilty of the Specification, in violation of Article of War 96, but not of Article of War 95 as charged. Profane reflection on enlisted men and the branch of the service to which they belong, expressed in their presence, is clearly prejudicial to good order and military discipline; and also, under the circumstances disclosed by this record,

conduct unbecoming an officer and a gentleman.

5. The accused is 22 years of age. Records in the Office of The Adjutant General show enlisted service from 16 September 1940 to 18 May 1942, when he was discharged to accept commission as second lieutenant of Infantry, Army of the United States, effective 19 May 1942, which was also the date of his entry upon active duty.

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 not legally sufficient to support the findings of guilty of Specification 1 or of the Charge; legally sufficient to support the finding of guilty of Specification 3, in violation of Article of War 96; legally sufficient to support the sentence and to warrant confirmation thereof. A sentence of dismissal is authorized upon conviction of a violation of Article of War 96.

Chas. L. Dressons, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Cooper, Judge Advocate.

SPJGN
CM 234008

1st Ind.

War Department, J.A.G.O., 6 - AUG 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 Edmund E. Grubb (O-1283945), 504th Parachute 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. I recommend that the sentence be confirmed but commuted to a reprimand.

3. Inclosed are a draft of a letter for the signature of the Under Secretary of War, 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 your 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. USW.
Incl 3 - Form of Executive action.

(Sentence confirmed but commuted to reprimand. G.C.M.O. 270, 28 Sep 1943)

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

SPJGN
CM 234033

1 JUL 1943

UNITED STATES	)	98TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Breckinridge, Kentucky, April 7, 1943. Dishonorable discharge and confinement for fifteen (15) years. Penitentiary.
Private ANGELO P. ATTANASIO (32536176), Headquarters Detachment, 323rd Medical Battalion.	)	

REVIEW 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 93rd Article of War.

Specification 1: In that Private Angelo P. Attanasio, then Technician 5th Grade, Headquarters Detachment, 323rd Medical Battalion, did, at Evansville, Indiana, on or about March 28, 1943, commit the crime of sodomy, by feloniously and against the order of nature, have carnal connection with one Rosemary Robeson, by mouth, forcibly against her will.

Specification 2: In that Private Angelo P. Attanasio, then Technician 5th Grade, Headquarters Detachment, 323rd Medical Battalion, did, at Evansville, Indiana, on or about March 28, 1943, with intent to commit a felony, viz: sodomy, commit an assault upon one Rosemary Robeson by willfully and feloniously striking the said Rosemary Robeson on the mouth, face and stomach with his hands and grasping her by the hair, the said Rosemary Robeson being approximately seventeen years of age.

He pleaded not guilty to and was found guilty of the Charge and both 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 fifteen years. The reviewing authority approved the sentence, designated the Federal 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, in brief, is as follows: On March 27, 1942, Miss Rosemary Robeson (who was seventeen) met Steve Budassi at the Greyhound Bus Station at about 11 o'clock. He suggested they go to his room, No. 526, in the Vendome Hotel, where they stayed and talked quite a while. The other boys came in, but left for a party. The accused, whom they called "Curly", did not leave and around twelve o'clock said he wanted to talk to her personally. The accused asked Budassi to step out, which he did, though she asked him not to leave. The accused tried to kiss her and when she pulled away he hit her. He tried to have intercourse with her, she refused, he hit her, and would not listen to her. She fought with him for quite a while, then he said if she did not want him to take her "virtue" there was something else she could do. He had all his clothes off, had forced her to take off hers, told her to take his private in her mouth, she refused, so he hit her again, and forced it in her mouth. She was across the bed when he hit her, and fell on the floor. Someone knocked at the door, so he let her dress and go out. She went down the hall looking for the elevator, past Captain Davis' door. He asked her if something was wrong, if someone had beaten her. She told what had happened, and at about a quarter to three he took her home. She had never met the accused in any hotel room before. When they were together she put up a fight, cried out, and screamed when he forced her to take her clothes off. She thought it was Budassi knocking on the door, because he said

he would be outside if she needed him. While she was in the room with the accused the telephone rang. The accused answered it and said "Everything's alright". She tried to get away, got in the hall with her slip on, and saw some soldiers down the small hall, recognized a boy named Lou, but nobody in the group made any attempt to help her (R. 3-7).

On the evening of March 27-28, Corporal Vincent A. Vinniti rode in on the bus with the accused. They got off at the bus station, and went to the Vendome to get a room. They then went to the "Zanzibar", and about twelve o'clock he and the accused got back to the hotel. He left the accused at the Vendome, and went out again and on his return went upstairs, and knocked at the door. The accused opened it, the girl ran out and said, "Thank God you came". At that time just the bathroom light was on. He did not know who the girl was but recognized her at the police station. On Sunday night when he got back to camp the accused stated in his room upstairs in the barracks, when McCall, Budassi and Gruber were present, that "he hit the girl and the girl blew him". After Corporal Vinniti got off the bus on March 27, he was with the accused. They went to various bars drinking from five o'clock until about midnight (R. 7-9).

On the evening of March 27, until the morning of the 28th, Mr. Walter A. Battorff was registered in room 506, Vendome Hotel, Evansville, Indiana. He and Mr. O'Connell met Captain Davis at the hotel and they went up to Mr. Battorff's room. Between 2 and 2:30 the young lady came to the door. Captain Davis went to see what the trouble was, and brought her into the room. She was crying, had been beaten, and was carrying some clothes in her hand. They bathed her face, had her lie down, tried to get her into a composed condition and she told them she had been attacked in the room down the hall. She was in a highly nervous condition. She told them her first name was Rosemary. Her clothes were rumpled. She complained of her stomach and said she had been beaten (R. 10-11).

Mr. Samuel J. O'Connell corroborated fully the testimony of Mr. Battorff, and stated he recognized the girl, that she was the one called out of the orderly room by the assistant trial judge advocate (R. 11-12).

On the evening of March 27, Private Stephen Budassi went to the Greyhound Bus Station, had a date there with Rosemary Robeson,

and met her there. As it was cold they went to his room in the Vendome Hotel at about ten minutes to eleven. She wanted to leave at 12 to meet her sister and about that time the accused came in, asked Budassi to step out, so he could get things straightened out with her. He left, went to the Greyhound Station, telephoned his hotel room, the accused answered and said the girl had gone home three-quarters of an hour before. He later went back to the hotel, in the lobby met the accused who said everything was straightened out, so he went to bed. Next morning the sister of the girl came to the hotel. The accused was asleep in the room. She blamed Budassi for what had happened to her sister, threatened to kill the accused who she claimed had beaten her sister, but he said nothing had happened, she had just walked out of the hotel room. Next night back in camp he asked the accused what happened. He said the only thing he did was to slap her, thought it was a joke (R. 12-14).

4. The defense did not introduce any evidence and after his rights had been explained to the accused he elected to remain silent.

5. Specification 1, alleges that the accused did, on March 28, 1943, "* * * commit the crime of sodomy, by feloniously and against the order of nature, having carnal connection with one Rosemary Robeson, by mouth, forcibly against her will". The latter part of the Specification alleging that the act was done "forcibly against her will" is surplusage since there is no offense under Article of War 93 described as sodomy by force. The evidence shows that the accused committed the unnatural sexual act with Rosemary Robeson on the date, at the place, and in the manner alleged, and sustains, beyond a reasonable doubt, every essential element of the offense.

Specification 2 alleges that the accused did on March 28, 1942, "* * * with intent to commit a felony viz: sodomy, commit an assault upon one Rosemary Robeson * * *". The evidence shows that the accused made a violent attack upon Rosemary Robeson with the intent of forcing her to submit to an unnatural sexual act with him. Every essential element of the alleged offense is established.

6. Since the assault with intent to commit sodomy in this case culminated in sodomy, the question may be raised as to whether the two offenses were merged, and whether, therefore, the sentence of 15 years imprisonment imposed for the two separate offenses was legally assessed. The common law rule provided that a misdemeanor was merged into a felony,

as an ordinary assault and battery was merged into the felony to which the assault and battery led, "but there was no merger of a felony in a felony, * * *. Nor was there any merger of a misdemeanor in a misdemeanor" (Clark & Marshall Crimes, 4th Ed. p. 12). In this connection it must be observed that each of the two offenses alleged in the present case are of the grade of a felony, and both are made punishable by the same Article of War. In considering the question of merger in the case of Berkowitz v. United States, 93 Fed. R. 455, the court asserted that:

> "The doctrine of merger is not applicable as between misdemeanors. A conspiracy to commit a misdemeanor is not merged in the misdemeanor when committed. Hence it follows that where the offence which is the object of the conspiracy amounts only to a misdemeanor against the United States there is no merger in it of the offence of conspiracy, nor is there a merger of the offence constituting such object in the offence of conspiracy."

Similarly in the case of State v. Weitzel, 69 p. 2d Pac., 958, 157 Ore. 337, in which the facts closely resemble those of the present case, the Supreme Court of Oregon held that an acquittal of the charge of attempted rape, did not bar a conviction of sodomy resulting from the attempted rape. The court asserted that:

> "Sodomy and attempted rape are separate and distinct crimes. Neither crime is an element of the other. Evidence sufficient to establish guilt of sodomy would not necessarily show guilt of attempted rape and vice versa."

It is equally true that sodomy and assault with intent to commit sodomy are separate and distinct crimes, as contradistinguished from rape and assault with intent to commit rape, wherein the violence involved in the latter is an element of the consummated offense. Sodomy is a perverted sexual offense against nature and punished primarily because of its detestable and debasing nature. It involves no element of violence. On the other hand, an assault with intent to commit sodomy is a specific intent crime of actual or potential violence. The proof required to establish sodomy is, therefore, different from the proof

required to establish an assault with intent to commit sodomy. Although each of these offenses is of the grade of a felony, the maximum punishment of 10 years imprisonment fixed for an assault with intent to commit sodomy, the crime involving actual or potential violence, is twice the maximum punishment prescribed for the equally detestable but less aggravated and dangerous offense of sodomy. Since the two offenses are distinctly different but of the same grade, there is no merger of the assault with intent to commit sodomy, the more aggravated of the two offenses, into the less aggravated offense of sodomy and in view of the independent character of the two offenses the maximum punishment prescribed for each offense is authorized. The record is, therefore, legally sufficient to sustain the sentence.

7. War Department records show that the accused, with no prior service, was inducted October 21, 1942, transferred to Enlisted Reserve Corps the same day, recalled to active duty November 4, 1942, to serve for the duration of the war, plus six months.

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. A sentence of dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for fifteen years is authorized upon conviction of sodomy and assault with intent to commit any felony, in violation of Article of War 93.

Edward L. Dresson, 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.

SPJGN
CM 234101

MAY 20 1943

UNITED STATES	)	UNITED STATES ARMY FORCES IN THE MIDDLE EAST
v.	)	Trial by G.C.M., convened at Cairo, Egypt, February 16, 1943. Dishonorable discharge and confinement for life. Penitentiary.
Private GARY H. McKEITHEN (34226741), Company A, 388th Port Battalion, Transportation Corps.	)	

REVIEW by the BOARD OF REVIEW
CRESSON, LIPSCOMB and SLEEPER, 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 Gary H. McKeithen Co. A, 388th Port Bn. Transportation Corps did, at Grasmere Camp, Ataka, Egypt, on or about January 16, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private James C. Daniels, a human being by shooting him with a rifle.

The accused 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 the remainder of his natural life. The reviewing authority approved the sentence, designated the United States Federal Penitentiary, Lewisburg, Pennsylvania, 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 shows that on January 16, 1943, and for four months prior thereto, the accused and Private James C. Daniels, the deceased, had occupied the same tent with six other negro soldiers at Grasmere Camp, Ataka, Egypt. At about 10:30 p.m. on the above date, the accused and a number of other soldiers, including the deceased, were in their tent when suddenly the accused stepped outside, dug a cartridge from the sand in front of the tent, loaded his rifle, reentered the tent, remarked that he believed that he would kill the deceased, referring to him as the "son-of-a-bitch", and then fired his rifle through the door of the tent. The accused then told the deceased that he would shoot him "just like that". A general scuffle then followed in which the rifle was taken from the accused and placed upon one of the bunks. The deceased then drew a knife and throwing his arm around the accused inflicted a slight wound over the accused's left eye. The wound was described by one witness as a scratch, and by the medical officer who examined it as a "superficial laceration" (R. 8, 24). The accused was described as having been drinking and the deceased as not having been drinking (R. 21). Following his encounter with the deceased, the accused left his tent and went to tent No. 17, a distance of about 80 feet away and procured a rifle there. He remarked at the time that "he was going to shoot the son of a bitch" apparently referring to the deceased. Upon leaving tent No. 17, the accused loaded the rifle which he had just procured. Upon reaching his own tent he left the rifle on the outside, entered the tent, and complained to the deceased over the injury which the deceased had inflicted upon him. Although the deceased still held his knife in his hand, he made no gesture toward the accused or attempted to use it against him. After making his complaint to the deceased the accused kicked open the door of the tent, and remarked that he was going to shoot the "son of a bitch" and stepped outside. There the accused picked up his rifle and aimed it through a crack in the door. The accused's actions were observed by one of the men in the tent who shouted a warning, and the occupants of the tent

sought cover, the deceased crouching down in one corner. The interior of the tent was well lighted and a full moon revealed the actions of the accused on the outside. The accused fired three shots, two of them striking the deceased, killing him instantly. The time which passed from the first threatening shot, to the time of the fatal shot was described as being about ten minutes (R. 4-10, 15-20, 27-32).

A medical officer, Captain Joseph L. Selden, testified that the cause of the death of the deceased was a wound caused by a .30 calibre bullet which entered the deceased's right shoulder in the back, just above the spine causing a pulmonary hemorrhage (R. 24-25).

The prosecution introduced a voluntary statement made by the accused to Captain William E. Leighty, Ordnance Department, wherein the accused asserted that at about 7:25 p.m., January 16, 1943, he was writing a letter in his tent when the deceased asked him to go to the latrine with him. The accused accompanied the deceased because he thought it was necessary to humor him. The deceased then asked the accused to return to the tent with him, but the accused declined to return and went instead to the recreation room. At about 9:10 p.m. he returned to his tent, whereupon the deceased asked him for his serial number. In reply the accused said "there is no one to hurt you" and walked over to his bed. The deceased then walked over and grabbed the accused by the collar and cut him over the left eye. The accused released himself from the deceased and ran out of the tent. As he was leaving, the deceased stated that "if you come back tonight I will kill you". The accused ran to tent No. 17, procured a rifle with which he returned to his own tent leaving it on the outside by the door. Upon entering the tent, the accused told the deceased "you done me wrong. You have cut me". The accused then ran out of the tent and the deceased said "wait and I'll get my rifle and I'll fix you up". The accused had two rounds of ammunition hidden on the outside of his tent in the sand. He picked up this ammunition and loaded the rifle which he had left there. He then looked back into the tent through a crack in the door, and saw the deceased going for his rifle. The accused then aimed his rifle through a crack in the do[illegible] After firing his rifle the accused did not know whether or not he had hit the deceased. Immediately after the firing, he ran to First Sergeant Brown and stated to him "Daniels has cut me and I shot at him" (R. 14-15).

4. The accused, after his right to become a witness or to remain silent had been explained to him, testified to substantially the same set of facts which he had given in his previous statement to the investigating officer. In addition to his previous statement, the accused testified that the deceased after having cut him over the eye said "I was intending to kill you black mother fucker", and started after him again with his knife. The accused testified further that he and the deceased had been very good friends prior to the night in question and that the ammunition which he had hidden in the sand outside of his tent had been hidden there in November. He asserted that he shot the deceased because he saw him reaching for his rifle. He denied having fired a rifle earlier in the evening. He claimed that only two shots were fired. He explained that the reason for his not continuing to run after rushing from the tent when Daniels had reached for the rifle and threatened to shoot him was because it was so bright on the outside, he thought he couldn't hide and therefore he would get shot (R. 42-51).

Private Hunter J. Moss, Company A, 388th Port Battalion, Transportation Corps, testified for the defense that he had known both the accused and the deceased since October, 1942, and that they had always appeared to be on friendly terms. He also testified that the accused had never had any "difficulty" with anyone in his company whereas the deceased had been involved in some trouble as the result of hitting a sergeant. The rest of his testimony corroborates the testimony as presented by the prosecution (R. 36-40).

First Sergeant Joseph Brown, the first sergeant of Company A, 388th Port Battalion, Transportation Corps, testified that he had known both the accused and Private Daniels since July, 1942. He testified also that accused had always been a good soldier but that the deceased had recently been involved in a disturbance and had struck the witness for which act the deceased was confined to the post and awaiting trial by court-martial on January 16, 1943. The witness further testified that he had never seen either the accused or the deceased drink intoxicating liquor (R. 40-44).

5. The accused is charged with murder and the Specification alleges that he

> "did, at Grasmere Camp, Ataka, Egypt, on or about January 16, 1943, with malice aforethought, will-

> fully, deliberately, feloniously, unlawfully, and with premeditation kill one Private James C. Daniels, a human being by shooting him with a rifle".

Murder is defined as "* * * the unlawful killing of a human being with malice aforethought". The word "unlawful" as used in this definition means "* * * without legal justification or excuse". A justifiable homicide is "a homicide done in the proper performance of a legal duty * * *". Furthermore an excusable homicide is one "* * * which is the result of an accident or misadventure in doing a lawful act in a lawful manner, or which is done in self-defense on a sudden affray * * *". The definition of murder requires that the death of the victim "* * * take place within a year and a day of the act or omission that caused it * * *" (par. 148a, M.C.M., 1928). It is universally recognized that the most distinguishing characteristic of murder is the element of "malice aforethought". The authorities, in explaining this term have stated that the term is a technical one and that it cannot be accepted in the ordinary sense in which the term may be used by the layman. In the famous Webster case, Chief Justice Shaw explains the meaning of malice aforethought as follows:

> "* * * Malice, in this definition, is used in a technical sense, including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done malo animo, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief. And therefore malice is implied from any deliberate or cruel act against another, however sudden.
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> * * *
>
> "* * * It is not the less malice aforethought, within the meaning of the law, because the act is done suddenly after the intention to commit the homicide is formed: it is sufficient that the malicious intention precedes and

accompanies the act of homicide. It is manifest, therefore, that the words 'malice aforethought,' in the description of murder, do not imply deliberation, or the lapse of considerable time between the malicious intent to take life and the actual execution of that intent, but rather denote purpose and design in contradistinction to accident and mischance" (Commonwealth v. Webster, 5 Cush. 296; 52 Am. Dec. 711).

Similarly, the Manual for Courts-Martial defines malice aforethought as follows:

"Malice aforethought. - Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor the actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed.

"Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; intent to commit any felony. * * *" (M.C.M., 1928, par. 148a).

The words "deliberately" and "with premeditation" have been held to mean "* * * an intent to kill, simply, executed in furtherance of a formed design to gratify a feeling for revenge, or for the accomplishment of some unlawful act" (Wharton's Criminal Law, vol. 1, sec. 420). These terms have also been defined as follows:

"* * * The thought of taking life must have been consciously conceived in the mind, the conception must have been meditated upon, and a deliberate determination formed to do the act; * * * malice is deliberate and premeditated when it has been dwelt upon at all in the mind, and when motive or consideration moving to the act has been to any extent mentally weighed; premeditation may be as quick as thought in the mind of man.

"* * * A majority held that no particular time is necessary, the existence rather than length of duration of purpose or intent to kill being important. * * *" (Miller on Criminal Law, pp. 274-275).

When the evidence is examined in the light of the above concepts, it becomes apparent that the accused is guilty as charged. The uncontradicted testimony shows that the accused shot and killed the deceased at the place and time alleged. It is equally clearly established that this homicide was unlawful in that it was done without justification or excuse. The claim of self-defense as presented in the testimony of the accused is sharply contradicted by the testimony of the eyewitnesses to the crime. The testimony of such witnesses show that the accused procured a cartridge which he had hidden in the sand and fired it through the door of his tent as a threatening gesture against the life of the deceased. Following this threat the deceased had thrown his arm about the accused and slightly wounded him by a knife cut over his left eye. The accused then left the deceased, and went to another tent where he procured a rifle which he promptly loaded. Upon returning to his own tent he left his rifle on the outside, entered the tent and proceeded to upbraid the deceased for having cut him with a knife. At this time the accused did not appear from any hostile word or gesture to be in danger from the deceased. After making his accusations against the deceased, the accused kicked open the door of the tent, went outside, grasped the rifle which he had left there, pointed it through a crack in the tent, and cruelly shot the deceased while he was crouching for safety in one corner of the tent.

The conduct of the accused in thus killing the deceased shows that his act was done not in self-defense, but with malice aforethought, willfully, unlawfully, feloniously, deliberately and with a premeditated intent to kill. The evidence shows beyond a reasonable doubt every

element of the crime alleged.

6. The charge sheet shows that the accused is 21 years of age, that he was inducted into the Army of the United States on July 22, 1942, and that he has had no prior military service.

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 and the sentence. A sentence of imprisonment for life is authorized 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 murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by sections 273 and 275 of the Criminal Code of the United States (18 U.S.C. 452, 454).

Chas. L. Bresson, 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.

SPJGN
CM 234110

3 JUL 1943

UNITED STATES v. Private CLAUDE C. RITCHIE (7013078), Service Battery, 385th Field Artillery Battalion.	104TH INFANTRY DIVISION Trial by G.C.M., convened at Camp Adair, Oregon, 23 March 1943. Dishonorable discharge, total forfeitures and confinement for twelve (12) years. Penitentiary.

REVIEW 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 Charges and Specifications:

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

Specification 1: In that Private Claude C. Ritchie, Service Battery, Three Hundred Eighty-fifth Field Artillery Battalion, Camp Adair, Oregon, then Staff Sergeant, Service Battery, Three Hundred Eighty-fifth Field Artillery Battalion, Camp Adair, Oregon, did, at Woodburn, Oregon, on or about the 9th day of January, 1943, and at Silverton, Oregon, on or about the 10th day of January, 1943, unlawfully and feloniously carnally know and have sexual intercourse with one Helen Marie Faulhaber, she, the said Helen Marie Faulhaber, then and there being an unmarried female person under the age of sixteen (16) years.

Specification 2: In that Private Claude C. Ritchie, Service Battery, Three Hundred Eighty-fifth Field Artillery Battalion, Camp Adair, Oregon, then Staff Sergeant, Service Battery, Three Hundred Eighty-fifth Field Artillery Battalion, Camp Adair, Oregon, did, at Camp Adair, Oregon, on

or about January 12, 1943, willfully, feloniously, and unlawfully write and knowingly write and knowingly deposit for mailing and delivery in the United States Mail an obscene, lewd, and lascivious letter dated the 12th day of January, 1943, too obscene to be set forth here, but beginning "My Darling Helen: Just a line to let you know that I still love you. . .", and ending "Let me know about it. Must close Hoping to hear from you soon. Love and kisses, Claude.", addressed to one Helen Marie Faulhaber, Woodburn, Oregon.

Specification 3: In that Private Claude C. Ritchie, Service Battery, Three Hundred Eighty-fifth Field Artillery Battalion, Camp Adair, Oregon, then Staff Sergeant, Service Battery, Three Hundred Eighty-fifth Field Artillery Battalion, Camp Adair, Oregon, did, at Monmouth, Oregon, willfully, knowingly, and unlawfully, from on or about the 6th day of September, 1942, to on or about the 25th day of February, 1943, cohabit and live in open relationship with one Rosa Lee McMillen, a female person not his wife.

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

Specification: In that Private Claude C. Ritchie, Service Battery, Three Hundred Eighty-fifth Field Artillery Battalion, Camp Adair, Oregon, then Staff Sergeant, Service Battery, Three Hundred Eighty-fifth Field Artillery Battalion, Camp Adair, Oregon, did, at Salem, Oregon, on or about the 8th day of January, 1943, feloniously take, steal, and carry away a woman's housecoat, value about Twenty-five Dollars ($25.00), the property of Mr. Roger Fleisbach, 925 Leslie Street, Salem, Oregon.

The accused pleaded not guilty to the Charges and Specifications. He was found guilty of Charge I and its Specifications, guilty of the Specification, Charge II with exceptions and substitutions, and guilty of Charge II. 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 25 years. The reviewing authority disapproved

"the finding of guilty of the Specification of Charge II and of Charge II, and so much of the finding of guilty of specification 1 of Charge I as involves a

finding of guilty of unlawful and felonious sexual intercourse at Silverton, Oregon on or about January 10, 1943, and so much of the finding of guilty of specification 3 of Charge I as involves a finding of guilty of unlawful cohabitation from September 6, 1942 to November 3, 1942",

approved only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 12 years, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record for action under Article of War 50½.

3 a. Concerning Specification 1, Charge I (statutory rape), the evidence for the prosecution shows that Helen Marie Faulhaber was 15 years of age - her 16th birthday was 17 April 1943 - when she met the accused on 9 January 1943 at the Club Cafe in Woodburn, Oregon. He took her to a show; then, at his invitation, she accompanied him to a bedroom of a local hotel, where, before she left, they indulged in four separate acts of sexual intercourse. She had never had sexual intercourse with anyone before. On cross-examination Helen admitted that, prior to the commission of the offense, she had told the accused she was 18 years of age. No pregnancy resulted (R. 43, 45, 47, 49-52).

b. The accused, having voluntarily elected to testify, after his rights as a witness had been explained to him, admitted having had sexual intercourse with Helen on 16 January 1943. The recital of the surrounding facts and other circumstances indicates that he was mistaken about the date of this occurrence and that it actually took place the preceding week, on 9 January 1943. He also testified that Helen represented herself to be 18 years of age and that, to him, she looked "around seventeen" (R. 74, 77).

c. The trial judge advocate erroneously quoted to the court, as the basis of this Specification, section 279 of the United States Criminal Code (18 U.S.C. 458), which provides for the punishment of anyone "who shall carnally and unlawfully know any female under the age of sixteen years". Apparently he overlooked the fact that this section of the Code applies to offenses committed within admiralty, maritime and territorial jurisdiction of the United States, and not to offenses

committed in the various states (see sec. 451 of the same Code). The statute, therefore, does not apply to the offense charged in this case. The error, however, was not fatal, for the reason that in the State of Oregon, at the time of the alleged commission of the offense, there was a similar state statute, providing as follows:

> "If any person over the age of sixteen years shall carnally know any female child under the age of sixteen years, or any person shall forcibly ravish any female, such person shall be deemed guilty of rape, and upon a conviction thereof shall be punished by imprisonment in the penitentiary for not less than three nor more than twenty years." (Vol. 3, Oregon Compiled Laws, Sec. 23-420).

The president of the court recognized the error of undertaking to proceed under the wrong statute, when he asked whether there was "any difference in the statutes of the State of Oregon as to the age limit" (R. 9-10). The evidence is clear that the accused had sexual intercourse with Helen Marie Faulhaber on January 9, 1943 at Woodburn, Oregon, and that Helen Marie Faulhaber, at the time, was an unmarried female person under 16 years of age. The act of carnally knowing the girl was admitted by the accused on the witness stand under oath, and the victim's age was clearly proven. Every element of the offense charged was clearly established. The punishment under the Oregon statute exceeds the 12 years approved by the reviewing authority. The fact that the girl misrepresented her age to the accused is no defense to the crime; nor is consent of the female material.

"That a female under 16 is incapable of consenting is conclusively presumed; and hence actual consent is immaterial." (State v. Sargent, 32 Ore. 110).

4. a Concerning Specification 2, Charge I (mailing obscene letter), the evidence for the prosecution shows that on or about January 12, 1943, Mrs. Mary Faulhaber, at Woodburn, Oregon, saw the postman deposit mail in her mail-box, immediately before she opened it and removed therefrom an envelope addressed to her daughter, Helen, to which a cancelled stamp was affixed, indicating that the letter had been mailed. She removed from the envelope a letter identified as the prosecution's Exhibit D, then destroyed the envelope, considering it unimportant. The letter commences with the words "My Darling Helen" and, after suggesting an assignation to which Helen should bring another girl so that all three might go to bed together and the accused have sexual intercourse alternately with both, terminates with "Love & kisses, Claude. P.S. My address is Mst. Sgt. Claude C. Ritchie, 7013078, Service Btry, 385th F.A. Bn., APO 104th, Camp Adair, Oregon", as alleged in Specification 2, Charge I. By stipulation it was admitted that, if a certain handwriting expert were called to testify, he would testify that in his opinion the letter was written by the accused. (R. 28-30, 38, 39)

b. The accused refrained from testifying concerning the writing or posting of this letter, and therefore was not cross-examined regarding it. He offered no evidence concerning this charge.

c. Title 18, par. 334, United States Code Annotated, provides: "Whoever shall knowingly deposit or cause to be deposited for mailing or delivery anything declared * * * to be nonmailable * * * shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Among those things declared to be nonmailable is "every obscene, lewd, or lascivious, and every filthy * * * letter." Competent evidence that the accused wrote the letter was uncontroverted. The envelope containing the letter had been destroyed, and Mrs. Faulhaber was properly permitted to testify that it was addressed to her daughter, and that there was affixed to it a cancelled stamp, indicating that it had been mailed. This evidence, together with her testimony of finding the letter in her mail box, was sufficient proof of its mailing. The gravamen of the offense, however, is the deposit of such a letter for mailing. The inference from the admissible evidence adduced is legally sufficient to support the finding of guilty.

5. a. Concerning Specification 3, Charge I (cohabiting with a woman not his wife), the prosecution's evidence shows that on 27 December 1941 Rose Lee McMillen met the accused in Oklahoma City, whence the two of them went to live together as man and wife on the outskirts of Fort Leonard Wood. Thence they went to Camp Barkeley, Texas, and then to Monmouth, Oregon, where they lived first at 331 South Monmouth Avenue at the home of a Mrs. Jader, then, on 3 November 1942 moved to the Fresh Apartments, continuing to live there as man and wife until the accused was placed in the guardhouse in February, 1943. The accused had told Mrs. McMillen that he had a wife living; and Mrs. McMillen was also married. By stipulation, it was agreed that, if the manager of the Fresh Apartments were called as a witness, she would testify that the accused rented an apartment from her from 2 November 1942 to 1 March 1943, and lived there with a woman whom he said was "Mrs. Ritchie". (R. 13, 14, 16, 18, 21)

b. The accused refrained from testifying himself regarding this particular Charge, and therefore was not cross-examined on the subject. He offered no testimony in contradiction of the prosecution's.

c. The evidence was amply sufficient to sustain the finding of guilty. The accused's cohabiting and living in open adulterous relationship with a female person not his wife was a violation of the 96th Article of War. Such improper relationships with women on the part of soldiers have long been regarded as conduct of a nature to bring discredit upon

the military service. The trial judge advocate inadvertently informed the court that he was basing this Specification upon a violation of a Federal Statute identified as Title 18, Sec. 514, of the United States Code, prohibiting the cohabiting of any male person with more than one woman. The statute applies only to offenses of this nature committed in territories and other places under the sole jurisdiction of the United States (See Section 511 of the same Code), and therefore not to such an act in the State of Oregon. However, the State of Oregon has a similar statute providing for an equally severe punishment, which reads as follows:

> "Lewd Cohabitation. If any man or woman, not being married to each other, shall lewdly or lasciviously cohabit or associate together, such man or woman, upon conviction thereof, shall be punished by imprisonment in the county jail not less than one nor more than six months, or by fine not less than $50 nor more than $300." (Oregon Compiled Laws Annotated Vol. 3. Penal Code Sec. 23-903).

Therefore, the error did not prejudice the substantial rights of the accused. Moreover, the offense constitutes a violation of Article of War 96, regardless of the statute.

4. The accused is 26 years of age. He enlisted at Lubbock, Texas, 21 June 1940 to serve three years, and was assigned to the Service Battery, 385th Field Artillery Battalion.

5. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence. Dishonorable discharge, total forfeitures, and confinement at hard labor for 12 years is authorized upon conviction of rape in violation of Article of War 96, where the statutory punishment of the State wherein the crime was committed provides for confinement of "not less than three years nor more than twenty years." Confinement in a penitentiary is authorized by Article of War 42 for the offense of statutory rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement by section 279 of the Criminal Code of the United States (18 U.S.C. 458); also for the offense of mailing obscene matter, recognized as an offense of a civil nature and so punishable by penitentiary confinement by section 211 of the Criminal Code of the United States (18 U.S.C. 334).

Chas. L. Grosson, 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.

SPJGH
CM 234118

MAY 28 1943

UNITED STATES v. Private RAYMOND M. REIS (6572661), Battery K, 63rd Coast Artillery (Antiaircraft).	)))))))))	39TH COAST ARTILLERY BRIGADE (ANTIAIRCRAFT) Trial by G.C.M., convened at Seattle, Washington, March 26, 1943. Dishonorable discharge and confinement for twenty (20) years. Disciplinary Barracks.

REVIEW 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 soldier named above.

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 Raymond M. Reis, Battery A, 63rd Coast Artillery (AA), did, at Fort Bliss, Texas, on or about the 13th day of April 1941, desert the service of the United States and did remain absent in desertion until he was apprehended at Roswell, New Mexico, on or about the 17th day of February 1942.

Specification 2: In that Private Raymond M. Reis, Battery K, Sixty Third Coast Artillery (AA), did, at Seattle, Washington on or about July 18, 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at Bakersfield, California on or about February 15, 1943.

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

Specification 1: In that Private Raymond M. Reis, Battery K, Sixty Third Coast Artillery (AA), did, in conjunction with Walter William Snow, at Seattle, Washington, on or about December 21, 1942, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Ralph W. Weir, a taxi cab driver, $52.00, lawful money of the United States, the property of the said Ralph W. Weir.

