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

SPJGQ
CM 235407

- 8 JUL 1943

UNITED STATES	)	ARMY AIR FORCES
	)	WEST COAST TRAINING CENTER
v.	)	
	)	Trial by G.C.M., convened at
Second Lieutenant GEORGE	)	Santa Ana Army Air Base, Santa
R. CLAYBOURN (0-726573),	)	Ana, California, 29 March -
Army Air Forces.	)	8 April 1943. Dismissal, total
	)	forfeitures and confinement
	)	for life.

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. Accused was tried upon the following Charges and Specifications:

CHARGE: Violation of the 92nd Article of War.

Specification: In that George R. Claybourn, 2nd Lieutenant, A.C., 1120th Flexible Gunnery Training Squadron, did, at or near Kingman, County of Mohave, Arizona, at or about 1:00 a.m., on or about January 20, 1943, forcibly and feloniously, against her will have carnal knowledge of Sarah E. Gallison.

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

Specification 1: In that 2nd Lieutenant GEORGE R. CLAYBOURN, 1120th Flexible Gunnery Training Squadron, did, at or near Kingman, Arizona, at or about 2 a.m. on or about January 20, 1943, forcibly and feloniously against her will, have carnal knowledge of SARAH E. GALLISON.

Specification 2: In that 2nd Lieutenant GEORGE R. CLAYBOURN, 1120th Flexible Gunnery Training Squadron, did, at or near Kingman, Arizona, at or about 3 a.m. on or about January 20, 1943, forcibly and feloniously against her will, have carnal knowledge of SARAH E. GALLISON.

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

Specification: (Finding of not guilty.)

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

Specification: (Finding of not guilty.)

ADDITIONAL CHARGE IV: Violation of the 92nd Article of War.

Specification: In that 2nd Lt. George R. Claybourn, 1120th Flexible Gunnery Training Squadron, then Aviation Cadet George R. Claybourn, A.C., did, at Sacramento, California, on or about the 2nd of May, 1942, forcibly and feloniously, against her will, have carnal knowledge of one Ruth Geiger.

A motion to strike Additional Charge II and Additional Charge IV, on the ground that there was no substantial compliance with the provisions of Article of War 70 in that accused was arraigned upon specifications alleging commission of the offenses on 2 May 1942, whereas the copies of the charges served upon him alleged the commission on 15 May 1942, was denied. Thereupon defense interposed a special plea to the jurisdiction of the court as to Additional Charge IV and its Specification on the ground that there had been no substantial compliance with Article of War 70 especially in that accused "was not afforded the opportunity by the investigating officer to report witnesses and have their statements examined" and also because the charge was referred for trial one day prior to the day upon which a copy of the Charge was served upon accused. This plea was denied. Accused pleaded not guilty to all Charges and Specifications. A motion for findings of not guilty as to Additional Charges III and IV and their Specifications was denied. He was found guilty of the Specification of the Charge and of the Charge, of Specifications 1 and 2 of Additional Charge I and of Additional Charge I, of the Specification of Additional Charge IV and of Additional

Charge IV. He was found not guilty of Additional Charge II and its Specification and of Additional Charge III and its Specification. No evidence of previous convictions was introduced at the trial. 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 the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 48.

3. For convenience, the evidence, in pertinent part, is reviewed in relation to the respective Specifications.

The Specification of Additional Charge IV.

a. For the Prosecution:

Miss Ruth Geiger testified that, on 2 May 1942 she and accused, though they had never met before, attended a prearranged party at the home of mutual friends named Hagan (R. 43, 44, 58, 131). The home was located in a residential district of Sacramento, California. In the earlier part of the evening there were five girls and two aviation cadets present and, after introductions, they did no more than sit and talk during which period drinks were served and she had a bourbon highball (R. 58).

About an hour later four of the party, including herself and accused, went to the Senator Hotel, met three more aviation cadets and after some dancing all returned to the party. Although she sat with accused in the taxicab by which they went to the hotel and in the car of one of the cadets in which they returned to the house, there was no undue familiarity between them (R. 59-61). At the home there were further introductions, drinks were mixed and she had another bourbon highball. Among those present were Miss Rose Oleson and Lieutenant (then cadet) Jack Commander. In the ensuing hour there was dancing, conversation and a moving about from one room to another. She danced with accused and at one time he kissed her while they were seated on a davenport (R. 63, 64).

At about 11 o'clock someone announced that they were "out of ice" and she suggested going to her home, a distance of from 5 to 7 blocks, to get some. Accused volunteered to accompany her (R. 65, 66). They took Cadet Adamson's car, went to her home, got some ice and returned (R. 44, 68, 69). During this episode accused made no advance of any kind toward her (R. 69).

Somewhat later he invited her to go out with him to get some "7-Up" for mixed drinks and they again used the same car, went to a store about 7 or 8 blocks away and returned directly to the house (R.45, 72, 76). Accused was driving and upon returning he parked the car on the wrong side across the street from the house and turned off the lights (R. 45, 82). The car was Cadet Adamson's two-door, five passenger Pontiac coach, model 1940 (R. 81, 138). Accused was sitting at the wheel and she sat by his side, on his right (R. 82).

He asked her to kiss him and she said "All right". While kissing he put his right arm around her shoulders and his left hand on her leg (R. 45, 85). She asked him not to do that, removed his hand and said "Let's go in the house" but accused answered "Not yet" (R. 45, 85, 86). He again put his hand on her leg, this time underneath the dress, and tried to remove her girdle. At this she became frightened and excited. She kept protesting and in the struggle bit him (R. 46, 88, 92). She struck and kicked him and he hit her about the face (R. 46, 92, 94). She made an effort to get hold of the door handle so as to leave the car but he kept her from reaching it and locked the door. Accused said he was "going to have" her. The struggle continued but accused was hindered by the steering wheel and she was able to brace herself against the foot boards (R. 47).

She kept pleading with him, begged him to stop and let her alone. She cried and screamed for help (R. 47, 127). By this time accused had forced her into the corner of the front seat with her back against the door and in a semi-reclined position (R. 91, 92, 96). He then picked her up and threw her over the back of the front seat to the rear seat. She landed in a reclining position with her head to the left side of the car, part of her body on and part off of the seat (R. 48, 97). Accused followed immediately and before she "knew anything" he was on top of her (R. 48, 98). He pinned her down to the seat so she could not move and again attempted to remove her girdle. She tried in every possible way to stop him. She pleaded, fought and struggled with him but to no avail (R. 48, 103, 104, 106, 108). The girdle was partially removed and hung about her right ankle (R. 110). Accused managed to force her legs apart (R. 108) and eventually penetrated her private parts with his, causing her "terrible pain" - "a horrible pain being pushed in me" (R. 49, 113, 114). She did not consent to the act (R. 52).

Thereafter accused got out of the car and she replaced her girdle which was still dangling around her ankle, fixed her stockings and also got out of the car (R. 49, 114). Accused attempted to kiss

her and she pushed him away and tried to run off but he grabbed her, pulled her back and tried to force her into the car again (R. 50, 114-117). She braced her arms against the car door to prevent him from doing so and then, noticing people in an automobile parked some distance away, she reached behind her with one hand and sounded the horn (R. 50, 119, 120).

Thereupon Cadet Commander came over from the other car and, excited and scared, she asked him to get accused away from her. She then ran back toward Miss Oleson who had gotten out of the other car and was standing between the two automobiles (R. 50, 121). She had not known that Commander and Miss Oleson were in the car and did not recognize them until Commander came toward her and she had run back to Miss Oleson (R. 121). She was hysterical and crying and did not, at first, speak to Miss Oleson who put her arms around her and tried to console her (R. 51, 122). Commander finally came back and she asked them to take her home. They walked across the street, Commander went into the house to get her coat and bag and then he and Miss Oleson took her home. She told them that accused had gotten very rough with her, had acted like a beast and that she had an awful struggle with him, though she did not tell them he had intercourse with her (R. 51, 122, 123).

When she arrived at home, still crying and hysterical, she knew that her father was there but she made no complaint to him (R. 123, 124). She removed her clothing and discovered that her dress and slip were ripped and torn, that there were spots of blood on her girdle, dress and slip, that she had bruises on her arms and legs and that the skin on her legs was torn. The severe pain which she felt at the time of the sexual penetration remained for a long time (R. 51, 52, 124, 126). She did not tell Miss Oleson that accused had intercourse with her when she saw her on the next day, made no report to the police and had no physical examination made by a doctor (R. 125). She burned the girdle and slip the next day (R. 52). She did not inform anyone because she was ashamed and "didn't want anybody to ever know about it" and she did not want to hurt her parents, especially her mother who, because of her age and condition of health, would have found it "too much for her" (R. 128, 129). She did finally tell Miss Oleson about the intercourse when she learned of the investigation being made by Lieutenant Williams sometime in February, 1943 (R. 125, 126).

When asked by defense counsel on cross-examination, respecting an interview with Lieutenant Williams on a date not disclosed: "Isn't it true at that time you said there had been no sexual intercourse involved

on this evening? Isn't that true?", she had answered "Yes" (R. 56), but when later cross-examined by defense counsel with regard to the same interview and asked: "As a matter of fact, didn't you volunteer the information to him that you did not have intercourse on the night in question?" she answered "He didn't ask me if I had and I didn't tell him I had. I just told him that there had been a terrible struggle and he had treated me very roughly". She had refrained from volunteering information at the time because she was ashamed and did not want anybody to ever know about it and thought that if she told anything she would probably have to go to court and testify (R. 128).

In May, 1942, Miss Geiger was 24 years of age, 5 feet, 5 inches in height and weighed approximately 120 pounds (R. 77). She was a comptometer operator for Pacific Coast Gas and Electric Company.

Miss Rose Oleson testified that she and Ruth Geiger were very close and intimate in their relations and that she considered Ruth her best friend (R. 141). She attended the party at the Hagan house on the evening of 2 May 1942 (R. 136) and at about 11:30 p.m., in company with an aviation cadet by the name of Commander, left the house and went to his automobile which was parked across the street (R. 136, 137). She had noticed that Miss Geiger had left the house before she did but did not know where she had gone (R. 144).

She and Cadet Commander got into the front seat of the automobile, turned on the lights and radio to which they then listened (R. 137, 138, 142, 143). She saw Cadet Adamson's car parked about 25 feet in front of them, and sometime later observed a shadowy form moving about on the back seat of the car. She wondered what was going on though she did not know who was in the car (R. 138, 143, 144). Later she heard a bottle crash, a horn sounded and someone screamed loudly. Looking up she saw Miss Geiger and accused struggling by the side of the Adamson car (R. 138, 144, 145). Miss Geiger was trying to get away and accused was pushing her backwards attempting to get her back into the car (R. 145). She turned to Commander and said "It looks like Ruthie needs some help" whereupon he immediately got out of the automobile, ran over to accused, grabbed him and threw him against a wall (R. 139, 145). After that she did not see the accused again (R. 139).

By that time she had also gotten out of the car and was going toward the group when Miss Geiger came running toward her crying hysterically. Her clothes were wrinkled and disarranged and her hair disheveled (R. 139). She put her arms around her and tried to console

her and Miss Geiger said: "Thank God, you are here; I think he would have killed me" (R. 139, 146). They walked to the middle of the street and when Commander joined them proceeded toward the Hagan house, Miss Geiger crying and asking them to take her home. Commander went into the house while the girls waited, got Miss Geiger's coat and bag and then he and witness took Miss Geiger home (R. 139, 140, 146).

On the way home Miss Geiger continued to cry but gave no details of what had happened and, although witness saw her and discussed the affair with her on the next and subsequent days, she did not discover the fact that accused had intercourse with her until sometime in February, 1943, when she knew that an investigation was being made and Ruth finally told her. She had advised Miss Geiger not to tell the whole story to the investigating officer because, in that way, she might avoid going to court (R. 146, 149, 150). Miss Geiger had told her "she couldn't go through with it, she had been trying to forget it and just couldn't do it" (R. 151).

Second Lieutenant Jack B. Commander, Air Corps, testified that he had known accused since they had been aviation cadet students in an advanced training school between April and June of 1942 (R. 153). On the evening of 2 May 1942 he had attended the party at the Hagan house (R. 155). They all had something to drink, though he did not remember seeing either Miss Geiger or accused take a drink (R. 160). Sometime later in the evening he and Miss Oleson left the house and went out to his car (R. 155, 160). They got into the automobile and looked at a picture; then he turned on the radio, they talked for a while and he kissed her once or twice (R. 155, 161, 162). During this period he noticed Cadet Adamson's car parked about 30 or 40 feet in front of his car. Later his attention was attracted by the sounding of the horn in the car ahead (R. 156, 161). Prior to this he heard no noises coming from that direction nor had he noticed any occupant in the car (R. 161, 162).

Immediately after the horn sounded he saw Miss Geiger jump out of the car followed by accused who caught her and tried to force her back in the car. He saw accused put her in the car and at this point he got out of his car and ran over to get accused out of the car. He did not recall whether he pulled him out or whether he backed out but a struggle ensued in which accused swung his arm around, caught him off balance and sent him reeling to the wall (R. 156, 164). Meanwhile, Miss Geiger again got out of the car and ran back to Miss Oleson where witness joined them and proceeded across the street to the house (R. 164). He recalled hearing a bottle fall on the pavement when he went back to his car (R. 162). Miss Geiger was crying and hysterical (R. 157, 167). She wanted to be

taken home and he and Miss Oleson took her, accompanying her to the door of her house. She did not relate to either of them what had happened (R. 157, 164).

He and Miss Oleson then returned to the party where he again saw accused in the sitting room. They glared at one another but he noticed nothing unusual about accused's appearance though "he did not look as well kept as he usually did * * * he just did not look as smooth as he normally did."(R. 166)

b. For the defense:

Accused testified under oath, that during the month of May, 1942, he was an aviation cadet student stationed at Mather Field, California. On Saturday evening 2 May 1942 he attended a party at the home of friends in Sacramento, California, where he met Miss Geiger for the first time. The group then consisted of five girls and two cadets (R. 482). After introductions they all had a drink of Bourbon (R. 483); then, in order to provide companions for three of the girls, four of the party, including Miss Geiger and accused, went to the Senator Hotel in a taxi. Upon arriving at the hotel they had another drink at the bar (R. 484), and after meeting three other cadets they all proceeded back to the house in two automobiles belonging to two of the cadets (R. 485).

After parking their car on the side of the street opposite the house, accused and his group went in and when the others arrived there were further introductions. One of the cadets brought a quart of Bourbon whiskey and a pint of Southern Comfort whiskey. There ensued

> "a general get-to gether of younger people, drinking, dancing, a little necking and general conversation. They kind of split up in groups and then they split in twos".

Sometime later while he was in the kitchen with his arms around Miss Geiger the party ran short of ice and she proposed that they go to her home for some. He thereupon borrowed Adamson's car and went with her to get the ice. He drove with both hands on the wheel and she sat against the door on his right. At the house, while in the kitchen, he kissed her, "not what you would call a soulful kiss but it was returned" (R. 487-489). They returned to the party, this time Miss Geiger sitting in the middle of the seat with his right arm around her and he kissed her again before they went into the house (R. 490).

After the ice was provided it was discovered that there was no mix for the drinks and again accused and Miss Geiger went to get some (R. 491, 492). He bought a half a dozen bottles which he placed in the middle of the floor in the front of the car (R. 492). On the trip to and from the store he drove with one hand while his right arm was around the girl. He parked the car on the opposite side from the house on their return and turned off the motor and the lights. He then asked whether he might kiss her. She made no reply but though she had her hand on the door and had started to get out, she turned her head back over her shoulder and he kissed her (R. 493).

He had "somewhat scooted across the seat preparatory to getting out of the automobile" (R. 493), but was apparently "still under the steering wheel" leaning toward her (R. 494). A general conversation followed. Then:

> "I kissed her and we kissed a couple of more times and each time we kissed the fervor of the moment carried itself to a higher passion, I mean by that we eventually were scooted over in the right hand corner of the car and I was more or less up on my right thigh and she was on her left thigh and our upper bodies were together".

His arms were around her, the left at the waist and the right at the shoulders (R. 494). Their passions were more or less aroused and "she was returning my kisses with more than ordinary ferver; her breathing was a little heavy and she was panting". Her arms were around him (R. 495). Then he placed his hand on her leg (R. 494). She said, "Please don't do that" and he removed his hand (R. 495, 496). He started playing with her hair and ears; "Just toying with the ends of her ear and rubbing the back of her neck with my finger tips. I can remember blowing in her ear - her left ear, once, softly with a little air". She was "responding". He put his hand back on her leg, moved her dress up and played with the outside of her right leg with his left hand. She made no protest (R. 496, 497).

He then put his left knee between her legs and then got both of his between hers. Still she did not protest. He unbuttoned his trousers, took out his penis and tried to move her panties aside but they would not move. "They wern't the ordinary panties a girl wears which are loose material so they can be readily moved aside" (R. 497). "I had my penis out at the same time and was trying to get her in a

position so I could have her" (R. 500). He asked her to remove her panties but just then a light flashed and "more or less broke the spell". She said "no", she "wouldn't take them off" (R. 498, 499).

At this time she started crying and said "Oh Bob, we shouldn't be doing this" (R. 499), by which he assumed she meant "we shouldn't have been in the position we were in; I shouldn't have been attempting to insert myself into her and she shouldn't have allowed me to do so" (R. 500). He "rolled off her" toward the middle of the seat. She continued to cry, pulled her dress down and he tried to console her telling her nothing had happened and not to be worried about it (R. 499). She expressed fear that someone might see them and he said "There's an automobile back there".

As she continued to cry he told her "to cut it out; there wasn't any sense in it" and "scooted back to the left of the seat away from her". About that time she started opening the door and getting out of the car. As she stepped on the running board he said "You damned fool, don't get out there, of course they will see us" (R. 500). With that she started crying harder and jerked her arm free. He grabbed at her arm again and in doing so accidently sounded the horn. He caught her a few steps from the running board. His pants were partially unbuttoned and he attempted to button them before she had left the car, but he was partially disarranged when he caught her. The car parked near them was about 50 or 60 feet away and she was going toward it when he held her back meanwhile trying to button his pants (R. 501).

> "I still tried to console her; tried to assure her nothing had happened, that I hadn't been successful in even proximating a penetration and nobody could have seen her and there was no sense why she felt she could have been seen and - well, I guess the two of us had just lost our reasoning power" (R. 502).

By that time he became angry, swearing at her and calling her names. He said "You dizzy bitch, shut up". At that point Commander came up and grabbed his shoulder. He turned around, gave Commander a shove sending him stumbling against the fence along the walk and angrily said "You dirty son of a bitch, keep your hands off me. I will take care of myself".

He denied that he had ever hit Miss Geiger, that she had screamed,

scratched or bit him, and that she had ever, on that night, been in the back seat of the Adamson automobile (R. 599). He did not see Miss Geiger or Commander again that night after gathering the bottles and going into the house (R. 503). The next day he called Miss Geiger on the phone calling himself "the bad boy that cussed you out last night" but she hung up (R. 504).

When asked upon cross-examination, whether he had told Lieutenant (formerly Cadet) Commander, on or about 18 January 1943, at Kingman, Arizona, "I guess I wouldn't have to apologize for what happened in Sacramento if you had known I had already screwed that girl (Ruth Geiger) that night" he denied making such a statement (R. 587, 588).

Lieutenant Jack Commander, on rebuttal, testified that, on or about 17 January 1943, while riding in an automobile near Kingman, Arizona:

> "Lieutenant Claybourn and I were talking and we mentioned an apology he had made to me while we were at Basic Instruction School at Mather Field. He told me he would not have made the apology he had, had I known all the facts that took place that night up in Sacramento, and he said that that night he had screwed the girl (Ruth Geiger) before, and said had I known that I would not have felt like I did about the matter." (R. 636)

In May, 1942, accused was 25 years of age (R. 603), weighed approximately 155 pounds (R. 547, 580, 601) and was about 5 feet, 9 inches in height (R. 547).

<u>The Specification of the Original Charge.</u>

<u>The Specifications of Additional Charge I.</u>

a. For the prosecution:

Miss Sarah E. Gallison of Kingman, Arizona, and by occupation a stenographer and clerk in the office of the Assessor of Mohave County, Arizona, testified that, on the night of 19 January 1943, she and Lieutenant Ansell Brown were in Gaddis' Cafe in Kingman, Arizona (R. 209,

210). Though not engaged he had asked her to marry him and they had kept steady company for a month (R. 274, 280). After purchasing a drink for her and following a dispute Brown left and accused, whom she had known for a period of four or five weeks, sat down with her (R. 210, 211, 286, 287). They danced twice and then accused asked whether he might take her home to which she agreed.

He obtained automobile keys from another officer and at about 11:45 p.m. they left the cafe (R. 211, 288-290). Other than the dancing there had been no intimacy or familiarity in their conduct (R. 211, 290). Accused drove the car, which was a four door sedan, and she sat on his right directing how he should drive to her house (R. 212, 290, 291). He followed her directions for a while but finally failed to make a suggested turn and kept going along an unused and practically abandoned road. She remonstrated, telling him to turn around and though he said he would, he did not do so. Thereupon she became worried and apprehensive, turned off the ignition and jerked the keys away (R. 213, 214, 291-293). At this accused slapped her face so hard that it stung and knocked the chewing gum out of her mouth (R. 213, 295). He grabbed the keys from her, started the car again and continued for some distance further and then pulled over to the side of the road and parked, turning off the ignition and the lights (R. 214, 293, 294).

Without further preliminaries, he put his right arm on the back of the seat, his left arm on the steering wheel and lifted himself over on top of and facing her (R. 214, 215, 295). Then he kissed her and put his left hand under her dress and placed it on her thigh (R. 215, 296). She asked him to let her go and started to fight, hitting at him with her left elbow trying to get him away. He pulled her down in the seat so that her head was in the left corner under the arm rest and she was lying on her back (R. 215, 297). He started tearing at her pants and she tried to kick him with her left knee, and to scratch him whenever her hands were free, saying "Let me go" but he slapped her in the face and told her to "shut up". He was lying upon her, holding her down with one arm across her chest and with the other reached in his pocket saying "Don't worry, nothing's going to happen to you, I'll use something" (R. 216, 297, 298).

He then placed his hand on her private parts and she grabbed his penis to see if she could hurt him and something came off in her hand (R. 217, 304). Accused said "You have ripped it" and reached into his pocket again. He was on top of her, pinning her down; her head was still under the arm rest and she seemed to smother for it was hard for her to get air. She was scared, on the verge of crying and continued to

kick and scratch him, but he nevertheless forced his private parts into hers.(R. 217, 298-301). "He gave two sharp lunges" and she felt pressure and pain in her stomach. She was still asking him to let her go, kicked him and, whenever her hands were free, hit at him. Then she felt the pressure relax, accused heaved a sigh, and raised himself off of her. Dangling a "rubber thing" which he held in front of her, he said "See, nothing happened to you" (R. 218, 301-303).

She complained "I am sick, let me out" and he said "I'll go with you". When she stated she wanted to go alone accused insisted he would go with her and, putting his arm around her, pinning her arm to her side, he walked her to the rear of the car where, after further protest from her he released her. She ran across the road, thinking she could go up into a cove of rocks in the hill and get away, but found she could not do so because of an embankment and in her attempts her feet caught in some wire. By this time accused came up to her, grabbed her and jerked her back across the road. She fell to the paving on her knees (R. 219, 269, 307-309). She hit at him and he hit her on the head with his fist, knocking her down so that she struck her head on the ground. This dazed her so she couldn't see. They then scuffled and she fought and tried to jerk away from him. When she succeeded in getting to her feet he pushed her backward toward the car.

She then got up on the running board of the car thinking that, since whe was taller than the door, he could not push her into the car. Thereupon accused hit her in the chest knocking her head against the top of the car. She was then definitely dazed and "could see white things in front of her eyes". He hit her again and she fell upon her back into the front seat (R. 219, 220, 310-312). He started to follow her into the car but she kicked him. When he backed away saying "You've bloodied my nose", she got out of the car and ran down the road toward Kingman trying to get away. She was exhausted and when accused chased her he caught her before she had gone very far, swore at her saying "You are not going to get away from me". He grabbed her by the hair, hit her in face and taking her by both hands pulled her back to the car while she kept kicking at his shins (R. 221, 313, 314, 318).

When they got to the open door of the car he threw her upon her back on the front seat and got on top of her again. She pleaded with him to let her go. She kept slapping at him and tried to get up, but her legs were pinned down. He hit her again and again telling her to "shut up" whenever she spoke (R. 223, 319, 320). He again put his hand under her dress, forced her legs apart, ripped at her pants, put

his hand on her private parts and although she was fighting and trying to move her body to prevent it, he again forced his private parts into her. She felt a tearing pain (R. 222, 223, 321, 322). Then she felt accused "relax again and sort of sigh" (R. 224, 323).

When he got up she said "this time I am really sick; let me out" and he replied "All right but I'll go with you and help you". He kept his hands on her all the time, pinning her arms as he had before, and, after walking around the car to the other side he released her and she took off her coat intending to "make another break to get away". She still complained of being sick and he turned her around and gouged or kneaded her stomach. Then she broke his hold on her and started running as fast as she could down the highway toward Kingman (R. 224, 324, 325).

Accused again caught her, grabbing at and tearing her sport jacket. He grabbed hold of her hair, slapped her face, jerked her around and dragged her back to the car where he threw her again upon her back in the front seat (R. 224, 327). She was fighting, kicking at him and trying to scratch him (R. 225). Accused then said the front seat was too crowded, picked her up and threw her over the back of the seat to the floor in the rear. By the time she had raised herself on her elbow he was in the back and jerked her up on the seat by her hair. She was tired, exhausted and scared but continued to fight, kicking and hitting him (R. 225, 328). He got on top of her again and put his hand in her blouse. She fought and got his hand out. He started tearing at her pants and this time removed them completely. He put his hand on her privates while she struggled and kicked with her knees. He finally succeeded in once again having intercourse with her. She felt pain in her stomach. Her brassiere was up around her neck. Then accused:

> "Sort of whined and whimpered and cried: I don't know what it was, whether I kicked him or what happened to him; he whined and cried out and whimpered and then he got up again".

She pleaded to go home and both got into the front seat of the car. By this time she was completely exhausted, her face hurt, and her lips were swollen and numb so that she could not feel the touch of her finger on them (R. 226, 227, 329, 330).

After some difficulty in getting the car started accused turned it around and drove toward Kingman. It became necessary to use the hand

throttle and when he pushed it in so that the car ran slower she pulled it out. At this he swore at her, slapped her hand and told her to let it alone. As they approached the outskirts of the town he again opened his pants and, seizing her hand, placed it on his penis (R. 228, 331). The car was in motion and he had his other hand on the wheel. Whenever she jerked her hand away he replaced it covering her hand with his and holding it on his privates.

Shortly thereafter he pulled over into a clearing by the side of the road and stopped. He continued to hold her hand on his penis. Then she saw a light in the window of a house, and though she did not know who lived there but wanted to get away, she said "This is where I live. You had better take me in because there is a light in that window and those people are probably waiting up for me". Whenever she reached for the door and everytime she screamed "Help" and "Let me go" he slapped her. Once she tried to sound the horn and he hit her arm and knocked it away. A dog barked and finally he let her get out of the car though he did not release her but walked by her side, pinning her shoulders down as he had done before.

As they approached the gate she told him the dog was liable to bite him but he continued holding on to her. He then tried to pull her back to the car again and during the struggle a woman came to the door and Miss Gallison screamed "Help! This fellow is attacking me". The woman told him to get out of the yard whereupon accused released her and she ran toward the woman, and recognizing her then as Mrs. Hubbs, she ran into the house. Mrs. Hubbs came in soon afterward, heard Miss Gallison relate some of her experiences that night and suggested calling Walter Black, the constable, which was done. He arrived within a short time and Miss Gallison got into his car. When she told him that she had been attacked he asked her whether she "wanted the fellow picked up" and she said she did (R. 230, 231, 335, 336). He took her home, left and returned again in about half an hour.

Meanwhile she woke Virginia Ann, the daughter of Mrs. Beller with whom Miss Gallison was living, and told her what had happened. Mrs. Beller also woke up and was told of the affair. She then went into the bathroom, looked into a mirror and saw that her left eye was swollen, turning black on the lid and almost shut, and that her upper lip was swollen. The left side of her face was also swollen and she had cuts on her forehead. Her knees, one hip and an ankle were skinned, she had bruises on her arm, one fingernail was broken down to the quick and the others were jagged.

Her hair was full of dirt and all matted and only one bent "bobbypin" remained of eight which she customarily used. When she combed her hair it came out in handfuls. The barrette she had been wearing was gone as were her earrings, her "cowboy" brooch and her gloves, all of which she had on her person in the car when she was with accused and various articles of her clothing were soiled, torn or ripped and had buttons missing. Her stockings were both torn (R. 232-248, 270).

On 21 January 1943, she accompanied Captain William A. Barker, Air Corps, Investigating Officer (R. 359), 2nd Lieutenant Max A. Sherman, Medical Corps, (R. 609), 2nd Lieutenant Richard M. Krannawitter, Air Corps, Assistant Trial Judge Advocate (R. 396), Frank Porter, Deputy Sherrif of Kingman, Arizona (R. 255), and a Captain Endicott to the scene of the crime. There her broken "cowboy" brooch, a button and one of her gloves were found upon the ground and she saw "the rubber thing" which accused had "dangled" in her face on the night of the crime (R. 251). On 22 January 1943 she had her photograph taken (R. 342, 412; Ex. Y).

She denied consenting to any of the acts of sexual intercourse with accused (R. 218, 264) though she admitted she was not a virgin before they were accomplished (R. 339).

At the time of the crime Miss Gallison was 21 years of age, was 5 feet and 3/4 inches in height and weighed between 98 and 100 pounds (R. 209, 272).

Mrs. Opal Hubbs, wife of the postmaster of Kingman, Arizona, testified that on the early morning of 20 January 1943, she was awakened by the barking of her dog. She got up, saw it was almost 4 o'clock, turned on the porch light and looked out. She saw a girl and a man in uniform struggling on the sidewalk about eight feet away. She could not at the time identify either though she later recognized Miss Gallison.

When she opened the door she asked what was going on, stating that her home was a respectable place, that they were disturbing the peace and that she was "going to call the law". Miss Gallison was crying "Help! Help!" and about that time broke away from the man and said "Let me in" and that he was attacking her. The soldier came up, caught hold of her and said "You don't live here; come on and get in the car". Miss Gallison was holding on to her, crying and hysterrical. The man then walked to the gate, said "Go to hell" and left. She then took Miss Gallison into the house and observed her condition. "She looked like she had been drug all over the place". Her blouse was ripped down to

the waist, her stockings were torn from the knee half way down the leg and her knees had gravel in them; her shoes were dirty and filthy and her belt dropped from her coat. She had a wild look, the side of her face was swollen, and one of her eyes was turning color. She continued to be hysterical, pacing the floor and shaking all over. Constable Black was then called on the telephone, he came to the house and Miss Gallison left with him (R. 345-349).

Mrs. Amy Beller, a clerk residing in Kingman, Arizona, testified that Miss Gallison lived with her. On 20 January 1943, when Miss Gallison came in between 4 and 4:30 a.m., she got up and found her in the bathroom combing her hair and had already thrown a couple of handfuls of loose hair in the toilet. Her eye and lips were swollen. She had scratches and bruises on her legs. Her clothes were dirty and mussed and her stockings were torn. Miss Gallison did not go to work on that day or the next but, except for a trip to the scene of the crime and to the doctor, she stayed in bed for about four days.

Walter H. Black testified that he had been the constable of Kingman, Arizona, for over four years. On 20 January 1943, at about 4 a.m., he received a call and went to the home of Mrs. Hubbs where he got Miss Gallison and took her home. On the way he lit his flashlight and looked at her. He found her eye discolored and her mouth swollen, her hair was disarranged and "bushy-like". He left but returned shortly and again observed Miss Gallison, finding a bruise on her right arm and bruises on her legs from the knees half way up the thighs. He took her stockings which were both torn and marked them and identified them in open court (R. 353-359).

Captain Edward Liston, Medical Corps, stationed at Kingman, Arizona, testified that on 20 January 1943 he made a physical examination of Miss Sarah Gallison at the office of Dr. Marvin Paup at 7:45 p.m. He found a bruised left eyelid, a bruise and slight abrasion on the upper lip; two small scratches on the left side of the face; tenderness over the left mastoid process behind the ear and in the right occipital region and on the back of the head and over the left sternomastoid muscle; bruises in seperated areas upon the left upper arm; the nails on her right ring and left index finger were cracked; a small abrasion on the left elbow; a faint bluish mark over the right scapula; several small abrasions and contusions and soreness on the inside of the left foot and ankle; many abrasions below the right knee; small abrasions onthe outer surface of the left thigh; and a discoloration one inch in length to the right

of the navel. The vagina admitted two fingers readily but with complaint of pain on her part. There was a small abrasion at the entrance on the left side. There were no lacerations or wounds of the vaginal canal and no evidence of internal or external tearing, striking or biting of the genitals.

When shown a photograph of Miss Gallison (Ex. Y), he stated that except for the fact that the bruises of the eye appeared to have travelled to the lower lid it was a fair representation of her appearance at the time he examined her (R. 369-371).

On the same date, at about 2 p.m., he made a physical examination of accused in the county jail at Kingman on the request of Captain Frank L. Martin, Provost Marshal for the Army Air Forces Flexible Gunnery School. He found scratches on his face, on the left side of the nose and on the left cheek; an old abrasion on the right upper forehead; old scratches on the right hand; a two-inch bruise behind the shoulder at the level of the eighth rib; an old abrasion on the left buttock and pain and tenderness in the right sacro-iliac region. His knee joints were exaggerated, his hands showed a fine tremor and he limped (R. 371-374).

Captain Frank L. Martin, Provost Marshal at Kingman, Arizona, testified that he saw accused in Military Police Headquarters in Kingman in the early hours of the morning of 20 January 1943, and took him to the the Sheriff's office at 5 a.m. His face was bloody and dirty, had scratch marks and one particular streak across the forehead appeared to be blood and dirt combined showing the appearance of finger marks and as though blood had been smeared and not completely wiped away. He wore a military short coat which was disheveled and minus a top button. He identified the coat in open court as well as the contents of the pockets which were removed in the Sheriff's office, which consisted, among other things, of two dissimilar ladies gloves, a pearl earring, a pair of pilot's wings without a clasp and with bent points, a broken pair of glasses and a rubber prophylactic (R. 377-380).

Major M. P. Beaur, Medical Corps, Santa Ana Air Base, a clinical pathologist and X-Ray specialist, testified that he had made a laboratory analysis of certain articles of clothing with the following results: two pieces of cloth from accused's O.D. short coat (Exs. X; AA; FF) contained human blood stains; two pieces from Miss Gallison's

herringbone blouse (Exs. B; BB; EE) had human blood stains; a piece from her skirt (Exs. C; CC) showed semen stains while another (Ex. DD) had human blood stain; a piece from her silk waist (Ex. G; CC) showed human blood; and a piece from her step-ins (Exs. E; HH) had semen stains (R. 385-395).

Second Lieutenant Richard M. Krannwitter, Air Corps, testified that on 21 January 1943 he was assigned to investigate a charge against accused. Thereupon he, together with another Army officer and Deputy Sheriff Frank Porter, went to the scene of the crime, 1.8 miles distant from Kingman (R. 397). At this point the ground on one side of the road was disturbed and disrupted and showed an automobile track. There were numerous footprints, large and small. They discovered lying about on the ground a brown shoe button (Ex. G), a tan top coat button (Ex. U), a small coat button (Ex. T), miniature articles in the shape of a sombrero and a pair of boots (Ex. R), a lady's glove (Ex. S) and two rubber prophylactics. Some photographs were taken (Ex. L, M, N, II).

They then examined the ground on the opposite side of the road and found footprints leading inside of the mouth of a cove cut into the side of a hill 15 feet from the edge of the road where they stopped at a piece of wire netting (Ex. JJ) lying on the ground. Later in the day the group returned to the scene accompanied by Captain Barker and Miss Gallison. None of the articles had been moved but they were then all picked up, shown to Miss Gallison for identification and remained in witness' possession until later delivered to Captain Barker. They also examined the automobile used by accused on the night of the crime and found therein a pearl earring (Ex. Q), a bobby pin and a hair pin under the front seat. In the evening witness received from Captain Martin, Provost Marshal, a left-hand lady's glove (Ex. V), another glove, and an earring (Ex. W), identical with the one found at the scene of the crime. These articles were placed in an envelope and sealed. He was also present in the sheriff's office when photographs of Miss Gallison and accused (Exs. LL; Y) were taken and he described the pictures as a fair representation of the appearance of each at the time when taken. (R. 396-418)

Captain William R. Barker, Air Corps, Investigating Officer, testified that Second Lieutenant Richard Krannawitter delivered to him during the last week in January 1943, the articles admitted in evidence as Exhibits Q,R,S,T,V,W and Z and that he, in turn, had then delivered them to the trial judge advocate, Major Robert A. Banyard. (R. 359-364).

b. For the defense:

Accused testified that he had first met Sarah Gallison sometime early in January 1943, and prior to 19 January had seen and talked with her on several occasions.

On the afternoon of 19 January he had gone to the officers' club at about 5:30 or 6 o'clock and remained there until about 10:30 p.m., when he left to keep a date with a girl at Gaddis' Cafe in Kingman. When he arrived at the cafe at about 10:45 p.m., after stopping to purchase a "package of rubbers", the girl failed to appear but he remained and bought a drink (R. 520-523). He saw Lieutenant Brown and Miss Gallison sitting together and passed some pleasantries with her. Upon returning from a back room where he had spent some time he found her alone, told her he had been busy drinking and when she said "I am a little drunk myself; maybe we ought to get together" he sat down in a booth with her. She did not appear to be drunk, however, and refused a drink though she had what appeared to be one in front of her, so he got one for himself. She suggested dancing and they went to the back room where they danced a couple of dances. She danced rather closely to him and at the end he kissed her (R. 525, 526).

He left a short while and asked her to wait. When he returned he had another drink though he was not positive that she had one. He asked her how she was going home and when she said she thought she would walk he suggested driving her home. He asked Captain Logan Reed to "borrow the car for a few minutes" and when asked whether the girl he was taking home was a "chunk"(meaning "would she indulge in sexual intercourse") he said he had come to no conclusions. He and Miss Gallison then left, one of the waitresses saying "You kids be good" as they went out (R. 527, 528). He had never been to her home so she directed him. He suggested taking a little ride to which she agreed provided he would not stay out too late.

Accordingly, he drove down a strange road for a while until she remarked that it was a pretty bad road with no side roads. He had put his arm around her and they engaged in general conversation. When he came to a wide place in the road he pulled over preparatory to turning around and going back to town. Then he stopped and asked her "if she minded" and she replied "no, as long as we don't stay out too late". He shut off the engine and they each smoked a cigarette. The lights of the car were burning, but poorly. When they had finished smoking he kissed her; then they started "necking" and shortly it became too warm for him and he took off his short overcoat. In doing so

he had trouble because of a tight button. When he got it off he placed it on the back seat with other things (R. 531-534). Miss Gallison did not remove her coat however, and remained fully clothed until later (R. 603, 604).

They started "necking" again. He had put his hand on her leg and after "general love making" inserted his finger in her vagina. They were kissing each other and she made no objection. Eventually he got between her legs and "things were progressing very nicely" but finding it too crowded he "twisted around her", opened the right door and stood on the running board. She was lying on the seat with her head against the other door, her legs apart, and he was between them lying on top of her. He reached down to unzip his trousers and having trouble in doing so, got up again so he could use both hands. After opening his pants, he got down upon her again and tried to insert his penis in her but she lifted up a knee to prevent it just as he was "close enough to start it in". He asked "What's the matter, honey, don't you want me?", and she replied "Well, yes, but I am afraid I will get pregnant". He told her he had "some rubbers" he could use and reached in his pocket to get them (R. 533-537, 597, 598, 603). When he started to take one out she complained about her legs being cold so he lifted them into the car, closed the door and walked around the car getting in on the left side. In raising her head she hit it against the steering wheel and then "scooted over to the other side of the seat".

He got in and put a "rubber" on his penis with both hands (R. 538). When he had first said he would use a "rubber" she had asked him what it was and it had amused him to think she did not know (R. 539); now that she saw him put one on his penis she asked "How is that going to help" and he proceeded to enlighten her by taking it off and explaining its use. In putting it on again he tore it, threw it out of the window and put on another. Then they "necked" again and while "she was up against the right corner of the door" and he "was kind of straddled the gear shift" they had sexual intercourse (R. 540).

He had used no artificial lubrication and experienced no difficulty in penetration. The vagina hed been moist while he was fondling her privates and during the act "she kind of scooted up" to him "from the seat". Her one arm was around him and she was playing with his neck. When it was over he rolled to the right of her, took off the "rubber", held it up and said "See, the rubber didn't break. Everything is all right" (R. 541). He kissed her a couple of times and then she said she had to go to the toilet and asked whether they

could go home. He suggested that she go behind the car.

They both got out of the car and he went forward while she went to the rear. He started to urinate but was interrupted by the sound of someone running down the road. He assumed it was Miss Gallison and ran after her (R. 542). When he reached her her coat was flying out behind her and when he caught hold of it he heard it rip. She turned around and slapped him and he slapped her in the face asking, "what the hell's the matter" (R. 585, 586, 598). She was crying hysterically (R. 586), and said she was afraid she was going to be pregnant. He tried to reassure her, kissed her and she stopped crying. He tried to talk her into going back to the car and she asked "Will you take me home if I go back?" Upon his promise to do so she walked back to the car with him (R. 543).

She got into the right side and he on the left. He started the motor but the foot throttle would not work so he shut it off again and bent down to fix the foot lever (R. 544, 584). He was unsuccessful and as he straightened up again a sacro-iliac pain "caught him". He swore a little bit, explained his situation to her and she sympathized with him. Then he started kissing her again and as they reached the point where they were "more or less like we had been before" he suggested that they get into the back seat. She agreed but, as they were changing and he was stepping to the running board his back "caught him again" and he grabbed her shoulder. Then she said she did not want to get into the back seat (R. 546, 547) but he "reconvinced" her, however and she got in and laid herself down on the back seat.

He got between her legs, but not without difficulty because of the "catches" of pain in his back whenever he got up or down. She continued to complain about becoming pregnant and he reassured her of the safety of rubbers (R. 548, 549, 596). Then he tried to take off her pants, as he said "not without ceremony". To accomplish this he had to roll over from between her legs in order to get them together and she had to raise herself from the seat to permit them to be stripped over her buttocks. When they were removed he placed them on the back of the front seat (R. 522). He again got between her legs, kissed her and "played with her hair and ears", then unzipped his pants and again reached for the "rubbers". This time he got a package of paper matches by mistake. In his anger at being unable to find the "rubbers" he said "What the hell, I'll jerk it".

He thereupon got out a handkerchief, straightened it out, placed

it under Miss Gallison between her legs, and inserting his penis in her again had intercourse (R. 548-550). She helped him by moving with him and though he wasn't positive he thinks she had a climax because "just about the time I came, why, she clinched me tighter to her and she was breathing pretty heavy and just general indications that a woman is satisfied" (R. 554). He could not swear positively whether his penis was inside or outside of Miss Gallison at the beginning of his emission but sometime during its duration he took his penis out and put his handkerchief around it catching part of the emission (R. 554, 555). When it was over he lay there for a while, then got up and backed out of the car. He asked for his overcoat and moved away from the car in modesty "so the lady could put on her pants" (R. 592). In putting on the coat the top button "flew off" (R. 553), though he "merely flipped it through the button hole" (R. 592, 593). He looked for it but could not find it though the moonlight was clear.

Then Miss Gallison got out of the car and he started to help her into the front seat when she again said she had to go to the toilet and he again suggested her going behind the car (R. 555). She got out of the car and went to the rear while accused went to the right and urinated. In a few minutes she came back and got into the front seat again (R. 556). He got in the left side, sat there for a second, then said, "I don't know how in hell I am going to drive this thing. I don't know what's wrong with it". She suggested using the hand throttle and he did so, starting the car. He turned around and started driving toward town. He recalled pushing in the throttle to reduce the speed because of road conditions and that Miss Gallison reached up and pulled it out, but he denied striking her at the time (R. 557, 558).

As they drove along he put his arm over her shoulder, reached into her blouse and held her breast in his hand. To this she made no objection except to say "Look at my blouse; its all undone", and he replied "it's pretty rough on clothes having sexual intercourse in a car, especially in the front seat" (R. 558, 559). They conversed again about her possible pregnancy and he pulled her over to him and said, "Just kind of skip it and give me a kiss", which she did (R. 559), but she said "Don't kiss me too hard, my lip is hurt". He accounted for this by saying:

> "While I was kissing her while we were having intercourse, — she kisses very hard with her lips rather compressed — as we were having the second intercourse, especially, she kept putting more pressure with her lips

on my mouth".

His lips were not sore though a bit swollen (R. 560). As they got past the edge of Kingman she said, "I live right on down the road here" and he saw an opening - a wide spot on the right side of the road and he "thought perhaps I had better let her straighten her clothes before we got to the house and I pulled to the right side of the road". As he did so she said "There is the house right there. You can see the light, the people are probably waiting up for me. They may have called the police". It was getting very late (R. 561).

Notwithstanding, they kissed a couple of times, turned, more or less to each other and her hand dropped down on his leg. Then:

> "I was playing with her legs with my left hand and then I moved my left hand and unzipped my trousers and took my penis out * * *. I reached over and took hold of her hand and put it on me * * *. She pulled it away * * *. I reached back and put it on me again * * *. She left it there * * *. I had my right arm around her and my right hand on her breast * * *. I had been playing with her leg and I had uszipped my trousers with my left hand and put her right hand on me. I put my hand back on her leg and put my finger in her * * *. She was squeezing my penis, she just kept squeezing it harder and harder with her hand as I played with her with my finger and kissed her * * *. She got to squeezing so hard I reached down and pulled her left hand away and said 'Honey, don't squeeze so hard' * * * She said 'What am I supposed to do? * * * I took her hand and put it back on me and I said 'Like this' and moved her hand up and down. I was about to come about that time and reached in my pocket with my left hand and got my handkerchief * * * she was moving her hand on my penis * * * it continued to move up and down."

He had an emission, caught it in his handkerchief and flipped the handkerchief back into his pocket (R. 562-564).

Again they began to converse about pregnancy and what she would do if she became pregnant. He told her not to worry but if anything did happen he would see to it that she was cared for (R. 564). She inquired about an illegal operation and he explained how to avoid one. She did not believe him and insisted that if she became pregnant

she was going to be married, leading accused to believe she meant to marry him. He told her if that was her idea she had better start looking for somebody saying "This boy is not getting married".

They argued back and forth until both were angry and he finally told her he "wasn't going to have anything to do with a bitch like that" (R. 564-566, 606). Then she started to get out of the car but he seized her by the shoulder and held her until he was finished talking to her. Then he released her, they both got out and started walking toward a gate when a dog barked and she warned him not to go in as he would be bitten. He nevertheless went through the gate and then stopped and asked her to kiss him goodnight. She refused and said if he did not leave she would call for help. He started to kiss her, she resisted, they struggled and she called "Help! Somebody help me!" With that she reached up her hand and "drug it down" his face, scratching him and simultaneously he "slapped hell out of her".