Specification 2: In that Private Raymond M. Reis, Battery K, Sixty Third Coast Artillery (AA), did, in conjunction with Walter William Snow, at Seattle, Washington, on or about December 21, 1942, by force and violence and by putting her in fear, feloniously take, steal and carry away from Grace E. Redman, employee of the La Boheme Tavern, $32.50, lawful money of the United States, the property of the said La Boheme Tavern.

The accused pleaded to Specifications 1 and 2, Charge I, and to Charge I, guilty of absence without leave in violation of the 61st Article of War; and to Charge II and its Specifications, not guilty. He was found guilty of all 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 twenty 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.

3. As to Charge I and its Specifications, the evidence for the prosecution shows that on or about May 2, 1942, the personnel of Battery A, 63rd Coast Artillery (Antiaircraft) were transferred to Batteries I and K and Headquarters Battery. There was introduced in evidence an extract copy of the morning report of Battery A (Ex. 1) showing that the status of the accused changed on April 13, 1941, from sick in quarters to absent without leave, and on April 10, 1942, from absent in confinement to duty; also, an extract copy of the morning report of Battery I (Ex. 2) showing the accused transferred June 21, 1942, to Battery K. An extract copy of the morning report of Battery K (Ex. 3) was introduced, showing the accused from duty to absent without leave on July 18, 1942, and from absent in confinement of civil authorities to confinement in regimental guardhouse on March 8, 1943. The

First Sergeant of Battery K testified that the accused was absent from bed check on the night of July 18, 1942, and was not again seen until shortly before the trial. On December 21 or 22, 1942, several persons observed the accused in public in civilian clothes (R. 16-18, 22-23, 25, 33-34, 41).

4. As to Charge II and its Specifications, the evidence shows that on the night of December 21 or 22, the accused was in La Boheme Tavern owned and operated by Mrs. Grace E. Redman of Seattle, Washington. He had been there the evening before with a man by the name of Snow. The second night, they, the accused and Snow, came in about ten o'clock and had Mrs. Redman telephone for a cab. While they were waiting for it they tried to get her to take a drink of whiskey, but she refused. About three-quarters of an hour after they left in the cab, when there was only one customer in the place, Snow came in the side door with a pistol in hand and said "It's a hold-up". He punched Mrs. Redman with the pistol and asked for her money. He took $32.50 from her (R. 34-36, 47-49).

On or about December 21, 1942, about nine-forty in the evening, Mr. Ralph W. Weir of Seattle, Washington, then a taxi driver, received a call from La Boheme Tavern. He went there and picked up the accused and Snow. When he reached 50th and Linden Avenue, "they pulled a gun" on him and told him to turn down the first dark street. When he stopped Snow crawled into the front seat and searched him. They took $52 from him and kept the gun pointed at him all the time. Snow pointed the gun at him. Then they put him in the back seat and drove through Woodland Park, up toward 65th and back to Phinney Ridge. The accused was driving the car, and took Weir's taxi uniform hat and wore it. Weir did not see Snow point a gun at the accused. Then they returned to La Boheme Tavern, where Snow went in and held it up. Weir did not see a pistol in the accused's hand while Snow was in the tavern, but thought that Snow had handed him one. When Snow went in he said "Here's the other one" and the accused turned around and kept watching him (Weir). The accused remained at the wheel of the car with the motor running, and watched Weir, until Snow came out and jumped in the cab. They then went toward town, with the accused still driving. After a time the police stopped them and the accused and Snow jumped out and ran. Weir stated on cross-examination that he had no conversation with the accused and did not see the accused with a gun, that Snow took the money from him, that Snow told the accused to

drive to La Boheme Tavern, and that Snow was doing all the ordering. The accused did not object to anything that Snow said (R. 39-47).

5. The defense had Mr. Clifford Lehman, Clerk of a Justice of the Peace Court, identify certified copies of two judgments on motions of the State of Washington dismissing robbery complaints against the accused, and they were introduced in evidence (Def. Exs. 1 and 2). The wife of accused identified a receipt dated February 14, 1942, for $53.02 from Intermountain Transportation Company to the accused (Def. Ex. 3), and a passenger's identification check, stamped February 15, 1942, showing destination El Paso, Texas (Def. Ex. 4), both of which were introduced in evidence. She testified that she and the accused were at that time going back to El Paso, Texas for him to turn in to the Army there. He had stated that was his purpose. He was apprehended in Roswell, New Mexico. She was with him from April, 1941, until February 15, 1942. In the spring of 1941 (sic) she and the accused went back to Seattle after he turned in at Fort Bliss, and he was sent back without guard. After their return to Seattle in the spring of 1942 the accused was stationed at Woodland Park. At that time she was working and gave him money because he was not drawing any pay. In February of this year (1943) she and the accused again took a train trip to El Paso. The accused told her that he was going back to Fort Bliss, near El Paso, to see whether he could get a transfer and that he thought he could get it all straightened out there. She had lived in El Paso for three years (R. 50-52, 54-58).

The accused testified that he enlisted in the Army in 1937 and received an honorable discharge. He stayed out two months and then reenlisted. After he left the Army the first time he went to Roswell, New Mexico, on his way to Fort Bliss to turn in. In two or three weeks he was sent from Fort Bliss to Seattle at government expense. He was stationed at Woodland Park until July, and between April and July, 1942, received no pay. His wife gave him some money, four or five dollars at a time. He talked to the Battery Commander about his pay, but was given no reason why he did not get it. He asked for a trial to get the thing straightened up so he could start drawing pay or go to the guardhouse and get it over with. He was apprehended once at Bakersfield, California, and once at Roswell, New Mexico. On cross-examination he stated that in April, 1941, he was stationed at Fort Bliss, Texas, and that when he left there he went to Dillon, Montana, which is his home. He worked in Butte, Montana, three or four months, and then went to California. He and his wife had a job in an apartment house. After war was declared he returned to Dillon, Montana.

He had a car accident and was in the hospital thirty-three days. He then started for El Paso, Texas, and was apprehended at Roswell, New Mexico. He left Seattle in July, 1942, and worked in Spokane, Washington, until December, 1942. He then returned to Seattle (R. 59-61, 66-72).

The accused testified further that about a week or a week and a half before December 21, 1942, he met Snow in Spokane and they came to Seattle, and that he did not know that Snow was an ex-convict. They were in Seattle for five or six days before December 21. On that night they went to La Boheme Tavern. He knew he would find some of the men from his organization there, and he wanted to find out how things were going, and whether some of the non-coms were still in the battery. He met two privates there and obtained information from them. He and Snow started back to town in a taxicab. He testified that Snow pulled out a revolver and held up the cabdriver, and that he, the accused, was as much afraid as the cabdriver was. He stated that he had approximately three hundred dollars with him, all that he and his wife had, and that he had worked all the summer saving it. He stated further that he did what Snow told him to do, drove the automobile, then drove back to the tavern and waited. Snow was in the tavern two or three minutes and the accused could not see inside the tavern. Snow had the gun in his hand as he got out at the tavern, but did not say what he was going to do when he went in. He also had the gun in his hand when he came out. The accused stated that while Snow was in the tavern he "was afraid and didn't know what to do". He stated further that he got none of the money that was taken and that while he was driving, Snow had the gun over the back seat. The gun "could have been" pointed at him as much as anybody. He had no conversation with the taxi driver. When the police started shooting he was scared and jumped and ran. About three hours later he saw Snow. He told his wife what had happened and that they would have to get away or they would get in trouble. They moved out of the hotel that night because he was afraid of Snow. The accused testified that he did not know that Snow was going to rob the taxi driver, that they had not discussed robbery, that he did not know that Snow had a gun when they met that evening, and that he had never seen Snow with a gun before (R. 61-66, 69).

6. The evidence shows that the accused was absent in desertion from April 13, 1941, to February, 1942, and from July 18, 1942, to about

February, 1943. The accused pleaded guilty to absence without leave for the periods stated and testified that he was apprehended at each place as alleged. The length of each absence terminated by apprehension and the accompanying circumstances, afford a basis for the inference of an intent to desert and clearly support findings of guilty of desertion upon each Specification.

As to the robbery charges, it is shown that on the night of December 21, 1942, the accused and Snow robbed the cabdriver, Weir, by pointing a pistol at him and taking $52 from his person, that thereafter Snow entered La Boheme Tavern and forced Mrs. Redman to give him $32.50 by punching her with his pistol, and that the accused waited at the wheel of the taxicab with the motor running and watched Weir, who was on the back seat, while Snow was in the tavern. The entire course of conduct of the accused as shown by the evidence adequately supports a finding that he was an active participant in both acts of robbery, although it appears that Snow was the person who handled the gun and actually took the money in both instances.

Under a joint indictment against the perpetrator and those who were present to aid and abet in a felony, each is responsible for the act and may be convicted as principal (31 C.J. 845).

The presence which distinguishes a principal may be either actual or constructive. One is constructively present if he is performing an act in furtherance of the felony, or is in a position to give information to the actual perpetrator, which would be helpful to the end in view, or would prevent others from giving warning or doing acts which would render its consummation more difficult. Thus a person who keeps watch so as to facilitate escape or to prevent interruption is constructively present aiding and abetting (22 C.J.S. 145, 154, 161).

For one to be guilty as principal in the second degree or as aider and abettor, he must share in the criminal intent of the principal in the first degree. However, intent or preconcert may be shown by all the attendant circumstances and by the conduct of accused subsequent to the criminal act (22 C.J.S. 155-156).

Accused was actually present when the robbery of the taxi driver was committed, and constructively present when the tavern proprietor was robbed. In each instance his entire course of conduct, and particularly his acts immediately after commission of the crime, evidenced his intent to participate if it became necessary. After the robbery of the taxi driver, accused put on the taxi driver's uniform hat and drove the car while Snow kept the gun pointed at the taxi driver.

At the tavern accused stood by with the motor of the vehicle running to assist in a quick "get-away" and he watched the taxi driver to prevent him from turning in an alarm. The evidence shows, therefore, that accused was present, aiding and abetting as to both offenses.

7. During the trial the defense pleaded in bar of Specification 1, Charge I that the accused had been unconditionally restored to duty on April 10, 1942 (R. 6-8) as shown by morning report (Ex. 1). It was shown that the accused was not restored to duty by competent authority and was not on an unconditional duty status (R. 20). This plea was properly denied.

As to Specifications 1 and 2, Charge II, a plea in bar based on former acquittal in state court was made (R. 8-13). This plea was properly denied because it was shown only that the state charges were dismissed on motion without trial, and because, as a matter of law, the offenses for which the accused was tried by general court-martial are different from those which may have arisen from the same acts under state law.

8. The charge sheet in this case discloses that the First Indorsement thereon, although completed for the signature of Major Michael F. Blenski, Adjutant General, was not signed by Major Blenski nor by any other person. This defect has been brought to the attention of the appointing authority, and advice received that trial by general court-martial was directed by the Commanding General as indicated by his initials on the report and recommendation of the Staff Judge Advocate. This document in the record contains a recommendation of trial by general court-martial. In the margin opposite this recommendation appears the pencil notation "OK" over the initials of the Commanding General. The court that tried the accused was properly appointed. The action of the Commanding General as reviewing authority approved the sentence. It follows that the court had jurisdiction of the accused and that the procedural error referred to did not injuriously affect the substantial rights of the accused under the 37th Article of War (CM 198108, Casey).

9. The charge sheet shows that the accused is 26 years of age, and that he had had three years prior service when he reenlisted on August 14, 1940.

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 and sentence.

Curtis S. Hill Jr., Judge Advocate

Samuel M. Drivers, Judge Advocate

F. J. Lotterhos, Judge Advocate

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

SPJGN
CM 234134

MAY 3 1943

UNITED STATES	106TH INFANTRY DIVISION
v.	Trial by G.C.M. convened at Fort Jackson, South Carolina, April 10, 1943. Dishonorable discharge and confinement for two (2) years. Disciplinary Barracks.
Private WILLIAM F. MONTGOMERY (35502348), Headquarters Company, 422nd Infantry.	

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

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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 Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private William F. Montgomery, (then Staff Sergeant), Headquarters Company, 422nd Infantry, did at Fort Jackson, South Carolina, on or about March 20, 1943, wrongfully place his hands upon the private organs of Private Maurice M. Greenway.

Specification 2: In that Private William F. Montgomery, (then Staff Sergeant), Headquarters Company, 422nd Infantry, did at Fort Jackson, South Carolina, on or about March 20, 1943, wrongfully and unlawfully solicit Private Maurice M. Greenway, to permit him, the said Private William F. Montgomery (then Staff Sergeant), to commit sodomy upon him, the said Private Maurice M. Greenway, by having sexual connection with him.

Specification 3: In that Private William F. Montgomery (then Staff Sergeant), Headquarters Company, 422nd Infantry, did at Fort Jackson, South Carolina, on or about March 28, 1943, wrongfully and unlawfully get into the bed of Private James R. Harkins and attempt to place his hands on the private parts of the said Private James R. Harkins.

Specification 4: In that Private William F. Montgomery (then Staff Sergeant), Headquarters Company, 422nd Infantry, did at Fort Jackson, South Carolina, on or about March 28, 1943, wrongfully and unlawfully solicit Private James R. Harkins to permit him, the said Private William F. Montgomery (then Staff Sergeant), to commit sodomy upon him, the said Private James R. Harkins, by having sexual connection with him.

The accused pleaded not guilty to and was found guilty of all Specifications and the Charge. 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 two (2) years. The reviewing authority approved the findings and 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.

3. a. Concerning Specifications 1 and 2, the evidence for the prosecution shows that on Saturday night, March 20, 1943, the accused, who was then a sergeant, was in his room drinking whiskey with Private Knickerbocker, when Private Greenway joined them, shortly after nine o'clock. The tippling was already well under way and the accused, who had been drinking to excess, appeared particularly solicitous that the late arrival should "catch up". Greenway took a drink and the three engaged in a general conversation until the lights were turned out in the barracks, when Knickerbocker left. Greenway was then sitting on Sergeant Battrick's bed and the accused was sitting on the bed across the room. Right after Knickerbocker left, the accused came over and sat down on the bed beside Greenway, offered him a drink, and grabbed his - Greenway's - penis. Greenway was fully dressed and the accused did not put his hands inside Greenway's pants, but grabbed his penis through his clothes. Greenway shoved the accused's hand away and "looked at him wonderingly". The accused repeated his invitation to Greenway to have a drink. Greenway moved across the room and took one; the accused followed and sat down beside him. Then, Greenway testified:

"He asked me to take another drink and asked me, 'Why don't you sleep here tonight?' He pointed to the bed across the room and said that that bed belonged to Sergeant Battrick and he wouldn't be there that night, and he asked me to stay there. I told him I wouldn't, and again, for the second time, he made a pass. I shoved his hand away and said I was going. He insisted that I stay."

Later that evening, Greenway saw the accused in the latrine, where the accused requested Greenway to come back to his room and sleep with him (R. 6-8, 10).

Greenway, on redirect examination, testified as follows:

"Q. Private Greenway, was there any doubt in your mind as to what the Sergeant meant when he asked you to sleep in his room?

"A. After he made the pass, and he made the second pass, no, Sir, there was no doubt in my mind as to his intentions." (R. 9)

b. Concerning Specifications 3 and 4, the evidence for the prosecution shows that, on Sunday morning, March 28, 1943, between 5 and 5:30 o'clock, the accused, fully clothed and apparently intoxicated, staggered from the latrine through the barracks and sat down on the bed where Private Harkins was sleeping, which was located just outside the accused's room. Private Harkins awoke when the accused reached under the covers and put his hand on Private Harkins' penis. "I pushed his hand away", Private Harkins testified, "and turned over on my stomach and he put his hand there again." The accused then lay down beside Private Harkins, but outside the covers. Private Harkins inquired who he was, and the accused identified himself. Harkins asked him what he wanted. The accused's response was, "Lie down and be quiet". Harkins pushed him to the floor, and moved over into another bed. The accused got up, then, and went into his own room (R. 12-16, 18, 20, 22).

Privates Kaplan and Hipple both saw the accused come into the barracks in an intoxicated condition and get into bed with Private Harkins. Kaplan, who reported the incident to the first sergeant, testified he heard Private Harkins say, "Stop it, Sarge", then, "Get up, Sarge, I want to go to sleep"; also, "There isn't room for both of us, Sarge. I need to get some rest", after which Harkins left his bed and went to the latrine, and the accused got up and went to his own room. Hipple, who was closer, heard no part of the conversation, but saw the accused get in bed with Private Harkins, and the latter, in a very few minutes, get up and go to the latrine (R. 16-25).

4. The evidence for the defense shows that the accused was examined, three days after his initial confinement, by Major John H. Rompf, Neuro-Psychiatrist, Station Hospital, Fort Jackson, South Carolina, who found symptoms which indicated the accused was a chronic alcoholic, that he had used alcohol excessively in a recent period before the examination, and that he was not homosexually inclined. On cross examination, Major Rompf testified that it would be possible for the accused to attempt to "fondle the penis of another soldier" or to "solicit another soldier", while under the influence of liquor, but he would have to be so drunk as not to understand what he was doing. (R. 25-28)

In response to questions propounded to him by a member of the court, Major Rompf testified as follows:

> "A. The tendency of curiosity is present in any human being - we cannot keep it in bounds by restraint. Under the influence of alcohol, they let it get the best of them.
>
> "Q. You mean that any perfect mind shows the tendency of homosexuality under the influence of alcohol?
>
> "A. Yes, Sir, that's right. In fact it is the only form of temporary insanity I believe in.
>
> "* * * * * *
>
> "Q. ***, does the result of the examination positively preclude that he is a homosexual?
>
> "A. It does not." (R. 28-29)

At 4 o'clock of the Sunday morning on which he got in bed with Harkins, the accused was observed sleeping on the barracks stairs. On the preceding Saturday night, he had been drinking with a party of soldiers in the barracks until ten-thirty, but was not drunk at that time (R. 30-33).

5. The accused, after his rights as a witness had been explained to him, elected to take the stand and be sworn. He testified that, on the night of March 20, 1943, he and Knickerbocker had "killed one pint", when Greenway came in, and the accused insisted Greenway was a little behind on the drinking. They had two pints altogether. When Knickerbocker left, the accused went over to the table and asked Greenway to have a drink. The accused remembers having three drinks, lying down on the bed, and nothing after that. He next saw Greenway on the

following morning in the barracks, when he - the accused - told Greenway that he had left his garrison hat in the accused's room, and Greenway said he would get it later (R. 34,35).

On the following Saturday night, March 27th, the accused had been working late and Sergeant Bishop asked him to come to his room for a drink. There were several other sergeants there, and, the accused testified, "They had lots to drink. They had a bar there in the room, and we drank and drank." The accused does not remember what time he left. "I remember putting in seven dollars -- they were going to get some more whisky", he testified, "I put that in on the whisky and I said, 'I am going to bed. You wake me up when you come back' ". He remembers going to bed in his own room about ten thirty, and, when he awoke, at ten or eleven o'clock the next morning, he had a headache. He has no recollection of sleeping on the stairs, but Private Hup said to him Sunday, "Sergeant, you sure had a load on last night - you were sleeping on the steps." (R. 35-36)

The accused has been married for six years. He last saw his wife around February 5, 1943, when he went home on a furlough. He gets a letter from her every day. One child born of their marriage (R. 36-37).

6. Specification 1 of the Charge alleges that the accused wrongfully placed his hands upon the private organs of Private Greenway. The latter's testimony is clear that he did, whereas that of the accused goes no further than to deny recollection. He admits that Greenway was still in his room when the fumes of the liquor which he had imbibed totally obscured his memory. The indecent conduct described, falling, as it does, into the "fondling" category, amounts to assault and battery and is punishable as such (CM 210370, Renfroe). The evidence sustains the finding of guilty of Specification 1 in violation of Article of War 96.

7. Specification 2 of the Charge alleges that the accused solicited Private Greenway to permit the accused to commit sodomy upon him by having sexual connection with him. The evidence merely shows solicitation to sleep in the same room with him, after an indecent familiarity, manifesting, it is true, some character of perverted interest, but not sufficiently definite to indicate whether or not it involved a desire to commit sodomy by either method specified in the Manual. Greenway's testimony that "after he made the second pass ** there was no doubt in my mind as to his intentions", was inadmissible in the absence of a showing that Greenway's mental interpretation of the accused's conduct was communicated to the accused; but, if admissible, it is still too vague and indefinite to constitute competent evidence of solicitation to commit sodomy. Evidence that the accused, after taking hold of Greenway's penis through his pants and having his hand shoved away, invited

Greenway to spend the night in his room, is not sufficient basis for a conclusive inference of solicitation to carnal copulation per os or per anum. In the opinion of the Board of Review, the evidence is insufficient to sustain the finding of guilty of Specification 2 of the Charge.

8. Specification 3 of the Charge alleges that the accused got into Private Harkins' bed and attempted to place his hands on Private Harkins' private parts. The evidence establishes not only the attempt, but its successful consummation, as well. However, since the specification limits the offense to assault, the finding of guilty, amply sustained by the evidence, is effective to convict the accused of simple assault only, in violation of Article of War 96.

9. Specification 4 of the Charge alleges that the accused solicited Private Harkins to permit the accused to commit sodomy upon him by having sexual connection with him. The evidence merely shows that the accused first sat down on Harkins' bed, reached under the cover and touched his penis, and, after Harkins' protest, repeated the offense. Then he lay down, outside the covers, until, in a very few minutes, Harkins left the bed. The only testimony as to what the accused said, during that time, is Harkins' that he identified himself, and told Harkins to lie still and be quiet. Another witness heard Harkins say, "Stop it, Sarge"; then, "Get up, Sarge, I want to go to sleep"; also, "There isn't room for both of us, Sarge, I need to get some rest." This evidence, although it establishes a suggestion, expressed by the accused to Harkins, that the latter permit an indecent familiarity, reprehensible in the extreme, is insufficient to establish solicitation to commit sodomy, and, hence, to sustain the court's finding of guilty of Specification 4 of the Charge.

10. The accused is about 30 years of age. He was inducted at Fort Thomas, Kentucky, July 3, 1942. His record shows no prior service.

11. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of Specifications 1 and 3 of the Charge; legally insufficient to support the findings of guilty of Specifications 2 and 4 of the Charge; and legally sufficient to support only so much of the sentence as involves dishonorable discharge, total forfeitures, and confinement at hard labor for nine (9) months.

Chas. L. Grosson, Judge Advocate.
Abner E. Lipscomb, Judge Advocate.
Benjamin R. Cooper, Judge Advocate.

1st Ind.

MAY 3 1943

War Department, J.A.G.O., - To the Commanding General 106th Infantry Division, Fort Jackson, South Carolina.

1. In the case of Private William F. Montgomery (35502348), Headquarters Company, 422nd Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Specifications 2 and 4 of the Charge 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 nine months, which holding is hereby approved. Upon disapproval of the findings of guilty of Specifications 2 and 4 of the Charge and upon vacation of so much of the sentence as is in excess of dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for nine months, 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 234134)

Myron C. Cramer

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

BAB/jth

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

SPJGN
CM 234153

14 JUL 1943

UNITED STATES	)	PUERTO RICAN DEPARTMENT
v.	)	Trial by G.C.M., convened at APO 847, c/o Postmaster, New York, 18 February 1943. Dismissal, total forfeitures and confinement for two (2) years.
First Lieutenant JOHN J. SHIRLEY, (0-450903), Signal 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 Charge and Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that First Lieutenant John J. Shirley, Signal Detachment, Henry Barracks, Puerto Rico, did, at Henry Barracks, Puerto Rico, between August 1, 1942 and October 10, 1942, feloniously embezzle by fraudulently converting to his own use, cash or currency to the amount of about Eight Hundred Thirty-two Dollars and Eighty Cents ($832.80), the property of the Henry Barracks Officer's Club fund, entrusted to him by virtue of his office as custodian of same.

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 at such place as the reviewing authority may direct for two years. 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 consisted of a written stipulation between the accused, his counsel, and the prosecution which shows the following facts: The accused was detailed as club officer of the Henry Barracks Officers' Club, Henry Barracks, Puerto Rico on 6 August 1942 and was relieved as club officer on 10 October 1942. On the latter date a board of officers was appointed for the purpose of auditing the accounts of the Henry Barracks Officers' Club for the period during which the accused was club officer. The audit disclosed that the accused during his term as club officer received the following amounts:

Received from predecessor in office	$1,044.97
Receipts for July	1,157.71
Receipts for August	1,468.27
Receipts for September	1,421.51
Cash Sales	1,635.22
Total	$6,727.68

During the same period of time the accused paid out for the club $4,027.54 and still had on hand (to deliver to his successor in office) on 10 October 1942, $31.09 on bank deposit and $1,836.25 in cash. The accused was credited with the total of these amounts equally $5,894.88. There was, therefore an unaccounted for shortage of $832.80, representing the difference between $6,727.68 and $5,894.88. The stipulation concluded that, "The audit disclosed the accused to be short $832.80 in the accounts of the officers' club" (R. 6, 7, Exs. A to O).

4. The court called as its witness, Captain S. Norman Black, Finance Department, who testified that he was a member of the board of officers who audited the records of the Henry Barracks Officers' Club; that the officers computed the amount of money received by the club from cash sales during the period that the accused was club officer, and added thereto the money which had been received, according to the collection sheets that period, thus showing the total amount of money for which the accused was accountable; that all the bills which were marked paid were totalled as expenditure vouchers, and this amount was subtracted from the money for which the accused was accountable; that this calculation showed a deficit against the accused of $705; that upon inquiry from members of the club, several members produced receipts for bills marked paid for which they had not received credit; that these uncredited bills resulted in an increase in the shortage of the club, totalling $837 or $838.36 (R. 77-79).

5. Mrs. Aurora Rodriguez Tous testified for the defense that she had worked under the supervision of the accused when he was serving as post signal officer; that during that time she was granted three months sick leave and that during her absence the accused kept the accounts of the signal office, and that upon her return she found that the accounts of the office were in a very confused order. The witness testified in effect that

although no money was involved in the record keeping of the signal office, the accused had kept the records during the period of her absence in a very poor manner (R. 14-23).

Miss Maria Georgina Lopez testified for the defense that the accused was her "boy friend", that she formerly was in his company every other weekend; that at no time did the accused ever spend over $5 or $6 during an evening; that he never gave her expensive presents or candy or flowers; that he never drank or gambled; that when the accused visited her he would stay at a hotel and would give her his wallet to keep while he was there, and that on these occasions she noticed that he had an average of about $60 in his wallet (R. 22-25).

Second Lieutenant Charles F. Heath Jr., testified for the defense that the accused kept club money in a safe to which several other people had access; that the accused had no key to the inner safe compartment and on two occasions the witness had opened the inner compartment for him (R. 25-31).

Lieutenant Colonel Paul A. Harris, testified for the defense that he had made an investigation of the shortages in the Officers' Club fund, and that he had found that the accounts of the club had not been properly kept and that no real accounting system had been maintained; that he had examined the personal effects of the accused and had found no evidence that the accused had mailed out any money (R. 35-37-73).

The accused testified that he had graduated from the University of Florida having specialized in agriculture, that he had never had any experience or any course in accounting, and that he had been unable to keep the accounts of the Officers' Club. He explained that he had never had a key to the inner compartment of the safe where the club funds were kept, that he had to use the key of the athletic and recreation officer or the key of Major Kingsbury; and that at least five other officers knew the combination of this safe. He admitted, however, that only on two occasions did he use the safe and on these occasions he did not know how much money he deposited there. The accused testified that his expenses averaged about $145 a month; that he did not gamble; that he did not own an automobile or entertain girls; that his club bill accounts amounted to about $55 a month and that he had allotted to a bank in the States $85. He also testified that he was paying $25 a month on a loan to a bank; that he owed the Grand Hotel $65.75, the Officers' Club at Fort Monmouth $85, the post exchange at Fort Monmouth $100, and the University of Florida $97.60. The accused explained that, in part, he could meet his debts from his salary as an Army officer which amounted to $204 a month. In addition to his salary he had at one time received $150 as a clothing allowance. The accused testified that he had paid off personal debts amounting to about $500 or $600. He testified further that at times he

collected funds for the Officers' Club at his office, and at other times he would collect them at parties or on Saturday night or at most any other place on the post. Sometimes when he made such collections he was drinking, and put the money in his pocket. Later he would put the money in his footlocker until he turned it over to the club steward. He admitted that it was possible that the club funds might have been intermingled with his personal funds, but that his personal funds never amounted to much. He stated that it was unlikely that the funds had been lost. The accused admitted that he had stated to Colonel Harris in October, during the investigation of this case, that he, the accused, was in need of money after he had been commissioned an officer, that he was a member of a group of newly commissioned officers who were extravagant, who were not accustomed to credit, and that he lived far beyond his means. Accused also admitted that in August, 1942, he had contemplated buying an automobile at a price of $550 (R. 40-73).

5. The Specification alleges that the accused did, between 1 August 1942 and 10 October 1942, feloniously embezzle $832.80 of the Henry Barracks Officers' Club which had been entrusted to him as custodian. The record shows that the accused, during this time was entrusted by virtue of his office with a total of $6,727.68 and that when he was relieved of his duty as club officer he could only account for $5,894.88, and that, therefore, there was a shortage in the club funds of $832.80. The accused testified that he was unable to explain this shortage and indicated that the money might have been taken by others who had access to the safe, on two occasions, when part of the club money had been kept there.

In view of the above facts, the real question for determination is whether the accused fraudulently converted the $832.80 in question to his own use. The Manual for Courts-Martial states that:

> "Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted or into whose hands it has lawfully come. (Moore v. U.S., 160 U.S. 268).
>
> "The gist of the offense is a breach of trust. The trust is one arising from some fiduciary relationship existing between the owner and the person converting the property, and springing from an agreement, expressed or implied or arising by operation of law. The offense exists only where the property has been taken or received by virtue of such relationship" (M.C.M., 1928, par. 149).

Although the record presents no direct testimony that the accused intentionally and fraudulently appropriated the money in question, it

does present a number of facts and circumstances which clearly justify the inference that the accused fraudulently misappropriated the monies as alleged. The most revealing and persuasive of such facts show that the accused had for some time been in debt, that in August, 1942, he had contemplated the purchase of an automobile at a price of $550, that he admitted that he had in the past lived extravagantly, that he utterly failed to keep a correct record of the monies entrusted to him, that at various times he collected money for the Officers' Club which he intermingled with his own, and for which he failed to account, and that over a period of two months and ten days a shortage of $832.80 in the officers' account had developed.

The Judge Advocate General, in a case very similar to the present one, asserted that,

> "An officer in charge of trust funds who fails to respond with them or account for them when they are called for by proper authority cannot complain if the natural presumption that he has made away with them outweighs any uncorroborated explanation he may make, especially if his explanation is inadequate and conflicting" (CM 123492, (1918), CM 123488 (1918) is to the same effect).

In the light of these precedents, and in view of the force of the logical inferences indicating the guilt of the accused, we must conclude that the court was legally justified in its findings of guilty.

6. The records of the office of The Adjutant General show that the accused was born 8 April 1906; and that he enlisted on 27 September 1940, and was discharged on 30 September 1941, to accept a commission issued to him on that date as Second Lieutenant, Signal Corps; that he was ordered to active duty on 1 October 1941; and that he was promoted on 26 May 1942 to First Lieutenant. There were no previous convictions.

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 of the sentence. A sentence of dismissal is authorized upon conviction of violation of Article of War 93.

Chas. L. Gresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

SPJGN
CM 234153

1st Ind.

War Department, J.A.G.O., 31 JUL - 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 John J. Shirley (0-450903), Signal 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. In view of the recommendation for clemency by the defense counsel and the assistant trial judge advocate and the fact that the accused has already been confined for several months, I recommend that the sentence of confinement be remitted. As thus modified, I recommend that the sentence 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 such action meet with approval.

Myron C. Cramer

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

3 Incls.
Incl1- Record of trial.
Incl2- Dft. ltr. for sig. Under Sec. of War.
Incl3- Form of Executive action.

(Sentence confirmed but that part providing for confinement at hard labor remitted. G.C.M.O. 224, 10 Sep 1943)

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

SPJGH
CM 234156

UNITED STATES	)	FIFTH DISTRICT ARMY AIR FORCES TECHNICAL TRAINING COMMAND
v.	)	
Second Lieutenant LEONARD E. DELOUGHERY (0-432677), Air Corps.	)	Trial by G.C.M., convened at Miami Beach, Florida, March 27, 1943. Dismissal.

OPINION of 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 2nd Lieutenant Leonard E. Deloughery, Army Air Forces Technical Training Command, Officer Candidate and Officer Training School, 304th Technical School Squadron (Special), Miami Beach, Florida, did, at Miami, Florida, on or about December 19, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Burdine's, a corporation, a certain check, in words and figures as follows, to wit:

Bank of America - Highland Branch
Highland, California, December 19, 1942
PAY TO THE ———Burdine's———$10.00
ORDER OF
———Ten and no/100———Dollars

/s/ Leonard E. Deloughery
2nd Lt. A.C.-0-432677

ADDRESS
Hotel Coronado
Miami Beach

and by means thereof, did fraudulently obtain from Burdine's, a corporation, ten dollars ($10.00) in lawful currency, he the said 2nd Lieutenant Leonard E. Deloughery, then well knowing that he did not have and not intending that he should have sufficient funds in the bank of America, Highland Branch, Highland, California, for the payment of said check.