Just then a porch light was lit and a woman came to the door and called out "This is a respectable house; you had better go back where you came from". Meanwhile Miss Gallison had broken away, crying out "He is attacking me" or "I have just been attacked" or "something that gave the impression that she had just had hell slapped out of her, and she wanted to tell the woman about it".

Accused walked out through the gate, said "What the hell", got into the car and tried to fix the foot throttle. Subsequently he noticed blood on his coat on the side against which he leaned in fixing the pedal (R. 566-570). He later finished fixing the throttle in front of the Beale Hotel, went into the hotel and was told by a military policeman that Captain Reed was looking for his car. Learning that Captain Reed was asleep at the Harvey House he went there and "half woke" him up. He saw his reflection in a mirror and noticed some "new marks" on his face which had not been there prior to the morning of 20th January on the middle of his nose, over his right eye, under his left eye and at the corner of the nose. All others were "old marks" (R. 570-572). Earlier he had testified that some time prior to 19 January 1943 he had "got pretty tight one night and, in leaving a doorstep, was backing up and fell off the doorstep and fell into a rose bush", scratching his face (R. 520). When shown Miss Gallison's gloves (Pros. Exs. S, V), he remembered taking them from her lap in the front seat of the automobile and putting them in his blouse pocket. Later, when he emptied his pockets in the provost marshal's office only one glove was found. He could not recall what he did with the other one or what

happened to it (R. 574). He later stated that he had put only one glove in his pocket (R. 591). When shown Miss Gallison's earrings (Pros. Exs. W, Q), he said that before he and she had intercourse one of them had fallen to the floor and could not be found, that he told her to take off the other one which she did and he put it in his pocket (R. 574). When asked whether Miss Gallison had been abusive in her language to him he said: "No sir, I don't recall. I presume that I was somewhat more abusive than she was" (R. 605). He explained his "slapping" of Miss Gallison by saying:

> "I think you misconceive, sir; it wasn't a slap with the intention of hurting her. She was merely hysterical and crying and I thought that — which is ordinarily sometimes a case — a small slight sound, more of the fingers of the hand on the cheek will bring them out of it" (R. 599).

He admitted participation in athletic sports such as football, baseball, basketball and track at high school and that he had some training in boxing and wrestling (R. 581, 600, 601).

At the conclusion of his testimony the following colloquy took place between accused and defense counsel:

> "Q. I have one question. Your description of your method of intercourse in the front seat with Miss Gallison with her pants still on — have you ever had intercourse like that before?
>
> A. I often do.
>
> Q. You often do?
>
> A. Yes sir, in the same circumstances - in an automobile and so forth".

Joseph Gaddis, owner and operator of Gaddis' Cafe and Cocktail Lounge in Kingman, Arizona, testified that he had known Sarah Gallison for over two years and had seen her on an average of three or four times a week (R. 454). She worked during the day and he usually saw her at night in his cafe, usually in company with two girl friends. He could not recall seeing her with men. The three girls would usually come and leave together. They would dance with officers and service men and take drinks. Miss Gallison occasionally would take whiskey, but usually

Coca-Colas (R. 445, 456). On one occasion he recalled her drinking excessively and she stated she was getting drunk and asked him to drink with her. He thought it was unusual, as he would not have known she was getting drunk if she had not told him (R. 456). He thought she was a good dancer and affectionate in manner, dancing "close" (R. 457). She was always a well behaved lady in his place of business (R. 458).

Mrs. Jeanne Bivens, waitress in Gaddis' Cafe for 6 months prior to 19 January 1943 testified that she had known Sarah Gallison during the time she was so employed; seeing her in the cafe four or five times a week during the evenings (R. 459, 460). Most of the time Miss Gallison was in the company of girls by the names of "Jeanne" and "V. A.". During the Christmas holidays she came into the cafe with Lieutenant Brown. Prior to that she had seen her go out with officers and enlisted men (R. 461). She saw her dance with men who asked her to do so, she herself introducing some men to her. She saw her drink Canadian Club and 7-Up high balls usually, on one occasion as many as six or seven drinks in an evening (R. 462).

Lieutenant James L. Powell, Air Forces, testified that he was acquainted with accused at the Kingman Army Gunnery School. For a week prior to 26 January 1943 he had observed scratches on accused's face and also observed them on the evening of 20 January (R. 468). He recalled a New Year's party attended by Miss Gallison at which she appeared to be under the influence of liquor (R. 469) though he himself was feeling the effects of alcohol and everybody, with few exceptions, was drinking and having a good time (R. 471). He also recalled two incidents in which some girl in Miss Gallison's presence referred to Gaddis' Cafe as "g.c." which he found out meant "gonorrhea gulch" (R. 470, 471).

Captain Lionel B. Pressey, Air Corps, stationed at Kingman, Arizona, testified that he met accused on 31 December 1943. He saw him about a week prior to 19 January 1943 and noticed scratches on his face (R. 475). He had seen Miss Gallison in "Gaddis' Cafe" which he thought was "a sort of dive type of cafe frequented by miners and enlisted men etc. - a pretty low type of cafe" (R. 476). He preferred the "El Trovatore" which was situated outside of town in the rural section and "about a mile up the hill" because officers and their wives patronize it more than "Gaddis' Cafe". He had seen Miss Gallison at the "El Trovatore" several times (R. 476, 477).

First Lieutenant Max A. Sherman, Medical Corps, assigned to the Station Hospital, Kingman, Arizona, testified that he was present when Frank Porter made a flourescent test of a handkerchief which accused

had given to witness and that the test indicated the presence of semen (R. 609-611).

Captain Edward Liston, Medical Corps, who had previously testified for the prosecution (R. 368), was called as a witness for the defense and testified that he was experienced in gynecology and obstetrics. He repeated his findings upon examination of Miss Gallison on 20 January 1943 and stated they disclosed that her hymen had been ruptured previously. (R. 614). He was of the opinion that a kiss could have caused her lip injury "if the lips were pressed together sufficiently" (R. 615) but he likewise believed it could have been caused by a slap (R. 625). He stated that in his opinion all the injuries disclosed by his examination of her, except the one adjacent to her umbilicus and the abrasion near the entrance to her vagina could have been caused by a fall. The injury to her naval could have been caused by pressure from a uniform button (R. 623); yet he was also of the opinion that all of them "could have been caused by a struggle and altercation involving violence between the young woman and another person" (R. 627). Upon being asked a hypothetical question regarding the damages liable to be expected if a woman about to be raped seized the man's penis "while resisting with all available faculties" he stated that the injuries could range from simple bruising or scratching to a complete fracture of the penis (R. 615, 616). He expressed the opinion that it was more difficult to effect penetration when using a rubber contraceptive than without one (R. 616). He maintained that there are four main conditions under which rape can be committed; (1) where there is an overwhelming disparity in strength between the male and female; (2) under the effects of alcolol or drugs; (3) following unconsciousness due to injury and; (4) when paralyzed with fear, like a rabbit (R. 616). He did not believe that a young woman who was kicking, fighting and scratching was paralyzed with fear (R. 617); nor did he believe that Miss Gallison had resisted to the utmost of her capabilities (R. 632, 633); nor that she could have been raped under the circumstances set out in a hypothetical question purporting to embrace most of the substantial facts related by Miss Gallison regarding accused's attacks upon her and her defense against them (R. 620, 621), but he admitted he "had never seen a man attempt to rape a woman" and that he was merely expressing his personal opinion based upon the meager facts he had and not upon all the evidence it was possible to get in connection with the case (R. 634). In answer to a hypothetical question asked by the prosecution and which presupposed the existence of substantially all of the pertinent facts to which accused had testified regarding his sexual relations with Miss Gallison, witness was of the opinion that though the woman could have sustained a black eye and a cut lip under the circumstances posed he did not see how the other injuries suffered could be accounted for (R. 631).

He stated that during his examination of Miss Gallison she was "definitely nervous and emotionally unstable; neither particularly sad nor ashamed but rather defiant and vindictive" (R. 621). He agreed that a defiant and vindictive attitude is normally to be expected of a raped woman but felt that Miss Gallison had not been sufficiently impressed with the gravity of the Charge against the accused and he had expected her to be shocked at the possibility of a death sentence against him (R. 632). The palms of her hands had sweated but this was evidence of and denoted her emotional instability (R. 622).

The motion to strike Additional Charges II and IV.

(a) For the defense:

Accused was sworn and identified the copies of Additional Charges II and IV which were served upon him by the trial judge advocate. They were admitted in evidence (Def. Exs. 1 and 2). He stated that he had never been served with any changes to any portion of the charges received by him, but admitted that Additional Charge IV, as read to him on arraignment, differed from the copy served upon him only in the date (R. 13-18).

(b) For the prosecution:

The trial judge advocate admitted that the date "May 15" had been changed to "May 2" in the Specifications of Additional Charges II and IV, that other substantial changes had been made in Additional Charge II and that, through his negligence, he failed to note that the copies served upon accused did not contain the corrections made upon the originals. He requested the court to withhold a ruling upon the motion as to Additional Charge II and grant a continuance so that the advice of the convening authority might be obtained and any prejudices occasioned the defense might be cured (R. 19, 20).

The Plea to the Jurisdiction as to Additional Charge IV.

(a) For the Defense:

First Lieutenant Victor E. Williams, Air Corps, Mather Field, California, testified that he was appointed investigating officer to investigate Additional Charge IV; that he did investigate the Charge; that he had never seen the accused prior to the trial and never informed him of his rights to examine and cross-examine witnesses and present anything in his own behalf (R. 23, 24; Def. Ex. 3).

(b) For the Prosecution:

Second Lieutenant Maurice F. Biddle, Air Corps, stationed at Santa Ana, California, testified that, on 15 March 1943 he was appointed investigating officer by Headquarters, Army Air Forces West Coast Training Center, Santa Ana, California, "to accomplish compliance with Article of War 70 on Additional Charge IV in U. S. vs. 2nd Lieutenant George R. Claybourn" (R. 25; Pros. Ex. A). He interviewed accused at the provost marshal's office at Santa Ana Air Base in the presence of Captain Preston, assistant defense counsel (R. 29), on the same day upon which the copy of Additional Charge IV was served upon accused. He told accused he could make a statement if he wished and showed him the charge sheet, pointing out the list of witnesses thereon. Accused said he had no statement to make and neither he nor assistant defense counsel requested that any witnesses be called nor did they ask about any of the witnesses who had given evidence as the basis of the charge (R. 25-32).

Challenges for Cause.

At the conclusion of the prosecution's case defense counsel severally challenged four members of the court for cause for the reason that:

> "improper evidence concerning Additional Charge IV had been allowed before the court and that the evidence is tantamount to the introduction of prior offenses against the accused and therefore tantamount to the introduction of bad reputation on the part of the accused, the reputation of the accused not having been made an issue in the trial and in that respect the challenged officer cannot fairly and impartially weigh and adjudge the facts of the remaining Charges and Specifications".

When each was asked whether he could, after having heard evidence concerning Additional Charge IV, fairly and impartially, without prejudice to the accused, weigh and come to a finding on the other charges and specifications, each answered that he could (R. 426). After four challenges had been disposed of defense counsel addressed the other members of the court as follows:

> "If any of you feel that in view of the challenges for cause of the members already challenged that he cannot fairly determine the individual specifications on their own merits and disregard Charge IV, that he

so announce it to the court",

to which there was no response (R. 430).

The suggestion of insanity.

(a) For the defense:

Immediately after the court had made its findings defense counsel suggested the insanity of accused by offering in evidence a report of Major Milton L. Miller, Medical Corps, Chief of the Neuropathic Section of the Station Hospital at Santa Ana Army Air Base dated 5 April 1943, stating his opinion that "by legal and social standards accused is insane and is not responsible for his actions" (R. 680). Major Miller being in attendance was sworn and testified that on 3 and 4 April 1943 he had made a psychiatric examination of accused, making an extensive review of his childhood, adolescence, and subsequent career to the present time (R. 683). His conclusion was that accused suffered from periods of sexual frenzy during which he did not know what he was doing and was incapable of distinguishing right from wrong (R. 684). This opinion was derived from a review of some eight or ten cases of sexual relations with girls detailed by accused in most of which he had found it necessary to have intercourse over and over again in order for him to be satisfied (R. 686, 689), as well as from other information elicited from accused and by observation of his actions and reactions during the interviews (R. 691, 692, 693). Accused had been an erotomaniac since the age of 16 or 17 years (R. 699). He defined erotomania as "sexual frenzy - that state of mind during sexual excitement which can be characterized by confusement (sic), excitement, impaired judgment and sometimes combativeness" (R. 689). To this, in the case of accused, should be added "sadism" (R. 696). In his opinion the "slapping" of girls by accused during sexual experiences with them occurred in fits of rage over which he had no control, and that his running after girls who were trying to elude him was evidence of a confusion arising out of the frenzy (R. 685). The confusion displayed by accused when asked why he grabbed a girl or chased her down the road indicated that he was completely confused and that "the powerful forces underneath" were so strong that he was unable to deal with them and apparently became confused at those times (R. 693). This "confusion" was however not very evident and required alertness and a trained person in private interview to observe it (R. 694). When asked whether the feeling of repulsion (sic) for a girl with whom accused had sexual relations indicated anything he replied that it denoted that "the individual has a very marked sexual conflict and a certain degree of immaturity" (R. 686). He was of the opinion that all true rapists are

erotomaniacs, that they should be treated by hospitalization rather than punished by incarceration and the mere fact alone that force was used in accomplishing sexual intercourse was sufficient to indicate to him that there was something wrong with the person's mental stability and his ability to determine right from wrong and that he should be hospitalized (R. 690).

4. It is conceded that various changes were made in the Specifications of Additional Charges II and IV, prior to trial without indicating such changes upon the copies of the Charges served upon accused or otherwise notifying him that they had been made. Defense counsel moved to strike the Charges for the reason that there had been no compliance whatever with Article of War 70 regarding them.

Specifically it was urged that the date of the offenses as alleged in the Specifications of the copies of Additional Charges II and IV served upon accused was "May 15th, 1942" but that the Specifications of these Charges upon which he was arraigned alleged the date as "May 2, 1942" and that in the former it was alleged that the assault was committed "by wilfully and feloniously seizing her (Ruth Geiger), dragging her across the street, forcing her upon her back in the front seat of a car, bruising and prying her legs apart and tearing her clothing", whereas the latter alleged it was accomplished "by wilfully and feloniously seizing her (Ruth Geiger) with his hands and attempting to force her bodily into the front seat of an automobile." It was argued that these changes in the Specifications, without informing accused thereof, compelled him to go to trial upon Charges and Specifications of which he had no prior notice, contrary to the provision of Article of War 70. This contention is frivolous.

The motion to strike is proper only if a Specification states no offenses whatever or is so defective in failing to fairly apprise the accused of the offense intended to be charged that he is actually prevented from properly pleading thereto (par. 71c, M.C.M. 1928). If accused was, in fact, embarrassed or prejudiced by any of the changes made his remedy was a motion for a continuance; or if he was unable to properly plead to or defend against the accusations because of any defect or deficiency in the Specifications, the court, upon proper request, could have required ammendment and, if deemed necessary and appropriate, might have granted a continuance (par. 73, M.C.M. 1928).

It is patent from and inspection of the Specifications upon which accused was arraigned that each clearly sets forth facts with sufficient precision to fairly apprise accused of the offense intended to be charged; and it is apparent in the record that, notwithstanding announcement by defense counsel, at arraignment, that accused had ample time to prepare his defense, a continuance was nevertheless allowed on application of defense counsel, before the pleas were received, and that, upon reconvening, when again asked whether he "had adequate time to meet the

allegations on which the accused is arraigned so far as preparation is concerned" he replied "I believe the accused will be prepared to meet the issues." In denying the motion the law member stated: that it was being done:

> "with the understanding that, if in the course of the trial in connection with these two Charges the defense feels that by reason of these more or less minor Charges that they have not been given adequate time to prepare their defense, in view of the Charges, if they will again address a motion to this court requesting a continuance for that purpose the court will grant such motion * * *. If you feel that you have been prejudiced after the evidence goes in you will be allowed a continuance until such time has elapsed as will enable you to present your defense."

Numerous continuances were afforded defense throughout the trial.

Under all of the circumstances there was clearly no error in denying the motion to strike.

Nor is there any merit in the plea to the jurisdiction of the Court as to Additional Charge IV. Defense counsel labors under the delusion that a failure to comply substantially with the provisions of Article of War 70 is jurisdictional and therefore fatal error. Even though this were true, the record discloses no material failure to accord to accused any of the rights and privileges which counsel insists are assured him under the article. A copy of the Charge was served upon him and he was not denied the right to cross-examine any available witness against him, to present any thing he may have desired in his own behalf and to have such available witnesses as he might have requested, summoned and examined. Indeed, counsel appointed to defend him upon another pending Charge, arising out of the same circumstances and involving the same girl, time and place (Additional Charge II) was present when the officer investigating Additional Charge IV was performing his duties and neither he nor accused indicated any dissatisfaction with the proceedings, made no requests and registered no protests. That the copy of the Charge was served upon accused one day after the Charge had been referred for trial, while irregular, is of no moment and could not, conceivably, have altered accused's position to his prejudice. It is evident in the record that counsel for the defense did avail themselves of the privilege of examining witnesses for the prosecution sometime in February, 1943, several weeks prior to the reference for trial of Additional

Charge IV. But, conceding though not admitting, that there were irregularities and deficiencies in the means whereby accused was brought to trial on Additional Charge IV and that there was no substantial compliance with some of the provisions of Article of War 70 in regard thereto, these matters, in no way involve the jurisdiction of the court. The requirements are wholly procedural and do not affect the processes of courts-martial in their determination of guilt or innocence. The provisions of Article of War 70 requiring the investigation of Charges before trial are not jurisdictional and, under the circumstances of this case, failure to comply with them did not injuriously affect the substantial rights of accused (A.W. 37: C.M. 229477 Floyd.). There was consequently, no error in denying the plea. Notwithstanding this ruling, consideration of the plea was again urged at the conclusion of the prosecution's case and it was again properly denied.

Thereupon, "in order to get the challenge in the record" four members of the court were challenged for cause on the ground that if the plea to the jurisdiction was well taken then the reception of evidence on Charge IV was tantamount to allowing evidence of prior offenses on the trial of the remaining Charges and Specifications and equivalent to permitting evidence of bad reputation before accused's character had been put in issue. Accordingly, upon voir dire, each challenged member was asked whether, after having heard evidence concerning Additional Charge IV he could then, fairly and impartially, arrive at the findings on the other Charges and Specifications without considering such evidence, and each answered that he could. The members were severally challenged and each challenge was likewise separately acted upon by a majority of the court in closed session. While challenges should ordinarily be made before arraignment, challenges for cause may be presented at any stage of the proceeding. The court properly permitted these to be presented after the close of the prosecution's case but, since no adequate or just cause was disclosed upon examination, the court, with equal propriety, refused to sustain them.

Defense counsel next moved for findings of not guilty as to Additional Charges III and IV and their Specifications. Such a motion should never be granted if there be any substantial evidence which, together with all reasonable inferences therefrom and all applicable presumptions, fairly tends to establish every element of an offense charged or included in any Specification to which the motion is directed (par 71d, M.C.M. 1928). There was ample prima facie evidence tending to establish every

element of the offenses charged in the Specifications and there was no error in the ruling denying the motion.

5. Accused stands convicted of four distinct and separate acts of rape, three of which were committed upon the same girl within a period of approximately three hours. For the purpose of discussion, therefore, the crimes may conveniently be designated as "The Geiger rape" and "The Gallison rapes", the former having been perpetrated in Sacramento, California on 2 May 1942 and the latter in Kingman, Arizona on 20 January 1943.

There is no connection between the two episodes other than the fact that accused is the offender in both. At the time of the "Geiger rape" he was, as alleged, an aviation cadet. The record and the data as to service on the Charge sheets disclose that he was graduated from the cadet school on 23 June 1942 and was simultaneously commissioned as a second lieutenant in the Air Corps. There was no termination or interruption of his military status and consequently no loss of jurisdiction over his person respecting the "Geiger rape" when later, during his term of service as a commissioned officer he was charged with the offense (par. 10, M.C.M. 1928).

The Geiger Rape

In an examination of the events which followed the gathering of aviation cadets and a group of young women at the Hagan house in Sacramento, California, on the night of 2 May 1942, it must be borne in mind that they transpired in an enviroment of average respectability as the record no where discloses that the conduct of anyone present at the party, other than accused, was reproachable. It is true they were drinking and dancing; they split up in couples, and accused testified, and it may be inferred, that there was the usual percarious though nevertheless prevalent, intimacy of "necking", but Ruth Geiger and her girl friends, insofar as the record shows, were of good character and reputation and during the earlier part of the evening there was nothing to lead her, or any of her friends to believe that they were intentionally encouraging or inviting any greater familiarities. She said and accused admitted he kissed her once in the Hagan home but she insists that, on the trip to and from her house and to and from the store, there was no undue familiarity of any kind. Accused said he had his arms around her and he kissed her in the kitchen of the Hagan home; he kissed her in the kitchen of her own home, he drove back to the party from Ruth Geiger's home with his arm around her and kissed her before going into the house, and he drove the automobile to and from the store with his arm around her — all of which seems rather

incredulous in the light of his further testimony that, after he had parked the car on the side of the street opposite the Hagan home and had turned off the motor and the lights he then for the first time, "asked" her for a kiss. It is difficult to understand the occasion for such a belated show of gentility if accused testified truthfully. Ruth Geiger corroborated the request for the kiss in the automobile and the fair inference is that as to this fact, accused spoke the truth but that his description of the numerous prior familiarities is false.

As the events progress from this point much of the testimony of accused and Ruth Geiger can be reconciled without great difficulty. Accused admits it was no easy matter to effect his purpose. Although he glowingly described the amorous blandishments by which he sought to seduce her and the growing fervor and passion which he said he gradually aroused in her he corroborates her and admits that she rejected his advances and told him to stop when he placed his hand on her leg and notwithstanding all his skilful efforts to gain her consent and cooperation, she burst into tears and he into anger. Ruth Geiger said that his attempts to remove her girdle while on the front seat were unsuccessful because she fought with him and in the struggle he was hindered by the steering wheel and the fact that she could brace herself on the foot boards. The cramped quarters were not conducive to a successful prosecution of his plans.

He admitted that eventually, while still on the front seat "we were scooted over in the right hand corner of the car and I was more or less up on my right thigh and she was on her left thigh and our upper bodies were together"; that his arms were around her, the left at the waist and the right at the shoulders, and this is almost identical with the position described by Ruth Geiger and from which she said she was lifted over the back of the front seat and thrown upon the rear seat. Accused nevertheless denied they were ever in the back seat of the car.

Having told her while on the front seat that he was "going to have her" he wasted no time after he had transferred her to the rear for, before she knew what had happened, he was upon her, pinning her back to the seat and again trying to remove her girdle.

Accused had already taken his penis out of his trousers and tried to move her panties to one side but discovered "they weren't the ordinary panties a girl wears which are loose material so they can be readily moved aside." He asked her to remove the girdle and she refused to do so; yet it had to be taken off if he was to accomplish his purpose. He tried to leave the impression that nothing further was done in the matter

because of an interruption. Miss Geiger said the girdle was partially removed, having been stripped from one leg and left dangling around the other and if this is true there can be no question as to who removed it, for had she done so or assisted in any manner in order to make intercourse more convenient or comfortable it is reasonable to assume that she would not have been so crude and artless in her method. Again, the weight of the evidence is against accused and leads to the conclusion that he, himself, removed this obstacle to the fulfilment of his desires.