Specification 2: In that 2nd Lieutenant Leonard E. Deloughery, Army Air Forces Technical Training Command, Officer Candidate and Officer Training School, 304th Technical School Squadron (Special), Miami Beach, Florida, did, at Miami, Florida, on or about December 28, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Burdine's, a corporation, a certain check, in words and figures as follows, to wit:

Bank of America - Highland Branch
Highland, California, December 28, 1942
PAY TO THE ———Burdine's———$7.50
ORDER OF
———Seven and 50/100———Dollars

/s/ Leonard E. Deloughery
2nd Lt. A. C.-0-432677

ADDRESS
Hotel Coronado
Miami Beach

and by means thereof, did fraudulently obtain from Burdine's, a corporation, seven dollars and fifty cents ($7.50) in lawful currency, he the said 2nd Lieutenant Leonard E. Deloughery, then well knowing that he did not have and not intending that he

should have sufficient funds in the Bank of America, Highland Branch, Highland, California, for the payment of said check.

Specification 3: In that 2nd Lieutenant Leonard E. Deloughery, Army Air Forces Technical Training Command, Officer Candidate and Officer Training School, 304th Technical School Squadron (Special), Miami Beach, Florida, did, at Miami, Florida, on or about December 30, 1942, with intent to defraud, wrongfully and unlawfully make and utter to Burdine's, a corporation, a certain check, in words and figures as follows, to wit:

```
:-------------------------------------------------:
:   Bank of America - Highland Branch             :
:   Highland, California, December 30, 1942       :
: PAY TO THE ---------Burdine's--------$10.00     :
:  ORDER OF                                       :
:   -------Ten and no/100--------Dollars          :
:                                                 :
:                        /s/ Leonard E. Deloughery :
:ADDRESS                  2nd Lt. A.C.-0-432677  :
:  Hotel Coronado                                 :
:   Miami Beach                                   :
:-------------------------------------------------:
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and by means thereof, did fraudulently obtain from Burdine's, a corporation, ten dollars ($10.00) in lawful currency, he the said 2nd Lieutenant Leonard E. Deloughery, then well knowing that he did not have and not intending that he should have sufficient funds in the Bank of America, Highland Branch, Highland, California, for the payment of said check.

Specification 4: In that 2nd Lieutenant Leonard E. Deloughery, Army Air Forces Technical Training Command, Officer Candidate and Officer Training School, 304th Technical School Squadron (Special), Miami Beach, Florida, did, at Miami, Florida, on or about January 2, 1943, with intent to defraud, wrongfully and unlawfully make and utter to Burdine's, a corporation, a certain check, in words and figures as follows, to wit:

Bank of America - Highland Branch Highland, California, January 2, 1943	
PAY TO THE ORDER OF	Burdine's $8.00
Eight and no/100 Dollars	
	/s/ Leonard E. Deloughery 2nd Lt. A.C.-O-432677
ADDRESS Hotel Coronado, Miami Beach	

and by means thereof, did fraudulently obtain from Burdine's, a corporation, eight dollars ($8.00) in lawful currency, he the said 2nd Lieutenant Leonard E. Deloughery, then well knowing that he did not have and not intending that he should have sufficient funds in the Bank of America, Highland Branch, Highland, California, for the payment of said check.

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

Specification: In that 2nd Lieutenant Leonard E. Deloughery, Army Air Forces Technical School Squadron (Special), Miami Beach, Florida, did, without proper leave, absent himself from his organization at Miami Beach, Florida, from about November 21, 1942, to February 7, 1943.

Accused pleaded not guilty to and was found guilty of both Charges and Specifications thereunder. 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 by paragraph 12, Special Order 204, Headquarters, 69th Observation Group, Army Air Forces, dated November 12, 1942, accused, who was then a member of the 10th Observation Squadron, stationed at Abilene, Texas, was transferred, on an unassigned basis, to Officers' Training School, at Miami Beach, Florida, where he was ordered to report not later than November 16, 1942. This transfer was noted on the morning report of the 10th Observation Squadron for November 17, 1942. Accused did not report to the Officers' Training School at Miami Beach until February 7, 1943 (R. 8-15, Exs. 1, 2).

During the period from December 19, 1942 to January 2, 1943, accused drew and uttered four checks on the Bank of America - Highland Branch, Highland, California, payable to the order of Burdine's. The first check in the amount of $10 was dated December 19, the second, in the amount of $7.50, December 28, the third in the amount of $10, December 30, and the fourth in the amount of $8, January 2. Accused cashed all of them at Burdine's, in Miami, Florida. On the face of each check, in the lower left-hand corner, there was this notation: "Address, Hotel Coronado, Miami Beach". All of the checks were returned unpaid by the drawee bank (R. 15-31, Exs. 3, 4, 5, 6).

In January, 1942, accused had opened a checking account in the bank on which the checks were drawn, and thereafter, and until October 1942, at his direction, all of his Army pay checks were mailed directly to the bank for deposit. It appears from the bank statements that on December 19, 1942, the date of the first of the checks to Burdine's, the balance in the account was $14.66, but by December 21 this balance had been reduced, by incoming checks, to $3.66. On December 24, there was an overdraft which progressively increased until January 23 when it amounted to $40.34. The last deposit to the account was made on October 31, 1942. It was the policy of the bank not to mail statements to its customers except upon special request. Pursuant to his telephonic request, monthly statements were mailed to accused, but the statements for the months of October, November and December were returned to the bank, unclaimed, for lack of a forwarding address, and were not delivered to accused. The bank received a letter from him, postmarked Miami, Florida, and dated December 21, 1942, in which he stated that he had been transferred to another post, pay vouchers had been delayed "during the movement", and he may have overdrawn his account, but he would have "any check" sent to the bank "as soon as orders are available" (R. 31, Ex. 7).

When interviewed by the investigating officer, Second Lieutenant David H. Henderson, on February 8, 1943, accused made and signed a written statement, after being informed that he need not make a statement if he did not wish to do so, and that anything he might say could be used against him if the case came to trial. The statement was received in evidence without objection. In it accused asserted that the teletype order directing him to report to Officers' Training School did not reach him at Abilene, Texas, until some time after November 16, 1942, and that it was not followed by written orders. He drew $72 against his November pay to purchase his ticket to Miami Beach, Florida, and left

without "official clearance", arriving at his destination about November 29, after the school was scheduled to start. He stayed at the "Y.M.C.A." in Miami until the first week in December when he moved to a hotel in that city. Since January 1940, the Finance Office had been sending his checks directly to the Bank of America, Highland, California, for deposit in his checking account. He did not know the amount of his balance when he arrived in Miami as the West Coast banks did not send monthly statements unless requested. Apparently, he had overdrawn his account, but, if so it was unintentional. Accused admitted that he had cashed four checks at "Burdine's, Incorporated", in Miami, on the dates and in the amounts alleged in the Specifications, Charge I. He also had cashed three checks at the "Y.M.C.A." and one at a bank for about $12.50. In addition to the proceeds of these checks he had $130 in travelers checks which he had purchased before leaving California. Since the first of December, he had spent his time in Miami going to shows, reading, and resting. He did not drink heavily, had not been drunk since arriving in Miami, and at all times had been in full possession of his faculties. He kept putting off reporting from day to day although he knew it was wrong. He knew that there was a headquarters of the Army Air Forces, Technical Training Command, at nearby Miami Beach. He had continued wearing his uniform and insignia. On February 7 an acquaintance in the Naval Service in Miami informed accused that his picture had been posted at Shore Patrol Headquarters and that he was wanted for a "bad check". Knowing that it was useless "to run off as I would be picked up later", he "flagged a jeep" and went to the headquarters of a Military Police Battalion in Miami (R. 31-35, Ex. 8).

4. Accused testified that when he enlisted in the Army in November, 1940, his home was in Butte, Montana, where his parents resided. In 1935 he had received an engineering degree from the University of Montana. At one time he had a school in music in the City of Butte, and for a little more than a year immediately preceding his entry into the service worked as a map maker for the Montana Mineral Resources Board. He attended Aviation Cadet School, a school in aerial photography and laboratory procedure, at Lowry Field, Colorado, from May to September, 1941, graduated, was sent to Salinas, California, as a cadet, and received his commission on Christmas Eve, 1941. He was then assigned as photographic officer, to a field at San Bernardino, about a half mile from Highland, California, and stayed there until May 1942. However, as there were no aeroplanes to fly cameras, and no laboratory

trailer to process the films, he had no useful work and did "practically nothing". At his next station, Ontario, California, where accused also served as photographic officer, until the first week in November, the situation as to lack of equipment was much the same. There were cameras but the available aeroplanes were not equipped to carry them and the cameras were never used. As a result he did no "substantial" work at Ontario. As he knew that he had a job to do, which he could do somewhere else, being idle, with the war effort going on, made him feel useless and unhappy. He was next transferred to Abilene, Texas, arriving there about November 10 (R. 38-43).

In January, 1942, accused had opened a checking account in the Highland Branch of the Bank of America. In his pay vouchers he had provided that his checks be sent directly to the bank. About November 1 the balance in his checking account was $235. He did not receive his monthly bank statements covering the months of October, November, and December, as he was "on the move". On November 16, at the Abilene Airport, he received a teletype message which directed him to proceed to Officers' Training School at Miami Beach, Florida, immediately and to arrive not later than November 16. Although the message indicated that written orders would follow by air mail, they did not come, and accused could not get clearance without them. He did not leave Abilene until about November 19, and arrived at Miami Beach approximately three days later (R. 42-46, Def. Ex. A).

Accused produced a document, which was received in evidence, signed by First Lieutenant John E. Satterstrom, as the commanding officer of the 10th Observation Squadron, dated November 17, 1942, designated "Memorandum" and directed "To all concerned". It stated, in substance that accused was unable to depart from his station at Abilene, Texas, "prior to November 17, 1942" and for that reason could not comply with paragraph 12, Special Order 204, Headquarters, 69th Observation Group (R. 44-46, Def. Ex. B).

Accused did not report for duty upon his arrival at Miami Beach because his baggage had been "side-tracked" at Jacksonville and did not reach him until three days later. He knew that he was not on time for school. He stayed at the "Y", intended to report, kept putting it off, did nothing but go to shows and visit the library, and, after "about three days of it", was afraid to report. He had no other explanation to offer except "I suppose I felt" that having done nothing all year "a week or two more wasn't going to bother the Army any too

much". He wore his uniform at all times and returned to military control on February 6, after he had been informed by an acquaintance in the Navy Shore Patrol that he (accused) was "wanted for passing a bad check". When a bad check was mentioned accused thought that he had better find out about it. He had no idea "such a thing happened" because he thought that he had enough money in the bank to cover his checks although he did not have "a statement". He admitted giving the four checks to Burdine's, on December 19, December 28, December 30, and January 2, but stated that he did not intend to defraud Burdine's. He did not know that his bank balance was insufficient to pay the checks but on the contrary thought that he had enough money in the bank to cover them. He did not write any checks after leaving Ontario until he reached Miami Beach, did not thereafter write "very many", and "thought I had more than I had". He had received no communication from the bank concerning the condition of his account. When asked by defense counsel why he had not "redeemed" the checks accused replied that he was not able to do so because he had not been paid but "I will when I can". He had drawn fifteen days pay, amounting to $72, in Abilene and had used the money to buy a railroad ticket. He first learned that the checks were not good when he met the shore patrolman (R. 47-51).

On cross-examination, accused admitted that the last pay voucher which he had signed was for the month of October, 1942. He knew that it was necessary for an officer to sign pay vouchers and that the reason he did not "get a check" was because he had not signed a voucher (R.51-52).

5. As to Charge II and its Specification, the evidence shows that by a special order, dated November 12, 1942, accused, who was then stationed at Abilene, Texas, was assigned to Officers' Training School at Miami, Florida, where he was ordered to report not later than November 16. The order was not communicated to accused in time for him to comply strictly with its terms, it is true, but the morning report of his squadron indicates that his transfer to Officers' Training School was effected as of November 17. Moreover, the certificate signed by his commanding officer at Abilene (Def. Ex. B), states that accused was unable to depart from his station there"prior to November 17". According to his own testimony accused left Abilene "about" November 19 and arrived in Miami Beach "about" three days later. He did not report to the

organization to which he had been transferred until February 7, 1943. He admits that during the intervening period he stayed in Miami doing nothing but going to shows and to the library. It thus appears, without substantial dispute, that accused absented himself from his organization, without proper leave, from about November 21, 1942, to February 7, 1943.

6. Concerning Specifications 1, 2, 3 and 4, Charge I, it appears that accused drew and cashed at Burdine's, in Miami, Florida, four checks, on the Highland Branch, Bank of America, Highland, California, payable to the order of Burdine's, bearing dates and in amounts as follows: December 19, 1942, $10; December 28, 1942, $7.50; December 30, 1942, $10; and January 2, 1943, $8. All of these checks were returned to Burdine's unpaid, by the drawee bank. Accused had been directing the Finance Office to send his pay checks directly to the bank but he did not send in any pay voucher after the one covering his October pay, and he knew that the bank would not receive another check until he had signed and submitted a voucher. He left no forwarding address, upon his removal from Abilene, and he did not thereafter communicate with the bank except for his letter of December 21. In that letter accused informed the bank that he had been transferred to another post, pay vouchers had been delayed "during the movement", and "I may have overdrawn my account". After writing the letter, without hearing from the bank and without making any provision for a deposit to his account, accused drew and uttered the last three of his four checks to Burdine's. The Board of Review is convinced from all of the evidence, that accused, despite his assertions to the contrary, knew that he did not have sufficient funds in the bank to pay his checks. His conduct in wrongfully making and uttering the checks, with knowledge of the depleted state of his bank account, was such as to bring discredit upon the military service and constituted a violation of the 96th Article of War (CM 202027 McElroy; CM 208870 Moore; CM 220160 Faulkner).

7. The accused is 29 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from November 14, 1940; appointed second lieutenant, Air Corps-Res., and active duty, December 23, 1941.

8. 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 authorized upon conviction of violation of the 61st Article of War or the 96th Article of War.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

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 Leonard E. Deloughery (0-432677), 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.

Upon being assigned to Officers' Training School at Miami Beach, Florida, accused went to Miami about November 21, 1942, but did not report for duty and was absent without leave until February 7, 1943, in violation of the 61st Article of War. During his absence, and between December 19 and January 2, he made and uttered four checks, aggregating $35.50, with intent to defraud, without having or intending to have sufficient funds in the bank for payment thereof in violation of the 96th Article of War. He had at one time arranged for the deposit of his pay checks in the bank, but had not signed a pay voucher since the voucher for his October pay. The action of accused in overdrawing his checking account with four checks aggregating $35.50 and his protracted absence for two and one-half months without excuse or justification demonstrates a lack of responsibility on his part inconsistent with the performance of his duties as an officer. I, therefore, 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 ltr. for sig. Sec. War.
3- Form of Executive Action.

(Sentence confirmed. G.C.M.O. 140, 10 Jul 1943)

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

SPJGK
CM 234190

26 JUN 1943

N.D

UNITED STATES)
)
v.)
)
Private PEDRO TORRES)
(32003017), Company B, 801st)
Tank Destroyer Battalion.)
)
)

EIGHTH SERVICE COMMAND
ARMY SERVICE FORCES

Trial by G.C.M., convened at Camp Hood, Texas, April 12, 1943. Dishonorable discharge and confinement for twenty (20) years. Penitentiary.

REVIEW by the BOARD OF REVIEW
LYON, HILL and ANDREWS, 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 93rd Article of War.

Specification: In that Private Pedro (NMI) Torres, Company "B", 801st Tank Destroyer Battalion, did, at Temple, Texas, on or about April 6, 1943, with intent to commit a felony, to wit: rape, commit an assault upon Grace Lynn O'Brien, a female child, by willfully, feloniously and forcibly holding her, pulling her to himself and attempting to have carnal knowledge of the said Grace Lynn O'Brien.

He pleaded not guilty to and was found guilty of the Charge and its Specification. Evidence was introduced of three previous convictions, (a) absence without leave (22 days), in violation of Article of War 61; (b) careless discharge of a service rifle in violation of Article of War 96, and (c) absence without leave (52 days), in violation of Article of War 61. 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 twenty (20) years. 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 shows:

Mrs. Mildred O'Brien of 617 South 17th Street, Temple, Texas, testified that she, and her husband met the accused at Judd's Barbecue Shack on the afternoon of 5 April 1943. On the following day, 6 April, at about noontime the accused knocked at Mrs. O'Brien's door and asked if he could come in. Mr. O'Brien welcomed him into the sitting room. The accused showed a picture of his wife and talked about his little boy and a little girl 5 years old who had died. Grace Lynn, the 5 year old daughter of the O'Briens wanted the accused to play baseball with her in front of the house, but accused said "No". The child went out and played and the accused went to Judd's Barbecue Shack. Shortly thereafter accused returned and said that the child wanted to go to the park. The O'Briens had many friends in the service and readily agreed. In about three quarters of an hour a police car drove up. The child was in the front with the officers and the accused was on the back seat. The child was frightened. She was not crying. She never cries when frightened. Her clothes were "just normally dirty" (R.4-7,37).

Mrs. Lily D. Bobo, 813 South 19th Street, Temple, Texas, while sitting in her living room on the afternoon of 6 April 1943 saw a man and a little girl "coming down through the ditch toward the bridge - in the park". Mrs. Bobo's house faces the park (called Jones' Park). She had never seen the man or the child before and it struck her as being quite unusual as the man was making his way to the bridge. The bridge is about 2 blocks from witness' house. In a few minutes she observed that the man and the child went under the bridge. It "skipped" her mind for a while. Then the man came from under the bridge and the little girl followed him. Witness at the time thought the man was a negro. She continued watching. The man went back and forth under the bridge several times. Finally he came from under the bridge, bareheaded with something in his hand and waved it, but witness could not understand what he meant. Mrs. Bobo saw the man and child go under the bridge twice. After coming from under the bridge the first time the child stood upon an elevation for a minute or so. The man stood in the ditch making "motions" and then they went under the bridge or culvert a second time. In about ten minutes witness saw a car drive up to the bridge and remarked "they've got that rascal". Witness could not identify accused as the man whom she saw with the child (R.8-12). On the

afternoon of 6 April 1943 Frank H. Bouldin, Chief of Police of Temple, Texas (R.13-20), Henry Cunningham, Deputy Constable of Bell County (R.21-24), and W.L. Luna, Texas Highway Patrolman (R.28-32), in response to a call at Police Headquarters went to Jones' Park in Temple, Texas, looking for a little girl and a soldier. On arriving at the park nothing was seen of them. Officer Cunningham suggested looking under a bridge across the street. Chief Bouldin went to the south end of the bridge. Cunningham was at the other end. As Chief Bouldin looked under the bridge he heard Cunningham "holler", "come out from under there". Chief Bouldin then saw accused and the little girl, Grace O'Brien, under the bridge. The accused was lying on his left side. He was moving to get up. His pants were down, unbuttoned from top to bottom, his privates were exposed, and in a state of erection. Accused was dressed in Army clothes. His cap and jacket were off to one side. The child was

> "* * * Right up to him, she was down on the ground, both their heads were toward me, whether his hands were on her, I don't know. She sat up facing me crying, I saw some streaks made from tears and she said 'He made me do it' 'He made me do it', 'Take me to my monna'"(R.18,30).

Chief Bouldin stated that when he first discovered them under the bridge "They were close together, he had pulled her up in his arms. I will say she was against him, when we spoke, he moved, it all happened in a second" (R.20). Accused came from under the bridge and was handcuffed by Officer Luna, the highway patrolman. By this time several people had congregated. As the child came from under the bridge her little panties were down on one side. After the accused had come from under the bridge and while standing on the highway, he stated to the officers, "Go ahead and shoot me - I deserve to die". When he had been placed in the car, accused stated, "Give me a rifle or a gun and I will kill myself". This was repeated by him several times (R.13-15,23,25,29,31). Chief Bouldin stated that when he looked under the bridge he did not see accused's hands on the child, but that they were facing each other and that accused "immediately flopped over on his stomach" and that at this time his organ was exposed and "was stiff". Accused appeared to have been drinking "for a day or two". He did not seem "dopey like he had just awakened". He was very talkative (R.18,21,22,26,29). The child was taken to her home and her parents were advised of the incident.

Grace Lynn O'Brien, the little girl involved, stated that she knew what it meant to tell the truth, that she did not tell stories, and that she would tell the truth. After being asked several questions, to

which she made no reply, she stated that she remembered the day the police took her to her mother. She remembered a man catching hold of her. She then demonstrated how she was taken hold of by grasping her right wrist with her left hand and stated that she pulled against him. She then identified the accused as the man (R.36-38).

Dr. John R. Winston, of Temple, Texas, at the request of Mrs. O'Brien, made a physical examination of Grace Lynn O'Brien on the afternoon of 6 April 1943. He stated that his findings were entirely negative and by that he meant that there was no indication that the child had suffered any physical violence. He found some sand around "her little box", as though she had been playing in the dirt (R.33-35).

For the defense, the accused stated that he walked to the park with the little girl. After picking some flowers he told the child to run along and play and to let him know when she was ready to return home. Accused then fell asleep and was awakened by a state trooper saying, "Get out of there with your hands up".

> "* * * The Chief said you should be killed for raping the little girl. I said if I raped the little girl give me a gun and I will kill myself, if you think I raped the little girl" (R.41).

Accused denied that his trousers were open, and stated that they were not open at any time while he was under the bridge. He stated that he was asleep when the officers came - and if the child was lying beside him it was through no act of his. He denied that the child cried. He denied taking hold of the child's wrist, denied taking down her panties, denied touching her, and denied that his penis was exposed at any time. Accused stated that he went under the bridge to sleep because he was absent without leave (R.45), - "the MP's might come around and ask me for my pass and I figured I would go under the bridge and be safe and nobody would know it" (R.43). He denied going under the bridge twice, as testified by the witness, Mrs. Bobo (R.44), but admitted that he was lying on his left side under the bridge when the officers called him (R.43). Accused stated that he was 34 years of age; that he was divorced in 1934, and that he had a son 15 years of age. He met the O'Briens on the afternoon of 5 April 1943. He went to the O'Brien home on the afternoon of 6 April because the child had fallen and scratched her knee (presumably on 5 April) and accused went to the O'Brien home to find out about that (R.41-46).

4. The evidence shows that on 6 April 1943 the accused, 34 years of age, took little Grace Lynn O'Brien, 5 years of age, to Jones' Park

in the town of Temple, Texas, with the consent of her parents. While in the park the accused and the little girl were seen going under a bridge or culvert. Shortly thereafter and in response to a call which had been received at the city police headquarters, the Chief of Police and two other law enforcement officers went to the park. Arriving at the park the officers looked under the bridge and saw the accused lying on his side with the little child close to and facing accused. When the officer called him, accused "flopped over on his stomach". His pants were down, and unbuttoned from top to bottom. His privates were exposed and in a state of erection. His cap and coat were to one side. The child was crying. As the child came from under the bridge it was observed that one side of her panties was down, her face was streaked with tears. She exclaimed: "He made me do it," and begged to be taken to her mother. The accused, after being ordered to do so, emerged from under the bridge and before entering the police car, exclaimed, "Go ahead and shoot me - I deserve to die", or words of similar import. Accused appeared to have been drinking. He was very talkative and did not act like one who had been asleep. An examination of the child made within a short time after she was found under the bridge disclosed no evidence of any physical violence.

Accused admitted that he and the child were found under the bridge at the place and time alleged. He contended that he did not assault or attack the child; that he left her playing or swinging in the park while he went under the bridge for a nap. He was absent without leave and his reason for going under the bridge was to avoid detection by the military police. He did not entice the child under the bridge. In fact he was unconscious of her presence until he was awakened by the officers. He denied that his trousers were unbuttoned and that his penis was exposed.

5. Since the court, by its findings has rejected the testimony of the accused, the question presented is whether, under the evidence for the prosecution, adjudged credible by the court, the acts committed 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 the evidence or passing upon the credibility of the 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 violence applied, the language, threats, demonstrations, and the entire conduct of the accused, the place, time and other circumstances of the attempt, etc. See Winthrop 2nd Ed., page 688. * * *".

As a general proposition an assault with intent to commit rape involves the use of force and violence - coupled with the intent to overcome any resistance, by force, actual or constructive, and to penetrate the woman's person (M.C.M. 1928, par. 149 1). Had the victim in the instant case been an adult, or of an age which would have rendered her capable of understanding the nature and character of the assault, the Board of Review, under the facts presented, would not hesitate to hold that the evidence is lacking in that degree of force necessary to constitute an assault with intent to commit rape. In this case, however, the victim is 5 years of age - wholly incapable of giving consent - and of course totally unable to comprehend the carnal motive and purpose of the assault. In such a situation the courts have held that the same degree of force is not required to be shown as in the case of an adult. The law wisely takes into consideration the age and relative strength of the parties and the existing human equations. The force employed need be no greater than is necessary under the circumstances. The rule has been aptly stated in the following paragraph:

> "Where one touches or handles or takes hold of the person of a female under the age of consent with the present intent of having sexual intercourse with her then and there, he commits the offense of assault with intent to rape" (52 Corpus Juris, sec. 45) (underscoring supplied).

See also Phillips v. State, 93 Fla. 112, 111 S. 515; State v. Roby, 194 Iowa 1032, 188 N.W. 709; Winans v. State (Tex. Cr.), 24 S.W. (2nd) 421; Beezley v. State, 108 Tex. Cr. 556, I S.W. (2nd) 903; Osborne v. State, 106 Tex. Cr. 310, 292 S.W. 240; Wilson v. State, 94 Tex. Cr. 373, 251 S.W. 221.

Thus the remaining question to be considered is whether under the proven facts in this case there is any evidence which would reasonably support an inference of intent on the part of the accused to commit rape upon the child. The evidence shows that the child was enticed or lured by the accused under the bridge; when they were discovered, the accused was lying on his side with the little child close to and facing him. He immediately "flopped over on his stomach". His trousers were down and unbuttoned from top to bottom. His privates were exposed and in a state of erection. His cap and coat were to one side. The child was crying. As she came from under the bridge it was discovered that one side of her panties was down, her face was streaked with tears and she exclaimed, "He made me do it", and begged to be taken to her mother, and when the accused emerged from under the bridge he stated to the officers, "Go ahead and shoot me - I deserve to die", or words to that effect.

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 by the court in Ware v. State (67 Ga. 352):

> "* * * What other motive could he have had? * * * 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; inferences and deductions from human conduct are proper to be considered where they flow naturally from the facts proven, 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 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."

6. The Charge Sheet shows that the accused is 34 years of age and that he was inducted in the military service 23 January 1941.

7. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence. 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).

Percy E. Gray, Judge Advocate.

[illegible], Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

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

SPJGH
CM 234195

MAY 28 1943

UNITED STATES	)	FOURTH AIR FORCE
v.	)	Trial by G.C.M., convened at March Field, California, April 1, 1943. Dismissal and forfeiture of all pay and allowances.
First Lieutenant JOSEPH R. WOODS (0-559449), Air Corps.	)	

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 Charges and Specifications:

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

Specification 1: In that 1st Lt. Joseph R. Woods, Air Corps, 311th Base Hq. & Air Base Squadron, did, at Ontario, California, on or about the 25th day of December, 1942, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to-wit:

"Sidney Volk No. 960
3736 23rd Avenue, South Minneapolis, Minn. Dec. 25, 1942
Pay to the order of Cash $100.00
One Hundred and 00/100 Dollars
Fidelity State Bank 77-92 Minneapolis, Minn. Sidney Volk"

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

Specification 2: In that 1st Lt. Joseph R. Woods, Air Corps, 311th Base Hq. & Air Base Squadron, did, at Ontario, California, on or about the 24th day of February, 1943, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to-wit:

"Sidney Volk No. 959
3736 23rd Avenue, South Minneapolis, Minn., Feb. 24, 1943
Pay to the order of Cash $100.00
One Hundred and 00/100 Dollars
Fidelity State Bank 77-92 Minneapolis, Minn. Sidney Volk"

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

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

Specification 1: In that 1st Lt. Joseph R. Woods, Air Corps, 311th Base Hq. & Air Base Squadron, did, at Ontario, California, on or about December 25, 1942, with intent to defraud, wilfully, unlawfully and feloneously pass as true and genuine a certain check in words and figures, as follows:

"Sidney Volk No. 960
3736 23rd Avenue, South, Minneapolis, Minn. Dec. 25, 1942.
Pay to the order of Cash $100.00
One Hundred and 00/100 Dollars
Fidelity State Bank 77-92 Minneapolis, Minn. Sidney Volk"

which check was endorsed on the reverse side, as follows: "Lt. Joseph R. Woods," a writing of a private nature which might operate to the prejudice of another, which said check was, as he, the said Joseph R. Woods, then well knew, falsely made and forged.

Specification 2: In that 1st Lt. Joseph R. Woods, Air Corps, 311th Base Hq. & Air Base Squadron, did, at Ontario, California, on or about February 24, 1943, with intent to defraud, wilfully, unlawfully and feloneously pass as true and genuine a certain check in words and figures, as follows:

"Sidney Volk No. 959
3736 23rd Avenue, South Minneapolis, Minn. Feb. 24, 1943
Pay to the order of Cash $100.00
One Hundred and 00/100 Dollars
Fidelity State Bank 77-92 Minneapolis, Minn. Sidney Volk"

which check was endorsed on the reverse side, as follows: "Lt. Joseph R. Woods," a writing of a private nature which might operate to the prejudice of another, which said check was, as he, the said Joseph R. Woods, then well knew, falsely made and forged.

He 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 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 and First Lieutenant Sidney Volk had been on very friendly terms. Lieutenant Volk identified two checks drawn to cash on forms of a bank in Minneapolis, Minnesota, with the name "Sidney Volk" printed in the upper left corner, each for $100 and signed "Sidney Volk". The checks, No. 959 dated February 24, 1943 (Ex. A) and No. 960 dated December 25, 1942 (Ex. B), were placed in evidence. He had missed these numbers and wrote to the bank for a statement sometime in January. Because of a transfer he was not receiving monthly statements and had told the bank he would notify it and have his checks forwarded. The statement and the checks (Exs. A and B) were received in March 1943, about one day before the charges against the accused were made out. The amount of these checks was deducted from the account of Lieutenant Volk and they cleared the bank. The name signed on them was not his signature. He never gave anyone permission to draw the checks, no part of the checks was made by him or with his authority, and the account was not a joint account. Both checks were indorsed with the signature of the accused, which did not appear to be disguised in any manner. When recalled as a witness in rebuttal Lieutenant Volk identified the pad of check forms (Ex. J) from which No. 959 and No. 960 came, and it was placed in evidence (R. 7-9, 32-33).

Major Vinton H. Luther, the investigating officer, had two conversations with the accused, on March 15 and 16, 1943. The accused,

after being properly warned of his rights, elected to make a sworn written statement on March 15 (Ex. C) and a supplemental sworn written statement on March 16 (Ex. D). These documents were in the handwriting of the accused except the jurat, and contained the entire conversation except some personal questions. They were introduced in evidence. These statements were in substance as follows: The accused was never involved in any trouble before and always fought his own battles and hardships. His home life was never of the brightest, as his father and mother were separated. His older brother was in the service overseas. Although his mother and sister, age nine, never asked for money, he knew that they had "none of the best" and needed assistance, and he sent the money home. He never tried to get away with anything, or he would not have used his own name on the checks. He should have told Lieutenant Volk what he had done before he discovered it, but he definitely knew that he would pay Lieutenant Volk as soon as he could get the money, and if necessary would sell his automobile. When Lieutenant Volk discovered it he telephoned the accused, who admitted signing Lieutenant Volk's name and told Lieutenant Volk he would pay him back as soon as possible. Lieutenant Volk said that would be satisfactory. That night the accused made preliminary arrangements with a used car dealer to sell his car, but no agreement was made as only the assistant was there, and the accused planned to go back the next day. The next morning the event had been brought to the attention of the commanding officer, who took the necessary action. The accused was brought to the hospital at March Field and held. He turned his car over to another officer to sell and repay Lieutenant Volk and gave this officer a note authorizing him to do so. The accused telephoned Lieutenant Volk on March 9, 1943, and assured him that he would be paid regardless of what became of the accused. Lieutenant Volk stated that he wanted everything straightened up soon and that he would not sign charges nor notify the Minneapolis bank. The accused had known Lieutenant Volk for about eight months and they were the best of friends. These two checks, No. 959 and No. 960, of $100 each were the only checks he signed as "Sidney Volk". He owed a balance of approximately $300 on his car, and withdrew an erroneous comment previously made that the car was fully cleared (R. 10-12; Exs. C and D).

Mr. R. J. McGrew, assistant cashier of Bank of America, Ontario Branch, who had custody and supervision of the bank's records, identified the ledger sheet of the account of the accused for the period

from November 25, 1942 (the document shows December 23, 1942) to January 1943 (Ex. E), a deposit slip showing a deposit of $100 to the account of accused on December 28, 1942 (Ex. F), "teller's pay proof" listing all checks handled on February 4, 1943 (the document shows February 24, 1943) by teller No. 4 (Ex. G), and "IBM batch tape" which is a breakdown of all checks handled by the bank throughout the day (February 24, 1943), indicating those cashed and those deposited (Ex. H). These documents were introduced in evidence. From an examination of Exhibits A and B and the bank stamps on them, and Exhibits E, F, G and H, Mr. McGrew testified that check No. 960 was deposited in the bank and check No. 959 was cashed at the bank, both being handled by teller No. 4, that the deposit was made on December 28, 1942, and that in his opinion the check that was cashed is reflected in the exhibits under date of February 24. He explained the nature of the bank records in evidence and how he interpreted them. On cross-examination he stated that there had never been any difficulty at the bank with reference to the account of the accused (R. 14-18).

Mrs. Hazel Boller, who had for twelve and a half years been engaged in identification work, handwriting and fingerprints, in the sheriff's office in Riverside, California, had for the past seven or eight years had experience in judging whether specimens of handwriting "belong to certain parties", and had appeared in state courts and courts-martial as a handwriting expert. She examined Exhibits A, B, C and D, which she had previously studied, and testified to the conclusion and opinion that the handwriting of the indorsements and signatures on Exhibits A and B and the handwriting on Exhibits C and D were the same, although there had been an attempt to disguise the signature "Sidney Volk" on the checks (R. 13-14).

4. The accused after being warned of his rights was sworn as a witness and testified that he was inducted June 9, 1941, became a staff sergeant, was selected to attend the first class at Officer Candidate School at Miami, Florida, February 20, 1942, was commissioned May 11, 1942, remained at that school as an instructor until June 1, 1942, completed the course at the Adjutant General's School in July 1942, was assigned to Headquarters, Fourth Air Force, then to 311th Base Headquarters and Air Base Squadron, Ontario, California, became Base Adjutant about August 20, 1942, was promoted to First Lieutenant November 3, 1942, and served as Base Adjutant until March 6, 1943. His home was

in a small town in Illinois, and he had been sending money to his mother and younger sister, usually between $50 and $60 each month, because he knew they needed it. His parents were separated. Out of his monthly pay check he usually paid $40 on his car and about $30 for his room, bought his meals, and tried to send what he could home. He had not been living beyond his means. He and Lieutenant Volk became very good friends. He picked up the two blank checks in Lieutenant Volk's room, which he frequented many times, because he needed money and thought he could take it as a loan and as soon as he got the money would pay Lieutenant Volk. He did not try to get a loan because he was not well known, thought it might be hard to do, and it would have embarrassed him. He indorsed his own name on the checks because he had no intention of using a fictitious name and did not intend to beat Lieutenant Volk out of the money. His indorsement on the checks was not disguised and he intended to repay the money. At the time of the trial he had sold his car and made full restitution of his own free will (R. 19-21).

On cross-examination the accused stated that he had never been married, had not made an allotment to his family, and received per month as a First Lieutenant, base pay of approximately $166, subsistence of about $21, and prior to the first of the year rental allowance of $60. He sent money to his mother and sister once or twice a month, sometimes by money order and sometimes by insured mail. He examined Exhibits A and B and stated that he had signed the name "Sidney Volk" on both, cashed the former at Bank of America, Branch No. 70, Ontario, and deposited the latter in his account at that bank. He picked up both checks about December 24, 1942, and made them out, or one and part of the other, on that date. He deposited the check dated December 25 on December 28, 1942, and later changed the date on the other to February 24, 1943. He did not have Lieutenant Volk's permission for what he did and had not spoken to him about it from December 1942 to March 1943. The only offer he ever made was when Lieutenant Volk telephoned him on March 5 after discovering the checks. He hesitated to say anything because he did not have the money to pay Lieutenant Volk, and thought he could borrow on his car, when paid for, and pay him back. From December 24, 1942 until March 6, he kept up the payments on his car. In January he made one attempt to sell the car, but the offer was only $500 and the balance due on the car at that time was $360. He did not attempt to borrow from a bank or lending institution from December 1, 1942 to March 5, 1943. Of the proceeds of the check (Ex. B) he sent his mother a

fifty dollar bill on December 29, 1942 and another fifty dollars on January 3, 1943, and from the other (Ex. A) he sent her fifty dollars in cash and the same amount by money order. The cash remittances were by registered mail. He identified a check form No. 921 (Ex. I) from Lieutenant Volk's check book, on which there were both writing and erasures, and stated that he had made neither. He picked up this check form when he took the other two (Exs. A and B) and it was in the same condition then. He thought that the writing on Exhibit I was that of Lieutenant Volk. The book of blank checks (Ex. J) had never been in his possession, but he had seen it (R. 21-27).

On redirect examination the accused stated that he did not make the erasures on Exhibit I. He did not write his family to get proof that he had sent the money to them because he did not want them to know of the trouble. He received $885 for his car, and if he had sold it in January for $500 he would have taken a loss. The receipts for the insured mail he sent home were in an envelope in his desk. On questions by the court it was brought out that he borrowed from Lieutenant Volk once in November and repaid the loan (R. 25-26, 28).

With reference to Exhibit I, Lieutenant Volk testified in rebuttal that the writing was made by him except a small part, that he had not signed it, and that he had made no erasures on it (R. 32).

First Lieutenant John M. Benson testified that the accused had been Base Adjutant for about six months and was very highly regarded and that he always believed the accused to be very efficient. He always thought the accused to be a gentleman and knew nothing unfavorable other than the present affair. He considered the veracity of the accused very fine and would believe him under oath. The accused did not live beyond his means. First Lieutenant Leo M. Christianson had known the accused about eight months, both officially and socially. The accused had been a guest in his home many times, and he would have him as a guest in the future. The accused performed his duties very efficiently. He knew nothing unfavorable about the accused, other than the present affair. The accused was very highly regarded among his brother officers and his reputation for truth and veracity was very good. He would believe the accused under oath. The accused did not live beyond his means. Lieutenant Volk, called as a witness for the defense, stated that he had known the accused since September 10, 1942. They lived at the same hotel for two or three months and

were together a great deal. The accused always seemed very efficient in the discharge of his duties. Up until this time he had implicit faith in the accused and still regarded him as a friend. He knew nothing unfavorable to the accused other than the present matter. The reputation of the accused for truth and veracity was good (R. 28-32).

5. The evidence shows without contradiction that the accused removed two blank checks from the check pad of his friend, Lieutenant Volk, without permission; that he falsely signed the name "Sidney Volk" on these forms, with the blanks filled in to make two checks for $100 each; that he deposited one of the checks in his own bank account on December 28, 1942 and cashed the other on February 24, 1943; and that he had no authority from Lieutenant Volk to do so. These checks were charged against Lieutenant Volk's account in his bank at Minneapolis, Minnesota. The accused did not advise Lieutenant Volk of what he had done. The accused testified that he considered it a loan, that he intended to repay Lieutenant Volk, and that after Lieutenant Volk discovered what he had done he sold his car and repaid the amount of the checks. Nevertheless, it is clearly shown that the accused, without authority, falsely made and uttered the checks with intent to defraud.

6. The accused is 23 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from June 1941; appointed temporary second lieutenant, Army of the United States, May 11, 1942; appointed temporary first lieutenant, Army of the United States, November 3, 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 and sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 93rd or 96th Article of War.

Curtis S. Hall Jr., Judge Advocate

Samuel M. Davies, Judge Advocate

F. J. Lotterhos, 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 First Lieutenant Joseph R. Woods (0-559449), 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 accused wrongfully obtained possession of two blank personal checks of another officer who was his friend, forged thereon the name of the other officer two checks in the amount of $100 each, in violation of the 93rd Article of War, and uttered these checks by depositing one to his own account on December 28, 1942, and by cashing the other on February 24, 1943, in violation of the 96th Article of War. Restitution was made of the amount obtained upon the two checks. 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 made above.

Myron C. Cramer

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

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

(Sentence confirmed but execution suspended. G.C.M.O. 176, 31 Jul 1943)

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

SPJGN
CM 234201

MAY 2 4 1943

U N I T E D S T A T E S	)	NORTHWEST SERVICE COMMAND
v.	)	Trial by G.C.M., convened at Dawson Creek, British Columbia, Canada, March 9, 10, 11, 1943. Dishonorable discharge and confinement for fifteen (15) years. Penitentiary.
Technician 5th Grade William Evens (34033045), Medical Detachment, 95th Engineer General Service Regiment.	)	

REVIEW by the BOARD OF REVIEW
CRESSON, LIPSCOMB and SLEEPER, 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 93rd Article of War.

Specification: In that Technician 5th Grade William Evens, Medical Detachment, 95th Engineer General Service Regiment, did, at Dawson Creek, British Columbia, Canada, on or about February 2, 1943, with intent to commit a felony viz., rape, commit an assault upon one Muriel Bernice Murray, by willfully and feloniously striking the said Muriel Bernice Murray, with his fist, throwing

> the said Muriel Bernice Murray to the ground, opening her clothing, throwing himself bodily upon her, and attempting to have sexual intercourse with her forcibly, unlawfully, and against her will.

The accused pleaded not guilty to and was found guilty of the Charge and its Specification. He was sentenced to reduction to the grade of a private, dishonorable discharge from the service, to forfeiture of all pay and allowances due or to become due and to confinement at hard labor for fifteen years. The reviewing authority approved the sentence, designated the United States Penitentiary, Terre Haute, Indiana, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution as presented by the testimony of Muriel Bernice Murray, the victim of the alleged assault, shows that on the evening of February 2, 1943, she left her place of employment at St. Joseph's Hospital in Dawson Creek, British Columbia, Canada, and walked into downtown Dawson Creek with intentions of going skating. She found the skating rink, however, too deeply covered with snow for the carrying out of her plan. In company with a girl friend she visited during the evening at the home of her friend and co-worker, Doctor Leon Lucien Geroux, the local civilian doctor. After leaving Doctor Geroux's home, she walked with her friend to her friend's beauty parlor. Miss Murray and her friend then separated, and at about 11:25 p.m. Miss Murray started to return to her quarters at St. Joseph's Hospital. Her route took her past an eating place called the "Waffle Shop" where a number of colored soldiers were assembled. Walking in the middle of the street, she had proceeded about a block and a half past the Waffle Shop, and beyond the district engineer's area when she heard steps behind her. Looking back she saw a colored soldier dressed in a long overcoat, and wearing a garrison cap. Just after the soldier was thus observed, he said, "Now, then, don't scream" and immediately grabbed her, placing his hands over her mouth. A struggle followed in which Miss Murray freed her mouth from the soldier's grasp and screamed for help. The soldier dragged her to the side of the road where they both fell into a shallow ditch. A struggle followed with Miss Murray continually screaming and with the soldier beating her over the head and about the face. At one time he "smashed" her face into the snow. He threatened her by saying "If you don't stop screaming I am going to cut your throat". When a car was heard

coming along the road the soldier warned "there is a car coming and if you scream I am going to kill you with this knife", but Miss Murray did not see the knife. During the struggle the soldier at one time started choking her by placing his thumbs against her throat. He tore open her slacks, pulling them below her hips, and managed to open his own pants. His penis was out and she could feel it against her leg. In an effort to invoke mercy, Miss Murray tried to talk to the soldier but he replied "There will be no talk". Realizing that the soldier was about to accomplish his purpose, she threw her last strength into a desperate effort to free herself. The soldier then hesitated for a moment, arose from the ground, and told Miss Murray to come further with him into the willows. Miss Murray realizing that she was free, climbed back to the road and seeing a man walking toward her, she started walking toward him in a dazed condition. The soldier, however walked in the opposite direction toward the willows (R. 15-37; Pros. Ex. 1, 2, 3).

As Miss Murray approached the man on the road, she said, "Are you a white man?" and he replied by saying "Is that you, Muriel?" She then realized that the man was Father McElligott, the local priest. Father McElligott told her that she was in need of medical treatment. As they were walking in the direction of the doctor's home, they were met by a group of negro military policemen in a truck. Upon Father McElligott's request, the military policemen carried them to Dr. Geroux's home. After she had been examined by Doctor Geroux, she was carried to the military police station, and thereafter to the scene of the assault where Father McElligott found her cap to her parka (R. 38-60).

Miss Murray described her attacker as a colored soldier about 5 feet 10 inches in height, and of medium build, but she did not remember his face (R. 62-63).

On cross-examination Miss Murray testified that she bit her attacker on the hand but not hard enough to break the skin. She testified that she had never associated with colored men and that she had never had her picture taken with a colored soldier. When shown a picture of herself with a negro soldier standing behind her, she explained that the colored soldier had sneaked into the picture, and he was not supposed to be there (R. 38-60; Def. Ex. 2).

The testimony of Cornelius John McElligott, pastor of the Dawson Creek Catholic Church, corroborated the testimony of Miss Murray

as to their meeting on the night of February 2, 1943. He also testified that at the time of this meeting, Miss Murray was crying and in an hysterical condition, that her clothes were disheveled, that blood was on her face, bumps on her forehead, and that she appeared exhausted. He further testified that a pneumatic drill which was being operated within about 75 feet of the scene of the attack made such a loud noise as to have drowned out any outcry which might have been made. He also testified that Miss Murray's reputation for morality, and for truth and veracity was good (R. 64-81).

Doctor Leon Lucien Geroux, the local civilian doctor, testified that when Miss Murray was brought to his home by Father McElligott at midnight on February 2, she was so disheveled that at first he did not recognize her. He described her as being very emotionally upset and as crying and sobbing. Further, he testified that her nose was bleeding and that her clothes showed the signs of some sort of a struggle. He gave her a sedative and made a superficial examination of her head and face. Furthermore he testified that her moral reputation in the community was good (R. 83-89).

The further evidence for the prosecution shows that two sets of footprints were found in the snow leading to the scene of the alleged assault. These footprints were intermingled and led to a space of about 26 feet in length by about 6 feet in width where the snow was well-trampled down. In or near this area there was the impression of buttocks in the snow. Near this area, a cigarette case was found which was identified by Miss Murray as resembling the one which she had lost on the night in question. There was also found in this area, a black stone with a silver caduceus insignia, similar to the one worn by the accused on a ring. The footprints corresponded in measurement to the size of the shoes shown to have been worn by the accused, and the heel of the footprint had a peculiar design similar to the design on the heel of the accused's shoe. Moreover the evidence shows that although approximately 1300 pairs of soldiers' shoes were examined, only the shoes of the accused were found to have a heel design which resembled the imprint in the snow (R. 127-133, 150-154; Pros. Ex. 7, 8, 9, 10, 11, 12, 13).

The accused was shown to have borrowed an overcoat and a garrison cap for wear on the day in question and to have been in the "Waffle Shop" in downtown Dawson Creek at about 10:30 on the night of February 2. It was also shown that following the alleged assault, the accused, after

having been warned of his rights to remain silent, and that any statement which he might make might be used against him, identified the cap, overcoat and shoes which he had worn on the night of February 2. Also the accused admitted having gone into downtown Dawson Creek on the night of February 2, 1943. In his statement the accused explained that he had gone to a movie and had met a girl whom he knew as Mary when he came out of the show about 11:30 p.m. He had then walked with her to a point near the place previously described as the place of the alleged attack and "propositioned her" and she consented. They then started to have sexual intercourse, but after about five minutes she became frightened and started to "yell". He had then hit her twice with his fist, broken away from her, and run back to town where he had gotten a ride to camp. After returning to camp he had missed his black mounted setting with the silver caduceus from his ring and had then thrown the ring away (R. 212-231).

4. The accused elected to remain silent (R. 270-271). The defense presented, however, evidence showing that the accused's fingers were examined by a medical officer on February 3, and that no teeth marks or scratches were to be found on them (R. 251). Private Oscar Roper, a member of the same organization of which the accused was a member, testified that he had lent his overcoat to the accused on February 2, and at that time the accused had told him that he had a date for that night. He testified further that Sergeant Smith who was shown standing behind Miss Murray in a picture previously introduced in evidence, had not sneaked into the picture but had in fact posed with her for the picture (R. 253-254). This latter fact was corroborated by the testimony of Private Irving Smith (R. 258).

Chaplain Edward G. Carroll, testified that the accused was deeply religious and that he had a good character (R. 268-270).

5. The Specification alleges that the accused did, at Dawson Creek, British Columbia, Canada, on or about February 2, 1943,

> "with intent to commit a felony viz., rape, commit an assault upon one Muriel Bernice Murray, by willfully and feloniously striking the said Muriel Bernice Murray, with his fist, throwing the said Muriel Bernice Murray to the ground, opening her clothing, throwing himself bodily upon her, and attempting to have sexual intercourse with her forcibly, unlawfully, and against her will."

An assault with intent to commit rape is defined as -

"* * * an attempt to commit rape in which the overt act amounts to an assault upon the woman intended to be ravished. * * *.

* * *

"The intent to have carnal knowledge of the woman assaulted by force and without her consent must exist and concur with the assault. In other words, the man must intend to overcome any resistance by force, actual or constructive, and penetrate the woman's person. Any less intent will not suffice.

"Once an assault with intent to commit rape is made, it is no defense that the man voluntarily desisted" (M.C.M., 1928, p. 179).

The facts show that on the night of February 2, 1943, Muriel Bernice Murray was brutally attacked by a soldier at Dawson Creek, British Columbia. The testimony of Miss Murray describing the brutal attack is corroborated by several factors, by the physical proof of a bruised face, by her spontaneous complaint to Father McElligott, the local priest, upon meeting him just after the attack, by her torn slacks, and disheveled clothes, and by the circumstances showing the loosing and finding of her cigarette case and cap at the scene of the crime.

The intent of the attacker to ravish Miss Murray is shown by her description of the manner in which the attack was made, by the fact that the attacker tore open her slacks and pulled them below her hips, and by the fact that he took out his penis and she felt it against her leg. This direct testimony is in turn corroborated by the evidence showing Miss Murray's torn slacks, by her spontaneous complaint to Father McElligott immediately following the attack, by the fact that the accused admitted, following the crime, that he had had intercourse with a girl he referred to as "Mary" on the night in question, and that he had struck her when she became frightened and screamed, and by the imprint of buttocks in the snow.

The identity of the accused as the attacker in question is established by several convincing elements of proof - by the resemblance of the footprints in the snow at the scene of the crime to the size and

measurement of the shoe worn by the accused on the night in question, by the peculiar impression made by the heel of the shoe, there being no other shoe found among the soldiers stationed at Dawson Creek with such a peculiarity, by the circumstances showing the presence of the accused near the vicinity of the crime shortly before the crime occurred, by the finding of the black ornament with a silver caduceus at the scene of the attack, an ornament which the accused admitted as having lost, and by the statement of the accused that he had sexual intercourse with a girl called Mary on the night in question near the vicinity of the attack. These factors considered collectively clearly identify the accused as the soldier who perpertrated the assault alleged, and together with the other facts shown, establish his guilt beyond a reasonable doubt.

The efforts of the defense to impeach the veracity of Miss Murray by attempting to show error in her statement that she had never had a picture made with a colored soldier, a matter immaterial to the vital issues of the case, has no legal significance. This is particularly true because the truth of Miss Murray's testimony concerning the vital elements of the crime are fully corroborated.

6. At the beginning of this trial, the defense entered a plea to the jurisdiction of the court, contending that since United States Armed Forces had entered Canada by sufferance and without a treaty arrangement, the personnel of our armed forces there were subject to Canadian law, and that since Canadian law had by Orders-in-Council retained exclusive jurisdiction over rape, it likewise had reserved exclusive jurisdiction over the lesser included offense of assault with intent to commit rape. This plea was overruled by the court on the grounds that no legislation by Canada could serve to detract from the exclusive jurisdiction of our military forces to try its own members by courts-martial (R. 11).

Considering this particular question, The Acting The Judge Advocate General, in a memorandum dated February 12, 1943, stated that:

> "* * * according to well-settled principles of international law as laid down by the leading authorities, the personnel of the armed forces of Nation A, in the territory of Nation B by B's consent, are subject to the exclusive jurisdiction of their own courts-martial and exempt from that of the courts of B. It follows, in my opinion

that, even though there has been no agreement made between the United States and Canada on the subject, the United States is entitled to the exclusive right to try its personnel in Canada by its own courts-martial." (Citing previous opinions JAG 300.8 and SPJGW 336 - 1943/3511).

The above conclusion is supported by the authoritative opinion of the Supreme Court of the United States in the case of The Schooner Exchange v. McFadden (7 Cranch 116) wherein Chief Justice Marshall asserted that: -

> "3d. A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions.
>
> "In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage therefore implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require." (See Jurisdiction Of Friendly Armed Forces by Archibald King, American Journal of International Law, October, 1942).

In view of the above authority we must conclude that the court-martial in this case had full jurisdiction under principles of international law

and under Article of War 12, to hear and determine the rights and criminal responsibilities of the accused.

7. The record shows that the accused is 25 years of age, that he was inducted into the service on March 18, 1941, and that he has had no prior service.

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. A maximum sentence of 20 years is authorized upon conviction of assault with intent to rape, in violation of Article of War 93.

Chas. 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 234208

23 JUN 1943

UNITED STATES	92ND INFANTRY DIVISION
v.	Trial by G.C.M., convened at Camp Atterbury, Indiana, March 5 and 6, 1943. Dismissal and total forfeitures.
Second Lieutenant REECE L. ANDERSON (O-1302255), 365th Infantry.	

OPINION of 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 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 61st Article of War.

Specification: In that, Reece L. Anderson, Second Lieutenant, 365th Infantry, Army of the United States, did, without proper leave, absent himself from his Post and Station at Camp Atterbury, Indiana from about 0730 hour February 1, 1943, to about 0230 hour February 5, 1943.

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

Specification 1. In that, Reece L. Anderson, Second Lieutenant, 365th Infantry, Army of the United States, was, at Indianapolis, Indiana, on or about February 1, 1943, drunk and disorderly, in uniform in a public place, to wit, the Anderson Hotel.

Specification 2. (Finding of not guilty).

He pleaded not guilty to all Charges and Specifications. Accused was found guilty of Charge I and its Specification, and of Charge II and Specification 1 thereunder and not guilty of Specification 2 of Charge II. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances 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 accused is a second lieutenant, Company "F", 365th Infantry, stationed at Camp Atterbury, Indiana (R.8). On the evening of 31 January 1943, accused attended an affair at the Officers' Club at Camp Atterbury (R.26,33). Between two and three o'clock on the morning of 1 February 1943, accused appeared at the Anderson Foundation, a hotel located in Indianapolis, Indiana (R.10,18). This hotel had about 52 rooms. It is located on the second floor of a building. At the head of the stairs leading up from the street is the desk. The stair landing opens into a long hall, half a block in length. The rooms are located along this hall. The parlors and bathrooms are at the far end of the hall. Rates at this hotel are $1.50 per night for single occupancy and $2.50 for double occupancy (R.22,23). When accused registered there was nothing "unusual about his condition" (R.11). He was quite sober and business-like (R.18). He was given Parlor B-1 (R.12). He told the bellboy, William Scott Davis, who was also clerk, and who evidently registered accused in, that his wife was over at a restaurant. He sent Davis out to purchase a half pint of liquor. He then went out and came back with his wife (R.18-20). He asked to be called at twenty minutes to three "to get the bus back to camp" (R.18). When Davis delivered the half pint, he saw accused "take a big swallow" (R.19). At about twenty minutes to three accused left with his wife (R.17,20,21). He returned in a cab in about ten minutes (R.17,20). He asked for another room and was given room 210 (R.12,17). He sent Davis for another half pint of whiskey and two sandwiches "one for 'Red' and one for him" (R.21). "Red" was a woman who came into the "lobby" about the time accused registered the second time (R.17,20). About this time accused went to a room with "Red" and remained with her "about an hour and a half" (R.15), or until about "six or seven o'clock" (R.20). "Red" had a reputation. She was "one of the women who runs in and out of the hotel" (R.22). Davis had heard that she had "clipped" people, that is, "going to bed with them and taking their money" (R.22). Vernon L. Anderson, Secretary of the Anderson Foundation, the hotel, who came on duty about the time accused re-registered (R.10), said, referring to "Red": "This particular person would drug one". When accused went into a room "once" with "Red", Anderson warned accused against her.

Anderson testified accused "was acting queer then - that was after he had been in her room" (R.13). At about six o'clock accused went to Parlor F, where there were two sergeants and two women (R.12,14,15,19, 20). Accused was not seen drinking with the enlisted men. He was seen drinking in his first room and in room 210 (R.16,19,21). About 7 o'clock, about an hour and a half since accused had been "in the presence of 'Red'", accused "started the commotion" (R.14,17). Mr. Anderson was at the desk during this time and until accused left the hotel at 8 o'clock (R.10,12,14,15). Davis, the bellboy and clerk, was "up and down the hall". "It was the soldiers' pay night - the soldiers had a lot of money". They kept "him going all night" (R.23). He was around the hall from the time of accused's arrival until his departure (R.20).

At about "a quarter of seven" accused went to Anderson and complained that he had lost "a large sum of money" and wanted it back (R.12). His claim varied as to the amount involved. One time it was $100, again it was $160, and another time $140 (R.15). Anderson said that at this time accused, to his mind, "was drunk". Accused was in uniform (R.12). Anderson did not smell his breath, but accused talked "incoherently" and "staggered". He believed accused gave the bellboy $20. He himself received $6 from accused in tips (R.12,13). Anderson claimed accused "declared the place under martial law", he "just ran around like a wild man". Accused told Anderson "you will catch Hell" and he telephoned that "he had been robbed. The police came" (R.16). Anderson said that because accused "went into a room once" with "Red" he had reason to believe accused might have been drugged instead of drunk (R.13). Accused caused no disturbance before he associated with "Red" (R.17). Anderson further explained his belief by the fact that accused "had the appearance of an insane man". Anderson claimed to know how a person acts when drugged (R.16). Davis, on the other hand, said accused was "high", "tight", but that he was not intoxicated, "he knew what he was doing" (R.22). Davis did not hear any orders "declaring martial law", he did not see any soldiers posted at the doors, but accused "told one boy to go back to the room and not let the girls out", and accused told Davis "to guard the door where 'Red' was" (R.20,22). Accused said he was going to call the military police (R.22). He finally left the hotel at eight o'clock (R.20), and according to Anderson told the latter that he "was as fine a man as he had ever met and wobbled down the steps" (R.15).

Helen J. Hatch, a kindergarten teacher, saw accused on February 1 at a quarter to twelve. He was escorting a lady. She had met accused the day before at the Officers' Club. She hailed him from her window.

He introduced her to the lady with him. Accused wanted to know where he could find some liquor. He said he wanted something to drink, wanted to give witness a drink. According to this witness, accused had been drinking. She did not smell his breath, but he talked incoherently. He was under the influence of liquor, but "very quiet and caused no disturbance" (R.25). He was not staggering. The lady with him was sober (R.24-27,37).

According to Captain Winston D. Wetlaufer, Commanding Officer, Company "F", 365th Infantry, the morning report of Company "F" for February, 1943, showed accused absent without leave from 7:30 A.M., February 1, until 7:45 A.M. 5 February 1943 (R.8, Ex. "A").

On cross-examination Captain Wetlaufer testified that he had been accused's company commander since 10 December 1942, and that during this time the behavior and character of accused was "excellent" (R.9).

4. Accused did not take the stand in his own behalf. Character testimony introduced in his behalf was as follows: Second Lieutenant Louis T. Williams, 365th Infantry, testified that he had known accused for six months since they were officer candidates together at Fort Benning. Lieutenant Williams spoke of accused as follows:

> "I have always had an exalted opinion of him. He is a quiet and modest chap. * * * never in any trouble * * * in my contacts with him I have never seen him drunk".

This witness was the assistant provost marshal and helped investigate the present case (R.28,29). Second Lieutenant Samuel W. Strothers, 365th Infantry, said of accused:

> "I have known him since the first week of September, 1942. * * * I met him at Officers' Candidate School * * *. * * * I thought he was outstanding. He was my No. 1 choice on my rating sheet".

He stated that he graded accused as to his moral character and military fitness - on his military bearing and his conduct at the Post (R.30,31). Second Lieutenant Virgil T. Young, 365th Infantry, testified that ever since he had known accused "he has been a soldier and a gentleman - very conservative". He never noticed accused drunk and disorderly. He had seen him drink a bottle of beer (R.32). Second Lieutenant Robert Lee Brown, 365th Infantry, testified that he had known accused six months since they were roommates at Fort Benning, Georgia. He said, speaking of accused, "He was a gentleman. He was very efficient at Fort Benning.

He was the leader of the squad and handled the platoon". He had never known accused "to be in the habit of being drunk and disorderly". He had never seen accused drink anything other than beer (R.34,35).

Defense "Exhibit A" was accused's Honorable Discharge on which his character was described as "Excellent" (R.36).

Josephine Maxfield, Chicago, Illinois, testified by stipulation that she had known accused since he was born; that his parents, "most worthy citizens", were her tenants for eighteen years; and that accused as a child, boy, and man was always industrious, honest, and well mannered, "a truly God fearing man" (R.36). Benjamin I. Salinger, Jr., Chicago, Illinois, testified by stipulation that he had known accused for fourteen years; that his parents were people of integrity; that accused's morals have been good and that he has not been known to drink to any great excess (R.37).

Sarah R. Hansen, Indianapolis, Indiana, testified by stipulation that she had been with accused for two hours and a half around midday on February 1 (R.24,25,37); that she had had dinner down town with accused. This witness testified "most emphatically" that there was nothing offensive in accused's manner or speech (R.37). William S. Braddan, Clergyman, Chicago, Illinois, testified by stipulation "I have known Reece" (accused), "since his birth * * *. He has ever been honest, ambitious, obedient and honorable" (R.38).

5. The evidence shows that accused was absent without leave from his post and station at Camp Atterbury, Indiana, from about 7:30 A.M., February 1, until about 2:30 P.M., 5 February 1943, as alleged in the Specification, Charge I, in violation of Article of War 61. This unauthorized absence was established by the testimony of his company commander and by his company morning report. No evidence in rebuttal was offered by the defense.

With respect to Specification 1, Charge II, there is ample proof that accused was drinking at the Anderson Hotel during the early morning of 1 February 1943. The evidence is clear that at about 7:00 A.M. until 8 A.M. and in the public lobby of the hotel accused was drunk in uniform. Vernon L. Anderson testified to this. In his opinion, accused "was drunk". According to Anderson, accused talked incoherently and staggered. At a quarter to twelve the same morning, four to five hours later, Helen J. Hatch saw accused and recognized symptoms of alcoholic overindulgence. At that time, according to her, he talked incoherently and was under the influence of liquor. The bellboy Davis did

testify that accused, although "high", "tight", was not intoxicated and knew what he was doing. Cross-examination endeavored to show that accused had been drugged by the woman referred to as "Red", that he was a victim not of drink but of drugs. However this theory was not substantiated. There was no evidence that accused was grossly drunk. The sole basis for considering him disorderly is Anderson's testimony that when he found he had been robbed, accused declared the place under martial law and stationed the two soldiers at the exits to prevent three women from leaving. Undoubtedly Anderson was excited. Learning of accused's loss of money and of his determination to hold the hotel responsible, Anderson probably ascribed to accused's conduct a more turbulent complexion than was warranted. Davis did not hear martial law "declared" nor see the military "take over". Accused asked one soldier not to let the girls out and he asked Davis to guard the door where "Red" was. Undoubtedly this was to preserve status quo until the arrival of the police whom accused called. The impression one derives from the record is not disorder but rather a pardonable and natural excitement on the part of accused flowing from his loss of over a hundred dollars. Under all the circumstances, it can not be said that the action taken by accused to recover his money was unwarranted or that accused was conspicuously disorderly.

For the foregoing reasons, it is the opinion of the Board of Review that accused was not guilty of violation of Article of War 95, but rather that he was drunk in uniform, in a public place, in violation of Article of War 96.

7. According to War Department records accused, a negro, is 36 years old. His marital status was "Divorced" at the time he executed his Classification Questionnaire, 3 December 1942. He served in the National Guard from 1924 to 1927. He was commissioned Second Lieutenant, Infantry, Army of the United States, 3 December 1942.

8. As appears from documents attached to the record the court unanimously recommended that because of accused's previous military service in the Illinois National Guard, his record of no previous convictions, and his potential value to the military service of the United States, his sentence be mitigated to a fine of two hundred dollars and a reprimand.

9. The court was legally constituted. It had jurisdiction over 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 of guilty of Charge I and its Specification, legally sufficient to support only so much of the findings of guilty of Charge II and Specification 1 thereof as involves findings of guilty of the Specification in violation of Article of War 96, and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Articles of War 61 and 96.

Henry C. Lyon, Judge Advocate.

Wm Wainwright, Judge Advocate.

Fletcher R. Lindsey, Judge Advocate.

1st Ind.

War Department, J.A.G.O., - 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 Reece L. Anderson (O-1302255), 365th Infantry.

2. I concur in the opinion of the Board of Review that the record is legally sufficient to support the findings of guilty of Charge I and its Specification, legally sufficient to support only so much of the findings of guilty of Charge II and Specification 1 thereof as involves findings of guilty of the Specification in violation of Article of War 96, and legally sufficient to support the 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. 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. Sec. of War.
Incl.3-Form of action.

(Sentence confirmed but forfeitures remitted. Execution suspended. G.C.M.O. 203, 17 Aug 1943).

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

SPJGN
CM 234286

MAY 6, 1943

U N I T E D S T A T E S	)	8TH SERVICE COMMAND ARMY SERVICE FORCES
v.	)	Trial by G.C.M., convened at Fort Sill, Oklahoma, April 9, 1943. Dishonorable discharge, total forfeitures and confinement for fifteen (15) years. Federal Reformatory, El Reno, Oklahoma.
Private ROBERT PHELPS (35154793) 4th Animal Transport Battalion, Field Artillery School, Fort Sill, Oklahoma.	)	

REVIEW 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 Specification:

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private Robert Phelps, Fourth Animal Transport Battalion, Field Artillery School, did, at Fort Sill, Oklahoma, on or about March 15, 1943, with intent to commit a felony, viz., rape, commit an assault upon Miss Alta Reagan by throwing her upon the ground, hitting her in the face with his fist, tearing her underclothing, getting on top of her and then and there attempting to have carnal knowledge of the said Miss Alta Reagan, forcibly, feloniously and against her will.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of two previous convictions, one by special court-martial for violation of Articles of War 69 and 96, and one by summary court-martial for violation of Articles of War 61 and 69, was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for fifteen years. The reviewing authority approved the sentence, designated the Federal Reformatory, El Reno, Oklahoma, 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, at about 5 o'clock on the afternoon of March 15, 1943, Miss Alta Reagan, an 18-year-old employee of the Civilian Personnel Office, Fort Sill, Oklahoma, took a walk with her co-worker, Miss Lorene Gage. They went north from their barracks to Medicine Creek, across which they waded, and continued their walk on the other side. At about 6 p.m., while it was still daylight, as they again approached the creek on their homeward journey, they saw the accused, a colored soldier whom neither of them knew. The accused asked them the time. They replied, and he then inquired if they would like some candy. They answered "No", and resumed their walk. The accused circled around from the spot where he had first spoken to the girls, and intercepted them at the creek bank, where, blocking their path, he requested them to sit down and talk to him. When they refused, he sat down himself, and repeatedly entreated the girls to remain and talk. Miss Gage was immediately frightened and remained standing, but Miss Reagan, for a moment, knelt or squatted, facing the accused. He then asked each one "Have you ever been frenched?". At this, they both became frightened and, answering "No", started away again. Miss Gage hurried along the creek bank to cross at another point. Miss Reagan, who was not wearing stockings, removed her shoes and started immediately to wade across the creek. She had almost reached the other side when the accused grasped her shoulder. She knocked his arm off. He stooped down as if to pick up a rock. She then ran up the bank. He pursued her and seized her from the rear with both arms. She resisted and during the struggle that followed, he raised her skirt and tore her drawers, in an apparent effort to pull them off. He then forced her to the ground, flat on her back, while he straddled her waist. As she struggled, he struck her on the face with his fist three times. One of his blows, which cut and bruised her forehead over her right eye, drew blood. During the struggle the accused inquired of Miss Reagan, "Do you want me to rape you?". Miss Gage, who saw the encounter from start to finish, was screaming

all the time. Suddenly the accused jumped up and ran away. Harry L. Arnold, Chief Foreman Plumber at Fort Sill, who lived on the reservation about 100 yards from Medicine Creek, heard screams and ran to the creek where he saw the girls coming up the bank. Both were crying hysterically, and Miss Reagan was bruised and cut over the right eye. Both of the girls positively identified the accused as the person who committed the offense (R. 7-14, 18, 19, 38).

4. The defense offered no evidence. The accused was advised of his rights and elected to remain silent (R. 39).

5. In order to support the finding of guilty, the record must show competent evidence that the accused committed an assault upon Miss Alta Reagan on March 15, 1943, with the intent to rape.

> An assault with intent to commit rape is defined as:
>
> "* * * an attempt to commit rape in which the overt act amounts to an assault upon the woman intended to be ravished. * * *.
>
> * * *
>
> "The intent to have carnal knowledge of the woman assaulted by force and without her consent must exist and concur with the assault. In other words, the man must intend to overcome any resistance by force, actual or constructive and penetrate the woman's person. Any less intent will not suffice.
>
> "Once an assault with intent to commit rape is made, it is no defense that the man voluntarily desisted" (par. 149l, M.C.M., 1928).

The uncontradicted and fully corroborated testimony of the prosecutrix establishes every element of the offense charged. It shows that the accused assaulted Miss Alta Reagan at Fort Sill, Oklahoma, by first grasping her by the shoulder as she crossed the creek, then pursuing her up the bank, seizing her with both of his hands, and forcing her to the ground. In the ensuing struggle, he struck her face three times

with his fist. His intentions were clearly shown, not only by his actions, but also by his indecent question during the conversation that preceded the assault, and his illuminating inquiry during the struggle. His act of raising Miss Reagan's dress and attempting to remove her drawers furnishes further convincing evidence of his intent. The Specification alleges and the evidence shows commission by the accused of assault with intent to commit rape in violation of Article of War 93.

6. The accused is about 20 years of age. He was inducted into the service on March 17, 1941. 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. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence. Dishonorable discharge, total forfeitures and confinement at hard labor for twenty years are authorized upon conviction of an assault with intent to commit rape, in violation of Article of War 93.

Blake B. Gibson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin P. Sleeper, Judge Advocate.

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

(317)

SPJGH
CM 234295

15 JUN 1943

N.D

UNITED STATES v. Private CHARLIE C. BEENE, alias Private JAMES D. LANDIS (18007107), Headquarters and Headquarters Company, 2nd Battalion, 23rd Infantry.	FOURTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort Benning, Georgia, April 6, 1943. Dishonorable discharge, total forfeitures and confinement for seven (7) years. Federal Reformatory.

HOLDING 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 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 54th Article of War.
(Finding of not guilty)

Specification: (Finding of not guilty)

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

Specification: In that Private Charlie C. Beene, Headquarters & Headquarters Company, 2nd Battalion, 23rd Infantry, alias Private James D. Landis, Service Company, 501st Parachute Infantry, did, at Fort Sam Houston, Texas, on or about 2 September, 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at Dallas, Texas, on or about 12 February, 1943.

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

Specification 1: In that Private Charlie C. Beene, Headquarters & Headquarters Company, 2nd Battalion, 23rd Infantry, alias Private James D. Landis, then Technician Grade V James D. Landis, Service Company, 501st Parachute Infantry, did, at Camp Toccoa, Georgia, on or about February 3, 1943, feloniously embezzle by fraudulently converting to his own use $30.00 lawful money of the United States, the property of Private Raphael L. Burkey, Company "B", 501st Parachute Infantry, entrusted to him for Private Raphael L. Burkey by Private First Class John Eagan.

Specification 2: In that Private Charlie C. Beene, Headquarters & Headquarters Company, 2nd Battalion, 23rd Infantry, alias Private James D. Landis, then Technician Grade V James D. Landis, Service Company, 501st Parachute Infantry, did, at Camp Toccoa, Georgia, on or about February 3, 1943, feloniously embezzle by fraudulently converting to his own use $101.60, lawful money of the United States, the property of Private Edward E. Endsley, Company "B", 501st Parachute Infantry, entrusted to him for Private Edward E. Endsley by Private First Class John Eagan.

Specification 3: In that Private Charlie C. Beene, Headquarters & Headquarters Company, 2nd Battalion, 23rd Infantry, alias Private James D. Landis, then Technician Grade V James D. Landis, Service Company, 501st Parachute Infantry, did, at Camp Toccoa, Georgia, on or about February 3, 1943, feloniously embezzle by fraudulently converting to his own use $42.00 lawful money of the United States, the property of Private Richard A. Hackett, Company "B", 501st Parachute Infantry, entrusted to him for Private Richard A. Hackett by Private First Class John Eagan.

Specification 4: In that Private Charlie C. Beene, Headquarters & Headquarters Company, 2nd Battalion, 23rd Infantry, alias Private James D. Landis, then Technician Grade V James D. Landis, Service Company, 501st Parachute Infantry, did, at Camp Toccoa, Georgia, on or about February 3, 1943, feloniously embezzle by fraudulently converting to his own use $73.00 lawful money of the United States, the property of Private William A. McDonald, Company "B", 501st Parachute Infantry, entrusted to him for Private William A. McDonald by Private First Class John Eagan.

Specification 5: In that Private Charlie C. Beene, Headquarters & Headquarters Company, 2nd Battalion, 23rd Infantry, alias Private James D. Landis, then Technician Grade V James D. Landis, Service Company, 501st Parachute Infantry, did, at Camp Toccoa, Georgia, on or about February 3, 1943, feloniously embezzle by fraudulently converting to his own use $20.00 lawful money of the United States, the property of Private William H. McGowan, Company "B", 501st Parachute Infantry, entrusted to him for Private William H. McGowan by Private First Class John Eagan.

Specification 6: In that Private Charlie C. Beene, Headquarters & Headquarters Company, 2nd Battalion, 23rd Infantry, alias Private James D. Landis, then Technician Grade V James D. Landis, Service Company, 501st Parachute Infantry, did, at Camp Toccoa, Georgia, on or about February 3, 1943, feloniously embezzle by fraudulently converting to his own use $24.00 lawful money of the United States, the property of Private Joseph E. Mallette, Company "B", 501st Parachute Infantry, entrusted to him by the said Private Joseph E. Mallette.

Specification 7: In that Private Charlie C. Beene, Headquarters & Headquarters Company, 2nd Battalion, 23rd Infantry, alias Private James D. Landis, then Technician Grade V James D. Landis, Service Company, 501st Parachute Infantry, did, at Toccoa, Georgia, on or about February 3, 1943, feloniously embezzle by fraudulently converting to his own use $260.74 lawful money of the United States, the property of First Lieutenant Loyal K. Bogart, Company "B", 501st Parachute Infantry, entrusted to him for First Lieutenant Loyal K. Bogart by Private Arnold.

The accused pleaded not guilty to all Charges and Specifications. He was found not guilty of Charge I and its Specification, guilty of Charge II and its Specification, and guilty of Charge III and the Specifications thereunder. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for ten years. The reviewing authority approved the sentence but reduced the period of confinement to seven years, designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence is legally sufficient to support the findings of guilty of Charge II and its Specification and of Charge III and Specifications 6 and 7 thereunder.

4. The only question requiring consideration is whether the evidence is legally sufficient to support the findings of guilty of Specifications 1, 2, 3, 4 and 5, Charge III.

The evidence for the prosecution, in pertinent part, shows that on February 3, 1943, the company of accused, then stationed at Fort Benning, Georgia, went on a practice field maneuver from which it returned on the afternoon of the following day. Accused was acting supply sergeant and did not take part in the maneuver. He stayed in barracks with the charge of quarters and, Private First Class John Eagan who had just been released from the hospital (R. 10-13, 18-19).

The enlisted men had been paid recently and eight of them left their billfolds, or wallets, containing various sums of money with Eagan to keep until they returned. Eagan gave seven of the billfolds to accused for safekeeping. In the supply room there was a records chest, or safe box, equipped with a lock, in which the records of the supply sergeant and some valuables were kept. Eagan counted the money in each of the seven billfolds in the presence of accused, then gave them to him and they were placed in the chest in the presence of Eagan. The understanding was that accused was to return them to Eagan the next day, February 4. There were two keys to the lock on the chest and accused had both of them. Five of the seven wallets which Eagan turned over to accused were owned by the same enlisted men and contained the identical sums of money alleged in Specifications 1 to 5 inclusive, Charge III (R. 14-18, 30, 35, 42).

When the men came back from the maneuver and asked Eagan for their money he searched all over camp for accused but to no avail. The Company Commander, Captain Raymond V. Bottomly, also searched for accused but could not find him. Accused did not return to Fort Benning until after he had been apprehended as a deserter at Dallas, Texas, on February 8. On February 5 Captain Bottomly entered the supply room and opened the records chest after he had hunted around the regiment and found a key to fit it in another company. He had to "fiddle" with the lock for about half an hour before he could get it open. There was no indication that anyone had tampered with the chest or that the lock thereon had been forced (R. 17, 42-43).

In addition to the seven wallets which Eagan had given accused, the latter had received, from members of the company, two other wallets which also had been deposited in the chest. Captain Bottomly found, in the chest, "about" eight wallets. All of them were empty except three, which contained money in secret folds. In his testimony, Captain Bottomly did not specify which wallets were empty and which were not (R. 10, 24, 29-30, 41-45).

None of the enlisted men who left their wallets with Eagan testified at the trial. Eagan testified that he was not present when the supply chest was opened by Captain Bottomly. When he was asked who had given him the money, Eagan started to answer, "Private McDonald, $73.00; Private Davis, $31.00", then remarked, parenthetically, "I think their money was in a secret place in the billfolds and they got it back". Other than the statement just quoted there is nothing in the testimony of Eagan or elsewhere in the record to indicate whether or not the money in any of the billfolds entrusted to him was returned to the owner. It appears from the evidence that the money in the two wallets left with accused by persons other than Eagan was never received by the owners after Captain Bottomly opened the supply chest (R.15-22, 24, 32-33).

5. The defense offered no testimony. The accused elected to remain silent (R. 45-46).

6. It appears from the undisputed evidence that when the company of accused went on a maneuver, accused, who was acting supply sergeant stayed in barracks; that nine members of the company directly or indirectly turned over to him for safekeeping, their wallets containing various sums of money; and that the nine wallets, together with their contents were deposited in a chest or lock box in the supply room. Seven of the wallets had been handed to Private First Class Eagan by the owners and he turned them over to accused. Five of those seven wallets contained the sums of money alleged to have been embezzled in Specifications 1 to 5, Charge III. There were two keys to the chest and accused had both of them. When the company returned from the maneuver accused had disappeared from the camp and was not seen again until he had been apprehended in desertion at a distant place eight days later. When the Company Commander, Captain Bottomly, opened the supply chest he found therein "about" eight wallets. All of them were empty except three which contained money in secret compartments.

Captain Bottomly did not state which wallets were empty or which were not. It affirmatively appears from the testimony that the owners of the two wallets which accused received from persons other than Eagan did not get back the money which the wallets contained. Eagan, testified concerning two of the enlisted men whose wallets he had delivered to accused, "I think their money was in a secret place in the billfolds and they got it back". It appears that one of them, Private McDonald, is the person named in Specification 4, Charge III as the owner of the money therein alleged to have been embezzled but the other, Private Davis, is not mentioned in any of the specifications.

Eagan was not present when the supply chest was opened by Captain Bottomly and there is nothing in the record to indicate that he otherwise acquired firsthand knowledge of the identity of the owners of the wallets which had money hidden away in secret compartments. However, even if the statement of Eagan as to the identity of two such owners be taken at its face value the identity of the third owner remains undisclosed. The third owner must have been one of the enlisted men whose wallet and money was turned over to accused by Eagan, but which one it is impossible to determine from the record.

An essential element of the offense of embezzlement is that the accused fraudulently converted or appropriated the money intrusted to him (par. 148h, MCM, 1928). The evidence in support of that element is wholly circumstantial. When circumstantial evidence alone is relied upon to sustain a conviction, in order to be sufficient it must point directly and unerringly to the guilt of accused. Mere suspicions or probabilities are not enough. The facts must exclude every reasonable theory or hypothesis except that of guilt (Wharton's Criminal Evidence, 11th Ed., 1604-1606; CM 195705 Tyson).

Measured by the principles just stated, the circumstantial evidence in the instant case is not legally sufficient to support the findings of guilty of Specifications 1 to 5, Charge III. As to any one of such Specifications the sum therein alleged to have been embezzled by accused, so far as the record shows, may have been the money hidden in a secret fold of one of the wallets found in the supply chest by Captain Bottomly and, therefore, never appropriated or converted by accused at all.

7. The maximum limit of punishment for embezzlement of property of a value of $50 or less and more than $20 (Specification 6, Charge III)

is confinement at hard labor for one year, and of property of a value of more than $50 (Specification 7, Charge III) is confinement at hard labor for five years. There is no maximum limit of punishment for desertion in time of war (Charge II) (par. 104c, MCM 1928; A.W. 58).

Confinement in a penitentiary is authorized by Article of War 42 for desertion in time of war and for the offense of embezzlement of property of value in excess of $35 (Specification 7, Charge III), recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by section 22-1202, Code of the District of Columbia, 1940.

8. The accused is 22 years of age. The charge sheet shows that he enlisted on November 14, 1942, with prior enlisted service from October 24, 1940 until terminated by desertion on February 21, 1941, and from December 15, 1941.

9. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Specifications 1, 2, 3, 4 and 5, Charge III, legally sufficient to support the findings of guilty of Specifications 6 and 7, Charge III, and of Charge III, of the Specification, Charge II, and of Charge II, and legally sufficient to support the sentence.

Curtis T. Rice Jr., Judge Advocate

Samuel M. Driver, Judge Advocate

F. J. Lotterhos, Judge Advocate

SPJGH
CM 234295

1st Ind.

War Department, J.A.G.O. JUN 16 1943 - To the Commanding General, Fourth Service Command, Army Service Forces, Atlanta, Georgia.

1. In the case of Private Charlie C. Beene, alias Private James D. Landis (18007107), Headquarters and Headquarters Company, 2nd Battalion, 23rd Infantry, I concur in the foregoing holding of the Board of Review. I recommend, for the reasons therein stated, that the findings of guilty of Specifications 1, 2, 3, 4 and 5, Charge III, be disapproved. Thereupon 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 234295)

RECEIVED JUN 19 1943 HQ. 4TH SERV. COMD.

Myron C. Cramer

RECEIVED JUN 19 1943 STAFF JUDGE ADVOCATE

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

JUN 17 '43 AM

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.

SPJGN
CM 234296

14 JUL 1943

UNITED STATES	)	FOURTH SERVICE COMMAND ARMY SERVICE FORCES
v.	)	
Major ALBERT W. PENNINGTON (0-127546), Infantry.	)	Trial by G.C.M., convened at Camp Croft, South Carolina, 30 March 1943. Dismissal.

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 Charge and Specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Major Albert W. Pennington, Infantry, Infantry Replacement Pool, Infantry Replacement Training Center, Camp Croft, South Carolina, was, at the Officer's Club, Camp Croft, South Carolina, on or about January 31, 1943, drunk and disorderly while in uniform.

Specification 2: In that Major Albert W. Pennington, Infantry, Infantry Replacement Pool, Infantry

Replacement Training Center, Camp Croft, South Carolina, did, at the Officer's Club, Camp Croft, South Carolina, on or about January 31, 1943, wrongfully assault Miss Ruby Barnhill of Spartanburg, South Carolina by twisting her arm violently; slapping her face; shaking her violently; choking her with both hands, and either striking or pushing her with such force and violence as to cause her to fall to the floor.

Specification 3: In that Major Albert W. Pennington, Infantry, Infantry Replacement Pool, Infantry Replacement Training Center, Camp Croft, South Carolina, did, at the Officer's Club, Camp Croft, South Carolina, on or about January 31, 1943, wrongfully threaten and demean Miss Ruby Barnhill of Spartanburg, South Carolina, by using the following vile, profane, obscene, and abusive language to wit: you double-crossing bitch; you old bitch; God-damn you, if you double-cross me I will kill you; in the presence of numerous officers with their wives and lady companions.

He pleaded not guilty to and was found guilty of the Charge and all 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. The evidence for the prosecution shows that on the night of 31 January 1943, at Camp Croft, South Carolina, a mixed crowd of civilians, officers and their ladies, were present at the Officers' Club, where the accused and Miss Ruby Barnhill were first observed as members of a group of eight or more, seated at three tables which had been pulled together, in the barroom. When this particular party broke up the accused and his companion moved over to another table by themselves, where they had two or three drinks. It was about ten o'clock and everything was quiet - "quieter than usual for Sunday night" - when the accused who was in uniform wearing his major's insignia, repeatedly and vociferously ordered his companion to "shut up". The club was practically full, and everybody was looking at them. Miss Barnhill was crying, and the accused, sounding off about "Jutso and Commando stuff", began twisting her arm with such apparent

severity that the bartender reported his conduct to the mess officer who was also in charge of the club. Arriving at the bar, the latter saw the accused "in a half stance" over his companion twisting her arm with his left hand, and choking her; whereupon he returned to his office and, via loud speaker, requested the accused to report to him there. When the accused appeared, the mess officer testified, "I told him that we were receiving complaints as to his actions in the Club, and that if he didn't refrain from them I wished that he would leave the Club. * * * He said that he had been trying to get this God-damn bitch out of here all evening" (R. 10-12, 18-25, 27-29, 40-42, 44).

The accused returned to the bar where he resumed the twisting of the arm of his weeping companion, whom he slapped once, saying "something about, 'you God damn bitch, I will learn you how to go over to Gaffney and two-time me. I will show some of these Commando tricks'". The bartender again complained to the mess officer, who returned to the bar, where he found the accused still twisting the lady's arm, and the lady crying; then again employed the loud speaker to call the accused to his office. This time, the accused said "he would get her out as quickly as he could". The mess officer ordered a car to transport the accused from the club. The latter did not leave immediately "but after a period of time he did", going to the front porch, where, in the presence of the mess officer and his wife and two other officers and their ladies, the accused continued to abuse Miss Barnhill, slapping, pushing and on one occasion striking her, repeating his remarks about "two-timing" and "Commando tricks", cursing and threatening to kill her, should she double-cross him again, using one of her arms to throw her over his shoulder, and both of his hands to push and shake her. Twice he threw or pushed her to the floor. She offered no resistance, her only audible remarks being requests for cigarettes. When, after they had been on the porch for about ten minutes, the automobile, which the mess officer ordered, arrived, Miss Barnhill got in first - "Major Pennington didn't seem to want to go, and he wouldn't go unless she did". Finally, the mess officer testified, "He somehow did get into the car", and "I instructed the driver to take him to the main gate". The accused was apparently intoxicated, and his companion also perceptibly under the influence of intoxicating liquor (R. 12-19, 20-23, 24-26, 32-36, 38-39, 42-45).

With the court's permission - and no objection by the defense -

the trial judge advocate stated a subpoena had been issued for Miss Barnhill and every effort made to locate her, but unsuccessfully (R. 46).

4. The evidence for the defense, consisting solely of the accused's sworn testimony, after his rights as a witness had been duly explained to him, shows that from August 1916 until April 1917, he was a member of the Royal Naval Transport Service, B.E.F., Salonica, Greece, where he was twice under fire. After enlisted service with the United States Army commencing 29 May 1917, he was commissioned second lieutenant 5 April 1918, and promoted to first lieutenant in September of the same year. He was discharged 19 February 1919, commissioned first lieutenant, Reserve Corps, 22 April 1919, promoted to captain, Infantry Reserve, in 1922, and to major, Infantry Reserve, May 1930. He was reappointed major, Inactive Reserve, 12 April 1940, due to high blood pressure, and last ordered to active duty 2 October 1942. His seven previous tours of duty as a reserve officer were in 1922, 1923, 1924, 1926, 1928, 1930, and 1931 (R. 47-48).

His income as insurance claim agent, adjuster and, later, vice-president, in civilian life, ranged from $2000 to $6000; during which time he took part in Legion activities; and, from 1937 to 1939, organized, commanded and drilled a boys' brigade with a membership of 165 (R. 48-49).

Upon reporting to Camp Croft 2 October 1942, he attended the pool school, from which he graduated 3 November 1942, and later - after two brief assignments - was attached - not assigned - to the 27th Training Battalion, where his duties have been "nothing of a definite nature" and did not occupy his full time. He has "inspected, checked the garbage, ordnance, general police of area, mess halls, kitchens", on one occasion "took 328 men to Blanding on a troop train", and has endeavored to secure additional duty (R. 49-50).

When he came on active duty, he had not had a drink for eight months, and had stopped smoking to reduce his blood pressure because he wanted to get back in the service. He started drinking again in the middle of November 1942. Two of his four sons had recently enlisted, and his wife was ill and hysterical, when he obtained a ten-day leave; during which he made arrangements for the change of surroundings which the doctor prescribed for Mrs. Pennington.

After his return to Camp Croft, he became acquainted - "the latter part of November, or the first week in December" - with Miss Barnhill. He was introduced to her by her uncle, "a former member of the 81st Wildcat Division", and a "Legionaire", whose home the accused often visited. After this introduction, the accused and Miss Barnhill "went out quite often with her aunt and uncle". Finally they found they were getting fonder of each other than they should; and, on the night of 31 January 1943, went to the officers' club with the idea of having a final dinner. "After we arrived there", the accused testified,

> "I had several drinks and toward the latter part of the evening the young lady began to get demonstrative. Well, she got stubborn when I suggested leaving there, and she got up on a chair and I realized where I was and that I was in uniform and I grabbed her wrists and she was feeling good, as the saying goes, and I could feel the drinks that I had. She insisted that she was going out and I told her that if she got up on her feet and made a scene that it would be detrimental to all of us."

The accused went to the mess officer's office,

> "and as quickly as possible when he told me there was a car coming we got our wraps from the cloak room. In the meantime, she found her pocketbook which she had left at the first table, then we went out on the porch and stood. So far as striking her, or choking her, I don't recall anything of the sort, but I do recall taking her by the front of the coat. Then we went to the Main Gate and I returned to Camp." (R. 50-52).

On cross-examination, the accused testified that he did not know of Miss Barnhill's reputation around town, nor receive information from her on the occasion of her trips to Gaffney, which "used to be her home town". He did not know that she habitually came into the camp, or that "she was going by the name of Ruby Spencer". He had seen her once since their farewell dinner at the club, about three or four days afterward, and had no idea where she was on the date of the trial (R. 52-55).

He expressed his desire to continue to serve - where he is best fitted - in the Army of the United States (R. 52).

5. Specification 1, of the Charge alleges drunkenness and disorder at the officers' club, both of which are clearly established, on the date and at the place specified. Various phases of his unmannerly and prolonged assault on his female companion, alleged in Specification 2, were attested by seven witnesses, several of whom testified, as well, to profane, threatening and abusive language, applied to the same woman, in the presence of numerous officers with their wives and ladies, as alleged in Specification 3. The protracted and violent drunken abuse, in a public place, of a helpless non-resisting female - even though intoxication, in her case, may have precipitated the throes of a "crying jag" - is conduct unbecoming either an officer or a gentleman. The evidence amply sustains the findings of guilty in violation of Article of War 95.

6. The accused is 47 years of age. War Department records show that he accepted original appointment in the Officers Reverve Corps, 22 April 1919, as first lieutenant; reappointment 12 April 1940 as major. He was found physically disqualified 21 July 1941, and transferred to the Inactive Reserve. On 18 September 1942, he was assigned to the Infantry Replacement Training Centre, Camp Croft, S. C., with 4 September 1942, designated as date of rank, and 2 October 1942, effective date of duty. He reported for active duty 3 October 1942. His resignation tendered on 17 February 1943, through channels, for the good of the service, as approved by his regimental commander, and its acceptance recommended both by the Commanding General, I.R.T.C., Camp Croft, S. C., and by the Commanding General, Fourth Service Command, the latter further recommending "that the separation be recorded under conditions other than honorable, and that the officer concerned not be awarded a Certificate of Service". On 1 March 1943, his resignation was submitted by order of the Secretary of War, to the Commanding General, Army Ground Forces, for recommendation. The office of The Adjutant General informally states that the resignation was disapproved.

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 of the Charge and its Specifications; legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of violation of Article of War 95.

Blasil Bresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

SPJGN
CM 234296

1st Ind.

31 July 1943

War Department, J.A.G.C., - To the Acting 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 Albert W. Pennington (0-127546), 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 legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the sentence of dismissal be confirmed and ordered executed.

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 your 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. Acting Sec. of War.
Incl 3 - Form of Executive action.

(Sentence confirmed. G.C.M.O. 264, 23 Sep 1943)

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

SPJGN
CM 234299

19 JUL 1943

UNITED STATES v. Second Lieutenant EVERETT C. JOHNSTON (0-1283783), 1st Battalion, 504th Parachute Infantry.	))))))))	82ND AIRBORNE DIVISION Trial by G.C.M., convened at Fort Bragg, North Carolina, 16 April 1943. Dismissal 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 Charge and Specification:

CHARGE: Violation of the 94th Article of War.

Specification: In that 2nd Lieutenant Everett C. Johnston, 504th Parachute Infantry, did, at Fort Bragg, North Carolina, on or about February 5, 1943, knowingly purchase from Private William C. Ogletree, 504th Parachute Infantry, in the Military Service of the United States, one

> caliber 45 U.S. Army pistol of the value of about $27.25, property of the United States, the said Private William C. Ogletree, 504th Parachute Infantry, not having lawful right to sell the same.

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, at such place as the reviewing authority may direct for one year. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The facts show that the accused stated in a conversation with Private William C. Ogletree, whom the accused knew to be a regimental supply helper, that he, the accused, wanted to purchase a pistol. Later the accused asked Private Ogletree if he knew where he could secure a pistol, and Private Ogletree suggested that he might be able to get one for the accused. The accused thereupon warned Private Ogletree that if he "* * * had any intentions of getting one not on the up and up * * *" that he should "skip it" (R. 6-9). Major Daniel W. Danielson, the investigating officer in this case, in testifying to the circumstances of the above described conversation as related to him by the accused, asserted that the accused,

> "* * * told Private Ogletree that he would not question where he secured this pistol but knowing that Ogletree worked in the regimental supply he cautioned Private Ogletree about not, that is if he was thinking of getting one there that he might get himself into a lot of trouble. He said he would give him money for a gun however the sum of money was not stated at that time" (R. 10-15).

A short time following the conversation between the accused and Private Ogletree, Private Ogletree surreptitiously secured a Government .45 calibre pistol from the regimental supply station and delivered it to the accused, for which the accused paid him $10 (R. 8). The pistol was shown to be a United States Colt 1911 model, .45 calibre pistol of a catalogued value of $27.25 (R. 20).

4. Lieutenant Colonel John P. Geiger testified that he had

formerly been the company commander of the accused and that he had known the accused since 1936, that he had promoted the accused to the grade of corporal, and later to the grade of sergeant, that he had a lot of confidence in the accused, and that the accused had never given him any reason to regret his confidence. He also testified that he had never known the accused to be in trouble before (R. 21-22).

The accused testified in his own behalf and freely admitted that he had purchased a pistol from Private Ogletree, explaining that if Private Ogletree had not had a right to dispose of the pistol that he, the accused, did not know of it. He testified further that he had carried the pistol on one occasion when he was on guard duty and on one occasion when he made a parachute jump with the battalion (R. 23-24). On cross-examination, the accused testified that he purchased the pistol in question on 5 February 1943, and paid Private Ogletree $10 for it. He further testified that he knew at that time Private Ogletree worked in the regimental supply office. The accused asserted that he had warned Private Ogletree against stealing a pistol. The accused testified, however, that he had told Private Ogletree that he, the accused, would not ask any questions as to where Private Ogletree had secured the pistol. The accused asserted that he had not known Private Ogletree very well or very long. The accused explained that in his efforts to secure a pistol he had asked several persons if they knew where he might secure one. The accused admitted that he saw the markings "U.S. Property" on the pistol at the time he purchased it but he had assumed that the pistol was not stolen. He understood that such a pistol could be purchased but he did not know if it could be purchased from the Government. He did not ask Private Ogletree where he had secured the pistol (R. 24-28).

5. The Specification alleges that the accused did, at Fort Bragg, North Carolina, on or about 5 February 1943 knowingly purchase from Private William C. Ogletree a .45 U.S. Army pistol of the value of about $27.25, the property of the United States, the said Private Ogletree not having a lawful right to sell the same.

The evidence establishes every element of the offense alleged. In particular the evidence shows that at the time the accused told Private Ogletree that he, the accused, wanted to buy

a pistol, the accused knew that Private Ogletree was a supply helper in the regimental supply room. Although the accused warned Private Ogletree at the time not to steal a pistol for him, at the same time he told Private Ogletree that he would not ask questions as to where the pistol was secured. Furthermore, when the pistol was delivered to the accused he did not ask Private Ogletree where he had secured it, but bought the pistol from him at less than half its catalogued price.

In determining the court's right to infer guilty knowledge on the part of the accused under the circumstances shown, we are aided by the logical statements that,

> "Whether the defendant knew that the goods were stolen is to be determined by all the facts of the case. It is not necessary that he should have heard the facts from eyewitnesses. He is required to use the circumspection usual with persons taking goods by private purchase; and this is eminently the case with dealers buying at greatly depreciated rates. That which a man in the defendant's position ought to have suspected, he must be regarded as having suspected, as far as was necessary to put him on his guard and on his inquiries" (Wharton's Criminal Law, Vol. 2, 13th Ed., sec. 1232).

When the evidence is considered in its entirety, one must conclude that the accused purchased the pistol in question from Private Ogletree knowing that it was Government property and that Private Ogletree did not have a lawful right to sell it.

6. The records of the office of The Adjutant General show that the accused is approximately 26 years of age, that he enlisted in the Ohio National Guard in 1935, that he was promoted to the grade of corporal and then sergeant, that he was inducted into the Federal Service on 15 October 1940, that he completed the educational requirements for Officer Candidate School by correspondence, and that he was commissioned a second lieutenant, Infantry, on 15 May 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 94.

Israel Gresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

SPJGN
CM 234299

1st Ind.

War Department, J.A.G.O. 6 - AUG 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 Everett C. Johnston (0-1283783), 1st Battalion, 504th Parachute 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. I recommend that the sentence be approved but commuted to a reprimand.

3. Consideration has been given to the attached letter from Warren M. Briggs, Esq., Attorney at Law, Cleveland, Ohio, dated 28 April 1943, addressed to the Board of Review.

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

Myron C. Cramer

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

4 Incls.
Incl 1 - Record of trial.
Incl 2 - Dft. of ltr. for sig. USW.
Incl 3 - Form of Executive action.
Incl 4 - Ltr from Warren M. Briggs, Esq.

(Sentence confirmed but commuted to reprimand. G.C.M.O. 228, 10 Sep 1943)

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

SPJGK
CM 234335

MAY 31 1943

UNITED STATES v. Private WARDELL F. TUPPER (20272216), Headquarters Detachment, Service Command, Camp Stewart, Georgia.	FOURTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Stewart, Georgia, March 30, 1943. Dishonorable discharge and confinement for three (3) years. Disciplinary Barracks.

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

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