Throughout the encounter, according to Ruth Geiger's testimony, she fought as best she could, kicking and hitting, and at one time biting accused. She said she screamed and in this she is corroborated by Rose Oleson though it is extraordinary that no others in that residential section heard her even though the radio was turned on in the Hagan home. Accused admitted that she was crying and complaining that "we shouldn't be doing this" and both Miss Oleson and Lieutenant Jack Commander corroborate her hysterical condition - - one hardly compatable with the mutually pleasurable relationship described by accused.

Since there was no great disparity in age and strength between accused and Ruth Geiger, her physical resistance could possibly, have been more determined and vigorous. Yet the courts have now generally discarded the rule of "utmost resistance" and it is the accepted doctrine that a conscious woman, in possession of her natural, mental and physical powers and not terrified by threats or in such place and position that resistance would be useless must resist to the extent of her ability at the time and under the circumstances of the occasion.

Since this rule makes resistance a relative matter it may and should be modified to meet peculiar circumstances and exceptional cases. After a careful comparison of all the evidence it is believed that Ruth Geiger did resist to the extent of her ability at the time and under the circumstances of the assault made upon her and did everything which a girl of her apparent respectability and evident modesty could reasonably have been expected to do in attempting to frustrate accused's designs.

But the crime of rape is never complete without penetration which is the sine qua non of the offense and proof thereof beyond every reasonable doubt is essential to support a conviction. Was there a penetration in this case? Ruth Geiger testified that there was "an intercourse" and that she felt a "horrible pain being pushed in her".

Though she did not see accused open his trousers nor did she see his private parts, she "couldn't imagine that it could be anything else" but his penis which caused her the pain. Accused strenuously denies having intercourse with her and the circumstances surrounding his professed failure to accomplish the act bear out his explanation of why he failed. He said that at the height of his efforts and when everything favored the accomplishment of his purpose "a light flashed and more or less broke the spell". The testimony of both Rose Oleson and Lieutenant Commander shows that a light was turned on in their car so that they could examine a picture. Thus, the spell was broken as much for accused as it was for Miss Geiger and, fearful of discovery, he desisted and did not renew his efforts until she had left the car and he had caught her, and tried to kiss her and get her back into the automobile.

There can be no doubt of accused's intention and apparent present ability to consumate the act except for Ruth Geiger's resistance. He had partly removed the girdle and he had taken his penis out of his trousers and "was trying to get her in position so he could have her." Both accused and Miss Geiger testified that his body was between her legs. That he made strenuous efforts to effect a penetration is a reasonable inference and in the struggle it is highly probable that he did jab with his penis in the region of Miss Geiger's genitalia with sufficient violence to cause a "pushing pain" without having made a penetration of her private parts. She may honestly have believed there was a penetration when, in fact, there was none.

While no part of her testimony is of such a nature as to seriously impugn her veracity there is a feature of the case which weighs heavily against her evidence on the issue of penetration and that is her failure to disclose the crime to anyone until almost ten months after its commission. It is generally believed that when an outrage has been committed upon a woman, the instincts of her nature prompt her to make her wrongs known and to seek sympathy and assistance. In all jurisdictions, failure to make complaint or delay in the prosecution of the offender, unless just cause and excuse be shown, are looked upon as suspicious circumstances. Miss Oleson and Jack Commander were at the scene of the crime and shortly after it was committed took her home while she was still in a hysterical condition, yet she made no complaint to them. Her father was in her home when she arrived but she told him nothing then or later. She said there was a blood spot on her girdle but she voluntarily destroyed the evidence which could have corroborated her. If she had fears that injuries to her body had caused the blood stain common sense should have

directed her to a physician for an examination but she refrained from taking that precaution.

She gave every appearance of being modest and reticent at the trial and the record disclosed that her mother was a sick woman who had suffered several nervous breakdowns and that the daughter was fearful of the affect which disclosure of the rape would have upon her. While her own nautral modesty and her thoughtful consideration for her mother's welfare are commendable, the circumstances of this case and the gravity of the Charge she later made required the girl, if outraged as she claims she was, to make prompt complaint of some kind. She could and should have confided in Rose Oleson, her bosom friend and constant companion. That she did not do so until ten months later and then only because the information was being sought, justifies the inference that, on the night of the crime there was in her own mind, a doubt which restrained her from making such a serious accusation. This, in turn, casts a grave doubt upon her statement now, that penetration was actually effected — a doubt so strong that it is not overcome by the purported admission said to have been made by the accused to Jack Commander sometime after the crime was committed.

The Board of Review is, therefore, of the opinion that, while the prosecution produced competent evidence of every essential element of the crime charged, a thorough and impartial weighing of all the testimony impels the conclusion that, although accused did assault Ruth Geiger with intent to rape her at the time and place alleged, her resistance and other circumstances were sufficient to prevent the completion of the act and that there was, in fact, no penetration by accused of the private parts of Ruth Geiger.

The record is, therefore sufficient to support only so much of the finding of guilty of the Specification as finds accused guilty of the lesser included offense of assault with intent to rape Ruth Geiger at the time and place alleged, and insufficient to support the finding of guilty of the Charge but sufficient to support a finding of guilty of a violation of Article of War 93.

The Gallison rapes

Kingman, Arizona, is a small desert town with little social life and only a few simple and unpretentious amusememt places available for

entertainment. Among these was Gaddis' Cafe, a combined restaurant and cocktail bar where dancing was permitted in a side room. Sarah Gallison 21 years of age, was employed as stenographer and clerk by the Assessor of Mohave County, Arizona. Though she was a frequent patron of Gaddis' Cafe, she generally was in the company of girl companions and lady-like in her conduct. There, on the night of 19 January 1943 she and Lieutenant Ansell Brown became involved in a lover's quarrel which ended when he got up and left because, though they had been "keeping steady company" since the middle of December, 1942, and he had previously asked her in vain to marry him, she was wearing a diamond ring on her engagement finger claiming it had been given to her by a bombardier then in England. This was an untruth but he did not know it and, in anger, he left her.

Accused who was a second lieutenant of the Air Forces stationed at Kingman and who had known Miss Gallison casually for four or five weeks, was present and when Lieutenant Brown left, sat down with her and eventually asked to drive her home, borrowing Captain Reed's four-door sedan for the purpose.

Miss Gallison's home was only a block from Gaddis' Cafe if a short cut over the railroad tracks was taken in daylight; but at night and by street route, the distance was considerably greater. At about quarter to twelve o'clock Miss Gallison left the cafe in company with accused, ostensibly to be taken home. Neither she nor accused testified to any other plan or arrangement and although one of his officer companions asked him before they left the cafe whether the girl would indulge in sexual intercourse, accused frankly stated he had come to no conclusion on the matter. The reasonable inference is that Sarah Gallison had no such notions and had given no encouragement in that direction but that accused intended to probe into the possibility under circumstances of his own making and which soon followed. Accused had never been out with her before and did not know where she lived so she was obliged to direct him. After making one turn, at her suggestion, he refused, according to her testimony, to make the next but continued on along a dark and abandoned road. As he proceeded, refusing to pay any attention to her protests and requests to turn around other than to promise her he would do so, she became alarmed, reached for the car keys, switched off the ignition and pulled the keys out of the lock. Thereupon accused slapped her face so that it stung her and knocked the chewing gum out of her mouth.

According to his version he asked whether she wanted to take a ride and she agreed, provided they would not stay out too late; and, though he

made no mention of her snatching the car keys and his striking her at that time he did admit that she commented about the bad road on which they were traveling and noticed that there were no intersecting side roads.

She said that eventually he drove to the side of the road and parked the car. Then without further preliminaries, he shoved himself close to her, kissed her, put his left hand under her dress and placed it on her thigh. She immediately asked him to stop, and started then to physically resist him, hitting at him with her left elbow to keep him away. Notwithstanding, he pulled her down on the seat so that her head was in the left corner under the arm rest and steering wheel and she was lying on her back pinned down by his weight and his left arm across her chest. He then began tearing at her pants and while she struggled as best she could to get her hands free, and kicking and kneeing him, he slapped her, told her to shut up and not to worry about anything happening to her as he would "use something". She did grab at his penis trying to hurt him and "something" came off in her hand which accused either grabbed from her or knocked out of her hand, saying "You've ripped it". Then during her continued struggles in which he was still on top of her, pinning her down so that she was almost suffocated for want of air, he apparently put on another condom and "pushing his hips into her" he had intercourse with her during which she felt "two sharp lunges" and a pressure and pain in her stomach.

This same episode is portrayed quite differently by accused who testified he drove along the road with his arm around her until they came to a wide spot where he pulled over preparatory to turning around and returning to town. If this was his honest intention it was short-lived for he stopped and again asked her whether she "minded" and was again told they must not stay out too late. They then smoked cigarettes and indulged in "necking" until he became overheated and discarded his overcoat though she, strangely kept hers on.

The "necking", according to accused proceeded to "general love-making" in which category he apparently included the insertion of his finger in her vagina and, as he said "things were progressing nicely." Finding it too crowded, however, he edged by her, opened the right door and, while standing on the running board, with her legs extended through the doorway, he opened his trousers, got down upon her and prepared to insert his penis in her. At this point he was confronted with a remarkably sudden change in the temper of his paramour. However nicely he may have thought things were progressing and regardless of his seductive arts, she was not as eager for his embrace as he had hoped to find her for she

balked at the critical moment just as he was "close enough to start it in", raised her leg so as to prevent him from doing so and bethought herself of two unromantic reasons why she should not allow the matter to proceed: first, that she did not want to become pregnant and second, that the chill air was uncomfortable on her legs. To relieve her discomfort on the latter score he lifted her legs, placed them in the car, closed the door and went around to the other side; and to allay her fears on the former, he proceeded, by actual demonstration, to enlighten her in the use of rubber contraceptives. On doing so he said he tore one but, after adjusting another and a bit more "necking" he had intercourse with her while "she was up against the right corner of the car" and he "was kind of straddled the gear shift".

It seems hardly necessary to comment, at length, upon the incongruous testimony of accused when compared with that of Sarah Gallison in determining whether the intercourse thus effected was a rape. He admits that she expressed apprehension as they proceeded along the lonely, unused road away from her home and that she twice cautioned him about keeping her out late. This is competent evidence of her state of mind before accused committed any overt act.

In connection with this it is quite plausible that she did snatch the keys from the ignition lock in an effort to make him return to town; and, in the light of his own admission of similar physical violence to her later in the night, it is equally plausible that he did then slap her in the face as she said he did. Having thus given her reasonable cause to hate, if not fear him, it is not difficult to believe Miss Gallison when she said that, after parking the car, he made a sudden and ruthless assault upon her without any of the fondling and caressing preliminaries as to which he testified; for, so soon after such rude and violent conduct toward her, no sensible man could have expected any satisfactory response to attempted endearments.

According to accused, inasmuch as this was a mutual enterprise, he resorted to "necking", "general love making" and other preparatory maneuvers looking to their comfort and pleasure during intercourse. Why he persisted in remaining in the congested front of the car when the unobstructed rear portion was available accused did not say; nor, why, if he removed his coat for greater comfort and freedom, he did not assist her to do likewise. When confronted with the dilemma which arose when Sarah Gallison felt cold because her legs were sticking out of the car, he chose the least practical solution, pushed her legs back into the car,

closed the door and going to the left, placed himself in the most awkward position under the circumstances.

This testimony, if true, accounts for Sarah Gallison's black eye by attributing it to a bump received when accused raised her head to help her to sit up and she struck it against the steering wheel. To make this explanation credible it is necessary to believe the rest of accused's explanation of what followed and conclude it to be plausible that, although Miss Gallison had thus given herself a grievous bruise of her eye, she nevertheless reversed her position on the front seat and voluntarily submitted to intercourse with accused while "she was against the right corner of the car" and he "was sort of straddled the gear shift". Counsel for accused may have been somewhat dubious regarding these probabilities for he inquired about the feasability of such a situation and elicited from accused the admission that he "often had intercourse like that, before, under the same circumstances." No explanation was offered as to why, at this time, the comparative comfort of the rear seat would not have been the logical and sensible solution if a mutually agreeable intercourse was desired.

From accused's testimony it would seem to appear that he never thought of using a contraceptive before Miss Gallison mentioned the possibility of her pregnancy. A comparison and study of all the evidence leads to a different conclusion. Accused had contemplated sexual intercourse with some woman on that night before he knew he would see Miss Gallison. He had an engagement with another girl who failed to meet him and he had prudently provided himself with a package of condoms before going to Gaddis Cafe. While it is not believed that there were such discussions about contraceptives and pregnancy between Sarah Gallison and accused as he detailed, his testimony on these matters does serve to disclose what appears to have been his morbid fear that he would impregnate a woman, for he testified to a great length about pregnancy, illegal operations and abortive measures; stated how he had told her he was not the "marrying kind" even though he caused a girl to become pregnant; and he frankly described the disgusting use of a handkerchief during one of his intercourses with Miss Gallison so that the emission might be deposited upon it instead of being injected into the girl.

The inference which might well be drawn from accused's testimony in this matter, standing alone was that such considerate treatment of the girl by him was conclusive evidence of the fact that he used no force or violence in the sexual act and that, after he had explained the protection afforded by the use of a condom, she consented thereto. After careful consideration of all the testimony bearing upon this matter it seems far more probable that accused used contraceptives for his own protection lest he be made the victim of a pregnant girl.

She made no mention of these incidents in her testimony other than to describe his use of a "rubber" during the first coition.

The weight of the evidence, considering all reasonable and justifiable inferences in connection with the proof of undisputed and uncontradicted facts, strongly supports the tale related by Miss Gallison. No reason or motive for her engaging in and sharing such an enterprise as accused pictured has been even remotely shown. Sarah Gallison was Lieutenant Brown's "girl" and had been "keeping steady company" with him for a month. They were together on the night of the crime and but for the episode of the ring accused would not have had the opportunity of offering to take her home. Neither she nor accused testified to any prior discussion of or arrangement for a love affair. In fact, although he was prepared for and was undoubtedly seeking a companion for such a purpose, accused was obliged to admit to his friends, just before leaving the cafe with Miss Gallison, that he had "come to no conclusions" as to how he might fare in such a venture with her — extremely persuasive evidence of the fact that she either had not yet been approached on the matter or, if solicited, had rejected his advances.

It is, of course, conceivable that, even upon such short and casual acquaintance, a girl of Sarah Gallison's standing in the community where she lived, might have been seduced by accused into sexual intercourse with him under circumstances reasonably conducive to the expected pleasures incident to such a relationship; but it is incredible that she succumbed as readily as accused said she did, at midnight, in January, on a desolate road, in the narrow confines of the front seat of an automobile, while fully clothed in every respect, and without better preparation for comfort and convenience and more dalliance than appears in this case. The time and the place and all of the surrounding circumstances impel the conclusion that this was a brutal overpowering by superior force and a sexual assault against the utmost resistance of which the victim was then capable and therefore clearly without her consent.

In this connection it must be borne in mind that in the encounter there was an appreciable disparity in age, size and weight between the participants. Sarah Gallison was a mite of a girl, 21 years of age, just a bit over 5 feet tall and weighed no more than 100 pounds. Accused was 26 years old, 5 feet 9 inches tall and weighed approximately 155 pounds. Inasmuch as he was a junior officer of the Air Corps on active flying duty status it is reasonable to infer that he was in excellent physical condition.

To say that Miss Gallison could have defended herself more vigorously and successfully against accused's assaults under the circumstances in which she found herself would be holding her to a higher degree of responsibility for her welfare than the law requires in such cases. The essential element of non-consent, or that the act be against the woman's will, signifies that it be committed against the utmost reluctance and resistance which the woman is capable of making at the time. As heretofore stated, the matter is relative and must be judged in the light of all of the circumstances of the occasion such as the disparities above noted, the degree of force employed by the assailant and the uselesness of resistance. Stated differently, the resistance of the female, so as to support a charge of rape, need only be such as to make non-consent and actual resistance reasonably manifest.

Surely there is a reasonable manifestation of reluctance, non-consent and resistance in the situation here presented. With his superior strength, accused, first intimidated her by promising to take her home late at night and then over her protests drove her instead to the uninhabited outskirts of the town; then having aroused her fear by striking her in the face for interfering with his plans, forcibly shoved her to a reclining position on the front seat of the automobile with her head under the arm rest and beneath the steering wheel. With the weight of his body upon her, his left arm across her chest, pinning her down and further curtailing her already limited movements, he continued to "slap" her whenever she pleaded with him to desist. She fought with him, scratched him, hit him, kicked him and shoved him with her knee whenever she was able to do so. Outcry and calls for help would have been in vain at the uninhabited and untraveled locale where the crime occured.

Other matter in justification of the Charge made against accused will appear further on in the discussion of the incidents that followed this first assault upon Miss Gallison but enough has already been shown to sufficiently establish beyond reasonable doubt, every element of the offense set forth in the Specification of the Charge.

While it is not necessary to do so, it should be said, in passing, that the evidence of accused's treatment of Miss Gallison prior to and during the first rape might be held to have been of such a character as to create in the mind of his victim a fear for her safety and welfare and a sense of hopelessness so as to suspend her ability to resist the further assaults and therefore dispense with the necessity of positive

proof of her continued and constant struggle and resistance in the events which followed.

When a woman is overwhelmed by circumstances which, to her, seem appalling, it is not only probable but likely that she may, through fear, lose her courage and with it, her normal strength and ability to defend herself and so become practically helpless in the hands of one who has a criminal design which may be more readily accomplished when his victim is reduced to that condition. This principle is recognized by the law in cases of robbery which may be accomplished by violence or by putting in fear; and it may be said to be particularly true and applicable in cases of rape where the assaulted party is the physically weaker one.

But with this we need have little concern other than to invite attention to it as a factor to be considered when weighing the conflicting evidence relating to the additional acts of rape; for the record is replete with many corroborated evidences of Miss Gallison's persistent resistance to the very end of a harrowing experience. It is, therefore, not only proper but necessary to comment in some measure, upon the remaining testimony regardless of adding to an already lengthy record.

After the first intercourse had been accomplished, Miss Gallison complained of illness, but intending to get away from accused, if possible, asked to leave the car. He would not permit her to go alone but walked by her side, his arm around her, pinning her arms to her sides. As soon as she managed to free herself, she ran across the road in the hope of entering a cove of rocks located there and by going over a small hill beyond, escape from accused. In this she was unsuccessful because her feet became entangled in a piece of wire netting lying on the ground and accused soon caught her and jerked her across the road toward the car during which scuffle she fell to the roadway on her knees.

After she regained her feet and they were in the vicinity of the automobile they engaged in a fight in which she hit him and he countered with a blow by his fist on her head, knocking her down backward so that her head, back of her left ear, struck the ground. The blow stunned her for the moment. He continued to force her toward the car but when there, she stood on the running board to prevent him from shoving her through the door. Then he hit her on the chest with such violence that her head struck the car top and she was again dazed and fell upon her back on the front seat. Accused tried to follow her but she was kicking and he backed away saying she had bloodied his nose.

Thereupon she got out of the car and, though exhausted, ran down the road toward Kingman, but in a short while accused, who had followed, caught up with her, swore at her, hit her in the face, grabbed her by the hair and taking her by both hands dragged her back to the car and threw her upon the front seat. Then he got on top of her, "ripped" at her pants, put his hand on her private parts, slapped her whenever she pleaded for release and thus accomplished a second intercourse in virtually the same manner and by the same method as before.

On the other hand, accused denied he had ever crossed the road and had no recollection of the cove of rocks and the embankment described by Miss Gallison. He admitted following her on one occasion when she ran away from him toward Kingman; that he caught her by the coat and ripped it; and that he slapped her in the face in order to break the spell of her hysterical crying. He also admitted that he lured her back to the car with his promise to take her home.

On 21 January the investigating officer, the deputy sheriff and another Army officer went to the scene of the crime and found an automobile track by the side of the road and a torn as well as an unbroken, but used condom; scattered about on the trampled area near the car were a glove, buttons, and broken articles of jewelry, all of which were either the property of Miss Gallison or accused; and across the road they examined the cove of rocks, the embankment and the piece of wire netting with numerous small and large shoe-prints surrounding it. Her torn stockings were introduced in evidence and these, as well as the scratches and bruises described by three disinterested witnesses, bear out the fall and scuffling upon the roadbed; the black eye, described by witnesses and evident on the photograph introduced in evidence corroborates a violent blow from a fist; the resulting fall backward upon the left side of her head and the blow upon her chest knocking her head against the car top are substantiated by the medical officer's testimony of tenderness over the left mastoid process behind the ear and in the right occipital region and on the back of the head and over the left sternomastoid muscle; the attempt to escape into the cove is supported by the evidence of the wire netting and footprints; and the struggle by the side of the car is plainly apparent from the evidences thereof in the glove, the shoe and clothing buttons and the fragments of broken jewelry found scattered on the ground.

Further discussion is not necessary. The clear, direct and unequivocal testimony of Miss Gallison as to this intercourse, so plainly

supported by other unimpeachable evidence, contrasts sharply with the palpably false explanations offered by accused, and the Board of Review is of the opinion that she was, as she said, again overpowered by him and, notwithstanding such resistance as she was able to make and did make, was sexually assaulted for a second time, against her will and without her consent.

After the second intercourse, Miss Gallison complained of being really sick and accused permitted her to get out of the car but again clung to her with his arm around her shoulders. When he relaxed his hold so that she could remove her outer coat and while he was kneading her stomach to ease the pain of which she complained, she again broke away from him and ran toward Kingman. It was on this occasion when, according to Miss Gallison, accused caught hold of her sport-jacket in his race after her, and ripped it, as he admitted he did. Again he grabbed her hair, slapped her face, jerked her around and dragged her back to the car where he threw her upon her back in the front seat. All the while she was kicking at his shins, hitting and trying to scratch him whenever she was able to do so.

Here the stories of accused and his victim are at complete variance. She said that he finally lifted her over the back of the front seat and she fell to the floor in the rear; that he then got into the back of the car, jerked her onto the seat by her hair, stripped off her pants and once again forced intercourse upon her but that, on this occasion. he "whined and whimpered and cried" as though in pain.

On the other hand, accused maintained that there were only two acts of intercourse, —one on the front seat and one in the rear. He said that when he had promised to take her home after she had run away from him, weeping, she returned with him and they got into the car which he was unable to start until she suggested pulling out the hand throttle. In trying to fix the foot pedal he said he had a recurrence of an old sacro-iliac pain when he stooped over.

Nevertheless he soon began again to excite Miss Gallison's passions and when they had reached a point where they were "more or less like they had been before" he, for the first time, became concious of the cramped conditions in the front of the car and suggested moving to the rear, which they did. When they were more comfortably settled he proceded in what he facetiously called a ceremonious removal, by him, of Miss Gallison's pants. Then, though he testified that he suffered a pain in

his back whenever he got up or bent down, they again had intercourse and in his testimony he detailed the intimate facts by which he was certain Miss Gallison had enjoyed the experience. He however, denied himself a natural gratification because he was obliged, under his promise to her that she would not become pregnant and since, when he reached for a condom he failed to find one, to spread his handkerchief beneath the girl to catch his emission upon withdrawal. This was not the only consideration shown her at the time, for when the affair was over, he got out of the car and, as he said, walked modestly away so that "the lady could put on her pants".

By such testimony, ridiculous and grotesque at times, accused apparently sought to establish not only non-resistance on the part of Miss Gallison but her full and complete assent as well; and he must have assumed the court to be over-credulous to attempt to justify himself by such conflicting and implausible statements.

Without consideration of what followed and irrespective of other, later corroborations of Miss Gallison's sordid tale, there can be little credence given to accused's testimony thus far where it differs from Miss Gallison's statements. For, though an attempt was made to destroy her credibility by the introduction of evidence intended to show a bad character and reputation, the facts adduced were so meager, vague and indefinite as to utterly fail in their purpose. If the proprietor and waitress of the cafe characterized as a "dive" by a defense witness could say no more about Miss Gallison than the record discloses, that fact is strongly persuasive of the converse and it is reasonable to assume that the girl, who was employed as clerk and stenographer by the Assesor of Mohave County, was of good repute in the community where she resided. Her credibility not only stands unimpeached but is, in fact, supported and strengthened by numerous corroborations on essential matters throughout and often by accused himself.

It is, therefore, the opinion of the Board of Review that accused did, by force and violence and against the will and without the consent of Miss Gallison, rape her a third time as she alleged and as the record clearly shows.

Comment upon the distasteful evidence of what followed next is reluctantly made but is necessary to show the depraved nature and inordinate desires of accused especially because of the elaborate detail with which he described his own misconduct.

Miss Gallison testified that when they were returning home accused again opened his trousers, seized her hand and, despite her protests and resistance, forcibly held it on his penis until a dog barked, a light appeared in the window of a house near the road and he desisted when she said she lived there and her folks were evidently "waiting up" for her. They thereupon got out of the car and walked toward the house.

Accused admitted placing her hand on his privates but put a different construction on the situation. He said that he showed her how to masturbate him and that they then indulged in the act mutually until he had an emission which he caught in his handkerchief. Immediately thereafter, according to his tale, they talked about possible pregnancy again and what to do in case it developed; then they argued about marriage until their wrangling caused a dog to bark and Miss Gallison informed him that she lived there, whereupon, they got out of the car.

Here followed the strangest and most illogical episode of the evening, if accused is to be believed. He testified that, although he had twice had sexual intercourse with a girl with whom he had never been out before, and although she unhesitatingly gratified him still further by masturbation before they parted, during all of which nothing occurred to mar their pleasant relations except his slapping her in the face to break the spell of her hysterical crying after he was obliged to race after and catch her when she tried to escape from him, he finally designated her as a "bitch" with whom he would have nothing to do. Then, a moment later, he asked her for a "good night" kiss, was refused, insisted upon having one, and when, in the struggle, she scratched his face in self-defense, he "slapped hell out of her." In this bold fashion accused apparently sought to explain how he received scratches on his face apparent on the day following the crime as well as justify the many bruises and injuries to her person and clothing which Miss Gallison said she received in resisting his attacks upon her.

But, on this issue, the most convincing proof is to be found in the testimony of Mrs. Hubbs who saw Miss Gallison immediately after her four-hour encounter with accused and who said that "she looked like she had been drug all over the place", minutely describing her torn and dirty clothing and her many bodily injuries. Further corroboration was furnished by Mrs. Beller and the constable who made a casual examination of Miss Gallison's face while taking her home and who, later examined her injuries more fully in the presence of Mrs. Beller and her daughter at the Beller home. It is inconceivable that the injuries and damages disclosed

could have been suffered at the time and in the manner stated by accused and the explanation thus offered by him must, like so much else of his testimony, be deemed false. It should be borne in mind that, in this case, there was not only prompt disclosure of the crime to a police officer as soon as the victim was free of her assailant, but a most compelling part of the evidence rests in the fact that while accused was still struggling with her, trying to get her back into the car near the home of Mrs. Hubbs, Miss Gallison, as soon as she knew she was near a habitation, cried out, calling for help and saying she was being attacked, thus adding still further weight to her testimony regarding her resistance against accused.

The evidence as to each offense alleged affords ample competent and convincing proof of every essential element of the crime charged. Two of the carnal connections with Miss Gallison were admitted by accused, leaving for determination solely the questions as to whether there was a third and whether any or all of them were had by force and against her consent. Any doubt which had arisen, from time to time, as the evidence of accused and Miss Gallison was compared, considered and weighed, was invariably resolved in her favor not only because of the corroborations afforded her in his own, as well as other testimony, but on account of the patent implausibility of much of his defense as well. The conclusions reached are irresistible and leave no ground for any reasonable doubt in any respect.

The Board of Review is therefore, of the opinion that the record is legally sufficient to support the findings of guilty of the Specification and the Charge and guilty of each of the Specifications of Additional Charge I and of Additional Charge I.

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In conclusion, it is noted that upon the suggestion of insanity which was made after the findings by the court and apparently against the express wish of accused, a medical officer was interrogated as an expert opinion witness in the matter.

It appears that he made an examination of accused over a weekend during the trial, and rested his conclusions solely upon conversations had with and statements made to him by accused, any or all of which could, under the circumstances, have been self-serving.

A casual inspection of his testimony will readily disclose the

indefinite character, shadowy substance and vague import of the expert's opinions and the amazing and untenable principles which he advanced.

A depraved sex appetite is little different from an uncontrolled desire for strong drink and should receive no greater consideration in the courts; and whether a rapist shall receive curative hospitalization or condign punishment when convicted of crimes of violence is not a matter for this Board to decide on the record now before it.

Mere frenzy, emotional insanity, perverted morals or, so-called irresistible impulse are not excuses for crime where such conditions coexist with a reasoning power and are not associated with an actual disease of the mind.

Nothing was produced before the court from which it could properly have ruled that accused's sanity should be probed. On the contrary, the shrewd and skillful manner in which he testified on direct and cross-examination conclusively demonstrated that accused had far more than average intelligence at the time of his trial and since there was no competent evidence that, at the time of the commission of any of the offenses alleged, he suffered with any mental disease or derangement which prevented him from knowing right from wrong and adhering to the right, nor any offer to produce further testimony of such a deficiency, the court was justified in constituting itself the judge of the extent to which the inquiry should go and properly determined that accused's insanity had not become an issue in the trial (CM 193543-Kazmaier).

6. Upon the request of Honorable C. W. Bishop, member of the House of Representatives, Marion M. Hart, Exquire, of the Illinois bar presented an oral argument before the Board of Review and filed a brief in this matter. Accused has also submitted an argument by informal papers in the nature of a brief and commentary on the evidence. In addition, letters from accused's parents, and numerous character testimonials have been submitted to The Judge Advocate General. All have been carefully examined and considered by the Board in arriving at its opinion. They accompany the record and are forwarded therewith.

7. The records in the office of The Adjutant General show that accused was born in Benton, Illinois, and is 26 years of age. He was graduated from Benton Township, (Illinois) High School, attended the University of Illinois for 2½ years, the University of Southern California for 6 months, and successfully completed the prescribed course as an Aviation Cadet (Pilot) at Mather Field, California. He was commissioned a Second Lieutenant, Army Air Forces Reserve on 23 June 1942 and on the same day was assigned to Headquarters AAFAFS, Mather Field, California.

8. The court was legally constituted and had jurisdiction of the person of accused and of each offense alleged. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of the Specification and the Charge and of the Specifications and Additional Charge I, legally sufficient to support only so much of the findings of guilty of the Specification of Additional Charge IV as finds accused guilty of assault with intent to rape Ruth Geiger at the time and place alleged and in the manner proven, legally insufficient to support a finding of guilty of Charge IV but legally sufficient to support a finding of guilty of a violation of Article of War 93, and legally sufficient to support the sentence and to warrant confirmation thereof. A sentence of death or life imprisonment is mandatory upon conviction of a violation of Article of War 92 and there is no limitation upon the imprisonment which may be imposed upon conviction of a violation of Article of War 93. Dismissal is authorized upon conviction of a violation of either Article of War 92 or Article of War 93. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape and the offense of assault with intent to rape, each of which is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year, the former by section 2801 and the later by section 501, Title 22, Code of the District of Columbia.

William A. Rounds, Judge Advocate.

Carle A. Hoffman, Judge Advocate.

Herbert Friedman, Judge Advocate.

1st Ind.

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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 George R. Claybourn (0-726573), 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 of the Charge and its Specification and Additional Charge I and its Specifications, - alleging rape in violation of Article of War 92 - and legally sufficient to support only so much of the findings of guilty of Additional Charge IV and its Specification, - alleging rape in violation of Article of War 92 - as involves findings of guilty of the lesser included offense of assault with intent to commit rape, at the time and place and upon the person alleged, in violation of Article of War 93. He was found not guilty of Additional Charges II and III and their Specifications, - alleging assault with intent to rape in violation of Article of War 93. I recommend that only so much of the findings of guilty of Additional Charge IV and its Specification be approved as involves findings of guilty of the lesser included offense of assault with intent to commit rape, at the time and place and upon the person alleged, in violation of Article of War 93, that the sentence be confirmed and 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 brief of counsel for accused and to numerous communications attesting to accused's good character, marked as follows: Brief of Marion M. Hart, Esq., Accused's Comments on Testimony; Character References 1 and 2; and Miscellaneous Correspondence 1 and 2.

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.

8 Incls.
Incl.1-Record of trial.
Incl.2-Dft let. sig. A.S.W.
Incl.3-Form of action.
Incl.4-Brief.
Incl.5-Character References 1.
Incl.6-Character References 2.
Incl.7-Miscellaneous Correspondence 1.
Incl.8-Miscellaneous Correspondence 2.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed. G.C.M.O. 246, 18 Sep 1943)

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

SPJGK
CM 235408

(55)

26 AUG 1943

UNITED STATES	)	4TH MOTORIZED DIVISION
v.	)	Trial by G.C.M., convened at Fort Dix, New Jersey, 10 May 1943. Dismissal.
Second Lieutenant HENRY H. JORDAN (O-1283786), Infantry.	)	

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

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

Specification: In that, 2d Lieutenant Henry H. Jordan, Company "H", 12th Infantry, did, without proper leave, absent himself from his organization at Camp Gordon, Georgia from about 11:00 A.M. Thursday, April 8, 1943, to about 0800 A.M. Friday, April 9, 1943.

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

Specification: (Finding of not guilty of the Charge and Specification).

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

Specification 1: In that, 2d Lieutenant Henry H. Jordan, Company "H", 12th Infantry, having received a lawful order from Captain Richard J. O'Malley, 12th Infantry, not to drink beer with enlisted men, the said Captain Richard J. O'Malley being in the execution of his office, did, at bivouac area near McCormick, South Carolina, on or about March 11, 1943, fail to obey same.

Specification 2: (Finding of not guilty).

Specification 3: (Finding of not guilty).

He pleaded not guilty to all Charges and Specifications. He was found guilty of Charge I and its Specification and of Charge III and Specification 1 thereunder, not guilty of Charge II and its Specification and Specifications 2 and 3 of Charge III. Evidence was introduced of one previous conviction by general court-martial for absence without leave in violation of Article of War 61 and for failure to sign the "Regimental In and Out Register" as required by standing orders in violation of Article of War 96. 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 six months. The reviewing authority approved the sentence, remitted that portion thereof adjudging confinement and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution is as follows:

Charge I - Absence without leave: Captain Richard J. O'Malley, commanding officer of H Company (accused's company), 12th Infantry, testified that on or about 8 April 1943 the company was engaged in cleaning barracks and that about 11:30 a.m. he missed the accused. He did not see the accused around the area nor was the accused at the mess hall for the noon meal. Thereafter Captain O'Malley conducted a search for accused which included the officers' barracks, company barracks, two post exchanges, the central officers' mess and company area, but without success. The search extended over a period from 12:00 noon to about 4:45 p.m. The accused was not seen until 8 o'clock in the morning, 9 April 1943. The absence of accused from his organization was without authority (R. 5-6). First Lieutenant Earl W. Enroughty of H Company stated that he was with the organization on 8 April 1943 and as far as he knew the accused was absent on that date (R. 8).

Charge III, Specification 1 - Failure to obey a lawful order of his commanding officer: On the evening of 11 March 1943 the men of the second platoon (H Company) were having a beer and chicken party (R. 8). Captain O'Malley stated that around 7 o'clock (while the organization was in bivouac area) he returned to the company area from a meeting at the battalion C.P. and found the accused, First Lieutenant Enroughty and Second Lieutenant James H. Berline, all of H Company, seated with some enlisted men, drinking beer. Calling the three officers to his tent, Captain O'Malley gave them the instructions which he had received from the battalion commander. He reminded the officers that he had just seen them drinking beer with the enlisted men and told them that he had no objection to their drinking beer " * * * if they would get the beer and take it to their tents away from the enlisted men * * *" and that he never wanted to see any of them drinking with enlisted men. This warning was given around 7 o'clock in the evening. The three officers were "lined up" in front of Captain O'Malley's tent and the accused was within four feet of Captain O'Malley (R. 6-7). Lieutenants Enroughty and Berline each corroborated the testimony of Captain O'Malley with respect to this incident. Each testified in substance that Captain O'Malley at the time ordered them not to drink with the enlisted men any more. Each testified

that within a few minutes after the order he saw the accused standing around the fire again drinking beer with the enlisted men (R. 8-11).

For the defense the accused, testifying in his own behalf, made no statement with reference to the absence without leave from his organization as alleged in the Specification, Charge I. Relative to Specification 1, Charge III, involving his alleged failure to obey the order of Captain O'Malley, the accused stated in substance that he did not recall receiving an "order" from Captain O'Malley -

> "Captain O'Malley told us that we shouldn't be drinking with the enlisted men unless it was a party - some sort of platoon party - and that he didn't approve of it, but so far as an order is concerned I didn't hear him say anything about it. * * * I went back to the platoon fire. * * * And after Captain O'Malley got through with us, all three of us went back there and ate some chicken, and I went back to my tent, and also took a bottle of beer with me to my pup tent." (R. 19, 20).

Accused stated on cross-examination that he did not drink any beer after leaving Captain O'Malley's tent. When asked if he understood Captain O'Malley's warning as an order accused replied, "Yes - a request, or his order" (R. 24).

4. Proof of the unauthorized absence of accused as alleged in the Specification, Charge I, is clear and undisputed. With respect to the alleged failure of accused to obey the order of his superior officer, it is perfectly obvious that Captain O'Malley, accused's company commander, seeing accused and two other lieutenants of his organization drinking beer with the enlisted men, called the three officers to his tent, expressed his disapproval and admonished them against the repetition of such practice. Within a few minutes thereafter accused, in disregard of his commanding officer's order, was seen again drinking beer with enlisted men of his platoon. The accused by implication contended that there was no order. Later, however, he admitted that he understood the admonition as "a request or an order" and that in deference thereto he refrained from drinking with the enlisted men. The denial of the accused is evasive and unimpressive. The testimony of Captain O'Malley and of the other two officers who were present, is positive and unequivocal, both as to the order and as to the failure of accused to obey the order. The court was fully warranted in its findings of guilty.

5. The record of trial of this officer upon other offenses (CM 236209) now before the Board of Review should be considered in connection with action upon this record.

6. The accused is 28 years and 7 months of age. The records of the

Office of The Adjutant General show that he attended Wheeler (Texas) High School two years but did not graduate. He served as an enlisted man in the Regular Army:

> "Enlisted October 6, 1933; honorably discharged May 29, 1935, reenlisted May May 29, 1935, honorably discharged June 16, 1937; reenlisted June 26, 1937; honorably discharged April 12, 1940; reenlisted February 12, 1941; honorably discharged October 18, 1941; reenlisted October 19, 1941; honorably discharged May 14, 1942 * * *"

on which date he was graduated from the Infantry School, Fort Benning, Georgia, and commissioned a temporary second lieutenant, Army of the United States. In recommending accused for Officer Candidate School his commanding officer stated that his character was excellent and "As leader of a Machine Gun Section he has shown that he possesses the qualities of a leader". On 12 May 1943 accused submitted his resignation as an officer in the Army of the United States for the good of the service. The resignation was disapproved.

7. 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. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 61 or 96.

Terry A. Gen, Judge Advocate.

John Bonnevill, Judge Advocate.

(On Leave), Judge Advocate.

1st Ind.

War Department, J.A.G.O. 30 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 Henry H. Jordan (0-1283786), 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 as approved by the reviewing authority and to warrant confirmation of the sentence. I recommend that the sentence be confirmed but that the forfeitures adjudged be remitted and that the sentence as thus modified be carried into execution.

3. The sentence in the instant case (CM 235408) was adjudged on 14 May 1943. Accused was thereafter tried (1 June 1943) by general court-martial, found guilty of breaking arrest, in violation of Article of War 69, drinking alcoholic beverages with enlisted men in public places (2 specifications), in violation of Article of War 95, and was sentenced to dismissal and total forfeitures. The record of trial in that case (CM 236209) 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 breaking arrest in violation of Article of War 69 and legally sufficient to support only so much of the findings of guilty of the specifications under the 95th Article of War as involves findings of guilty of those specifications in violation of Article of War 96. 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 confirmed and carried into execution I shall cause the record of the other trial (CM 236209) to be filed in my office without further action. The opinion of the Board of Review in the other case (CM 236209) is attached hereto for your information.

4. Inclosed herewith are a draft of a letter for your signature, transmitting the record to the President for his action and a form of Executive action 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-Op. Bd. of Rev. (CM 236209).
Incl.3-Dft. ltr. for sig. Sec. of War.
Incl.4-Form of action.

(Sentence as approved by reviewing authority confirmed, but forfeitures remitted. G.C.M.O. 281, 30 Sep 1943)

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

SPJGN
CM 235420

MAY 27 1943

UNITED STATES	)	ARMY AIR FORCES WEST COAST TRAINING CENTER
v.	)	Trial by G.C.M., convened at Yuma, Arizona, April 26, 1943. Dismissal.
Second Lieutenant WILLIAM J. KELLY (0-1288564), Air Corps.	)	

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

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that 2nd Lieutenant William J. Kelly, Air Corps, Yuma Army Air Field, Yuma, Arizona, did, at Yuma Army Air Field, Yuma, Arizona, on or about February 9, 1943, with intent to defraud, wrongfully and unlawfully make and utter to Yuma Air Base Exchange, Yuma, Arizona, a certain check, in words and figures as follows, to wit:

Ajo, Arizona February 9, 1942 No.

VALLEY NATIONAL BANK

Pay to the
Order of Cash $35.00

Thirty-five and no/100 - - - - - - - - - - - Dollars

/s/ William J. Kelly
0-1288564

and by means thereof did fraudulently obtain from Yuma Air Base Exchange, Yuma, Arizona, cash in the amount of thirty-five dollars ($35.00), he the said 2nd Lieutenant William J. Kelly, then well knowing that he did not have and not intending that he should have sufficient funds in the Valley National Bank, Ajo, Arizona for payment of said check.

Specification 2: In that 2nd Lieutenant William J. Kelly, Air Corps, Yuma Army Air Field, Yuma, Arizona, did, at Yuma Army Air Field, Yuma, Arizona, on or about February 13, 1943, with intent to defraud, wrongfully and unlawfully make and utter to Yuma Air Base Exchange, Yuma, Arizona, a certain check, in words and figures as follows, to wit:

Ajo, Arizona February 13, 1942 No.

VALLEY NATIONAL BANK

Pay to the
Order of Post Exchange, Yuma Army Air Field $12.00

Twelve and no/100 - - - - - - - - - - - - - - - - Dollars

/s/ William J. Kelly
0-1288564

and by means thereof did fraudulently obtain from Yuma Air Base Exchange, Yuma, Arizona, cash in the

amount of twelve dollars ($12.00), he the said 2nd Lieutenant William J. Kelly, then well knowing that he did not have and not intending that he should have sufficient funds in the Valley National Bank, Ajo, Arizona for the payment of said check.

Specification 3: In that 2nd Lieutenant William J. Kelly, Air Corps, Yuma Army Air Field, Yuma, Arizona, did, at Yuma Army Air Field, Yuma, Arizona, on or about February 20, 1943, with intent to defraud, wrongfully and unlawfully make and utter to Yuma Air Base Exchange, Yuma, Arizona, a certain check, in words and figures as follows, to wit:

Ajo, Arizona February 20, 1943, No.

VALLEY NATIONAL BANK

Pay to the
Order of Cash $25.00

Twenty-five and no/100 - - - - - - - - - - - - - Dollars

/s/ William J. Kelly 0-1288564

and by means thereof did fraudulently obtain from Yuma Air Base Exchange, Yuma, Arizona, cash in the amount of twenty-five dollars ($25.00), he the said 2nd Lieutenant William J. Kelly, then well knowing that he did not have and not intending that he should have sufficient funds in the Valley National Bank, Ajo, Arizona, for payment of said check.

Specification 4: In that 2nd Lieutenant William J. Kelly, Air Corps, Yuma Army Air Field, Yuma, Arizona, did, at Yuma Army Air Field, Yuma, Arizona, on or about March 19, 1943, with intent to defraud, wrongfully and unlawfully make and utter to Lt. Sherman L. Huston, a certain check, in words and figures as follows, to wit:

Ajo, Arizona March 19, 1943 No.

VALLEY NATIONAL BANK

Pay to the
Order of Cash $20.00

Twenty and no/100 - - - - - - - - - - - - - - Dollars

/s/ William J. Kelly

and by means thereof did fraudulently obtain from Lt. Sherman L. Huston, cash in the amount of twenty dollars ($20.00), he the said 2nd Lieutenant William J. Kelly, then well knowing that he did not have and not intending that he should have sufficient funds in the Valley National Bank, Ajo, Arizona for the payment of said check.

Specification 5: In that 2nd Lieutenant William J. Kelly, Air Corps, Yuma Army Air Field, Yuma, Arizona, did, at Yuma, Arizona, on or about March 20, 1943, with intent to defraud, wrongfully and unlawfully make and utter to The Emporium, Yuma, Arizona, a certain check, in words and figures as follows, to wit:

Ajo Branch
VALLEY NATIONAL BANK

Yuma, Arizona, March 20, 1943

Pay to the
Order of The Emporium $40.00

Forty and no/100 - - - - - - - - - - - - - - Dollars
/s/ Alteration of title
guaranteed /s/ William J. Kelly
0-1288564

and by means thereof did fraudulently obtain from the Emporium, Yuma, Arizona, cash in the amount of forty

dollars ($40.00), he the said 2nd Lieutenant William J. Kelly, then well knowing that he did not have and not intending that he should have sufficient funds in the Valley National Bank, Ajo, Arizona, for the payment of said check.

Specification 6: In that 2nd Lieutenant William J. Kelly, Air Corps, Yuma Army Air Field, Yuma, Arizona, did, at Yuma, Arizona, on or about March 22, 1943, with intent to defraud, wrongfully and unlawfully make and utter to the San Carlos Hotel, Yuma, Arizona, a certain check, in words and figures as follows to wit:

Ajo Branch
VALLEY NATIONAL BANK
Yuma, Arizona March 22, 1943

Pay to the
Order of Cash $20.00

Twenty and No/100 - - - - - - - - - - - - - Dollars
/s/ Alteration of title
guaranteed
WJKelly /s/ William J. Kelly
0-1288564

and by means thereof did fraudulently obtain from the San Carlos Hotel, Yuma, Arizona, cash in the amount of twenty dollars ($20.00), he the said 2nd Lieutenant William J. Kelly, then well knowing that he did not have and not intending that he should have sufficient funds in the Valley National Bank, Ajo, Arizona for the payment of said check.

Specification 7: In that 2nd Lieutenant William J. Kelly, Air Corps, Yuma Army Air Field, Yuma, Arizona, did, at Winterhaven, California, on or about March 22, 1943, with intent to defraud, wrongfully and unlawfully make and utter to J. M. Mueller, a certain check, inwords and figures as follows, to wit:

Ajo, Arizona March 22, 1943 No.

VALLEY NATIONAL BANK

Pay to the
Order of Cash $10.00

Ten and No/100 - - - - - - - - - - - - - - - Dollars

/s/ Alteration of title
guaranteed
WJKelly /s/ William J. Kelly
O-1288564

and by means thereof did fraudulently obtain from J. M. Mueller, cash in the amount of ten dollars ($10.00), he the said 2nd Lieutenant William J. Kelly, then well knowing that he did not have and not intending that he should have sufficient funds in the Valley National Bank, Ajo, Arizona for the payment of said check.