2. Accused was found guilty under Article of War 93 of larceny of about $490, lawful money of the United States, property of the American Express Company, stolen between the approximate dates December 14, 1942, and January 8, 1943 (Charge I and Specification). He was also found guilty under 15 Specifications for violation of Article of War 96 of unlawfully, wrongfully, without authority, and with intent to defraud, signing the names of various people as remitters of certain American Express Company money orders (Charge II and applicable Specifications). He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for three years. The reviewing authority approved the findings of guilty of Charge I and its Specification as to larceny of $399.85 only. He disapproved certain Specifications of Charge II, to which it is unnecessary to refer in detail, 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.

3. The Specifications of which accused was convicted under Charge II, as approved by the reviewing authority, support the sentence, and the only question involved is whether the evidence in connection with

the Specification, Charge I, proved larceny as alleged.

4. The evidence shows that James A. May, director of the United Service Organizations club in Hinesville, Georgia (R.14), was authorized by the American Express Company to sell American Express Company money orders and to authorize others whom he considered reliable to do the same. In connection therewith he was authorized to issue books containing blank money orders (R.27,28). Upon accused's assertion that a need for such service existed at the Headquarters Building, "Headquarters Service Command", May appointed accused an authorized agent of the American Express Company to sell their money orders, and delivered to accused a book containing blank money order forms. Accused's authority extended to the issuance of money orders to persons in accused's building or service command. The transaction and the delivery of the book occurred between December 10 and 15, 1942 (R.18,20,21,24,25). The arrangements for accused's accounting to May were not entirely definite, but in general accused was advised to bring the money to May when it amounted to somewhere between $200 and $400 (R.20,23,25). Between December 15, 1942, and January 7, 1943, accused issued a number of money orders without authority. The transactions will be discussed in more detail subsequently. On January 7 or 8, 1943, May saw accused, who told him that he had loaned the cash received from the sale of the money orders. Accused handed May $175. May applied this on a personal loan which he had made to accused. It did not appear whether the $175 were part of the proceeds from money order sales. Accused told May that there were about $400 or $450 worth of money orders outstanding at the time (R.21,22,27,28). Other than the $175, May never received any money from accused (R.23). It was stipulated that the American Express Company paid in due course of business the face amount of the money orders introduced in evidence as Exhibits 4 to 19, inclusive (Ex. 26). These did not include all the money orders in evidence. Accused did not testify or make an unsworn statement with regard to the Charges and Specifications concerning the money order transactions.

5. The mere writing out of the money orders, and issuing them to various persons, obviously did not constitute larceny of any money from the American Express Company. There was no trespass; no money was taken from the possession of the American Express Company. It is equally clear that when the American Express Company paid the money orders in due course of business there was no larceny. With reference to Exhibits 4,5,6,17, and 19, it definitely appears that the American Express Company did not pay the money to accused (R.29,30,31,32,33,41,42,50; Ex. 25). Rather, it must have paid the holder who presented the respective instruments. There is no direct evidence relating to the other money orders enumerated

in Exhibit 26. However, except for one which becomes of no importance by reason of the reviewing authority's action, all of them were made payable to accused, and a study of the indorsements discloses that in no instance did the company pay the money to accused. Payment by the drawee, the American Express Company, to some subsequent holder other than accused, could not be larceny on accused's part by any stretch of the imagination. Even if the company paid the money to accused directly, he would not be guilty of larceny. No matter how fraudulent the recipient or how black his intent, he is not guilty of larceny if the person delivering the money or property intends to pass title (Clark and Marshall, Law of Crimes, 3rd ed., sec. 318). And a drawee making payment of commercial paper does so intend.

It next becomes necessary to analyze the transactions respecting the issuance of the several money orders to see whether larceny occurred. In the case of Exhibits 4,19, and 20, the payee merely had the money order cashed for accused and gave accused the money (R.29-31, 48-50,52). In the case of Exhibits 17 and 22 the payee advanced to accused the amount of the money order, took the money order, and received credit from the bank in the one case and cash in the other (R.37,38,41, 42). With reference to Exhibit 5, part of the amount of the money order represented payment of a debt owed to the payee by accused and the balance constituted a loan from accused to the payee (Ex. 25). Exhibit 6 was given to the payee as a loan from accused (R.32,33).

It is obvious that no larceny was involved in the debt payment and loan transactions. Accused did not "take, steal, and carry away" any money at all. He simply defrauded his principal by making a wrongful use of the money orders. The transactions in which accused caused the cashing of the money orders for himself and received the cash did not constitute larceny either. Nor did the transactions in which the payee advanced cash to accused, receiving the money order in exchange. When he received the money from the payee, he was not "taking" money from the American Express Company. The money came from the payee. Although accused made these transactions on his own account rather than for the account of his principal, the money which he received became the property of his principal, for it arose from an unauthorized use of money orders entrusted to him by the company (1 Mechem, Agency, 2nd ed., sec. 1224; Ex parte Hedley, 31 Cal. 109). Assuming that he converted the money to his own use, which he undoubtedly did, his crime was not larceny, for no trespass occurred. When an agent receives money from a third person for his principal, the legal possession of the money is in the agent, and his conversion is from his own possession, not from his principal's (Clark and Marshall, Law of Crimes, 3rd ed., sec. 317 (b)(3)).

Of course, if he puts the money into the constructive possession of the principal, as, for instance, by depositing it in a safe furnished by the principal for that purpose, he is guilty of larceny if subsequently he purloins the money from the safe, but there is no evidence of any such situation in the present case. His intent at the time of receiving the money from the third person is immaterial. When a person receives the legal possession of property from the owner, as in the case of a bailment, intending at the time to permanently deprive the owner of it, he is guilty of larceny, for his felonious intent nullifies the transfer of possession to him and consequently in receiving the property he is "taking" from the possession of the owner (Clark and Marshall, Law of Crimes, 3rd ed., sec. 316(c)). But this is not so in the case of property delivered to the agent by a third person. The third person gives up possession and title, and, although title thereafter is in the converter's principal, legal possession, rather than mere custody, is in the agent (Clark, Criminal Law, 2nd ed., 284-285).

Tredwell v. United States (266 Fed. 350), cited by the prosecution (R.64), does not represent the correct view of common law larceny and is opposed to the overwhelming weight of authority. The court in the Tredwell case bases its opinion on two cases which are not in point. Moreover, one of them quotes with approval the following passage from People v. Tomlinson (102 Cal. 19), which is in accord with our views:

> "But, where the possession has been obtained through a trick or device, with the intent, at the time the party receives it, to convert the same to his own use, and the owner of the property parts merely with the possession and not with the title, the offence is larceny". (italics ours)

Although the distinctions are subtle and refined, the Manual for Courts-Martial, in defining larceny under Article of War 93, undoubtedly contemplates common law larceny, and the Board of Review is bound thereby (par. 149g, M.C.M.).

6. There was no evidence whatsoever relating to the transactions involved in connection with the other money orders, but from a study of the indorsements it is safe to infer that they fell within one or more of the classes of transactions already enumerated. That being so, they are governed by the same rules. And of course if we make no assumption about them, there is no evidence at all.

7. For the reasons stated, the Board of Review holds the record

of trial legally insufficient to support the findings of guilty of Charge I and its Specification, but legally sufficient to support the other findings of guilty as approved by the reviewing authority, and to support the sentence.

Henry G. Gyo, Judge Advocate.

(On leave), Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

JUN 8 - 1943

War Department, J.A.G.O., - To the Commanding General, Fourth Service Command, Army Service Forces, Atlanta, Georgia.

1. In the case of Private Wardell F. Tupper (20272216), Headquarters Detachment, Service Command, Camp Stewart, Georgia, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Charge I and its Specification. Upon disapproval of the findings of guilty of Charge I and its Specification, you will have authority to order 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 234335).

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

RECEIVED JUN 10 1943 STAFF JUDGE ADVOCATE

RECEIVED JUN 10 1943 HQ. 4TH SERV. COMD.

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

14 JUN 1943

SPJGH
CM 234358

UNITED STATES	)	28TH INFANTRY DIVISION.
v.	)	Trial by G.C.M., convened at Camp Gordon Johnston, Florida, March 11 and 12, 1943, and reconvened April 10, 1943. Dismissal.
Second Lieutenant IRVIN O. BLACK (0-1293359), 112th Infantry.	)	

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 Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that 2nd Lieutenant Irvin O. Black, 112th Infantry, did, on or about October 15, 1942, at the maneuver area, Leesville, Louisiana, wrongfully borrow from Corporal Frank J. Dicembre, Cannon Company, 112th Infantry, the sum of $2.00 in cash, promising that it would be repaid on or about November 1, 1942, and did dishonorably fail and neglect to pay said debt until on or about February 5, 1943, after the institution of an official investigation of the subject.

Specification 2: In that 2nd Lieutenant Irvin O. Black, 112th Infantry, did, on or about October 17, 1942, at the maneuver area, Leesville, Louisiana, wrongfully gamble with enlisted men by "shooting craps" with them.

Specification 3: In that 2nd Lieutenant Irvin O. Black, 112th Infantry, did, on or about October 17, 1942, at the maneuver area, Leesville, Louisiana, wrongfully borrow from Private Edmund Rucinski, Company M, 112th Infantry, the sum of $100.00 in cash, promising that it would be repaid promptly and having failed to do so, and having on or about January 28, 1943, at Camp Gordon Johnston, Florida, promised to settle such indebtedness on February 1, 1943, did dishonorably fail and neglect to keep said promise and pay said debt.

Specification 4: In that 2nd Lieutenant Irvin O. Black, 112th Infantry, did, on or about October 18, 1942, at the maneuver area, Leesville, Louisiana, wrongfully borrow from Sergeant Carl B. Adams, Cannon Company, 112th Infantry, the sum of $27.00 in cash, and promising that it would be repaid on or about December 21, 1942 and did dishonorably fail and neglect to pay said debt.

Specification 5: In that 2nd Lieutenant Irvin O. Black, 112th Infantry, did, on or about October 26th, 1942, at the maneuver area, Leesville, Louisiana, wrongfully borrow from Sergeant Carl B. Adams, Cannon Company, 112th Infantry, the sum of $25.00 in cash, and promising that it would be repaid on or about December 21, 1942, and did dishonorably fail and neglect to pay said debt.

Specification 6: In that 2nd Lieutenant Irvin O. Black, 112th Infantry, did, on or about November 15, 1942, at Camp Livingston, Louisiana, wrongfully borrow from Corporal Roy O. Uddman, Cannon Company, 112th Infantry, the sum of $30.00 in cash, promising that it would be repaid on January 1, 1943, and did dishonorably fail and neglect to pay said debt.

Specification 7: In that 2nd Lieutenant Irvin O. Black, 112th Infantry, did, on or about November 28, 1942, at Camp Livingston, Louisiana, wrongfully borrow from Sergeant Louis F. Sharp, Cannon Company, 112th Infantry, the sum of $20.00 in cash, promising that it would be repaid December 1, 1942 and did dishonorably fail and neglect to pay said debt.

Specification 8: In that 2nd Lieutenant Irvin O. Black, 112th Infantry, did, on or about December 18, 1942, at

Camp Livingston, Louisiana, wrongfully borrow from Private 1cl Corbit Reed, Cannon Company, 112th Infantry, the sum of $1.50 in cash, promising that it would be repaid the same day and did dishonorably fail and neglect to pay said debt until on or about February 5, 1943, after the institution of an official investigation of the subject.

Specification 9: In that 2nd Lieutenant Irvin O. Black, 112th Infantry, did, on or about December 24, 1942, at Camp Livingston, Louisiana, wrongfully borrow from Corporal Roy O. Uddman, Cannon Company, 112th Infantry, the sum of $25.00 in cash, promising that it would be repaid on January 1, 1943 and dishonorably fail and neglect to pay said debt.

Specification 10: In that 2nd Lieutenant Irvin O. Black, 112th Infantry, did, on or about January 1, 1943, at Camp Livingston, Louisiana, wrongfully borrow from Corporal James A. Aplin, Cannon Company, 112th Infantry, the sum of $10.00 in cash, falsely stating that he was borrowing it for 2nd Lieutenant Edwin H. Patterson, 112th Infantry, and promising that it would be repaid February 1, 1943, and did dishonorably fail and neglect to pay said debt until on or about February 5, 1943, after the institution of an official investigation of the subject.

Specification 11: In that 2nd Lieutenant Irvin O. Black, 112th Infantry, did, on or about January 3, 1943, at Camp Livingston, Louisiana wrongfully borrow from Sergeant Albert P. Porfilio, Cannon Company, 112th Infantry, the sum of $35.00 in cash, falsely stating that he was borrowing it for 2nd Lieutenant Edwin H. Patterson, 112th Infantry, and promising that it would be repaid February 1, 1943, and did dishonorably fail and neglect to pay said debt.

Specification 12: In that 2nd Lieutenant Irvin O. Black, 112th Infantry, did, at Camp Gordon Johnston, Florida, on or about February 16, 1943, wrongfully make statements under oath to the Assistant Division Inspector, 28th Infantry Division, then detailed to investigate the matter, to the effect that he was not indebted to any person in the military service other than certain designated individuals, not

> including Private Edmund Rucinski, Company M, 112th Infantry, and that he had never gambled with enlisted men, which statements were false in that he did then owe the said Private Rucinski $100.00, for a loan made to him on or about October 17, 1942, by the said Private Rucinski, while both of them were engaged in gambling by "shooting crpas" with other enlisted men.

He pleaded not guilty to Specifications 1, 2, 3 and 12; guilty, except the date "October 18, 1942", substituting therefor the date "November 15, 1942", to Specification 4; guilty, except the date "October 26, 1942", substituting therefor the date "December 8, 1942", to Specification 5; and guilty to Specifications 6, 7, 8, 9, 10 and 11 and to the Charge. He was found guilty of Specification 2, except the word and figures "October 17, 1942", substituting therefor the word and figures "November 8, 1942"; guilty of Specification 3 except the word and figures "October 17, 1942", substituting therefor the word and figures "November 8, 1942"; guilty of Specification 4, except the words and figures "October 18, 1942, at the Maneuver Area, Leesville, Louisiana", and substituting therefor, the words and figures "November 15, 1942 at Camp Livingston, Louisiana"; guilty of Specification 5, except the words and figures "October 26, 1942, at the Maneuver Area, Leesville, Louisiana", and substituting therefor, the words and figures "December 8, 1942, at Camp Livingston, Louisiana"; guilty of Specification 12, except the words "to the effect that he was not indebted to any person in the military service other than certain designated individuals, not including Private Edmund Rucinski, Company M, 112th Infantry, and that he had never gambled with enlisted men, which statements were false in that he did then owe the said Private Rucinski $100.00 for a loan made to him on or about October 17, 1942, by the said Private Rucinski, while both of them were engaged in gambling by 'shooting craps' with other enlisted men", and substituting therefor the words "that he had never gambled with enlisted men, which statement was false in that he had on or about November 8, 1942 gambled with enlisted men, including Private Edmund Rucinski, Company M, 112th Infantry, by 'shooting craps' with the said Private Rucinski and other enlisted men"; and guilty of Specifications 1, 6, 7, 8, 9, 10 and 11 and of the Charge. He was sentenced to pay to the United States a fine of Six Hundred Dollars ($600.00) and to be dismissed the service. The reviewing authority approved only so much of the sentence as involves dismissal and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution:

a. Specification 1: About October 15, 1942, while in the maneuver area the accused borrowed $2 from Corporal Frank J. Dicembre for cigarettes, stating that he would repay the loan on pay day, November 1. The money was not paid on November 1; but on February 2, 1943 it was paid to Corporal Dicembre by "Mr. Munson", assistant adjutant of the regiment (R. 20-21).

b. Specification 2: It was shown that on November 8 or 9, 1942, in the evening, during maneuvers, there was a big "crap" game, a dice game, going on in the Company M, 112th Infantry area, near the kitchen. Private Edmund Rucinski, who was present and playing in the game, saw the accused in the game, rolling the dice and betting money. There were three or four other officers present, but it was "mostly" an enlisted men's game. Corporals Anthony J. Dorcik and John G. Quinn, saw the accused and several enlisted men in the game, and some other officers present. The night before there had been a card game in which the accused, several other officers and two enlisted men had participated (R. 8-11, 17-18, 46-50).

c. Specification 3: During the dice game about November 8 or 9, 1942, while on maneuvers the accused borrowed from Private Edmund Rucinski, $20, then $30, then $50, a total of $100, and gave him an "IOU" for the latter amount (Ex. 1), due December 1, 1942. The accused promised several times to pay the $100 in the future, but never paid it (R. 8-10).

d. Specifications 4 and 5: While the company was on maneuvers, the accused borrowed about $27 from Sergeant Carl B. Adams and later at Camp Livingston borrowed enough to bring the total debt to $52. The debt was to be paid the day before Sergeant Adams' furlough, which was about Christmas. He did not see the accused when he went on furlough, as the accused was away on duty. The debt was never paid, except that Captain Hamlin gave $20 to Sergeant Adams on February 5 (R. 51-55, 101-102).

e. Specification 7: About November 28, 1942, the accused borrowed $20 from Sergeant Louis F. Sharp, which was to be repaid on December 1, when Sergeant Sharp was to leave on furlough. It was never repaid except for $10 which he received from Captain Hamlin on February 7 (R. 43-44).

f. Specifications 10 and 11: The accused borrowed $10 from Corporal James A. Aplin about January 1, 1943, stating that he wanted

the money to give to Second Lieutenant Edwin H. Patterson, who was on leave, and that it would be repaid the first of the month when Lieutenant Patterson was paid. The accused did not repay the loan, but Corporal Aplin received the money from Captain Hamlin on February 7. The accused also borrowed twenty or thirty dollars from Sergeant Porfilio for the same purpose. Lieutenant Patterson testified that he was on leave from January 1 to January 10, that he did not borrow from the accused nor request the accused to get money for him about that time, but that while on leave he visited the camp about January 6 or 7 and while he was there the accused voluntarily handed him $75, and later $25, and that he repaid the $100 to accused about the end of his leave. In his opinion the accused was a good officer and was very generous. Two or three meetings were held in the regiment at which new officers were instructed as to relationship and customs between officers and enlisted men. About the last part of December Lieutenant Patterson discovered that the accused had been borrowing from enlisted men and explained to him that this was considered conduct unbecoming an officer. The accused promised to repay the money out of his December pay check (R. 33-35, 37-42, 97-99).

g. Specification 12: On February 16, 1943, Captain Joseph B. McDermott, Assistant Inspector General, took a sworn statement from the accused, who had been warned of his rights under the 24th Article of War. The accused stated to Captain McDermott that he had never gambled with enlisted men. The accused was very cooperative on the three occasions when Captain McDermott interviewed him (R. 27-30).

Captain William J. Hamlin, Regimental Adjutant, received $90 from the accused in January or the early part of February, after an investigation by the Inspector General, to pay certain enlisted men as shown on a list (Ex. 2), and later Captain Hamlin received about $70 for the same purpose. The accused was away from the regiment from about January 9, 1943 until about ten days before the trial (R. 24-26).

4. The evidence for the defense shows that from October 25, 1942, the accused was liaison officer of Cannon Company, 112th Infantry during the remainder of maneuvers, and as such was absent from the company a great deal. After maneuvers he was transportation officer and platoon leader, and about January 9, 1943, left the company for other duties. First Lieutenant Earl J. Moore, who was company commander of the accused during that time, testified that the accused performed very satisfactory work, was cooperative, and worked well with other officers. Lieutenant Moore was present on an occasion early in January when the accused loaned

Lieutenant Patterson what appeared to be about $100. No instruction as to customs of the service was given to the accused, who was necessarily absent on the two occasions when instruction was given to officers of the regiment. First Lieutenant Guy T. Piercey testified that he was a classmate of the accused at Fort Benning and that instruction was there given in customs of the service, but he could not say whether the accused was present on that particular day, nor just what the instruction was (R. 56-58, 67, 69).

On November 15 and December 24, 1942, respectively, Corporal Roy O. Uddman loaned about $30 (Spec. 6) and about $25 (Spec. 9) to the accused. About January 2 he had a conversation with the accused about repayment. Corporal Uddman, who was going on a three-day pass and had a large sum of money with him, asked the accused to keep it until he returned. Subsequently he was paid part of it by Captain Hamlin. About December 18, 1942, the accused borrowed $1.50 from Private Corbit R. Reed (Spec. 8) to buy hose for First Lieutenant Charles F. Monson, stating that it would be repaid that day. The accused did not repay this sum, although Reed later, about February 7, received it from some other person. Accused offered to pick up some socks for Lieutenant Monson and did not take the money Monson offered him to pay for them. Lieutenant Monson later paid the accused. The night before the dice game of November 9, 1942, the accused was in a poker game with other officers and possibly some enlisted men (R. 59-62, 64-65,67, 70-74)

The accused testified that he was born in Jay County, Indiana, December 25, 1916, was graduated from high school in 1932, remained at home on the farm for a year, held various jobs until he was inducted January 17, 1941, attained the rank of staff sergeant, entered Officer Candidate School at Fort Benning about June 16, 1942, and after receiving his commission there reported to Cannon Company, 112th Infantry about September 30, 1942. He was married on November 21, 1942, and his wife had been ill most of the time since. While he was an enlisted man, officers borrowed from him on several occasions, and he was not told that it was improper for an officer to borrow from an enlisted man, either at Fort Benning or before going there. For three weeks he was second in command of Cannon Company, 112th Infantry, then acting company commander until October 25, and thereafter liaison officer, executive officer, transportation officer and platoon leader. He was away from the regiment on other duties from about January 7 to about February 24, 1943 (R. 75-79).

He had no recollection of borrowing from Corporal Dicembre. On the night before the dice game, he was in a card game, when two enlisted men wanted to join in. The accused asked whether it was all right for enlisted men to play, whereupon one of the enlisted men stated that they did it all the time. The accused accepted this as a true fact, and they entered the game. He considered the dice game an officers' game, and when enlisted men entered it, he thought it was all right. He denied borrowing $100 from Rucinski, and stated that he lost that amount to Rucinski on a bet in the dice game, gave Rucinski his "IOU" and sent him home. Rucinski asked him about the money three times but the accused did not pay him. About November 10 the accused borrowed $25 from Sergeant Adams to purchase an overcoat, and about December 15, $27 more to go visit his wife, who was sick. On December 21 he had the money for Sergeant Adams, but found that Sergeant Adams was on furlough. The money he borrowed from Corporal Uddman was used by his wife and himself while his wife was ill. On one occasion he offered to pay Corporal Uddman, who then asked him to keep the money for him, as Corporal Uddman had a considerable sum of cash and was going on a pass. The accused attempted to pay the amount he owed Corporal Sharp, but found that Corporal Sharp had gone on furlough. He borrowed from Reed to buy hose for Lieutenant Monson, and as to paying Reed "never gave it a thought". As to the Aplin and Porfilio loans, the accused testified that he found that Lieutenant Patterson needed money because he had not received his uniform allowance, and that he (the accused) then talked to Sergeant Porfilio and Corporal Aplin, who gave him some money, which he loaned to Lieutenant Patterson along with some money of the accused. With reference to his statement to Captain McDermott about not having gambled with enlisted men, the accused stated that he still thought he was correct, as it was an officers' game, not an enlisted men's game. The officers started the game. It was after Christmas, about January 3 or 4, that Lieutenant Patterson told him that it was wrong to borrow from enlisted men and that he must pay the money back. He has not made any additional loans since. He has made an effort to pay up the loans, and for that purpose delivered to Captain Hamlin $90 and $60.50 (R. 79-85, 104-105).

5. The evidence as to Specifications 1, 2, 3 and 12 shows that the accused borrowed $2 from Corporal Dicembre, to be repaid on November 1, 1942, and that he neglected to pay the loan; that he engaged in a dice game and gambled with enlisted men, on or about November 9, 1942; that he became indebted to Private Rucinski in the sum of $100

during the dice game, and executed an "IOU" due December 1, 1942, but neglected to pay the debt; and that he stated to Captain McDermott, Assistant Inspector General, on or about February 16, 1943, in the course of an investigation, that he had never gambled with enlisted men.

As to Specifications 4, 5, 6, 7, 8, 9, 10 and 11, to which the accused pleaded guilty, it is shown that he borrowed sums as alleged from enlisted men, and failed and neglected to repay the loans at the agreed date and not until after an investigation had been initiated with respect to them.

6. All of the members of the court joined in a recommendation that execution of the sentence to dismissal be suspended. That recommendation was based upon the limited education and experience of accused in the customs of the service and consequent lack of appreciation of the serious nature of his actions, and upon their belief that he was potentially a good officer and of substantial value to the service.

7. The accused is 26 years of age. The records of the Office of The Adjutant General show his service as follows: Inducted January 17, 1941; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty September 14, 1942.

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 trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 96th Article of War.

Carlos S. Hill Jr., Judge Advocate

Samuel M. Rivera, Judge Advocate

F. J. Fetterhoff, 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 Irvin O. Black (0-1293359), 112th 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 borrowed from eight enlisted men a total of $275.50 and failed to repay the sums borrowed when due, gambled with enlisted men in a dice game on or about November 8, 1942, and on or about February 16, 1943 made a false statement to an Assistant Division Inspector to the effect that he had never gambled with enlisted men, in violation of the 96th Article of War. All members of the court joined in recommending that the execution of the sentence to dismissal be suspended because of the limited education and experience of the accused in the customs of the service, his consequent lack of appreciation of the serious nature of his actions, and their belief that he was potentially a good officer and of substantial value to the service. I recommend that the sentence to dismissal be confirmed, but, in view of the recommendation of all members of the court, 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

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

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

(Sentence confirmed but execution suspended. G.C.M.O. 158, 24 Jul 1943)

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

SPJGN
CM 234408

MAY 6 1943

UNITED STATES	)	28TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Gordon Johnston, Florida, March 29, 1943. Each: Dishonorable discharge and confinement for ten (10) years. Disciplinary Barracks.
Privates RICHARD E. WARNER (20314537), and BERT D. OLDHAM (20314520), both Battery C, 229th Field Artillery Battalion.	)	

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 soldiers named above has been examined by the Board of Review.

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

CHARGE I: Violation of the 65th Article of War.

Specification: In that Private Richard E. Warner, Battery C, 229th Field Artillery Battalion, a garrison prisoner serving a sentence involving confinement at hard labor, having received a lawful command from Sergeant Kenneth F. Hughes, Headquarters Battery, 229th Field Artillery Battalion, a noncommissioned officer who was then in execution of his office, to "double time" did at Camp Gordon Johnston, Florida on or about February 27, 1943, wilfully disobey the same.

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

Specification: In that Private Richard E. Warner, Battery C, 229th Field Artillery Battalion, a garrison prisoner serving a sentence involving confinement at hard labor, did at Camp Gordon Johnston, Florida on or about March 1, 1943, wrongfully and wilfully refuse to perform any work in the area of the 229th Field Artillery Battalion.

CHARGE I: Violation of the 65th Article of War.

Specification: In that Private Bert D. Oldham, Battery C, 229th Field Artillery Battalion, a garrison prisoner serving a sentence involving confinement at hard labor, having received a lawful command from Sergeant Kenneth F. Hughes, Headquarters Battery, 229th Field Artillery Battalion, a noncommissioned officer who was then in execution of his office, to "double time" did at Camp Gordon Johnston, Florida on or about February 27, 1943, wilfully disobey the same.

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

Specification: In that Private Bert D. Oldham, Battery C, 229th Field Artillery Battalion, a garrison prisoner serving a sentence involving confinement at hard labor, did at Camp Gordon Johnston, Florida on or about March 1, 1943, wrongfully and wilfully refuse to perform any work in the area of the 229th Field Artillery Battalion.

The accused pleaded not guilty to and were found guilty of all Charges and Specifications. Evidence of two previous convictions by special courts-martial as to accused Warner for absence without leave on three occasions, in violation of Article of War 61, was introduced. Evidence of three previous convictions as to accused Oldham, one by summary court-martial for absence without leave, in violation of Article of War 61, and failure to obey a superior officer, in violation of Article of War 96, and two by special courts-martial for absence without leave on three occasions, in violation of Article of War 61, and failure to obey a noncommissioned officer, in violation of Article of War 96, was introduced. Each was sentenced to be dishonorably discharged the service,

to forfeit all pay and allowances due or to become due and to be confined at hard labor for ten years. The reviewing authority approved the sentence as to each, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement for each, and forwarded the record of trial for action under Article of War 50½.

3. (a) Concerning the Specification, Charge I, the evidence for the prosecution shows that on February 27, 1943, the sergeant of the guard, in compliance with orders issued by Major Prusaitis, officer of the day, went to the post stockade to get four prisoners, including the two accused, to bring them to the battalion area for work. Major Prusaitis, who was also Battalion S-3, had, on the same date, given the sergeant of the guard instructions that these (and other) prisoners would be double-timed to the camp area and from one job to another. This latter order "applied to the movement of prisoners whenever they moved from one place to another whether it was from work or not. Any place at all they moved to, they moved on the double." In issuing such an order, Major Prusaitis testified "I believe I was adhering to Army Regulations which stated that prisoners sentenced to hard labor would receive work over and above that of the regular troops." (R. 19, 25; Ex. 6)

The training which the battalion was undergoing on February 27, 1943, and for a month prior thereto emphasized physical conditioning; and "throughout all our training in that month they had to double time every place they went within the training areas." Prisoners, such as the accused, were not included in the training plan for the battalion. A little less than half a mile was the distance from the post stockade to the battalion areaasestimated by Major Prusaitis who had double-timed that distance himself, and considered it "no great feat." (R. 25; Ex. 6)

The sergeant took the prisoners to the guard tent, and told them they would double-time to work, whereupon, according to the sergeant, "the prisoners put up a howl about that and at that time the Major came up and he said he didn't want to hear any more about it and they would be getting themselves in more trouble." The prisoners then double-timed from the stockade to the battalion area. The sergeant estimated the distance at "about 1½ miles", of which distance he double-timed them about one-half mile on the way over, himself double-timing along with them. "After lunch," the sergeant continued,

> "when it was time for them to go back,
> the Major told me to double-time them

> back * * * I gave the order and nothing happened. They just kept marching. Then I gave them the double-time order again and they still did nothing. * * * I gave them a 'double-time march' the 3rd time and I reported it to the Officer of the Day * *."

Neither of the accused double-timed any part of the way back to the stockade. The accused Warner "said he wouldn't double time because he had a sore foot. This was the first time he mentioned it." As for the accused Oldham, "he didn't say anything." (R. 19-23)

Major Prusaitis testified that it was not his intention that prisoners should double-time, regardless of the state of their health. "One of the prisoners", he continued,

> "complained of a sore foot, I believe that morning. I sent him to the medical officer of our battalion and had his foot examined and he stated that the foot would not hamper the man performing full duty. * * * I took full duty to mean double timing because full duty for other men in the battalion would include double timing." (R. 25; Ex. 6)

(b) Concerning the Specification, Charge I, the only evidence introduced on behalf of either of the accused, was the testimony of accused Warner, who elected to take the stand and be sworn, after the rights of both the accused as witnesses had been fully explained to them. The other accused, Private Oldham, elected to remain silent. The accused Warner testified that

> "The Sergeant of the Guard received orders to take us back to the Stockade on the double and we walked about one-half mile from the battalion and he gave the orders to double time * * * I turned around and told him I had a sore foot * * *. The Sergeant got mad and gave us the order again and I told him I had a sore foot. Nothing was said after that and then we went to the Post Stockade * * * Private Oldham was right behind me." (R. 25-27)

He further testified that while working on the road on February 25, he had dropped a loading block on the instep of his left foot. He did not ask to go to the infirmary but bandaged it himself. It did

not hurt particularly to walk on it. "I rested it a little bit now and then," he explained. He did not go on sick call on February 27, and double-timed from the stockade to the battalion area that morning. After lunch, however, when the sergeant, taking him back to the guard house, ordered him to double-time, he did not do so. (R. 27-30)

(c) The Specification, Charge I, alleges, in each instance, willfull disobedience of the sergeant's order to "double time". If the double-timing ordered was intended only as a punishment, it was illegal, and the disobedience shown not an offense under Article of War 65 (CM 226870 (1942)). In the instant case, however, the uncontroverted evidence shows that the entire battalion was participating in a training program in which the men "had to double time every place they went within the training area." To permit prisoners to move at quick time while the rest of the battalion was habitually moving at double time would seem --- to the less energetic, at least--to place a premium on incarceration. Regardless, however, of the training program then in progress, an order to double-time to a specific place appointed for the performance of a specific duty, is not of itself unlawful. In the cited authority, the order could have been intended only as a punishment, since the soldier was already at the supply room, where he had been directed to report by his company commander, when the latter ordered him to "double-time back down there to the kitchen and then double-time back." That order was issued not as a means of getting him anywhere but solely to make him run. Double timing is a recognized method of moving troops, and may be lawfully employed either to expedite arrival at a desired destination, or for training and exercise. There is not only no direct evidence in the record now under consideration that punishment of the accused was the only object of the order which they disobeyed, but none from which such an inference might properly be drawn. The evidence that the accused Warner responded to the lawful order of the sergeant, then in the execution of his duty, by stating that his foot was sore, is not of a character to absolve him from the offense charged, all the elements of which are clearly established. The court's findings of guilty, as to each of the accused, of Charge I and its Specification are therefore sustained.

4. (a) Concerning the Specification, Charge II, the prosecution made an opening statement, from which the following pertinent excerpts are quoted:

> "* * * before the accused enter their pleas, it is desired to point out the significance of the specification of Charge II as it is understood by the prosecution. * * * this specification * * * does not allege a

> specific order, but alleges he wrongfully and wilfully refused to perform any work in the 229th Field Artillery Battalion area. The prosecution will introduce evidence that the accused in fact refused on 3 separate occasions when ordered to perform work in the Battalion area. (First by a non-commissioned officer and later by 2 officers). And it is the contention of the prosecution that the specification as drawn alleges mutinous conduct which is a lesser included offense under the charge of mutiny and as such can be charged under the 96th Article of War. Reference-- Winthrop, 2nd Edition, page 578 and 579. * * * if this offense is proved as alleged, the sentence that can be imposed will not be restricted by the maximum punishments enumerated under the 96th Article of War, but may be arrived at by using as a guide the sentence provided for violations of the 66th Article of War, mutinous conduct being a lesser included offense under that Article. The authority for this proposition is found in paragraph 104c, MCM". (R. 8)

The evidence for the prosecution shows that both the accused were sentenced to six months confinement at hard labor on February 23, 1943. The sentence was approved on February 27, 1943, and the Post Stockade, Camp Gordon Johnston, Florida, designated as the place of confinement (R. 10; Ex. 1 and 2).

On March 1, 1943, the sergeant of the guard told Private Frank Lynn, Headquarters Battery, 229th Field Artillery, to take the accused prisoners to get some brooms and then over to the motor garage where there was a pit of water that had to be swept out and filled with sand. Lynn took the accused down to get the brooms, but both refused to take them. "They said," he testified,

> "they weren't going to do any work. They asked me to take them to the Officer of the Day * * * They showed me their Court Martial orders. They said they didn't have to do any work in the battalion area as they were in the Post Stockade and they were to do their work there."

Lynn escorted the accused to the officer of the day, to whom, also, they displayed the court martial orders promulgating their convictions. After some discussion, the officer of the day directed them to perform the work assigned to them and they still refused. They were then taken to the office of the battalion commander who, after reading and explaining to them Articles of War 64 and 66, asked them if they were going to work, and they again refused. Their contention, in each instance, was "that they wouldn't work in the battalion area; that their sentence at hard labor was at the Post Stockade." (R. 13-18)

(b) The defense presented no evidence concerning the Specification, Charge II. In a statement made by the accused Warner to the investigating officer on March 5, 1943, introduced by the prosecution after proper predicate, without objection, the accused Warner asserted that his reason for telling the officer of the day that he would not work in the battalion area but that he would work in the stockade, was "because I did not wish to be ridiculed by having the other men in the battalion see me performing hard labor" (Ex. 4).

(c) The Specification, Charge II, merely alleges that the accused, both garrison prisoners serving sentences involving confinement at hard labor, wrongfully and willfully refused to perform any work on a designated date in a designated area.

> "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; underscoring supplied).

According to this standard, the Specification under consideration is defective in not alleging the nature of the work the accused refused to perform, or the identity and status of the person or persons who instructed the accused to perform such work, or the manner in which such instructions were communicated to the accused. The trial judge advocate's statement, immediately following the arraignment of the accused, was more definite as to what evidence the prosecution expected to adduce in support of the defective Specification; and this evidence, as outlined, was actually adduced on the trial of the case, establishing the accused's refusal to perform specific work properly assigned to them, as prisoners, by the sergeant of the guard, despite orders to perform such work given directly to the accused not only by the soldier who was detailed to guard them, but also by the officer of the day and the battalion commander. Moreover, the record discloses affirmatively that no surprise to the accused resulted from the vagueness of the Specification.

> "No finding or sentence need be disapproved solely because a specification is defective if the facts alleged therein and reasonably implied therefrom

> constitute an offense, unless it appears from the record that the accused was in fact misled by such defect, or that his substantial rights were in fact otherwise injuriously affected thereby" (par. 87b, p. 74, M.C.M., 1928).

In the Specifications under consideration, it may be reasonably inferred that on the date specified, lawful work was assigned to the accused by a person or persons in the military service charged with the supervision and control of garrison prisoners at the place where the refusal is alleged to have occurred, and that such person or persons, in the proper execution of such control and supervision, ordered the accused to perform such work, and that the accused refused to obey such order. The sentence therefore need not be disapproved on account of the defects noted in the Specification.

However, the theory advanced by the trial judge advocate, which the sentence indicates was also adopted by the court, that the offense charged is a lesser included offense under Article of War 66, is wholly untenable. Neither Winthrop's statement that "mutinous conduct", falling short of mutiny as defined by military law, is "commonly to be treated as 'conduct to the prejudice of good order and discipline' in violation of Article of War 62" (now 96), nor paragraph 104c, M.C.M., 1928, furnishes any basis for that proposition, although both were cited as authority. "Mutiny imports collective insubordination and necessarily includes some combination of two or more persons in resisting lawful military authority" (par. 136a, p. 150, M.C.M., 1928). An individual's refusal, on his own initiative alone, to perform work lawfully assigned to him by a superior, is not mutinous conduct, nor is such unconcerted insubordination necessarily included in the offense of mutiny, which may be properly charged and proved without establishing such conduct but never without establishing some form of combination or concerted action. The mere fact that the refusals in this case, were contemporaneous is not enough to establish the essential concert. Therefore the offense of which each of the accused was found guilty under the Specification, Charge II, is not a lesser included offense under Article of War 66.

The most closely related offense to the one both charged and proved, and of which the accused were found guilty, under the Specification, Charge II, is "failure to obey a lawful order of a

superior officer" for which a maximum sentence of confinement at hard labor for six months is authorized (par. 104c, p. 100, M.C.M., 1928). The findings are sustained, but the sentence is excessive, to the extent that it was imposed under the misconception that the maximum punishment prescribed for violation of Article of War 66 applied to the offense of which the accused were found guilty under the Specification, Charge II.

5. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of both Charges and the Specifications thereunder, 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 one year.

Chas B Besson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R Shafer, Judge Advocate.

1st Ind.

War Department, J.A.G.O., JUN 1 1943 - To the Commanding General, 28th Infantry Division, Camp Gordon Johnston, Florida.

1. In the case of Privates Richard E. Warner (20314537), and Bert D. Oldham (20314520), both Battery C, 229th Field Artillery Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial as to each accused is legally sufficient to support the findings of guilty of the Charges and the Specifications thereunder, but legally sufficient to support only so much of the sentence in each case as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year, which holding is hereby approved. Upon vacation of so much of the sentence in each case as is in excess of dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for one year, you will have authority to order the execution of the sentences.

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 234408)

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 234414

15 JUL 1943

UNITED STATES	)	THIRD AIR FORCE
v.	)	Trial by G.C.M., convened at Myrtle Beach, South Carolina, February 26, 27, and 28 and March 1, 1943. Dismissal and forfeiture of all pay and allowances to become due.
Second Lieutenant JULIUS P. UIHLEIN (0-792325), 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 2nd Lieutenant Julius P. Uihlein III, 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 64th Article of War.

Specification 1: (Finding of not guilty).

Specification 2: In that 2nd Lieutenant Julius P. Uihlein III, 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 III: Violation of the 95th Article of War.

Specification 1: In that 2nd Lieutenant Julius P. Uihlein III, 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 2: (Finding of not guilty.)

Specification 3: (Nolle prosequi)

Specification 4: In that 2nd Lieutenant Julius P. Uihlein III, 455th Bombardment Squadron (M), did, at Myrtle Beach Bombing Range, Myrtle Beach, South Carolina, from about November 27, 1942 to about December 1, 1942, fail to repair to his place of duty at the proper time.

Specification 5: In that 2nd Lieutenant Julius P. Uihlein III, 455th Bombardment Squadron (M), did, at Lafayette Manor, Myrtle Beach, South Carolina, on or about December 1, 1942, behave himself with disrespect toward 1st 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.

Specification 6: (Finding of not guilty.)

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

Specification 1: In that 2nd Lieutenant Julius P. Uihlein, III, 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 2: Breach of arrest, same place, January 5, 1943.

Specification 3: Breach of arrest, same place, January 6, 1943.

Specification 4: Breach of arrest, same place, January 11, 1943.

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

Specification: In that Julius P. Uihlien III, 323rd Bomb Group having been duly placed in confinement in the Base hospital at Myrtle Beach, S.C. on or about January 11, 1943 did at 2400 EWT on or about January 17th, 1943 escape from said confinement before he was set at liberty by proper authority.

The accused pleaded not guilty to all of the Charges and Specifications. He was found not guilty of Specification 1, Charge II; Specifications 2 and 6 of Charge III; with reference to Charge III, not guilty of violating the 95th Article of War, but guilty of violating the 96th Article of War. He was found guilty of the remaining Charges and Specifications. There was no evidence of any prior convictions. 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 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. The evidence for the prosecution shows that the accused was a combat co-pilot in the 455th Bombing Squadron, commanded by Captain William W. Brier. His duties consisted of flying, and attending link trainer instruction and air ground school, all in accordance with posted schedules, bearing the notation that each would be strictly adhered to. When the accused first reported to the squadron, approximately the middle of October, 1942, and when the squadron first reported to Myrtle Beach on 3 November 1942, the squadron operations officer, who had charge of the ground school as well as the schedule of flights, told the accused "to be sure and be at all meetings". The accused, however, attended less frequently than the rest of the squadron officers. As a result, shortly after the squadron's arrival, he was reprimanded by Captain Brier for being frequently absent from classes during the squadron's first week at Myrtle Beach (R. 28, 42, 45, 49-50).

On 1 December 1942, the operations officer reported to Captain Brier the accused's absence from ground school classes from 27 November 1942 to 1 December 1942, whereupon Captain Brier, on the afternoon of 1 December 1942, called the matter to the accused's attention, informing him that it was his duty to attend these classes; ordering him, at the same time, to move from the Lafayette Manor, where he was then residing, to the officers' barracks on the post; and authorizing Government transportation for the move. While Captain Brier testified, on direct examination, that his order to the accused was to move to the base "immediately", he corrected this statement on cross-examination, admitting that he might have said "as soon as convenient". He also told the accused that he trusted his attendance at the ground school would be more frequent, as he would then be living on the base. The absences reported had been determined by roll call, and the operations officer, before reporting them to Captain Brier, had checked the roll. Asked if he had the rolls in court, he responded, "We do not file those rolls, and, therefore, we do not have them", but he remembered the accused's absence because, when the accused was present, "it was so obvious" (R. 29, 37, 42, 50, 51).

About 5 o'clock on the afternoon of 1 December 1942, Mrs. Sam Houston, manager of the Lafayette Manor Hotel, where the accused was registered, heard banging on the doors upstairs and someone calling the porter for gingerale. Ascertaining that this disturbance emanated from

the room shared by the accused and Second Lieutenant Kenneth A. Sawyer, she went to it and requested them to be quiet. The accused, who was standing in the hall, refused to comply with her request, stating that Mrs. Houston and the chaplain, who was also a guest at Lafayette Manor, had been trying to "knife" him, and report him to the base. Mrs. Houston telephoned the base "for some help", and "asked for someone to come to the hotel and they sent an M.P.". The "M.P." was Lieutenant Byrd, Airdrome officer of the day, who at about 6:20 p.m., went to the accused's room and came down shortly, saying he had quieted the occupants. (R. 54).

About a quarter of seven, when about five guests were sitting in the lobby, the accused and Lieutenant Sawyer met Mrs. Houston at the foot of the stairway, where the accused told Mrs. Houston she was just a "God damn whore". At about this time, the chaplain came up and tried to quiet the accused and his roommate, but they "turned on the chaplain", whom the accused called a "God damn chicken shit son of a bitch". Mrs. Houston, very nervous and hysterical, again called the base. Major Fleming, the base executive officer, responded, arriving in about half an hour, at which time the accused and his roommate were on the side porch, where Major Fleming joined them for a very short time. "When Major Fleming got out there", the chaplain testified, "they quieted down and didn't say much more". The chaplain also testified that the accused called him a "tale-bearing" - as well as a "chicken-shit" - son of a bitch, and charged him with carrying tales to the accused's commanding officer and going behind his back. On cross-examination, the chaplain admitted that he had told Captain Brier that the accused's conduct made his presence undesirable at the Lafayette Manor, and that Mrs. Houston desired to have him removed (R. 54-55, 63-66).

Late that same night - 1 December 1942 - accused came to Captain Brier's room in the officers' barracks, and finding the latter's roommate's bed unoccupied, slept there, fully clothed. Captain Brier was absent from the base from the afternoon of 2 December 1942, until late in the evening of 3 December 1942, and did not see the accused again until 14 December 1942 (R. 29-30).

Prior to the accused's departure from the base on 4 December 1942, he had made a written request for a leave of absence, which had been approved by his squadron and group commanders; and orders issued authorizing him to go on leave. "The leave", Captain Brier testified

> "was revoked verbally by Colonel Thatcher to me and to the group Adjutant. Verbally on 4 December 1942, I relayed instructions to the squadron Adjutant that if leave had been cut at that time, that it was too late for me to disapprove it, and so I instructed Lt. Johnson not to give the leave orders to Lt. Uihlein, but to have him see me if he called at the orderly room to pick up his orders".

Lieutenant Johnson, the squadron adjutant, relayed these instructions to his first sergeant, about 4 December 1942, on which date the accused inquired at the orderly room if his orders had come in. The first sergeant informed him they had, but that he had to hold them up for a day or two until further notice. Entering his office later in the afternoon, the first sergeant met the accused leaving it with two extract copies of the order authorizing his leave. "I asked him for them," the first sergeant testified, "but he said they were his and he was going to keep them". The squadron adjutant, being informed by the first sergeant of the accused's refusal to return the extract copies, told the accused he must see Captain Brier before leaving the base; that he had better see him. Finally the accused gave the first sergeant one of the two copies which he had taken from his desk (R. 34, 39, 48-49, 51-53).

Captain Brier did not tell the accused that his leave was revoked, nor, in fact, know that it had been when, on 10 December 1942, he sent to the accused - as well as to "all members of the station who were at that time absent from the station" - the telegram advising "your leave has been recinded" (sic) "return to station regardless of condition", which telegram was delivered to the accused at his home in Cincinnati on 12 December 1942 (R. 40; Defense Ex. "C").

On 14 December 1942 "the date", Captain Brier testified, "Lt. Uihlein returned from leave", he was placed under arrest by his squadron commander "upon direct instructions" of his group commander, who directed Captain Brier to charge the officer with all the violations of the Articles of War of which he had knowledge (R. 30,31,32,35,36,43).

In placing the accused under arrest, Captain Brier explained to him that the limits of his confinement were "the officers' mess, the quarters, and the latrine". Thereafter, when verbal extensions were granted, "the limits and places he was allowed to visit and the time he was allowed to be off the base were clearly outlined to him". After notifying him of his arrest on 14 December 1942, Captain Brier again authorized the accused to procure Government transportation for the purpose of moving his belongings from town to barracks (R. 30,32).

On December 31, 1942 and on 5, 6 and 7 January 1943, Captain Brier found the accused absent when he inspected both the accused's quarters and the latrine, during evening hours when the mess hall was closed. No extension of limits was in force on the 5th, 6th and 7th of January (R. 32-33).

On 31 December 1942 the officer of the day was also asked to make an inspection of the accused's quarters to see if he was in arrest as ordered. He checked periodically - approximately every hour and a half- from about 8 o'clock on the evening of 31 December 1942 until 7 o'clock on the morning of 1 January 1943. The accused was not in his quarters at any time during that period (R. 26-27).

On 11 January 1943, the Assistant Provost Marshal, having received an order from the Base Commander to place the accused in confinement, found the latter at the Colonial Restaurant, beyond the prescribed limits of his arrest. In compliance with the Base Commander's instructions, the accused was incarcerated, for the night, in the county jail at Conway. The next morning he was placed in the detention ward at the base hospital, from which he escaped five days later through a bathroom window, after prying loose the heavy wire grating from its iron frame. He was apprehended, that same day - on the afternoon of 17 January 1943 - in a locked bedroom in a private home in Myrtle Beach, after the Assistant Provost Marshal and a state highway patrolman had forced the door open (R. 72-79).

4. The evidence for the defense shows that from 27 November to 1 December 1943 (sic), the accused and Second Lieutenant Kenneth A. Sawyer went together, every day, to the base and to squadron operations, where they checked the flight schedules, and, finding they were not scheduled to fly, checked the mail, hung around for a while, and left. The operations officer had never talked to Lieutenant Sawyer about attending ground school classes, nor to the accused about attending them, in Sawyer's presence. About a week before 1 December 1942, Captain Brier talked to both of them about attending one ground school class, then in progress, saying "since you fellows are here, you might as well stay and hear this lecture"; which they did. Asked what their specific duties were if not to attend classes, Sawyer testified, "There were no specific duties. We were ignored". (R. 87, 93).

"Ground school", he continued, "was held anytime anybody wanted to give us lectures", notice of which was sometimes posted on the bulletin board, but whether between 27 November and 1 December, Sawyer could not remember. "How did you know when they were held", he was asked, on re-cross-examination, "when they were not scheduled on the bulletin board?" "Sometimes", he replied, "we would be together in operations, and some of the fellows would say that a class was going to be called, and sometimes when they were scheduled, they wouldn't have any" (R. 96).

The accused left the Lafayette Manor 1 December 1942. He could not check out because he did not have sufficient funds to pay his bill, which he paid on the following afternoon. On the evening of 1 December, before the accused's departure, he and Sawyer were in their room with a civilian guest, "drinking occasionally and having what you might call a general bull session", when Sawyer rang the bell for the porter to get some gingerale. After waiting twenty or thirty minutes - having no telephone - he called down the hall for it. It is possible he pounded the door at the same time. "I believe I said, 'Damn it', once, 'Where is that gingerale', and pushed the door just playfully", Sawyer testified (R. 83, 85-86, 91).

Shortly afterward - they had consumed about three drinks each at the time - there was a knock on their door, and the airdrome officer of the day came into the room. He informed them that Mrs. Houston had

telephoned the base, reporting a riot at the hotel, with furniture broken and a fight in progress. Upon his arrival, she had warned him that the accused and Sawyer would beat him up if he came to their room, and had taken him to the chaplain's room, whence he had come alone to theirs. Finding no evidence of the reported disturbance, after a brief and courteous interview, "he just left". (R. 83)

The accused and Sawyer then started down the stairs to demand an explanation of their landlady. Seeing them descending, Mrs. Houston announced in a loud voice, "There come those God damned sons of bitches now;" whereupon the accused called Mrs. Houston a bitch. That was the only epithet he applied to her. In the hall outside the lobby, the two young officers indignantly demanded an explanation of her report to the base. In the midst of the resulting argument, Mrs. Houston ran upstairs and got the chaplain. She had previously told the accused and Sawyer that the chaplain had been carrying tales behind their back, to their squadron commander, about their conduct at the hotel. The accused invited the chaplain out on the west porch to discuss this, which he characterized as "certainly a chicken shit thing to do". The chaplain said Mrs. Houston had told him they were going to beat him up. The accused and Sawyer went out on the porch, where the chaplain soon joined them, along with Major Fleming, the Base Executive Officer, whom Mrs. Houston had called via telephone. "There we discussed the matter", Sawyer testified, "and the Chaplain made the statement * * * that as far as he was concerned he had seen nothing of our actions there at the hotel which were out of the way and that all he knew was what Mrs. Houston had told him". Major Fleming left, and the chaplain accompanied the other two to their room, where all shook hands and agreed to let bygones be bygones (R. 84).

Lieutenant Sawyer, during his sojourn at Lafayette Manor, "heard Mrs. Houston use profanity on numerous occasions, and profanity of a type which men would not use". He elucidated this statement with two lurid and obscene examples of utterances ascribed to his landlady (R. 86-87, 92, 94).

Major Fleming, Base Executive Officer, testified for the defense, that, having responded to Mrs. Houston's telephone call on the evening of 1 December 1942, he inquired of the accused and Sawyer "what the trouble was, and they said there had been a little mix-up; that they had accused the Chaplain of reporting them to their Commanding Officer; and that it had all been straightened out". The Chaplain at that time "assured them that it wasn't him that reported them to the Commanding Officer". No disturbance was observed by Major Fleming, who remained "not over five minutes", and merely advised the accused and Sawyer to go up to their rooms and be quiet, whereupon the two of them left, accompanied by the chaplain (R. 97-98).

5. The accused, having elected to take the stand under oath, after his rights as a witness had been explained to him, testified that he was

listed as "a spare in the squadron", having been informed by the group operations officer that he was "being loaned to the 455th Bombing Squadron" at the time he joined it, and that at the end of two weeks, when it moved out, he would be returned to the 398th, his original organization. Not being assigned to duty in the 455th, "from October 14th on" he requested transfer to a pursuit squadron. Captain Brier, he testified,

> "expressed his opinion that it would be both beneficial to me and to the squadron inasmuch as I liked pursuit and wasn't interested in Bombers. He told me that such transfer would be forthcoming and told me so about every day * * *. I flew twice during the month of November. I was scheduled two more times, but it seems that the regular crew wanted to fly."

He attended some lectures in ground school, but not all,

> "because they were not all scheduled. On certain particular occasions there were lectures in ground school scheduled on the bulletin board, and these lectures were not given."

Sometimes these lectures had to do with subjects which did not pertain to the accused. He read the bulletin board and would always adhere to the schedule when it involved any subject with which he was connected (R. 102, 107).

Captain Brier suggested at one time that the accused attend a lecture. The latter had asked him why he had not been transferred, and Captain Brier told the accused to sit down and listen to the lecture, "and afterwards he would discuss it with me" (R. 103).

The squadron commander also mentioned the chaplain's reports to him about the accused's conduct at Lafayette Manor, after which, on the night of 1 December 1942, the accused spent the night in Captain Brier's room. Returning on 2 December and finding the bed assigned to him at the base broken, he spent the night in town. He did nothing about moving the next day, he testified, "since I could not get in touch with Captain Brier and I had a leave on or about the 4th and since I had all my belongings in town at the bus station" (R. 110-111).

On the night of 1 December, the accused, "rather incensed" at the officer of the day's report of Mrs. Houstons' "riot call", was descending the stairway at Lafayette Manor when "she called out in a loud voice, 'Here comes those two God Damn sons of bitches now', and I called her an old bitch at the time," he admitted. The hysterical landlady enlisted the support of the chaplain, whom the accused forthwith called to account for carrying tales about him to the commanding officer, asserting that any man who would do that was a "chicken shit". The chaplain denied everything, an argument ensued, and the officers adjourned to the porch, where Major Fleming soon joined them. After the accused had apologized to the chaplain, the two shook hands and parted amicably (R. 101-102).

On 4 December 1942, the accused testified,

"I went on official leave. I obtained the orders from the Sergeant's desk. There were two copies lying there, and I thought I was entitled to two. A few days later the Sergeant asked me for the papers back in front of Lt. Johnson; inasmuch as they gave me no reason why, I saw no reason to give them back, and finally he insisted so much I gave him one copy. I felt that the leave came from higher authority than Lt. Johnson. It was authorized and was signed by the group adjutant. I went on leave about December 4th about 5:30 in the afternoon after my check had arrived in the mail. I visited some friends in Detroit, Michigan, and on December 8th, I went to Cleveland and visited relatives and returned to Cincinnati on December 11th, and on the morning of December 12th, Western Union called me up and read the telegram to me at 9:28 A.M.

* * * * * * *

I arrived back at Myrtle Beach about 8:00 P.M. on the night of December 13th, and reported back to the Base about 10:00 in the morning the next day on December 14th.

* * * * * * * *

I went to the orderly room where I met Lt. Johnson. Lt. Johnson told me that I must see Captain Brier that day, and at 1 o'clock in the afternoon Captain Brier came back and called me in his office. He handed me a paper showing that I was in arrest.

* * * * * * * *

I was taken into Colonel Thatcher's office, and he read all the charges that had been brought against me, and it took about an hour, and he emphasized the seriousness of them, and had my resignation all typed up and said I will not press charges if you will resign, and I told him that I was not guilty of the charges and had no intention of resigning, and told him that if he desired to Court-Martial me, to go ahead. I told him that if he thought punishment was coming to me that it belonged under the 104th Article of War. As I was walking out of Colonel Thatcher's office he warned me against making statements and told me that I had no right to make any statement and said that I was to remain quiet. I was taken back to my quarters and remained there under arrest." (R. 100)

With reference to the four alleged beaches of restriction, during his arrest and prior to his confinement, the accused testified,

"On the night of January 11th when I was picked up by Lt. Klein in the Colonial Restaurant I had gone in there for the specific purpose of seeing Mr. Johnson who I believed knew a great deal about me and would testify as to my reputation and to the fact that I had not gotten out of line at any time. I went there because Captain Brier told me that under no conditions would I be permitted to see witnesses and the prosecution was seeing witnesses, and I had no opportunity. As far as the breach of arrest is concerned, the only other time that I broke arrest

was on January 6th. I went in for the same purpose — to see witnesses.

* * * * * * *

On January 5, 1943, I was in my quarters, and I went to the mess hall at times other than meal hours to make phone calls.

* * * * * * *

On December 31, 1942, I had made several phone calls, and I was in the mess hall and my quarters celebrating a little that night. I had consumed alcohol to a certain extent and I spent considerable time that evening coming to and from the mess hall." (R. 104)

With reference to his escape, the accused testified,

"I had been taken up to the Conway County jail, and I was thrown in the lock-up where they usually put robbers and everything else connected with it. I awoke the next morning and I was all bitten up, and there were big rats running around the place. I believe in the first place that there was no legality in bringing me up there. I was taken back to Myrtle Beach, and this was all in secret. When I was taken back to the hospital I was lodged in a veneral disease ward. It was turned into a veneral disease ward about three days later. They had a big thick door and a little window that was closed. I had gotten to the state of mind where I was certainly beginning to get highly nervous over the situation, and the fact that all these patients, both negroes and white were constantly peering in through the key hole and making all kinds of remarks, and I thought it was humiliating that, as an officer, I should be subjected to that.

I also happened to be engaged to a certain girl in town, and she had not known my whereabouts, and no one would let me communicate with her. Captain Mason had been informed that my mail was to be opened and I received letters addressed to the 455th Bomb Squadron and they were opened and were not resealed. I had not signed any agreement and had no intention that they read my mail coming in from my sister or anyone else. I escaped from confinement at the time alleged and I went directly to a girl's house that Lt. Klein mentioned and stayed there during all that time. There was no intention of doing anything other than to see her. When I got to her house, I was sick. I was running a very high temperature, and I was in bed at the time when Lt. Klein arrived.

* * * * * * *

I made no effort to go anywhere else other than that house and consented to go back when Lt. Klein came in." (R. 105)

During the period of his arrest in quarters, the accused asked Captain Brier for some special duty in the squadron, as he was, "just lying around all the time." Captain Brier agreed that the accused should be assigned to some duty, having been in arrest for such a long time, and undertook to request the group commander's permission for such

assignment. The latter, Captain Brier later reported to the accused, said he had no intention of ever letting the accused return to duty, and would not rest until he was dismissed from the Army (R. 104, 107).

The accused was a licensed pilot for two years before he was inducted into the Army, and had flown seven or eight thousand miles. He had studied engineering at the University of Cincinnati, before he began military training 2 January 1942. He always had an average of 90 or more in his work, never met with any accident, and received his wings on 10 September 1942, having graduated from the usual training, prerequiste to a pilot's rating. He was interested in becoming a first pilot, and was disappointed at not being transferred back to his original group, with whom he had flown 35 hours during the first two weeks in October, whereas he has flown only 6 hours at Myrtle Beach (R. 105, 114).

6. The Specification, Charge I, alleges absence without leave from 7 December 1942 to 14 December 1942. The uncontradicted evidence shows that a valid order had been issued granting the accused a leave, prior to 4 December 1942, the date of his departure. Neither the first sergeant's nor the squadron adjutant's unexplained reluctance to permit the accused to take extract copies of this order from the orderly room affected the leave status which the order created. The accused's squadron commander testified that he had no knowledge that this leave had been previously revoked when, on 10 December 1942, he telegraphed the accused — and all other absent members of his squadron —"Your leave has been recinded return to station regardless of condition;" upon receipt of which the accused promptly returned. No published order revoking his leave was introduced. The record, failing signally to show beyond a reasonable doubt that the accused's absence for the period specified was "without leave", does not support the finding of guilty of the Specification, Charge I, nor of Charge I.

7. Specification 2, Charge II, alleges disobedience of Captain Brier's order to move to the bachelor officers' quarters, 1 December 1942. While Captain Brier first testified that he ordered the accused to move "immediately," on cross-examination he retracted this statement, admitting he might have said "as soon as convenient." The evidence shows that the accused left Lafayette Manor Hotel on the day the order was given, spent the night at the base in his squadron commander's quarters, and checked out at the hotel the next day, as soon as he had obtained funds to pay his bill there. He admits that he spent the next two nights in town — his bed at the base was broken, he was going on leave on the 4th and had all his belongings in town at the bus station—but moved to the base immediately on his return from leave; which would appear to constitute substantial compliance with an order to move "as soon as convenient." The record discloses a real doubt in the mind of the man who gave the order as to whether it was to move "immediately", or "as soon as convenient". His testimony constitutes all the evidence pertaining to this essential element of the offense alleged. It is insufficient to show, beyond a reasonable doubt, the disobedience charged. The record does not sustain the finding of guilty of Specification 2, Charge II, nor of Charge II.

8. Specifications 1 and 5, Charge III, allege, respectively, defamatory and provoking speech to Mrs. Sam Houston, and disrespectful behavior toward Chaplain Branyan, the accused's superior officer. The evidence is ample that the accused applied to the persons named, publicly and to their faces, the indecent epithets attributed to him in these two Specifications. Those addressed to Mrs. Houston were defamatory and provoking; the language directed to the Chaplain, opprobrious and denunciatory. The uninhibited grossness of the expressions employed, regardless of the provocation shown, rendered their public utterance by an officer definitely conduct of a nature to bring discredit on the military service. The record sustains the findings of guilty of Specifications 1 and 5, Charge III and Charge III -- as amended --in violation of Article of War 96.

9. Specification 4, Charge III, alleges that the accused, "from about November 27, 1942 to December 1, 1942, failed to repair to his place of duty at the proper time." The Specification is defective in its failure to allege the nature, time or place of the duties to which the accused failed to repair. However, the record discloses evidence that the accused, having been told by the squadron operations officer, who had charge of ground school classes, to be present at all meetings, and having been reprimanded by his squadron commander for frequent absences, did not attend ground school classes on the dates alleged. The defense introduced evidence of indefiniteness in the accused's orders, and irregularity in ground school schedules; and the accused himself testified there were no classes scheduled on the dates alleged; also that he was at ground school on those particular dates. So the issue was fairly joined.

> "No finding or sentence need be disapproved solely because a specification is defective if the facts alleged therein and reasonably implied therefrom constitute an offense, unless it appears from the record that the accused was in fact misled by such defect, or that his substantial rights were in fact otherwise injuriously affected thereby" (MCM, 1928, par. 87b).

The record sustains the finding of guilty of Specification 4, Charge III, in violation of Article of War 96.

10. Specifications 1, 2, 3 and 4, Additional Charge I, allege breach of arrest on four separate occasions. The testimony of repeated inspections of the accused's quarters, in the first three instances, furnishes substantial evidence of the commission of the offenses charged; and in the last instance, the evidence shows he was apprehended outside the prescribed limits. One of the alleged breaches was admitted by the accused. His explanation of his whereabouts on the occasion of the others is not convincing. The record sustains the findings of guilty of Specifications 1, 2, 3 and 4, Additional Charge I, and of Additional Charge I.

11. The Specification, Additional Charge II, alleges escape from confinement, which was not only clearly shown by the testimony of the

prosecution's witnesses, but also admitted by the accused. The record sustains the findings of guilty of the Specification, Additional Charge II, and of Additional Charge II.

12. The accused is 22 years of age. The records of the Office of The Adjutant General show enlisted service Aviation Cadet from 2 January 1942 to 5 September 1942; appointment as second lieutenant, Air Corps Reserve, and assignment to active duty 6 September 1942.

13. 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 not legally sufficient to support the findings of guilty of Charge I and its Specification, nor of Charge II and Specification 2 thereunder; legally sufficient to support the findings of guilty of Specifications 1, 4 and 5, Charge III, in violation of Article of War 96; Additional Charge I and its Specifications; and Additional Charge II and its Specification; legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 96 or 69.

Edward Dresson, Judge Advocate

Abner E. Lipscomb, Judge Advocate

Benjamin R. Sleeper, Judge Advocate

SPJGN
CM 234414

1st Ind.

War Department, J.A.G.O., 7 - AUG 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 Julius P. Uihlein (0-792325), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is not legally sufficient to support the finding that the accused was absent without leave for seven days, in violation of Article of War 61 (Chg. I, and its Spec.); not legally sufficient to support the finding that the accused willfully disobeyed the lawful command of his superior officer, in violation of Article of War 64 (Chg. II, Spec. 2); legally sufficient to support the other findings; and legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the sentence of dismissal be approved, 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 your 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. Under Sec. of War.
Incl 3 - Form of Executive action.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence as approved by reviewing authority confirmed but forfeitures remitted. G.C.M.O. 211, 2 Sep 1943)