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

Specification: In that 2nd Lieutenant William J. Kelly, Air Corps, Yuma Army Air Field, Yuma, Arizona, having been restricted to the limits of Yuma Army Air Field, Yuma, Arizona, did at Yuma Army Air Field, Yuma, Arizona, on or about April 16, 1943, break said restriction by going to Yuma, Arizona.

He pleaded 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 only so much of the sentence as provides that the accused be dismissed the service and forwarded the record of trial for action under Article of War 48.

3. The accused having pleaded guilty to all Charges and Specifications neither the prosecution nor the defense introduced any evidence and the accused neither testified under oath nor made any statement.

4. War Department records show that the accused is 31 years of age. He had continuous enlisted service from October 15, 1940, to January 22, 1941, entered the Officer Candidate School at Fort Benning, Georgia, and there was commissioned a Second Lieutenant, Infantry, on July 23, 1942.

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 and to warrant confirmation thereof. A sentence of dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of a violation of Article of War 96.

Chas. L. Dressor, Judge Advocate.

Abner E. Lipscomb Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

1st Ind.

War Department, J.A.G.O., JUN 7 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant William J. Kelly (O-1288564), 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 as approved by the reviewing authority and to warrant confirmation thereof. I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution.

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

Myron C. Cramer

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

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

(Sentence as approved by reviewing authority confirmed but execution suspended. G.C.M.O. 138, 8 Jul 1943)

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

SPJGQ
CM 235435

MAY 25 1943

UNITED STATES v. Private WILLIAM W. ELLIS (35630609), Company G, 11th Quartermaster Training Regiment.	THIRD SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Lee, Virginia, May 13, 1943. Dishonorable discharge and confinement for fifteen (15) years. Federal Reformatory, Chillicothe, Ohio.

REVIEW by the BOARD OF REVIEW
ROUNDS, LYON and FREDERICK, 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 tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private William W. Ellis, Company G, 11th Quartermaster Training Regiment, did, at Camp Lee, Virginia on or about May 6, 1943 with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Theodore J. Gage, a human being, by stabbing him with a knife.

He pleaded not guilty to and was found guilty of the Specification and Charge. No evidence of previous convictions was introduced in the trial. He was sentenced to be dishonorably discharged, 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 but reduced it to fifteen 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 for the prosecution discloses, in substance, that accused, the deceased, Private First Class Charles Taylor, Privates David Seabrook, Baskin Van Leer, David Sherman, and others were engaged

in a "crap" game after "bed check" on the second floor of a platoon barracks in Camp Lee, Virginia on the night of May 5, 1943. Accused, deceased and all of the soldiers named were members of Company G, 11th Quartermaster Training Regiment (R.10,11,17,18,25).

According to the testimony of Private David Seabrook, he and Gage were seated upon Army foot lockers by the side of a bed upon which the dice were being rolled. He sat on the right and accused stood on the left of Gage. At about 12:25 a.m. accused and Gage had an argument about a dollar bet in which accused asked Gage to return the dollar to him which Gage refused to do, saying he had won the bet fairly. The argument was of short duration and had entirely ceased when, about two minutes afterward, he saw accused make two motions toward Gage's chest. Gage got up, "hollered - he had been cut" and witness saw a knife in accused's hand at the time. When shown a knife at the trial he identified it as the knife seen in the hand of accused by three notches on the handle which he had observed at the time of the assault. There had been no physical attack by either upon the other, nor any scuffle or fighting prior to the stabbing (R.10-16).

Private Baskin VanLeer testified that he was present in the room on the occasion when deceased was stabbed, standing behind a row of men who were between him and the bed around which the dice playing was done. He heard Ellis say to Gage "You owe me a dollar", and heard Gage deny it, whereupon they started to scuffle and when they were "released" Gage was cut or stabbed and blood was flowing from his chest. He saw deceased standing at the foot of the bed but neither saw the stabbing nor a knife. He also heard accused say, after the stabbing that "I am tired of these fellows fooling around with me" (R.16-21).

Private First Class Charles Taylor testified that the incident occurred in his room, but that after "bed check" he had gone to sleep until awakened by a scuffle caused by stumbling over foot lockers. He did not see the manner in which Gage was injured but saw him stumbling back against the door with blood on his undershirt. Accused was at that time standing at the foot end of the bed. He had asked accused about the affair and was told by him that "Private Gage tried to take a dollar from me", "I am not going to let anybody take anything from me", and "They are always picking on me" (R.21-24).

Private David Sherman testified that, although he had been playing with the group earlier in the evening he had stopped at 10:30 p.m. because of "bed check" and had gone to an adjoining room to do some writing. When disturbed by an argument between accused and Gage over a matter of a dollar he had gone to the room where the playing was

continuing and told the men to keep quiet. Gage was, at that time, sitting on a foot locker and accused was standing beside him. The argument subsided and there had been no disturbance for about 20 or 25 minutes when he saw accused stab Gage with a knife. Immediately prior to this he had heard Gage yell "Ugh" and accused would have stabbed him again if witness had not stopped him. There had been no altercation between accused and Gage after witness had told the men to be quiet and there was no scuffling of any kind. He had helped take deceased to the dispensary and then returned and looked for accused whom he found in the middle of the barracks. He had taken up a part of a shelf to hit accused when he got out by way of the fire escape. He later found a knife covered with blood on a shelf in the latrine and the knife shown him at the trial looked like the one accused had in his hand when he stabbed deceased (R.24-30).

Corporal Israel Madison testified that he was, on the night in question, in charge of quarters for Company G, 11th Quartermaster Training Regiment. Shortly after "bed check" he had gone outside of the orderly room, seen men carrying Private Theodore Gage in their arms and he helped them take him to the dispensary where, after an undershirt had been cut off, he saw stab wounds on Gage's body (R.7).

A true copy of the death certificate of Theodore J. Gage was received in evidence with the consent of defense counsel and accused (R.8; Ex. 1).

It was orally stipulated and agreed between the prosecution, defense counsel and accused that if Major Marshall M. Lieber, Medical Corps, were present and sworn as a witness he would testify that, on May 6, 1943, at 10:30 a.m., he personally performed an autopsy upon the body of Private Theodore J. Gage and that his findings were as they are contained in a written report which, by agreement between the prosecution, defense counsel and accused, was received in evidence (R.8, 9; Ex. 2).

4. Accused, after explanation of his rights, elected to remain silent. First Lieutenant Gaston C. Bordis, commander of the platoon in which both accused and deceased were serving, as a witness for the defense testified that accused was a very quiet individual. He had never seen him associate with any men of the platoon but kept to himself and he never had any trouble with him at all. He "followed out orders" and did what he was told. There was nothing outstanding as to his ability as a soldier but he did average work. Private Gage, the deceased, was well liked by most of the men of the platoon and was a good soldier. He was full of fun and a bit playful. He never did any arguing or fighting (R.31,32).

5. The uncontradicted evidence shows that deceased, Private Theodore J. Gage, was stabbed by accused on the early morning of May 6, 1943, while engaged with others in a peaceable crap game in platoon barracks at Camp Lee, Virginia, and that he died of a stab wound of the heart at 1:09 A.M. of the same day at the Station Hospital. There had been words between accused and deceased before the fatal assault over what appears to have been a difference of opinion respecting a dollar which accused had lost in a bet and deceased's refusal to return it. Although one witness testified that the argument resulted in a scuffle during which deceased was stabbed, there is no other evidence of such physical encounter between them. Two other eye witnesses stated that accused, without warning and from a standing position stabbed deceased who was sitting at the moment of the first stab but who rose to his feet before he was again struck. Deceased was unarmed and made no effort to defend himself but stumbled backward to the door of the room with blood running from his chest. One of these witnesses testified that there was a period of two minutes of calm intervening between the dispute over the money and the assault by accused on deceased. The other fixed the period of time at twenty to twenty-five minutes, recalling that he had heard the dispute about the money while he was in the adjoining room and that he had gone to the room where the group was playing and warned them to be quiet. Thereafter, while he remained and during the period of time stated, there was no argument or discussion and no unusual circumstance disturbing the occasion until accused stabbed deceased.

There is no doubt about the wilful, deliberate, unprovoked, and unjustified attack made upon deceased, and regardless of the conflict in testimony about the length of the calm which preceded the killing, there can be no question about the intent existing in the mind of the accused at the time when he stabbed deceased. The court had the advantage of personally and directly hearing the testimony of all the witnesses and weighing the credibility of each and from it was abundantly justified in determining that there was neither justification nor excuse for the act of accused and that he killed Gage with malice aforethought.

6. Accused is 19 years of age and was inducted at Columbus, Ohio, on February 26, 1943. He had had no prior service.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally

sufficient to support the finding of guilty of the Specification and the Charge and the sentence. Either death or imprisonment for life is authorized upon conviction of violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by sections 273 and 275, Criminal Code of the United States (18 U.S.C. 452,454).

William A. Lounds, Judge Advocate.

Irving G. Gay, Judge Advocate.

Herbert B. Fredrick, Judge Advocate.

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

SPJGH
CM 235445

22 June 1943

N.D

UNITED STATES	THIRD AIR FORCE
v.	Trial by G.C.M., convened at Peterson Army Air Field, Colorado Springs, Colorado, 27 April 1943. Dismissal, total forfeitures and confinement for six months.
Second Lieutenant PETER J. MATURO (0-566163), 373rd Base Headquarters and Air Base Squadron.	

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 Charges and Specifications:

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

Specification: In that Peter J. Maturo, 2nd Lt., 373rd Base Headquarters and Air Base Squadron, Peterson Field, Colorado Springs, Colorado, did, at Peterson Field, Colorado Springs, Colorado, in Barracks 1451, on or about March 9, 1943, feloniously take, steal, and carry away one tan-colored, light-weight, tropical worsted shirt and one pair of tan-colored, light-weight, tropical worsted trousers, of the value of about nineteen dollars ($19.00), the property of 1st Lt. Elwyn A. Eastman, 25th Photographic Sq (L), Peterson Field, Colorado Springs, Colorado.

ADDITIONAL CHARGE I: Violation of the 94th Article of War.

Specification: In that Peter J. Maturo, 2nd Lieut., 373rd Base Headquarters and Air Base Squadron, Peterson Field, Colorado Springs, Colorado, did at Peterson Field, Colorado

Springs, Colorado, on or about March 22, 1943 feloniously take, steal, and carry away one U. S. Government .45 calibre revolver, serial No. 143151 and holster, of the total value of about $50, property of the U. S. Government, furnished and intended for the military service thereof.

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

Specification: In that Peter J. Maturo, 2nd Lieut., 373rd Base Headquarters and Air Base Squadron, Peterson Field, Colorado Springs, Colorado, having been duly placed in arrest at his barrack No. 1401, Peterson Field, Colorado Springs, Colorado, on or about March 27, 1943, did, on March 29, 1943, break his said arrest by leaving his barrack before he was set at liberty by proper authority.

He pleaded not guilty to, and was found guilty of, all Charges and Specifications. The accused 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 six months. The reviewing authority approved only so much of the finding of guilty of the Specification, Additional Charge I "as finds the accused guilty at the time and place and under the circumstances as alleged of the articles and of the ownership as alleged of the value of $17.93", approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows as to the Specification, Charge I, that First Lieutenant Elwyn A. Eastman had purchased a shirt and trousers (Ex. A) at Saks Fifth Avenue in New York, had worn the shirt on 7 March 1943, and had placed it in the locker in his quarters with the trousers, which he had not worn; and that on 12 March, he missed the garments and notified the Post Exchange cleaning establishment. Later the shirt and trousers were brought into the cleaning establishment by the accused, for cleaning, pressing and alteration, as shown by ticket (Ex. B) and claim check (Ex. F). Lieutenant Eastman was informed, and he identified the garments by the Saks label and by his name in ink on the shirt. The defense counsel stated that there was no question about the shirt and trousers (Ex. A) being the clothes taken by the accused to the cleaning establishment. On 27 March 1943, the accused went to the cleaning establishment and claimed the garments, asserting that they were his in the presence of Lieutenant Colonel Olin G. Bell. Colonel Bell took the accused into

custody, went with him to the office of "Colonel Wallace", and charged the accused with theft of the clothing (R. 6-15).

As to the Specification, Additional Charge I, the evidence shows that a .45 calibre revolver (No. 143151) and holster (Exs. C and D) which had been issued by the Government to Major John C. Foster, and were kept in the squadron orderly room, had been missing for about two weeks. Circumstantial but convincing testimony shows that they were in the trunk locker of accused in the supply room of the 21st Squadron on the morning of 29 March 1943. On that day, the accused ran into the supply room, out of breath, opened his trunk locker in the presence of Corporal Leonard C. Robson, and took out an armful of clothing which he asked Corporal Robson to dispose of or hide for him. Corporal Robson dropped the clothing on a bed and went out to report what had taken place to Major Foster, who returned with him. In the meantime, the accused had picked up the clothes and taken them out of the supply room. He met Corporal Lewis Yarusso between the door of the supply room and the latrine and asked Yarusso to take care of some clothing that he had in his hands. Yarusso took the clothing to his barracks, put it on his bed, and, noticing a gun and holster, put the clothing, gun and holster in his barracks bag and reported to Corporal Robson that he was holding some clothes for the accused. When the barracks bag was taken to the supply room and emptied on a bed, the gun and holster fell out of it with clothing including a blue shirt which had been on the bed after accused first opened the trunk locker. Major Foster met the accused at the supply room, took him to Colonel Bell's office, and returned with the accused, Colonel Bell and some others to the supply room. At that time, the revolver and holster were on a pile of clothing near the trunk locker. The locker was then reopened in the presence of the officers. Major Foster identified the revolver by its serial number, and the holster by his name on it. The court took judicial notice of the official list prices of an issue .45 calibre revolver and holster as being $16.50 and $1.43, respectively (R. 15-36; Ex. G).

As to the Specification, Additional Charge II, the evidence shows that after taking accused into custody, on 27 March 1943, Colonel Bell immediately escorted him to the office of "Colonel Wallace" who placed accused in arrest in quarters. The orders were that accused remain in arrest except that he was given the privilege of going to eat at the mess hall and was directed to report to the guard squadron three times a day until further notice. Defense counsel offered the following

oral stipulation, which was received in evidence: "I will agree to stipulate with you that Colonel Wallace put him [the accused] under arrest in quarters in 1401". Lieutenant Colonel Hillford R. Wallace was the Commanding Officer of Peterson Army Air Field. Accused was a member of the 373rd Base Headquarters and Air Base Squadron, Peterson Field. On 29 March 1943, Colonel Bell went to the quarters of accused, made an inventory of the articles of clothing found there, and then stated that he would take the accused to the squadron supply room and examine the latter's trunk locker. The accused turned pale, denied that he had keys to the trunk locker, looked for them for a few minutes, and at about 9:15 a.m. left the room and walked out toward the latrine. At about 9:30 a.m., Colonel Bell searched for the accused but was unable to find him in the latrine or in the building. Upon being informed that accused was in the supply room, Major Foster went there, found accused, reminded him that he was in arrest, and took him back to Colonel Bell's office (R. 2, 15-17, 24, 27, Ex. G).

4. For the defense, Captain C. D. Rea testified that he had roomed with and known accused for several months, that the reputation of accused for truth and veracity and as a law abiding "citizen soldier" had been good prior to this charge. Captain Leslie L. Kunkel had lived in the same building with accused, was not familiar with the reputation of accused for truth and veracity, but had never heard it questioned. Second Lieutenant Jay Robbins testified that he had been closely associated with accused at the post and that the reputation of accused as to truth and veracity and as a peaceful and law abiding soldier prior to the present case was good. It was stipulated that Lieutenant Kupec and Lieutenant Probasco would give similar testimony if called as witnesses (R. 37-40).

The accused submitted an unsworn written statement, in which he admitted taking the shirt and trousers belonging to Lieutenant Eastman and the revolver and holster issued to Major Foster. Accused claimed that the revolver and holster were not stolen but had been taken as a joke on Major Foster, who treasured them highly; that when he found that Major Foster was angry over the loss, he put the revolver in a foot locker and sent the locker to the supply room, intending later to return the revolver without Major Foster's knowledge; that after he had been "placed under arrest in quarters for the charge of larceny of Lt. Eastman's clothes", he was "surprised and almost terrified" when Colonel Bell proposed to search his foot locker at the supply room; that he knew that if the revolver were found in the locker he would be charged with its theft; and that therefore he rushed down to the supply room and opened the foot locker. He also stated that if he had stolen the revolver, he certainly would not have sent his locker with the

revolver in it to the supply room. As to the shirt and trousers, the accused stated that he did not need the clothes, but that he took them to "get even" for numerous items of clothing and money which had been stolen from him as an enlisted man and as an officer, which he had never been able to recover (Defense Ex. A).

5. The evidence clearly establishes larceny by the accused of the tropical worsted shirt and trousers and of the revolver and holster. It also appears that after being placed in arrest by "Colonel Wallace", accused breached his arrest. In the testimony concerning the arrest and in the stipulation offered by defense counsel, conceding that the arrest was made, "Colonel Wallace" is not otherwise named or identified. However, it is clear from the context of such testimony and from the stipulation that the officer thus designated was Lieutenant Colonel Hillford R. Wallace, the Commanding Officer of Peterson Army Air Field, where accused was on duty, and, therefore, a commanding officer authorized to place accused in arrest (MCM 1928, par. 20).

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 21 February 1942; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty 28 October 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 69th, 93rd or 94th Article of War.

On Leave, Judge Advocate

Samuel M. Driver, Judge Advocate

F. J. Lotthuhos, Judge Advocate

1st Ind.

War Department, J.A.G.O. 26 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 Peter J. Maturo (0-566163), 373rd Base Headquarters and Air Base Squadron.

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 stole a tropical worsted shirt and a pair of new tropical worsted trousers (value other than substantial value not shown by any competent evidence) in violation of the 93rd Article of War, and a United States Government .45 calibre revolver and holster of the value of $17.93 in violation of the 94th Article of War, and breached his arrest in quarters in violation of the 69th Article of War. I recommend that the sentence to dismissal, total forfeitures and confinement at hard labor for six months be confirmed and carried into execution.

3. The United States Disciplinary Barracks, Fort Leavenworth, Kansas, should be designated as the place of confinement.

4. 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 to carry into effect the foregoing recommendation.

Myron C. Cramer.

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

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

(Sentence confirmed. G.C.M.O. 173, 30 Jul 1943)

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

SPJGQ
CM 235461

- 7 JUL 1943

UNITED STATES v. Second Lieutenant VINCENT B. RONEMOUS (0-1298936), Company 'I', 389th Infantry.	98TH INFANTRY DIVISION Trial by G.C.M., convened at Camp Breckinridge, Kentucky, 17 May 1943. Dismissal and total forfeitures.

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: In that 2d Lieutenant Vincent B. Ronemous, Company I, 389th Infantry, was, at Camp Breckinridge, Kentucky, on or about May 2, 1943, in a public place, to wit, the Officers Club, Camp Breckinridge, Kentucky, drunk and disorderly while in uniform.

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

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

He pleaded guilty to and was found guilty of both Charges and the Specifications thereunder. 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 six months. The reviewing authority approved only so much of the findings of guilty of the Specification and Charge I, in violation of Article of War 95, and only so much of the sentence as provides for dismissal and total forfeitures, and forwarded the record of trial for action pursuant to Article of War 48.

3. Notwithstanding the plea of guilty the prosecution showed by competent evidence that about midnight of 2 May 1943 the accused was first noticed by the witnesses at the Officers' Club at Camp Breckinridge, Kentucky, when he staggered across the dance floor and collided with a couple that was dancing. Colonel John D. Kelley, the post commander, observing the occurrence, rushed over and took the accused by the arm at the end of the dance hall and engaged him in conversation while awaiting the arrival of the Provost Marshal (R. 4). He was very drunk and in a belligerent mood (R. 4, 7). During the conversation he addressed Colonel Kelley as "Kelley", put his hand on and attempted to rumple the Colonel's hair, told the Colonel to "kiss his ass", and that he did not give a damn if he was a colonel (R. 4, 5, 7). He kept pawing the Colonel, grabbing hold of his eagles and mauling him (R. 5). Many people were watching this performance (R. 6). He was unable to walk straight or to talk coherently. His language was profane (R. 6). His face was red, his eyes bloodshot, his speech thick and he was "weaving" (R. 5). He used profane and insulting language to other officers who offered to assist Colonel Kelley (R. 7-8).

4. The defense offered no evidence.

5. The accused is charged with being drunk and disorderly while in uniform in a public place. It was clearly shown that on the date specified he was drunk in the Officers' Club at Camp Breckenridge, Kentucky, which is a public place. His actions in staggering into people using the dance floor, using vile and profane language, pawing his commanding and superior officer and exhibiting disrespect toward him was disorderly conduct. That he was in uniform may be inferred from the circumstances that he was a member of the armed forces, it was war time, it was a public place, and Army regulations require wearing of the uniform. Military personnel should be presumed to comply with standing orders and regulations unless the contrary is shown. The plea of guilty cures the trial judge advocate's oversight in failing to produce direct evidence on this point. His conduct clearly was unbecoming an officer and a gentleman and violated Article of War 95.

The action of the reviewing authority, while clear as to intent, is expressed in inapt and ambiguous words. In view of the staff judge advocate's review and recommendation as to final action it is obvious that the reviewing authority intended to disapprove the findings of guilty of Charge II and the Specification thereunder. The action as written and signed fails to express this thought specifically, but leaves a basis for a reasonable inference to that effect. The error is procedural only and in no way affects any substantial right of accused (A.W. 37).

6. The record shows the accused to be 26 years of age. He was commissioned a second lieutenant, Infantry, on 5 November 1942 after previous military experience as an enlisted man from 18 August 1941. The records of the Adjutant General show that he tendered his resignation as a second lieutenant on 27 January 1943 following his arrest for being drunk and disorderly, the acceptance of which was recommended by his regimental and divisional commanders but was not favorably considered by the Secretary of War. Appropriate disciplinary action was directed.

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 mandatory upon conviction of violation of Article of War 95.

William A. Rounds, Judge Advocate.

Earle Stephens, Judge Advocate.

Herbert B. Fredian, Judge Advocate.

1st Ind.

War Department, J.A.G.O. 31 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 Vincent B. Ronemous (0-1298936), Company I, 389th 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 as approved by the reviewing authority and to warrant confirmation thereof. Suspension of the sentence was considered but is not recommended because of a previous similar offense alleged to have been committed by the accused on January 26, 1943, more fully referred to in paragraph 6 of the opinion of the Board of Review. 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. Acting S/W.
Incl. 3 - Form of action.