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

SPJGH
CM 234443

MAY 13 1943

UNITED STATES	93rd INFANTRY DIVISION
v.	Trial by G.C.M., convened at Fort Huachuca, Arizona, March 13, 1943. Dismissal, total forfeitures, and confinement for three (3) years.
Second Lieutenant HERBERT B. PURVIS (0-1290656), 369th Infantry.	

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Second Lieutenant Herbert B. Purvis, 369th Infantry, did, at Fort Huachuca, Arizona, on or about January 29th, 1943, with intent to defraud falsely make in its entirety a certain check in the following words and figures, to-wit:

Fort Huachuca, Ariz. 1/29/43 1943 No. 15
91-167 ARMY BRANCH 91-167
MINERS AND MERCHANTS BANK
(Head Office, Bisbee, Ariz.)

PAY TO THE ORDER OF CASH $40.00
Forty Dollars ..... Dollars
HENRY M. BENNETT

Indorsed.
Henry M. Bennett
2nd Lt. Inf.

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

Specification 2: In that Second Lieutenant Herbert B. Purvis, 369th Infantry, did, at Fort Huachuca, Arizona, on or about February 1st, 1943, with intent to defraud falsely make in its entirety a certain check in the following words and figures, to-wit:

Fort Huachuca, Ariz. 2/1/43 1943 No. 18
ARMY BRANCH
MINERS AND MERCHANTS BANK 91-16
Bisbee, Ariz.

PAY TO THE ORDER OF CASH $20.00
Twenty Dollars ..... Dollars
HENRY M. BENNETT

Indorsed.
HENRY M. BENNETT
2nd Lt. Inf.
Co. A - 369th

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

He pleaded not guilty to and was found guilty of the Charge and all 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 three years. 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 Second Lieutenant Henry M. Bennett had on several occasions loaned money to the accused, and that these loans were made by check. Three of these checks, which Lieutenant Bennett identified as checks he had drawn, were introduced in evidence as Exhibit A. Lieutenant Bennett had a checking account in the Army Branch of Miners and Merchants Bank, and did not authorize anyone to write checks on that account. He identified two checks which had been "paid against" his account and received by him from the bank with his cancelled checks, and they were introduced in evidence as Exhibit B. Both checks were drawn to cash, one dated January 29, 1943,

for $40, and the other dated February 1, 1943, for $20. The name "Henry M. Bennett", which appeared as both the drawer and indorser of each of the two checks, was not in his handwriting. Lieutenant Bennett did not see either of these checks until he asked the bank for his cancelled checks. The branch manager for the Fort Huachuca Exchange identified the check for $40 as a check which he cashed for the accused. The check had been indorsed before it was presented to him (R. 8-10, 13-14, 17-18).

In the course of an investigation of the case by Captain E. S. Booth, J.A.G.D., the accused, after he had been warned of his rights under the 24th Article of War, stated that he wrote the first indorsement on each of the three checks marked Exhibit A. The accused, in the presence of Captain Booth, wrote four check forms which were received in evidence as Exhibit C, and wrote the words and figures in the center of a sheet of paper marked Exhibit D (R. 10-13).

Mr. C. B. Arnold, inspector of questioned documents, City Police, Phoenix, Arizona, whom the court accepted as an expert witness, compared the two questioned checks (Ex. B), with known writings of accused, the indorsement "Herbert B. Purvis" on each of the three checks (Ex. A), and the writing on the sheet of paper (Ex. D), and expressed the opinion that the person who wrote the three indorsements and who wrote that sheet of paper, made the face of and indorsed the two questioned checks (Ex. B). (R. 20-23.)

4. The defense presented no testimony. The accused elected to remain silent.

5. The evidence shows clearly and without contradiction that the accused, without authority, falsely made and indorsed with intent to defraud the two checks alleged in Specifications 1 and 2 of the Charge, and uttered the check alleged in Specification 1, and that the checks were in fact paid by the bank upon which drawn against the account of the purported drawer, Henry M. Bennett.

6. The record of trial of this officer upon other offenses (CM 232980) now before the Board of Review should be considered in connection with action upon this record.

7. The accused is 26 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. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violation of Article of War 93.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

SPJGH
CM 234443

1st Ind.

War Department, J.A.G.O., MAY 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 Herbert B. Purvis (0-1290656), 369th 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. I recommend that the sentence be confirmed and carried into execution.

3. I recommend that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement.

4. The sentence in the instant case (CM 234443) was adjudged on March 13, 1943. Accused was previously (February 19, 1943) tried by general court-martial upon other charges, found guilty of absence without leave for thirteen days, in violation of Article of War 61, and of making a false official statement, in violation of Article of War 95, and was sentenced to dismissal and total forfeitures. The record of trial in that case (CM 232980) has been examined by the Board of Review and the Board has submitted its opinion that the record is legally sufficient to support the findings of guilty of absence without leave and the sentence, but is legally insufficient to support the findings of guilty of making the alleged false official statement. I concur in that opinion. Action by the President upon both records of trial appears to be unnecessary. Provided the sentence in the instant case is carried into execution, I shall cause the record of the other trial (CM 232980) to be filed in my office without further action. The opinion of the Board of Review in the other case (CM 232980) is attached hereto for your information.

5. Inclosed herewith are a draft of a letter for your signature, transmitting the record in the instant case 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.

4 Incls.
Incl.1- Rec. of trial.
Incl.2- Lft.ltr. for sig. Sec. of War.
Incl.3- Form of action.
Incl.4- Cpy. Op. in CM 232980.

(Sentence confirmed. G.C.M.O. 134, 1 Jul 1943)

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

SPJGK
CM 234444

19 JUN 1943

UNITED STATES	)	93RD INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at
	)	Fort Huachuca, Arizona, March
Second Lieutenant WILLIAM	)	13, 1943. Dismissal, total for-
B. NELSON (0-1289470),	)	feitures, and confinement for
369th Infantry.	)	three (3) years.

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

CHARGE: Violation of the 93d Article of War.

Specification: In that 2d Lieutenant William B. Nelson 369th Infantry, did, at Fort Huachuca, Arizona, on or about January 9, 1943, with intent to defraud falsely make in its entirety a certain check in the following words and figures, to wit:

Fort Huachuca, Ariz. Jan. 9, 1942 No._____
91-167 ARMY BRANCH 91-167
MINERS And MERCHANTS BANK
(Head Office, Bisbee, Ariz.)
Pay To The
Order Of _____ Cash _____ $ 70.00/100

Seventy dollars -------- 100/00 Dollars

/sgd/ Harold J. Barnes
2d Lt. 368th Inf.

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

He pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for three years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows:

Second Lieutenant Harold D. Barnes, 368th Infantry, Fort Huachuca, Arizona, the person whose signature is alleged to have been forged, testified that on 9 January 1943, he had a checking account at the Army Branch of the Miners and Merchants Bank, Fort Huachuca, Arizona, and that when he received from the bank in February a statement covering his January 1943 account, he discovered among the items which had been charged to his account a check in the amount of $70 payable to cash, purporting to bear the signature and the indorsement of the witness (R.8; Ex.A). Realizing that the instrument in its entirety was spurious, the witness took the check to the bank on which it had been drawn and informed the bank that the check was a forgery. The matter was also reported to the Provost Marshal. Lieutenant Barnes stated that he did not write any part of the check, that the signature and indorsement on the check were not in his handwriting, and that he did not authorize anyone to write a check in his name (R.6,8,9).

Mr. R.T. Edwards, Assistant Cashier of the Miners and Merchants Bank, Bisbee, Arizona, and manager of the Army Branch at Fort Huachuca, identified the check in question as one which his bank had paid on 12 January 1943, and charged to the account of Harold J. Barnes. The witness corroborated the statement of Lieutenant Barnes that the check was returned to the bank by Lieutenant Barnes as a forged instrument. The witness stated that he had been engaged in the banking business "off and on since 1908", and that in his experience as a banker he had had occasion to examine signatures with a view of detecting forgeries (R.9), but especially with a view of determining "if the checks were genuine" (R.11). The witness testified that he was "familiar" with the signature of Lieutenant Harold J. Barnes; that he had compared the alleged forged signature with the genuine signature of Lieutenant Barnes, and that in his opinion the signature on Exhibit "A" was not in the genuine handwriting of Lieutenant Barnes (R.8-9). The witness was then

shown another check in words and figures identical with the alleged forged instrument. He stated that this check, including the signature and indorsement thereon, was written in his presence by the accused at the request of Captain Edwin S. Booth, Judge Advocate General's Department, 93rd Division, Fort Huachuca, Arizona, for the purpose of comparing the handwriting of the specimen with the handwriting on the check alleged to have been forged (R.10; Ex. B). Witness had never compared the handwriting on the two checks (R.11, Exs. A and B).

Captain Booth stated that the check (Ex. B), together with the signature and indorsement thereon, was written by the accused in his presence and at his request. He also testified that the accused after being "* * * warned of his rights under the 24th Article of War to the effect that anything he might say might be used against him and he could not be compelled to testify against himself or make any statement which might incriminate himself", made a statement which was reduced to writing by the witness and signed by the accused. No promise of reward or immunity was offered the accused and his statement was "voluntary and of his own free will". Captain Booth identified the statement, which, with certain exceptions (relating to other checks) and without objection, was received in evidence (R.13,15; Ex. C). This statement contains the admission by the accused that he wrote "and passed a check dated Jan 9 1942 (3), for $70.00 and signed Harold J. Barnes"; that he received the money upon, and had no authority to draw the check (R.15).

Mr. C. B. Arnold of Phoenix, Arizona, testified that he is an inspector of questioned documents; that he has made a study of the science of handwriting over a period of 20 years, and has been continuously engaged in that field since 1926 when he was first qualified in a Federal court. During the past 16 years witness has been in charge of the forgery detail of the Phoenix Police Department, handling nothing but checks and forgeries. Without any objection the witness was accepted as an expert. Mr. Arnold stated that he had made a careful examination and comparison of the alleged forged check (Ex. A), and the specimen check marked Exhibit "B", and that in his opinion both checks were written by one and the same person (R.17-18).

Accused declined to testify or make an unsworn statement.

4. The undisputed evidence shows that when Lieutenant Barnes received from the Army Branch, Merchants and Miners Bank, Fort Huachuca, Arizona, in February, 1943, a statement covering his January, 1943, account, he discovered among the items which had been charged to his account a check in the amount of $70 payable to cash, and purporting

to bear his signature and indorsement. The check was a forgery and Lieutenant Barnes so advised the bank. The cashier of the bank admitted that the check was not signed in the genuine handwriting of Lieutenant Barnes. The accused, after being fully advised of his rights under Article of War 24, signed a confession dated 4 March 1942, stating in effect that he wrote, negotiated and received the money on the check, and that he had no authority for so doing. Corroborating the confession of the accused, Mr. C.B. Arnold, a qualified expert in handwriting, after an examination and comparison of the alleged forged check with the specimen check shown to have been written by the accused, testified that in his opinion both checks were written by one and the same person.

It is the opinion of the Board of Review that the evidence is amply sufficient to support the findings of guilty of the Charge and its Specification.

5. It is noted that the confession of the accused (Ex. C) refers to other checks than the one upon which accused was being tried; viz, one for $15 dated 13 February 1943, and one for $65 dated 18 February 1943. Since these checks involve transactions which occurred subsequent to the date of the offense for which accused was being tried, any reference to them in the presence of the court was improper. The record shows, however, that the trial judge advocate expressly stated to the court that the confession as introduced was limited solely to the $70 check. In view of this statement, and considering the record as a whole, the Board of Review is convinced that the error did not injuriously affect the substantial rights of accused within the meaning of Article of War 37.

6. The accused is 23 years of age. The records of the Office of The Adjutant General show enlisted service from 31 March 1941, through 5 August 1942, on which later date accused was commissioned a temporary Second Lieutenant, Army of the United States.

7. The court was legally constituted and had jurisdiction of the person and of 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, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 93.

Jim C. Gier, Judge Advocate.

John Hannikel, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 25 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 William B. Nelson (0-1289470), 369th 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 thereof. I recommend that the sentence be confirmed, that the period of confinement be reduced to one year, that the United States Disciplinary Barracks, Fort Leavenworth, Kansas, be designated as the place of confinement, and that the sentence as thus modified be carried into execution.

3. Consideration has been given to the attached letter of accused to the Secretary of War dated 28 April 1943, requesting clemency in his behalf.

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 hereinbefore 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. of accused to Sec. of War, 28 Apr. 1943.

(Sentence confirmed but confinement reduced to one year. G.C.M.O. 167, 28 Jul 1943)

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

SPJGN
CM 234458

19 JUL 1943

U N I T E D S T A T E S	)	FORT KNOX, KENTUCKY
v.	)	Trial by G.C.M. convened at Fort Knox, Kentucky, 26 January 1943. Dishonorable discharge and confinement for thirty (30) years. Disciplinary Barracks.
Private IRVINE D. WILLIAMS, (6665555), Company I, 35th Armored Regiment.	)	

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REVIEW by the BOARD OF REVIEW
CRESSON, LIPSCOMB and SLEEPER, 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 96th Article of War.

Specification 1: In that Private Irvine D. Williams, Company I, 35th Armored Regiment, a garrison prisoner employed without armed guard, did, at Fort Knox, Kentucky on or about August 16, 1942, violate the conditions prescribed for such employment by absenting himself without authority from his appointed place of duty.

Specification 2: In that Private Irvine D. Williams, Company I, 35th Armored Regiment, did, at Greenwood, Mississippi on or about October 29, 1942, impersonate an officer of the Army of the United States, to wit: a Second Lieutenant of the Tank Corps.

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

Specification: In that Private Irvine D. Williams, Company I, 35th Armored Regiment, did, at Fort Knox, Kentucky on or about August 16, 1942 desert the Service of The United States and did remain absent in desertion until he was apprehended at Greenwood, Mississippi, on or about November 4, 1942.

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

Specification 1: In that Private Irvine D. Williams, Company I, 35th Armored Regiment, did, at Greenwood, Mississippi on or about October 31, 1942, with intent to defraud Ralph E. Petty, wrongfully and unlawfully make and utter to cash, a certain check, in words and figures as follows, to wit:

THE BANK OF GREENWOOD 85-563

CUSTOMERS DRAFT

_____ Greenwood, Miss., 10/31/42 19 ____

Pay to the
Order of CASH - - - - - - - - - - - - - - - - $ 10.00

Ten and no/100 DOLLARS

Value received and charge to account of

TO Citizens National Bank
Bowling, Green, Kentucky /s/ Irvine D. Williams

and by means thereof, did, fraudulently obtain from Ralph B. Petty $10.00 in payment of said check, he the said Irvine D. Williams, Company I, 35th Armored Regiment, then well knowing that he did not have and not intending that he should have any account with the Citizens National Bank, Bowling Green, Kentucky for the payment of said check.

Specification 2: In that Private Irvine D. Williams, Company I, 35th Armored Regiment, did, at Greenwood, Mississippi on or about October 31, 1942, with intent to defraud Ralph B. Petty, wrongfully and unlawfully make and utter to cash, a certain check, in words and figures as follows, to wit:

THE BANK OF GREENWOOD 85-563

CUSTOMER'S DRAFT

Greenwood, Miss., 10/31 19 42

Pay to the
Order of Cash $ 5.00

Five no/100- - - - - - - - - - - - - - - - - - DOLLARS

Value received and charge to account of

TO Citizen National Bank
Bowling Green, Kentucky /s/ Irvine D. Williams

and by means thereof, did, fraudulently obtain from Ralph B. Petty $5.00 in payment of said check, he the said Irvine D. Williams, Company I, 35th Armored Regiment, then well knowing that he did not have and not intending that he should have any account with the Citizens National Bank, Bowling Green, Kentucky for the payment of said check.

Specification 3: In that Private Irvine D. Williams, Company I, 35th Armored Regiment, did, at Greenwood, Mississippi on or about October 30, 1942, with intent to defraud The Citizens National Bank, Bowling Green, Kentucky, a corporation duly organized under the laws of the United States, wrongfully and unlawfully make and utter to cash, a certain check, in words and figures as follows, to wit:

THE BANK OF GREENWOOD 85-563

CUSTOMER'S DRAFT

Greenwood, Miss., 10/30/42 19 _____

Pay to the
Order of CASH $ 10.00

Ten and no/100 DOLLARS

Value received and charge to account of

TO Citizens Natl. Bank
Bowling Green, Kentucky /s/ Irvine D. Williams

and by means thereof, did, fraudulently obtain from The Bank of Greenwood $10.00 in payment of said check, he the said Irvine D.

Williams, Company I, 35th Armored Regiment, then well knowing that he did not have and not intending that he should have any account with the Citizens National Bank, Bowling Green, Kentucky for the payment of said check.

Specification 4: In that Private Irvine D. Williams, Company I, 35th Armored Regiment, did, at Greenwood, Mississippi on or about October 29, 1942, with intent to defraud The Citizens National Bank, Bowling Green, Kentucky, a corporation duly organized under the laws of the United States, wrongfully and unlawfully make and utter to cash, a certain check, in words and figures as follows, to wit:

THE BANK OF GREENWOOD 85-563

Greenwood, Miss., 10/29/42 19__

CUSTOMERS DRAFT

Pay to the Order of CASH $ 20.00

Twenty and no/100- - - - - - - - - - - - - - -DOLLARS

Value received and charge to account of

TO Citizens Natl Bank
Bowling Green, Kentucky /s/ Irvine D. Williams

and by means thereof, did, fraudulently obtain from The Bank of Greenwood $20.00 in payment of said check, he the said Irvine D. Williams, Company I, 35th Armored Regiment, then knowing that he did not have and not intending that he should have any account with the Citizens National Bank, Bowling Green, Kentucky for the payment of said check.

He pleaded guilty to Specification 1, Charge I, and to Charge I; guilty to the Specification, Charge II 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; not guilty to Charge II, but guilty of a violation of Article of War 61; and to Specification 2, Charge I, and to Charge III and each of the four Specifications, thereunder, not guilty. He was found guilty of all Specifications and Charges. Evidence of two previous convictions was introduced, each for violation of Article of War 61. 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 30 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.

3. The evidence for the prosecution shows that on 3 August 1942, the accused, then a garrison prisoner, executed a written parole agreement with the post prison officer, authorizing the accused to work without an armed guard, and containing the following stipulation:

> "The penalty for * * * desertion has been explained to me and I realize that if I * * * desert, I may be given a sentence of two and one-half years confinement at hard labor."

According to the morning report of the Post Casual Detachment, and the stipulated testimony of the sergeant of the guard, the accused absented himself without leave from his station on 16 August 1942. According to his own statement to the investigating officer - introduced by the prosecution - the accused separated himself from the military service on or about 24 August 1942, at which time information that his wife was suing for a divorce prompted him to go to Louisville, Kentucky. He was apprehended in Greenwood, Mississippi, on 4 November 1942, where, according to the deposition testimony of various witnesses, he wore on his uniform at various times the insignia of a tank corps second lieutenant (R. 10-13, 15, Exs. A-I-Q).

While the accused was at Greenwood, Mississippi, during the month of October 1942, he cashed two checks for ten dollars each, one for twenty, and one for five dollars, all drawn on the Citizens National Bank, Bowling Green, Kentucky, in which bank the accused had established a checking account on 16 May 1940, only to close it out by withdrawing his entire balance on 23 May 1940. The checks themselves were introduced in evidence and correspond, in every particular, to the checks described in the four Specifications under Charge III. Those described in the first two Specifications, Charge III, bear the indorsement of Ralph Petty, in whose home the accused was visiting; those described in the last two, that of the Bank of Greenwood, where Mr. Petty was employed as teller. Petty testified by deposition that he indorsed the first two to enable the accused to cash them at a night-club in the vicinity of Greenwood, Mississippi; and that he was acting as representative of the Bank of Greenwood when he cashed the other two for the accused, at the teller's window in said bank. All four of these checks were returned unpaid by the Citizens National Bank of Bowling Green, with the notation "no account."(R. 13-14, Exs I-P)

4. The accused, having been duly advised of his rights as a witness, elected to take the stand under oath. He testified that the particular cause of his leaving the service was "domestic trouble, family trouble", his wife having written him a letter while he was in the stockade, stating that she was suing him for a divorce — which was eventually granted on 7 October 1942. (R. 15-16)

The accused purchased a tailor-made uniform in Louisville, before he went to Mississippi; wore officer's insignia at one time when he was drinking; and admitted, "I was wearing the insignia naturally when I was picked up". (R. 16)

On cross-examination, he testified that he came back in the Army on 7 September 1940, and was stationed at Fort Knox until 15 April 1942, when he was transferred to Pine Camp, New York. His wife lived in Louisville, and his next station was the guardhouse, Fort Knox, where he consulted the prison officer with reference to his domestic troubles, before taking unauthorized leave; after which he signed "papers concerning the divorce" in Louisville. (R. 16-19)

In response to questions by members of the court, he testified, "I stayed in Louisville most of my time and I got on a big toot and went down to Mississippi. I had some kin-folk down there." (R. 19)

5. Specifications 1 and 2, Charge I, allege, respectively, breach of parole and impersonation of an officer, in violation of Article of War 96. The accused's plea of guilty to the first, and his admission on the witness stand of his commission of the second offense, are corroborated by substantial and uncontradicted testimony. Both offenses are highly prejudicial to good order and military discipline. The record sustains the court's findings of guilty of Charge I and the two Specifications thereunder.

6. The Specification, Charge II, alleges desertion on 16 August 1942, terminated by apprehension at Greenwood, Mississippi, on or about 4 November 1942, in violation of Article of War 58. The record showing prolonged unauthorized absence terminated by apprehension at a distant point, sustains the finding of guilty of Charge II and the Specification thereunder. In view of the recitation in the parole agreement, which the accused was required to sign on 3 August 1942, "if I desert I may be given a penalty of two and one-half years confinement at hard labor", it is questionable if these findings are morally - as contradistinguished from legally-susceptible

of supporting a sentence for this particular offense, of more than two and one-half years.

7. Specifications 1, 2, 3 and 4, Charge III, allege the fraudulent obtaining of various sums of money, ranging from $5.00 to $20.00, by means of wrongfully and unlawfully making and uttering checks, well knowing that the account on which they were drawn was non-existent, and not intending that it should exist, in violation of Article of War 96. The uncontradicted evidence establishes the making and uttering of these checks by the accused, and his obtaining, by means thereof the money for which each was drawn, from - or upon the guarantee of - the persons alleged in the respective Specifications; also the non-existence of the account on which the checks were drawn. It is a fair - indeed, a well-nigh inescapable - inference from the facts shown, that the accused had no intention of establishing an account for the purpose of covering these checks when they should be presented at the drawee bank. The variance in the Specifications and proof, as to the checks described in the first two Specifications, Charge III, in that they allege the money was obtained from Petty, whereas the proof shows that Petty indorsed them to enable the accused to procure the sums of money for which they were drawn from a night-club, is not sufficiently material to require disapproval of the finding of guilty of these two Specifications, which might have been amended by exception and substitution, without prejudice to the accused. The checks were introduced in evidence, with Petty's the first indorsement thereon, and the proof shows that the accused obtained the cash by negotiating them. The record sustains the findings of guilty of Charge III and its four Specifications, which allege crimes and offenses not capital, and not made punishable by any Article of War other than 96, committed in violation of public law enforced by the civil power. Moreover the conduct involved in these offenses is definitely of a nature to bring discredit upon the military service.

8. The accused is 24 years old. The charge sheet shows prior service from 7 March 1938 to 4 November 1939; current enlistment, 7 September 1940.

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 of guilty and the sentence. Such punishment as a court-martial may direct is authorized upon conviction of a violation of Article of War 58.

Charles L. Grisson, 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.

11 JUN 1943

SPJGH
CM 234468

N.D

UNITED STATES	)	FOURTH AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at McChord Field, Washington, April 1, 1943. Dishonorable discharge and confinement for eighteen (18) months. Disciplinary Barracks.
	)	
Staff Sergeant OSCAR O. RHEA (37007656), 863rd Guard Squadron, McChord Field, Washington.	)	

HQ. 4th AIR FORCE
JUN 18 1943
201

HOLDING 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 soldier named above.

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Staff Sergeant OSCAR C. RHEA, 863rd Guard Squadron, did at McChord Field, Washington, on or about January 21, 1943, wrongfully and willfully and with intent to steal, remove a letter from the United States mail addressed to Roy H. Williams while said letter was in custody of the Provost Marshal, McChord Field, Washington, and opened the said letter and removed two checks from the said letter with the intent to permanently deprive the true and lawful owner, R. H. Williams, the use thereof.

The accused pleaded to the Specification of the Charge, guilty, except the words "remove a letter from the United States Mail" and "while said letter was in the custody of the Provost Marshal, McChord Field, Washington, and

opened the said letter and", substituting therefor respectively the words "remove two checks from a letter" and "with the intent to permanently deprive the true and lawful owner R. H. Williams, the use thereof", of the excepted words not guilty and of the substituted words guilty; and to the Charge, guilty. He was found guilty of the Charge and the Specification thereunder. He was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for eighteen months. 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.

3. The pertinent evidence for the prosecution shows that on January 21, 1943, the accused, provost sergeant of the 863rd Guard Squadron, McChord Field, Washington, with his headquarters in the guardhouse, was directing the activities of the military police under the orders of Captain N. H. Dorn, Provost Marshal. In the distribution of mail at the guardhouse, the mail comes from the post office to the message center where it is picked up by a driver and brought to the guardhouse where it is segregated into two lots, prisoners'mail, and mail for the Provost Marshal. The accused was not authorized to open mail except in instances where Captain Dorn gave specific instructions. Written permission to open the mail of each prisoner to search for money and valuables, is obtained when the prisoner enters the guardhouse (R. 9-12, 17-18).

Upon a date not directly shown the accused gave to Private First Class M. J. May, serving as provost clerk under the accused, a check of the Louisville and Nashville Railroad Company dated November 30,"1943" payable to R. H. Williams, and another check of the same company. The accused stated that he took the Williams check out of the mail, and wanted to know if they should cash the checks. After some conversation May cashed the Williams check, brought back the money, and gave $10 of the proceeds to the accused and himself retained the balance. Exhibit 1 was a photostat of the Williams check which accused gave to May. The photostat shows the amount of the check was $15.50 and the stamped bank indorsements show it was paid on January 27, 1943 (R. 25-29).

After Captain N. H. Dorn, Provost Marshal, had warned accused of his rights "to talk or not to talk", he talked with the accused two or three times. The accused made a statement to Captain Dorn at some time shortly prior to the date March 13, 1943, on which Captain Dorn

signed the Charges, that he took an envelope addressed to H. R. Williams in care of the Provost Marshal, McChord Field, Washington, which contained two checks, from the desk of Captain Dorn or from a desk outside of the office of Captain Dorn. Accused stated further that he carried the envelope around in his pocket two or three days (R. 13-16).

A prisoner by the name of H. R. Williams came to Captain Dorn and complained that he should have received a check from the railroad company (R. 23-34). Captain Dorn received in response to a letter, a photostatic copy of a check of the Louisville and Nashville Railway Company dated November 30, 1942, payable to R. H. Williams. Upon identification by Captain Dorn of a photostat copy as a true copy of an original check which was handed him by the prosecution, the photostat copy was received in evidence, upon an affirmative statement of "No objection" by the defense, as Exhibit 1 (R. 15-17, 23-24; Ex. 1).

4. Defense:

Staff Sergeant Joseph G. Brand, 863rd Guard Squadron, testified that mail is picked up at the base message center by patrol drivers, brought to the guardhouse where the provost marshal mail, including the prisoners' is put on Captain Dorn's desk and distributed from there. To the best of his knowledge the mail so placed was not opened by an enlisted man, except in the presence of the Provost Marshal or his commissioned assistant (R. 30-36).

Staff Sergeant Leonard C. Ryan, 863rd Guard Squadron, testified that the mail was brought from the message center to the guardhouse by a patrol driver, where it was opened by an officer or by Sergeant Ryan in the presence of an officer. An enlisted man had never, to his knowledge, opened mail for a prisoner except in the presence of an officer (R. 36-37).

Private Joseph Gallagher, a prisoner, testified that he was in the guardhouse around January 1, 1943, that it was a common practice for a noncommissioned officer to open mail for the prisoners, that he had seen Sergeant Ryan open a letter and Sergeant Brand open a package under those circumstances (R. 38-45).

Private George Longwich, a prisoner, testified he had been confined in the guardhouse since about January 1, 1943, and had seen both Sergeant Ryan and Sergeant Brand open first class mail for prisoners when not in the presence of a commissioned officer (R. 45-48).

The accused testified that he became a staff sergeant, August 6, 1942. He was provost sergeant at the guardhouse and had always been allowed to open mail for prisoners even before he was made provost sergeant. As provost clerk about a year previously, the provost marshal, Lieutenant Allen and later Lieutenant Dorn authorized him to open mail. He took "this particular check" which he found in a letter which he had opened around January 21st. The mail was brought from the message center by the patrol driver and handed him at his desk just outside of the office of Captain Dorn. He put prisoners' mail and mail from organizations in Captain Dorn's basket. He heard Captain Dorn ask Sergeant Ryan if they had a prisoner named "Ray H. Williams". When Sergeant Ryan replied in the negative, Captain Dorn put it in the outgoing basket, and accused took it to his desk to look over. He knew there was a Williams in the guardhouse with the initial "H". He then opened the letter to see if it had any further identification. He found two checks in it, one for $15 and one for around $9. When Ryan said that this was not the man in the guardhouse, he should have resealed the envelope with tape and sent it back and right there he "started being guilty". He did take the checks but was not guilty of opening mail as charged because he had permission. He could not find a memorandum signed by Captain Dorn in August, giving him permission as provost sergeant to open mail (R. 49-52).

Upon cross-examination and examination by the court, he stated there were two checks in the letter addressed to R. H. Williams. The letter was first class mail and bore the return address of a railroad company, but was not certain whether it was from the Louisville and Nashville Railway Company. He knew that he should have returned the letter to the McChord Field post office. The check, Exhibit 1, was a check he removed. He gave both checks to the other fellow. He received $10 of the proceeds of the $15.50 check. He had not seen the $9 check since then. The check was not indorsed when he gave it to the other fellow (R. 49-60).

5. In rebuttal for the prosecution Second Lieutenant Raymond J. Husebo, Air Corps, testified that he was base postal officer, McChord Field. Mail for prisoners was delivered to the message center at post headquarters, picked up there by a guard and delivered to the office of Captain Dorn. He stated that the mail remained in the custody of the Army postal service until delivered to the addressee. Until then "The mail remains the United States mail, but it is in the custody of the army postal service". In the opinion of Lieutenant Husebo, when the provost marshal has written permission of the prisoner, delivery has been made when delivered to the provost marshal (R. 60-64).

6. The evidence shows that the accused took a letter either from the desk of the provost marshal, or from a desk outside of the room of the provost marshal, after conclusion was reached that the addressee was not in the guardhouse, opened it, extracted two checks payable to the addressee, gave the checks to his provost clerk, who cashed one check in the amount of $15.50 and gave $10 of that amount to the accused. The other check for around $9 was given by accused to "the other fellow" and had not been seen since. The accused stated that the letter was "first class mail".

The evidence shows conclusively that the mail matter for the office of the provost marshal was received at the McChord Field post office, sent to the message center at post headquarters, picked up there by a patrol driver, taken to the guardhouse, segregated into two lots, prisoners' mail and mail for the provost marshal, and placed in a basket on the desk of the provost marshal. The base postal officer, Lieutenant Husebo, expressed the opinion that mail matter was still "United States mail" until it reached the addressee but was in the custody of the Army postal service.

In CM 115684, Stafford, The Judge Advocate General said:

> "* * * But the difficulty is that the offenses there denounced are such as must be committed when the letter or other object is in the control and under the authority of the Post Office Department. (United States v. Bullington, 170 Fed. 121). * * * The accused as mail orderly, cannot be regarded as an agent of the Post Office Department. Having been detailed to carry mail from the post office to the school he must be deemed to have received the letters on behalf of the addressees. With delivery to him the control and authority of the Post Office Department over the letters came to an end, and any offense thereafter committed in respect of such letters could not be an offense against the laws designed by Congress for the protection of the mail * * *."

It is clear in this case that the letter had passed through several hands since leaving the control and authority of the Post Office Department and that the record does not support so much of the finding as involves a finding of guilty of removal of a letter "from the United States mail".

The record does support the finding of guilty of the Specification with the exception of those words "from the United States mail";

and the finding of guilty of the Charge in violation of the 96th Article of War.

7. There is no maximum limit stated in the table of maximum punishments (par. 104c, MCM 1928) for the offense supported by the record, the wrongful removal with intent to steal of a letter from the custody of the provost marshal and the opening of and removal of two checks from the letter. The penalty of the statute for the protection of the United States mails, 18 U.S.C. 317, is not here applicable. The most closely related offense is that of larceny, for which the penalty where the property stolen is of a value of more than $20 is dishonorable discharge, total forfeitures and confinement at hard labor for one year. The check shown to have been cashed was for $15.50 and the other check was stated by accused to have been for around $9, which gives an aggregate value in excess of $20.

8. The charge sheet shows that the accused is 23 years old, and that he was inducted on June 4, 1941, with no prior service.

9. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support the findings of guilty of the Charge and of the Specification thereunder, except the words "from the United States mail", 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 one year.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

1st Ind.
JUN 12 1943

War Department, J.A.G.O. - To the Commanding General, Fourth Air Force, San Francisco, California.

1. In the case of Staff Sergeant Oscar C. Rhea (37007656), 863rd Guard Squadron, McChord Field, Washington, I concur in the foregoing holding of the Board of Review. I recommend for the reasons therein stated, that so much of the finding of guilty of the Specification of the Charge as involves a finding of guilty of the words "from the United States mail", and so much of the sentence as exceeds dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year, be disapproved. Thereupon 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 234468)

RECEIVED JUN 19 1943 JUDGE ADVOCATE 4th AIR FORCE

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

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