(Sentence as approved by reviewing authority confirmed. G.C.M.O. 247, 18 Sep 1943)

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

5 JUL 1943

SPJGH
CM 235496

UNITED STATES	)	THIRD AIR FORCE
v.	)	Trial by G.C.M., convened at MacDill Field, Florida, 21 April 1943. Dismissal.
Second Lieutenant VINCENT R. ARNOLD (0-665890), 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 Charge and Specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that 2nd. Lt. VINCENT R. ARNOLD, 497th Bombardment Squadron, 344th Bombardment Group, MacDill Field Sub-Base, Lakeland Army Air Field, Lakeland, Florida, did, at MacDill Field, Florida, on or about December 30, 1942, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

Midland, Texas December 30, 1942
THE NATIONAL BANK OF MIDLAND

Pay to the
Order of The Officer's Club $20.00

Twenty no/100 - - - - - - - - - - - - - - - - DOLLARS

Victor A. Miller
0-658392 450th

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

Specification 2: In that 2nd. Lt. Vincent R. Arnold, 497th Bombardment Squadron, 344th Bombardment Group, MacDill Field Sub-Base, Lakeland Army Air Field, Lakeland, Florida, did, at MacDill Field, Florida, on or about December 31, 1942, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

Brooklyn, N.Y. December 31, 1942

THE FIRST NATIONAL BANK OF BROOKLYN

Pay to the
Order of Officer's Club $20.00

Twenty no/100 DOLLARS

Victor A. Miller
0-738692 450th

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

Specification 3: In that 2nd. Lt. Vincent R. Arnold, 497th Bombardment Squadron, 344th Bombardment Group, MacDill Field Sub-Base, Lakeland Army Air Field, Lakeland, Florida, did, at MacDill Field, Florida, on or about December 21, 1942, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

Los Angeles, California December 21, 1942

THE FIRST NATIONAL BANK

Pay to the
Order of Officer's Club $20.00

Twenty no/100 - - - - - - - - - - - - - - - - - - DOLLARS

Thomas A. Miller
315th 0-645832

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

Specification 4: In that 2nd. Lt. Vincent R. Arnold, 497th Bombardment Squadron, 344th Bombardment Group, MacDill Field Sub-Base, Lakeland Army Air Field, Lakeland, Florida, did, at MacDill Field, Florida, on or about December 30, 1942, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

Brooklyn, N. Y. December 30, 1942

THE FIRST NATIONAL BANK OF BROOKLYN

Pay to the
Order of _____ $15.00

Fifteen 00/100 - - - - - - - - - - - - - - - - - - - DOLLARS

Fred R. Ramsey
0-743892 3rd Map

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

Specification 5: In that 2nd. Lt. Vincent R. Arnold, 497th Bombardment Squadron, 344th Bombardment Group, MacDill Field Sub-Base, Lakeland Army Air Field, Lakeland, Florida, did, at MacDill Field, Florida, on or about December 24, 1942, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

Rochester, N. Y. December 24, 1942

THE ROCHESTER NATIONAL BANK

Pay to the
Order of The Officer's Club $15.00

Fifteen 00/100 - - - - - - - - - - - - - - - - - - - DOLLARS

Charles M. Linne
313th 0-663832

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

Specification 6: In that 2nd. Lt. Vincent R. Arnold, 497th Bombardment Squadron, 344th Bombardment Group, MacDill Field Sub-Base, Lakeland Army Air Field, Lakeland, Florida, did, at Lakeland, Florida, on or about January 31, 1943, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

San Antonio, Texas January 31, 1943 No. 3

NATIONAL BANK OF FORT SAM HOUSTON

Pay to the
Order of _____ $20.00

Twenty no/100 _____ DOLLARS

Charles W. Stark
0-666473 Hqs.

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

Specification 7: In that 2nd. Lt. Vincent R. Arnold, 497th Bombardment Squadron, 344th Bombardment Group, MacDill Field Sub-Base, Lakeland Army Air Field, Lakeland, Florida, did, at Lakeland, Florida, on or about February 2, 1943, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

San Antonio, Texas February 2, 1943 No. 4

NATIONAL BANK OF FORT SAM HOUSTON

Pay to the
Order of _____ CASH _____ $30.00

Thirty xx/100 _____ DOLLARS

Charles W. Stark
0-668-473 Hqs

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

Specification 8: In that 2nd Lt. Vincent R. Arnold, 497th Bombardment Squadron, 344th Bombardment Group, MacDill Field Sub-Base, Lakeland Army Air Field, Lakeland, Florida, did, at Lakeland, Florida, on or about January 8, 1943, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

San Antonio, Texas January 8, 1943

NATIONAL BANK OF FORT SAM HOUSTON

Pay to the
Order of CASH $30.00

Thirty xx/100 - - - - - - - - - - - - - - - - - DOLLARS

Charles C. Anderson
0-179643

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

Specification 9: In that 2nd Lt. Vincent R. Arnold, 497th Bombardment Squadron, 344th Bombardment Group, MacDill Field Sub-Base, Lakeland Army Air Field, Lakeland, Florida, did, at Lakeland, Florida, on or about February 3, 1943, with intent to defraud, falsely make in its entirety a certain check in the following words and figures, to wit:

San Antonio, Texas February 3, 1943

NATIONAL BANK OF FORT SAM HOUSTON

Pay to the
Order of CASH $20.00

Twenty 00/100 - - - - - - - - - - - - - - - - - DOLLARS

Charles W. Stark
0-666473 Hqs 344th

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

He pleaded guilty to and was found guilty of the Charge and all 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 consisted of nine checks, Exhibits A to I, inclusive, which were admitted in evidence upon an affirmative statement of "No objection" by the defense. The prosecution and defense entered into nine separate stipulations relating respectively to the nine Specifications of the Charge, in substance as follows:

a. As to Specification 1, that the accused did, at the time and place stated, with intent to defraud, make the check, Exhibit A, and write the signature of the drawer.

b. As to Specification 2, that the accused did, at the time and place stated, with intent to defraud, "attempt to make" the check, Exhibit B, and write the signature of the drawer.

c. As to Specification 3, that the accused did, "in an attempt to defraud", make the check, Exhibit C, and write the signature of the drawer.

d. As to Specification 4, that the accused did, at the place stated, with intent to defraud, make the check, Exhibit D, and write the signature of the drawer.

e. As to Specification 5, that the accused did, at the time and place stated, with intent to defraud, "attempt to make" the check, Exhibit E, and write the signature of the drawer.

f. As to Specification 6, that the accused did, at the time stated, make the check, Exhibit F, and write the signature of the drawer.

g. As to Specification 7, that the accused did, at the time stated, "attempt to make" the check, Exhibit G, and write the signature of the drawer.

h. As to Specification 8, that the accused did, at the time stated, make the check, Exhibit H, and write the signature of the drawer.

i. As to Specification 9, that the accused did at the place stated, make the check, Exhibit I, and write the signature of the drawer (R. 6-10).

4. No evidence was offered for the defense. The accused elected to remain silent.

5. The pleas of guilty fully support the findings of guilty.

None of the stipulations fully cover all the elements of proof which would be required to support the allegations of the respective Specifications in the absence of the pleas of guilty. Each stipulation omits one or more of the elements of proof, but none are inconsistent with the respective pleas of guilty. The stipulations with respect to Specifications 2, 5 and 7 that the accused did "attempt to make" the respective checks do not deny the making of the checks covered by the pleas of guilty, admit the writing of the signature of each drawer by the accused, and are not inconsistent with the pleas of guilty nor do they indicate that the pleas of guilty were improvidently entered. It is the opinion of the Board that there is nothing in the record inconsistent with the pleas of guilty, so as to require the court under the provisions of the 21st Article of War to proceed to trial as if the accused had pleaded not guilty to those Specifications.

The commission of a felony is cited by Winthrop as an instance of an offense constituting conduct unbecoming an officer and a gentleman, and cognizable under the 61st (95th) Article of War. (Winthrop's Military Law and Precedents, Reprint, p. 718.)

6. The accused is 21 years of age. The records of the Office of The Adjutant General show his service as follows: Aviation cadet, January 1942 to 16 October 1942; appointed second lieutenant, Air Reserve, and extended active duty, 17 October 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 legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is mandatory upon conviction of a violation of the 95th Article of War.

Victor S. Pickard, Judge Advocate

Samuel M. Driver, Judge Advocate

F. J. Lotterhos, Judge Advocate

1st Ind.

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

1. Herewith transmitted for the action of the President are the record of trial and opinion of the Board of Review in the case of Second Lieutenant Vincent R. Arnold (0-665890), 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 pleaded guilty to the forgery of nine checks aggregating $190 during the period 21 December 1942 to 3 February 1943. I recommend that the sentence to dismissal be confirmed and carried into execution.

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

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

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

(Sentence confirmed. G.C.M.O. 168, 28 Jul 1943)

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

10 JUN 1943

SPJGH
CM 235504

U N I T E D S T A T E S v. Cadet FRANK P. BREITENBACH, First Class, United States Corps of Cadets.	)	UNITED STATES MILITARY ACADEMY Trial by G.C.M., convened at West Point, New York, May 21, 22, 1943. Dismissal.

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

1. The Board of Review has examined the record of trial in the case of the cadet 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 95th Article of War.

Specification 1. (Finding of Not Guilty).

Specification 2. (Finding of Not Guilty).

Specification 3. In that Cadet Frank P. Breitenbach, First Class, United States Corps of Cadets, having on or about March 20, 1943, signified his intention to go only to authorized places at West Point, New York, by writing under the date March 20, 1943, in the Company Departure Book for Company G, Second Regiment, United States Corps of Cadets, the following entry, "Breitenbach - 1° - D.P. Hop XXX - " - 5:10P - 12:03A", and having been beyond cadet limits, to wit, in the Village of Highland Falls, New York, at an unauthorized time, to wit, after 6:15 p.m., March 20, 1943, did, thereafter, at West Point,

New York, knowingly, willfully and with intent to deceive, fail to report himself as required by the provisions of paragraph 1.07, Orders, United States Corps of Cadets, 1942.

The accused pleaded not guilty to the Charge and all Specifications. He was found not guilty of Specifications 1 and 2 of the Charge, and guilty of the Charge and of Specification 3 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 is substantially as follows:

On Saturday, March 20, 1943, the accused, a first classman, United States Corps of Cadets, signified his departure on "dining privilege" and for a cadet "hop" by the following entries under the appropriate headings in the official company departure book:

"NAME	CLASS	DESTINATION	AUTHORITY	TIME OUT
BREITENBACH	1°	D.P. Hop XXX	Reg.	5:10 P"

Thereafter, at about 5:50 p.m., the accused, together with the young lady whom he was escorting, a Miss Ottaviano, proceeded from the military reservation and entered the village of Highland Falls, New York, returning therefrom to the reservation at about 6:50 p.m. In the interim, first call for supper formation had been sounded at 6:15 p.m. Following dinner at the Thayer Hotel, and attendance at the cadet "hop", the accused returned to barracks and completed the departure book entries by noting his return, under "TIME IN", as "12:03A" (R. 8, 9; Ex. 1).

Administrative Memorandum No. 20, Headquarters, United States Corps of Cadets, February 5, 1943, which was published to the Corps and was discussed in the accused's presence prior to March 20th (R. 25-27, 35-37), provides in part:

"1. * * *

"i. Leaving Post.--(1) During release from quarters on Saturday, Sunday and holidays, 1st Classmen not undergoing punishment who have no duties to perform and who are in proper uniform may leave the post as follows: On Saturdays after

inspection until 1st Call for supper * * *. Departure and return must be signed in the company departure book.

"(2) Cadets who take advantage of this privilege must be in proper uniform and are 'on honor' that departure and return are properly signed in company departure book * * *." (Ex. 2)

With respect to the company departure book, the Orders, United States Corps of Cadets, provide that entries therein "will be official statements that cadets are going to the places indicated and nowhere else. Entries in the departure book have the significance of the 'All Right' prescribed in Section 5 * * *" (Sec. 2.03e; R. 13b), that is, when rendered by a cadet outside his room or crossing a sentinel's post, "That he is going, or has been, on an authorized visit to an authorized place and nowhere else and that no undue advantage is to be, or has been, taken of the privilege." (Sec. 5.01b; R. 13b, 83).

Section 24.10, Orders, United States Corps of Cadets, provides:

"Dining Privileges.--a. Upon invitation, cadets not performing duty or undergoing punishment may dine at the quarters of officers or civilian instructors residing on the Post, or at the Thayer-West Point Inn as follows:

"(1) Noon meal on Saturdays, when inspection precedes the noon meal.
"(2) Noon meal on Sundays and holidays.
"(3) Evening meal on Saturdays and evenings preceding holidays.

"b. A cadet taking advantage of dining privilege will be excused from the corresponding meal formation, but not from retreat when it is held at supper formation.

"c. A cadet taking advantage of a dining privilege will sign his departure and return in the company departure book, stating the place where dining. If a combination of privileges is to be taken, entries will be made accordingly. All entries will be made prior to first call for the meal formation which the cadet is to miss, otherwise the cadet will attend the formation. After reports have been made a cadet may be excused by the Cadet Company Commander for the purpose of going on dining permit. * * *" (R. 8)

Section 1.07, Orders, United States Corps of Cadets, provides:

> "Necessary Violations of Orders.—Whenever circumstances over which he has no control make it necessary for a cadet to violate orders or regulations in order to do the obviously right thing, he will report the facts as soon as possible to the authority who gave the orders, or to his Tactical Officer or to the Officer in Charge. An 'All Right,' or equivalent signature, will not bind a cadet to observe regulations in defiance of common sense; but it will bind him to report himself for every violation of the regulations embraced by the 'All Right.'" (R. 13d)

The order promulgating Orders, United States Corps of Cadets, provides:

> "When a cadet is in doubt of the meaning of an order or regulation, he will seek advice from his Cadet Company Commander, his Company Tactical Officer, or the Officer in Charge. No other persons, such as cadet honor representatives, will interpret these regulations." (R. 8)

Other than as provided by Administrative Memorandum No. 20, quoted in part above, there was, on March 20, 1943, no authority for the accused to be in Highland Falls under the circumstances disclosed (R. 74). Moreover, a first classman signed out for the combination privileges of "hop" and "dining permit" would have violated his "All Right" by entering Highland Falls during the period for which he was signed out, whether before or after the publication of Administrative Memorandum No. 20 (R. 85, 86). Again, the company honor representative (Cadet Calnan) had advised the first classmen of the company of accused, prior to March 20th, that "in order to take advantage of First Class privileges, that is, of being allowed to leave the post at certain times, we were placed on our honor to sign out properly in our Departure Book * * *". (R. 84)

Cadet Peter J. Ryan, First Class, United States Corps of Cadets, who had been informed by the young lady whom he was escorting on March 20, 1943, that she had seen the accused that day in Highland Falls (R. 52), testified that he had thereafter on four occasions spoken to the accused concerning the latter's presence in Highland Falls on the date in question, as follows:

First. On March 23rd, in class, he had asked the accused what the latter had been doing in Highland Falls, to which the accused had made no response (R. 52, 54);

Second. On March 27th, again in class, he had asked the accused what the latter was doing about being in Highland Falls, to which the accused had responded; "Are you still worrying about that?" (R. 52, 54).

Third. On or about April 2nd, in the room of Cadet Ryan, he had asked the accused what the latter was doing about being in Highland Falls, to which the accused had replied: "Nothing". (R.52); and

Fourth. On April 8th, in the area of barracks, he had inquired of the accused whether the latter had not committed an offense in failing to "turn himself in", to which the accused had made no response; whereupon Cadet Ryan had reported the matter to the company honor representative (Cadet Calnan) (R. 53).

Between March 20, 1943, and April 16, 1943, on which latter date the accused was summoned before the cadet honor committee (R. 140), no report of the alleged delinquency had been made by the accused to the company tactical officer, Major Joel T. Walker (R. 76), either orally or in writing, nor had such report been made by the accused to the company representative on the cadet honor committee (R. 77, 84).

4. The evidence for the defense is substantially as follows:

Cadet Lowell B. Smith, First Class, a roommate of Cadet Ryan, had heard the latter ask the accused what he had done about being in Highland Falls, but had heard no response (R. 95). He, as well as Cadet Howard B. Coffman, Jr., First Class, a roommate of the accused, and Cadet James H. Short, First Class, testified to the pronounced stubbornness and persistency of accused in a course of action (R. 97, 100, 143). Cadets Coffman and Short testified further that the accused's general reputation for truth and veracity was good (R. 99-101, 142-3). Cadet Argonne C. Dixon, First Class, a roommate of the accused, described the accused as very stubborn, and a man reputed to be of "unimpeachable honor" (R. 103). He stated that during the week April 3rd - April 10th the accused had asked him whether a first classman could go to Highland Falls while on a dining permit (R. 102, 104) (See testimony of Cadet Dixon in rebuttal).

Cadet Heber C. Brill, First Class, a member of the cadet honor committee, testified that Cadet Ryan had told him, on or about April 8th, of speaking to the accused that evening and suggesting that accused turn

himself in for having been in Highland Falls, but that he had not advised Ryan to tell the accused to turn himself in (R. 105-106).

Miss Beatrice M. Ottaviano, the young lady whom the accused was escorting on March 20, 1943, testified that on a subsequent visit to West Point, on April 10th, the accused had stated that he had "tied it up" by going to Highland Falls and that "when he found out, he intended to turn himself in" (R. 110). The witness produced a letter, written to her by the accused on April 17th, in which the accused reminded her of their conversation on April 10th regarding his having been off limits on her earlier visit and that he was "going to have to turn myself in" (R. 111; Def. Ex. B).

The accused at his own request was sworn and testified substantially as follows:

He had seen Administrative Memorandum No. 20 only briefly at its first distribution at a cadet lecture in February, 1943, and had had the opportunity to read "paragraph headings and a word or two in each" as it was being circulated through the lecture hall (R. 115). On March 20th, he had construed first class dining privileges on Saturday night to include the privilege of dining in Highland Falls (R. 138) and had intended to go to Highland Falls on so signing out (R. 116). On "The Friday night before March 20th" he had asked his roommate, Cadet Dixon, whether first classmen were authorized "to go on dining permit Saturday night down in Highland Falls, and I gathered from his answer that we were allowed to" (R. 116). He had first availed himself of first class privileges on March 20, 1943 (R. 117). With respect to Cadet Ryan's queries as to the alleged delinquency of accused, he had believed on the first and second occasions that Ryan had been trying to get information as to "ways and means of getting extra privileges" (R. 119) and on the third occasion had answered "Nothing" to Ryan's question in the questioner's room on the ground that it was "none of his business what I had done about it" (R. 120). Intending, however, to make absolutely sure that he was right, the accused had searched the files in the company orderly room during the week of April 3rd to April 10th, without result (R. 121; 139). On or about April 8th, "the night of the Tannenberg lecture" (R. 120), Cadet Ryan had approached the accused in the area of barracks with the question, in substance, whether the accused did not have to turn himself in for being in Highland Falls, to which the accused had made no reply (R. 121). On April 10th he had told Miss Ottaviano that he had "tied it up" by being in Highland Falls on her earlier visit and that he was going to turn himself in (R. 122).

Although he had decided to report on April 17th, the following Saturday, to the Tactical Officer (R. 122), he had never taken the matter up with that officer (R. 123). He had not read Administrative Memorandum No. 20 until April 18th, when a copy was produced by his roommate, Cadet Coffman, after the accused had told the cadet honor committee that he would not resign from the Academy (R. 115, 116).

5. In rebuttal for the prosecution: Cadet Heber C. Brill testified that, on either April 17th or April 19th, he had gone to the company orderly room of accused and had found Administrative Memorandum No. 20 on file (R. 144). Cadet Argonne C. Dixon, a roommate of the accused, testified that he and the accused had never discussed going to Highland Falls while on dining permit (R. 145), although at the time of the first distribution of Administrative Memorandum No. 20, early in February, 1943, he had stated in the presence of accused that "I say, we can go to Highland Falls" (R.146)

6. The accused was found guilty of "knowingly, willfully and with intent to deceive" failing to report himself as required by section 1.07, Orders, United States Corps of Cadets, after having been beyond cadet limits at an unauthorized time under an entry showing an intention to go only to authorized places. The essential elements of the offense of which he was found guilty are: (1) the commission of the offense of being beyond limits in violation of regulations and contrary to his entry in the departure book, and (2) a failure to report himself, as required by section 1.07 of the regulations, with the intent alleged.

The evidence shows that both before and after the issuance of Administrative Memorandum No. 20, Highland Falls was off-limits, and that the special permission granted to first classmen by that Memoradnum whereby they could at certain times "leave the post" and thus visit Highland Falls was limited by the provisos that first classmen taking the privilege would return prior to first call for supper and that they would be "on honor" that departure and return would be properly signed in the departure book. The symbol "D.P." signifying dining permit, which the accused entered in the departure book on March 20, meant that a meal would be eaten at an authorized place. Highland Falls was not an authorized place. It follows that when the accused went beyond limits on March 20 after signing out only for dining privilege and "hop", and remained beyond cadet limits after

hours, he committed the offense contemplated in the first essential element stated above.

To satisfy the requirements of the second essential element, it must appear that accused violated section 1.07, Orders, United States Corps of Cadets, knowingly and with intent to deceive. That section in effect provides that whenever a cadet has unavoidably or inadvertently violated orders or regulations he shall report the facts to the authority who gave the orders, or to his Tactical Officer or to the officer in charge. That section must, however, be read in conjunction with the fourth paragraph of the order promulgating the orders of the Corps of Cadets. So construed the applicable regulations require a cadet in doubt as to the meaning of an order or regulation and therefore in doubt as to whether he has violated his "All Right", to seek the advice of his company tactical officer or other specified officer. It should be noted that no time limit is fixed for so doing other than the implied limit of a reasonable time.

The evidence shows that on March 23 and 27, Cadet Ryan made certain remarks to accused about the visit of the latter to Highland Falls, but that such remarks were not sufficiently specific or pointed to raise doubt in the mind of accused. However, on April 2 and again on April 8, Cadet Ryan approached accused on the matter in a much more definite way. As a result the accused, about April 3, became aware that he may have done something wrong, and made an unsuccessful search for Memorandum No. 20. By the time Cadet Ryan spoke to him the fourth time on April 8, the accused thought there was a delinquency and on April 10 he advised Miss Ottaviano that he had "tied it up" by going to Highland Falls and that he was going to turn himself in. Nevertheless, he took no action prior to being called before the Honor Committee on April 16, although he stated that he intended to consult the Tactical Officer on April 17.

In the opinion of the Board of Review the evidence failed to establish beyond a reasonable doubt that accused actually knew prior to April 16 that by the terms of Memorandum No. 20, he had committed an offense in going to or remaining in Highland Falls on March 20. However, inasmuch as he definitely realized, from April 3 to April 16, that he may have committed a reportable offense, dependent upon the language and meaning of Memorandum No. 20, it was the duty of accused to seek advice as prescribed by the provisions of the regulations of

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the Corps of Cadets cited above. According to the uncontradicted evidence, he failed so to do. It follows that he violated the regulations and committed an offense which, if accompanied with intent to deceive, would constitute a breach of honor.

A course of conduct is not a violation of "personal honor" unless there are present in the mind of the individual concerned those elements of knowledge and intent which are inherent in dishonorable conduct. Knowledge and intent may be established by circumstantial evidence, it is true, but in the instant case the Board of Review is of the opinion that the evidence does not show beyond a reasonable doubt that the accused, in violating section 1.07, Orders, United States Corps of Cadets, by his unreasonable delay in seeking advice as to whether he had committed a reportable offense, was motivated by an intent to deceive. It may be that he actually intended to state the facts to the Tactical Officer on April 17 in order to obtain his advice. Accused so testified. There is evidence in the record that his reputation for truth and veracity is good and no evidence to the contrary. His unreasonable delay in seeking advice and interpretation as required by the cited regulation, considered in conjunction with the promulgating order, in the absence of intent to deceive did not constitute a breach of personal honor.

With reference to the 61st (95th) Article of War, it is stated by Winthrop: "The fitness therefore of the accused to hold a commission in the army, as discovered by the nature of the behavior complained of, or rather his unworthiness, morally, to remain in it after and in view of such behavior, is perhaps the most reliable test of his amenability to trial and punishment under this Article" (Winthrop's Military Law and Precedents, Reprint, pp. 712-713). Absent the intent to deceive, violation of a regulation requiring the accused to seek advice can hardly be said to show moral unworthiness to hold a commission.

The Board of Review is of the opinion that the evidence fails to establish beyond a reasonable doubt the allegation of the Specification "and with intent to deceive", and that the record is legally sufficient to support a finding of guilty of the Charge only in violation of the 96th Article of War.

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7. Major Ralph C. Barrow, Assistant Defense Counsel for accused, made an oral argument before the Board. Representatives of Congressmen John M. Costello and John H. Tolan of California appeared before the Board in behalf of the accused. A letter from Congressman Tolan addressed to the Secretary of War, requesting clemency for the accused, was presented to and considered by the Board. A file of letters from a tactical officer and several cadets addressed to the "Special Personnel Board of Officers", with respect to the character of the accused, presented to the Board by Major Barrow, have been carefully considered.

8. The Cadet Register for the year ending June 30, 1942, shows that the accused was admitted to the Military Academy from California, on July 1, 1940, that he was 24 years old on March 27, 1943, and that his class standing for the academic year ending June 30, 1942, was 319 in a class of 523 members.

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 finding of guilty of Specification 3 of the Charge, except the words "and with intent to deceive", legally sufficient to support only so much of the finding of guilty of the Charge as involves a finding of guilty in violation of the 96th Article of War, and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 96th Article of War.

Curtis E. Price Jr., Judge Advocate

Samuel M. Driver, Judge Advocate

F. J. Lotterhos, 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 Cadet Frank P. Breitenbach, First Class, United States Corps of Cadets.

2. The court found the accused not guilty of Specifications 1 and 2 of the Charge. 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 Specification 3, except the words "and with intent to deceive", in violation of the 96th Article of War, and to support the sentence, and to warrant confirmation of the sentence. The accused violated a regulation of the Corps of Cadets in failing for an unreasonable period of time to report himself by seeking the advice of specified officers on the question whether his act of going beyond cadet limits on a certain occasion was authorized by an official memorandum granting designated first class privileges. It was not, in my opinion, shown beyond a reasonable doubt that the accused had an intent to deceive in so violating the regulation. It was shown that the accused has a good reputation for truth and veracity and is a man of stubborn disposition. Since the trial the accused has completed all of the work required of a cadet for graduation and commission as a second lieutenant. The class of which he was a member was graduated from the Military Academy on June 1, 1943. I recommend, therefore, that only so much of the findings of guilty be approved as involve findings of guilty of Specification 3 of the Charge except the words "and with intent to deceive", and of the Charge in violation of the 96th Article of War, that the sentence be confirmed but commuted to restriction to cadet limits until the day following the date of the action of the President, on which day this cadet shall be graduated and commissioned, if otherwise qualified, and that the sentence as thus modified be 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.
Incl.1- Record of trial.
Incl.2- Dft. ltr. for sig. S/W.
Incl.3- Form of Executive action.

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(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but commuted to restriction to cadet limits until day following the date of the action, on which day he shall be graduated and commissioned if otherwise qualified. G.C.M.O. 170, 30 Jul 1943)

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

SPJGK
CM 235530

16 AUG 1943

UNITED STATES	FOURTH AIR FORCE
v.	Trial by G.C.M., convened at Hamilton Field, California, 2,3,4,5, and 6 April, 1943. Dismissal.
First Lieutenant VINCENT J. HOBBINS (O-563320), Air Corps.	

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

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

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

CHARGE: Violation of the 95th Article of War.

Specification: In that 1st Lt. Vincent J. Hobbins, 46th Base Headquarters and Air Base Squadron, Hamilton Field, California, was, at Fort Bragg, California, on or about March 1, 1943, in a public place, to wit, "The Ship Ahoy", a tavern located in the Windsor Hotel, Fort Bragg, California, drunk and disorderly while in uniform.

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 dismissal. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48, recommending that the sentence be commuted to restriction to the limits of accused's station for three months and forfeiture of $50 pay per month for ten months.

3. Summary of evidence.

The Ship Ahoy Cafe is a bar and dance hall attached to the Windsor Hotel, Fort Bragg, California. The cafe or tavern is divided into a front and rear room, in each of which there is a bar. The rear room contains a number of booths and a dance floor where patrons dance to the

strains of a juke box. In the rear, the cafe opens into the Windsor Hotel, and a corridor leads to the latrine, which is back of the hotel and is patronized by the guests of both the hotel and the tavern. At the front of the bar in the front room, there is a telephone (R.12,23,26,35,36,66, 69,85,86,129,160; Ex. A).

It was stipulated that during the period involved, accused was in uniform (R.84).

At about 5 p.m., 1 March 1943, accused was seen drinking in the Ship Ahoy with Private First Class Joseph T. Duffy, Company C, 748th Military Police Battalion. Accused used profane language. Since Duffy was leaving the next day, accused urged him to return to town that evening to say goodbye. Accused said,"'God damn, you better come back in tonight'" (R. 158,165,292-294,296). In the opinion of Arthur Lambert, the bartender, and Sergeant L. R. Doberstein, Company C, 748th Military Police Battalion, accused was drunk (R.157,159,165,296). Doberstain testified that "he could see it in his eyes". Accused could not stand up straight and was repetitious in his conversation (R.296). Because of accused's condition, Lambert refused to sell him any more drinks (R.158,165). However, Mrs. Edath Hollinger, who worked at the rear bar, testified that she did not think that accused had been drinking at this time (R.102-104,138), although she saw him drink two or three beers later in the evening (R.103,126,127).

Around 7 p.m., Private First Class Domonic DiMatteo, Company C, 748th Military Police Battalion, saw accused drinking at the bar with some women (R.11-13,16,70-72, 228). DiMatteo bought accused two whiskey drinks. Accused drank the first. While lifting the second drink, his hand was unsteady and he spilled about half of the contents of his glass (R.13,15,16, 72,73,174,175,223,224). In DiMatteo's opinion, accused was intoxicated (R.13,15). Although witness could understand what accused said, accused's voice was thick and his speech blurred and not as intelligible as usual (R.15,176,177,178). Witness went upstairs for a few minutes. When he came down, accused was still drinking at the bar (R.18,19). Witness left the Ship Ahoy, accompanied by Duffy. They went to another bar, where Duffy became drunk, and returned to the Ship Ahoy about 9 p.m. (R.19,20, 178,179).

Thereafter, several witnesses saw accused and Duffy at the rear bar. They were drinking and arguing (R.23,104,116,359,360,393,396,397). Both were drunk (R.105,384,410). Duffy was in a "haze", but not belligerent, whereas accused was belligerent (R.397,409). At times accused spoke in loud tones and in an angry manner (R.107,361-363,399,403,406,424). Duffy did not say much and used no profanity (R.409). Accused became profane.

Among other things he accused Duffy of being "too God damned drunk to be drinking", and called him a "God damned thick-headed Irishman" (R.107, 108,361-363,368,398). He also told Duffy that he would give him "a good whipping", and dared him to go back of the tavern (R.365,369). When Mrs. Hollinger intervened, accused told her to get out (R.108). Mrs. Hollinger testified that she was accustomed to hearing conversations by intoxicated people at the Ship Ahoy (R.136). No people were standing near accused and Duffy at the time (R.368,402,404). The room was crowded with service men and civilians (R.82,87,370,403). The juke box was playing, people were dancing, and the place was noisy (R.87,95,366,405). Most of the patrons appeared to be drunk (R.94).

Chief Boatswain's Mate Theodore Roberge, United States Coast Guard, was sitting in a booth with two ladies (R.77-79,83,86). He saw accused at the bar, engaged in a "drunken argument" with some enlisted men, who were all drunk (R.79,80,83,89,93). Although he could hear accused talking, he could not hear "the gist of the conversation" (R.96). On two occasions, accused staggered against Roberge's table (R.81), and in the opinion of Roberge accused was drunk (R.82,96).

On one occasion Roberge heard accused talking to a woman near Roberge's table. Accused was referring to somebody as "a God-damned son-of-a-bitch" (R.83,84,90). So far as Roberge could determine, the woman was not offended by the profanity (R.92). Roberge's women companions heard this language of accused, and remarked that he did not talk or act like an officer of the Army (R.91,96,100). Apparently, no one else heard accused at this time (R.95).

Subsequently, accused grabbed Duffy by the arm of his blouse and pulled him through the door leading to the Windsor Hotel lobby, creating no particular disturbance in so doing (R.22-24,67,68,180-182,223).

First Lieutenant Max L. Hill, 748th Military Police Battalion, who observed Duffy and accused in the bar, gave orders to remove Duffy from the place (R.25,183,207,370,371,407,414). Thereafter, Lieutenant Hill saw Duffy and accused in a yard back of the latrine (R.372,373,410). No one else was there (410). They had taken off their "outside wraps" and stood facing each other. Accused warned Duffy that he was going to give him "a God damned good whipping", to which Duffy made no reply. Lieutenant Hill ordered Duffy to put on his blouse and cap, and leave (R.373). Duffy said, "'Yes, sir'". As he started to obey, accused ordered him to come back, and Duffy complied. The same conflicting orders were repeated twice more by Lieutenant Hill and accused, whereupon Lieutenant Hill gave up and went back to the hotel lobby (R.374,375,410).

Sergeant Ellis W. Gano, 46th Air Base Squadron, saw accused and Duffy in the yard (R.302,307). They were both talking loudly, and accused was holding Duffy by the blouse. He also saw accused fall down underneath an outside stairway (R.303,304).

The enlisted men, including DiMatteo, who were looking for Duffy pursuant to the orders of Lieutenant Hill, found him and accused in a passageway adjacent to the latrine. A civilian and a coast guardsman stood near them (R.29,34,184,185,187,255; Ex. A). DiMatteo did not hear any loud conversation as he approached the passageway (R.196). Accused was holding Duffy by the lapels, and they were weaving back and forth (R.30,35-37,186,189,195,255,259). They were excited and disheveled (R. 255). Accused was "roughing" Duffy against the wall (R.194,196). He threatened to punch Duffy in the nose, called him an "'onery son-of-a-bitch'", and declared that he (accused) didn't "'take that shit from no one'" (R.30, 31,186,195,196,231). No blows were struck (R.187,230,260). Duffy tried to break away and was "cussing and blabbing as a fellow would that was intoxicated" (R.30). In DiMatteo's opinion, accused and Duffy were drunk (R.30-33). Accused's speech was "thick" and "sly" (R.32). The coast guardsman and civilian were arguing and fighting between themselves (R. 30,31,33,34,186,187,231,232;234,256,282). When DiMatteo and the other military policemen endeavored to persuade accused to release Duffy, he swore at them, but finally capitulated and allowed them to take Duffy away (R.33,34,37,188-190,257-259).

The unresisting Duffy was dragged into the lobby by the military police (R.38,39,199,259,376). Accused followed them (R.39,199,262,376). No other people were in the lobby at the time (R.208,426). Accused was disheveled and there was blood around his mouth (R.380,412). He again grabbed Duffy by the lapels, and another profane conversation sprang up between them, during the course of which accused called Duffy a "'God damned thick headed Irishman'" and a "'son-of-a-bitch'" (R.39,40,45,46, 199,200,202,204,262,263,377-379). Accused was drunk (R.45,389). One of the military policemen separated accused and Duffy, and the latter was then taken outside (R.40,41,205,264,265,289,376,377,380).

Accused followed them to the sidewalk and grabbed Duffy by the shoulder, but was pushed away by one of the military policemen. There were some other people nearby at the time (R.41,42,211,212,266).

The military policemen then took Duffy to a jeep, put him into it, and started for camp (R.43,44,214,267,306). Accused walked into the street directly in the path of the car, and held up his hand. The driver stopped the car (R.43,44,267,268,381). Accused told Duffy that

he was under arrest and would be taken to Hamilton Field in the morning under armed guard (R.44,45,268,381). He also said that Duffy would "hang for it" (R.306). Accused then walked away and Duffy was driven to camp (R.45,46,268). At the time of the events on the sidewalk, accused was drunk (R.268,306,389). He staggered, his speech was thick, and he was mussy and disheveled in appearance (R.268-271).

Accused told Doberstein that he had ordered Duffy into arrest and confinement, and he directed Doberstein to shoot Duffy if the latter tried to escape. Accused also said,"'Duffy will hang for this'" (R.297-299,383).

Later in the evening DiMatteo saw accused in the Windsor Hotel latrine. Accused remarked, "'Duffy is a big bunch of shit and I can whip him any minute in the day and any day in the year'". He added that Duffy "was going to hang", and he recounted various fights in which he had participated. Two enlisted men from the cavalry appeared, and accused started betting with them about who could drink the largest amount of whiskey (R. 49-51).

Returning to the front bar, accused staggered to the telephone, located at the bar (R.53,54,109,161,165). He called to someone to shut off the "damned" music box (R.107,109,110,121,142). While making a telephone call, accused fell to the floor (R.54,55,106,107,110,117,161,162,165,166,220, 222). He was helped to his feet by some members of the crowd standing at the bar, and completed the call in an upright position (R.55,107,117,130, 140,161,166,170,221). After being picked up, accused used some profanity, including "'son-of-a-bitch'" (R.58). Lambert testified that accused was drunk at the time, but that he had "seen a lot worse cases" (R.166).

Officers on duty at Base Headquarters, Hamilton Field, testified that during the evening they received two telephone calls from accused, in which he kept repeating that an enlisted man had assaulted him and that he had placed the man under arrest. He kept asking for instructions even after the officers had told him what to do (R.317-319,320,322,323,329,330,331, 333-337). He was "very coherent", but talked in an excited manner, and during the second conversation seemed quite angry (R.321,335).

At length accused took a room at the hotel and went upstairs (R.382).

In addition to the testimony already referred to concerning the condition of accused at particular spots in his strenuous evening, there was evidence that in general he staggered, that his speech was thick and disconnected, and that he talked loudly at various times (R.46,164,170,411).

For the defense, First Lieutenant George M. Plagens, Medical Corps, testified that accused consulted him during the early part of March, 1943. Accused had a bad cold at the time. His face was flushed, his throat and nose red, and his voice husky. He had cold sores around his lips. In the opinion of Lieutenant Plagens, the cold had been of several days' duration (R.432,434-436). On cross-examination Lieutenant Plagens admitted that accused might have become hoarse overnight and that a hoarse throat would have no effect upon his enunciation (R.438-439).

Accused testified in his own behalf. On the day in question he had a cold (R.497). During the afternoon he was in the Ship Ahoy a few times between errands, and had one beer (R.488,490,509). On one visit he saw Roberge, and on another he saw Doberstein and Duffy, but he had nothing to drink (R.492,493,506,513,516,523,524). Duffy was sober at the time. Duffy and accused were friends, and accused arranged for a pass for Duffy, in order that the latter might come to town that evening to say goodbye to his friends, since he was slated to leave the next day (R.524,526-528). Accused was not loud and talkative and did not use profane language, nor was his speech thick (R.539-540).

Accused returned to the Ship Ahoy around 5 p.m. and had two or three beers with friends (R.443,444,497,500,507,508,516,553). He was not drunk and did not use profane language. Lambert did not cut off his drinks (R.553). He did not recall seeing Doberstein at that time (R.516). He took a shower, came back to the bar, and had two more beers (R.444,499, 509,510). About 5:45 p.m., he went out to dinner, after which he returned to the Ship Ahoy and had two or three glasses of beer (R.444,445,503,505, 506,510). He left for camp in order to get another pair of trousers, but on the way he met Lieutenant Hill, who was bringing the trousers, whereupon he returned to the tavern at about 7 p.m. (R.445,447,448,495,496,502, 507,512,513,515). He went into the bar, borrowed a room key from Mrs. Hollinger, and changed his trousers. Neither Duffy nor DiMatteo was there (R.448,514-517). Thereafter he went to a nearby fire house and talked with the firemen, coming back to the Ship Ahoy about 8 p.m. (R.448,449,514,519, 520). He drank another beer and talked to Mrs. Hollinger (R.501,520). He was not drunk, but was "feeling good" (R.550). He did not see Duffy (R.521). He saw DiMatteo, but did not drink with him then or at any other time (R.501,502,517,521,528). He did not spill a drink (R.541). When accused declined the invitation of a friend to have another beer, Lambert laughed, waved at accused, and said, "'Hell, no, you've got enough'" (R. 450). Accused was not involved in any argument, and Mrs. Hollinger's statement that he told her to go away and mind her own business was untrue (R.551). He refused Duffy's invitation to have a drink (R.449,450,522, 529,532).

Accused then went to another part of the bar and had two or three glasses of beer (R.450,451,529-531). About 9:30 p.m., accused had two or three highballs at the bar with Lieutenant Hill. He sat between Lieutenant Hill and Duffy. Duffy appeared to have drunk too much, and accused suggested that he go home and to bed. He did not dare Duffy to step out and fight, but Duffy became antagonistic, wanted to fight, and refused to leave. Lieutenant Hill left. Since Duffy continued to annoy accused, the latter decided he would have to remove him (R.451-454,556). Accused did not argue with Duffy, did not use loud and profane language as stated by Roberge, and did not reel across the floor or lurch against Roberge's table (R.538,539).

Accused took Duffy by the arm and led him into the yard back of the hotel (R.454). He did not pull Duffy around by the collar while they were in the back yard (R.543). In fact he released his grip on Duffy, who started screaming and wanted to fight (R.454). Although accused had to shout at Duffy a couple of times, he used no profanity, and succeeded in calming Duffy down (R.455,535,536). Accused did not fall to the ground at any time. As a result of his drinking, he was "feeling good" (R.536). Lieutenant Hill came out and told Duffy to put on his blouse and go. Accused said that he would get one of the boys to drive Duffy back. Every time Duffy made a move to pick up his blouse, Lieutenant Hill would give him another order to put his blouse on. Accused gave Duffy some orders. Thinking that Lieutenant Hill would take care of the hapless Duffy, accused departed to the latrine (R.455,536). Duffy came in and became embroiled in the argument between the civilian and the member of the Coast Guard, whereupon accused grabbed Duffy by the lapels and pushed him into the corridor and against the wall. Duffy started crying, and accused shook him and told him to stop. Duffy wanted to go back and fight. DiMatteo arrived to take Duffy away. Accused told DiMatteo to leave Duffy alone, but subsequently turned him over to DiMatteo (R.455,456,536,541). After the two had left, accused heard Duffy screaming and saw the military policemen struggling to hold him. Accused rushed down, grabbed him by the lapels, and told him to "smarten up" (R.456,563). Accused did not recall that anyone stepped between him and Duffy (R.549,563). Duffy was waving his arms, and accused "caught a Sunday punch in the mouth", which he was "pretty sure" came from Duffy, although it might have come from one of the others (R.456,548). Accused then stepped back and told DiMatteo to take Duffy to camp under arrest and put him to bed. Accordingly, Duffy was dragged out (R.456,457).

Accused denied that his uniform was mussy at this time, but admitted that he was still "feeling good" (R.544). Accused went outside and saw Duffy being placed in the jeep. Accused reiterated his order to take Duffy to camp under arrest and put him to bed. The jeep "took off" (R.459,537).

Accused denied running in front of the jeep. He likewise denied cursing Duffy or saying that he would "hang" for his malefactions (R.537,542,543).

Accused further denied telling Doberstein that Duffy "would hang for this", and ordering Doberstein to shoot Duffy in case of an attempted escape (R.540). In addition, accused testified that he did not tell DiMatteo that he could "whip" Duffy any day, and did not argue or bet with any men from the cavalry as to who could drink the most (R.543).

Accused made two telephone calls to Hamilton Field and reported what he had done in connection with Duffy. He was told that he had done the right thing (R.461,555). He did not fall down, as stated by witnesses for the prosecution (R.550,554). The cafe was crowded at the time (R.463,465). Accused went upstairs to bed about 11:30 p.m. (R.566).

Accused testified that he did not swear at Duffy or call him a "damned thick headed Irishman" or any other name (R.525,534,542,555,556). At no time during the evening was he loud, and he did not use any foul or profane language, except possibly "hell" or "damn" (R.542,552,555). Between 3:30 and 11:30 p.m. he had about six or eight glasses of beer and two highballs (R.467,568). His speech was not thick and he enunciated clearly, although by reason of the cold, his voice was hoarse. At no time during the evening did he stagger (R.537,538,543,544,553).

4. No recapitulation of the evidence is needed to support the statement that at the place and time alleged, accused was grossly drunk, and that over a period of several hours his conduct was disgraceful and conspicuously disorderly.

In listing examples of offenses under Article of War 95, Winthrop includes the following:

> "Drunkenness of a gross character committed in the presence of military inferiors, or characterized by some peculiarly shameful conduct or disgraceful exhibition of himself by the accused" (Winthrop, Military Law and Precedents, 2nd ed., Reprint, p. 717).

In the opinion of the Board of Review the condition and conduct of accused constitute a violation of Article of War 95 as thus exemplified.

5. The defense objected to the admission of any evidence dealing with events occurring in the yard, latrine, lobby, street, or other place outside the confines of the Ship Ahoy Tavern proper, and subsequently moved to

strike all such testimony. The court overruled the objection and denied the motion (R.26-29,238-250). The court's action was proper. The Specification was broad enough to cover the territory concerned, and even had it been more narrowly drawn, the slight variance in locale would have been immaterial.

The court sustained an objection by the prosecution to the admission in evidence of a statement made by accused to the investigating officer (R.469-471). Again, the court's action was correct. Accused was a witness, and self-serving statements made by him out of court were clearly inadmissible.

The record of trial does not show that the second reporter was sworn (R.547). Since the record was properly authenticated, the defect is not prejudicial.

6. War Department records show that accused is 27 years of age and attended Manhattan College for two years and Fordham University for one-half year. He served as an enlisted man from October 1940 until 16 September 1942, when, upon graduation from the Air Forces Officer Candidate School, Miami Beach, Florida, he was appointed second lieutenant, Army of the United States. In recommending accused for Officer Candidate School, his commanding officer stated that his qualities of leadership were unknown and his character excellent. He was promoted to first lieutenant 21 January 1943.

7. The court was legally constituted and had jurisdiction of the person and subject matter. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is mandatory under Article of War 95.

Lucy G. Gow, Judge Advocate.

(On leave), Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O. 30 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 First Lieutenant Vincent J. Hobbins (0-563320), 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. In view of the previous good conduct of the accused and the recommendation of the reviewing authority, I recommend that the sentence be confirmed but commuted to forfeiture of $50 pay per month for ten months and restriction to the limits of the station where accused may be serving, for three months, 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 commuted to forfeiture of $50 pay per month for ten months and restriction to limits of station where serving for three months. G.C.M.O. 265, 24 Sep 1943)

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

SPJGQ
CM 235557

10 JUL 1943

UNITED STATES v. First Lieutenant C. D. McMILLIN (O-504601), Dental Corps.	THIRD DISTRICT ARMY AIR FORCES TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Keesler Field, Mississippi, 7 May 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 Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that 1st Lieutenant C. D. (IO) McMillin, Dental Corps, Detachment Medical Department (SC), Gulfport Field, Mississippi, was, on or about April 3, 1943, drunk and disorderly in uniform in a public place, to wit, on an Atlantic Greyhound bus, at or near Winder, Georgia, under such circumstances as to bring discredit upon the military service.

Specification 2: (Finding of not guilty.)

He pleaded not guilty to the Charge and Specifications and was found guilty of Specification 1 and of the Charge, but not guilty of Specification 2. There was no evidence of any prior convictions submitted. 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 pertinent evidence introduced by the prosecution shows that the accused was granted an emergency leave from his station, Gulfport Field, Mississippi, to undergo an operation on his arm at Greenville, South Carolina. At one point on his journey, he boarded a crowded bus at Atlanta, Georgia, 3 April 1943 in proper military uniform. This bus then proceeded to Winder, Georgia, where it stopped for a rest period. While the bus was standing there at the bus stop the accused became involved in a fight with two enlisted men in the rear of the bus. The two soldiers had the accused down on a seat and were striking him in and about the face with their fists. The bus driver stopped the fight by pulling the enlisted men off. The bus driver then got the accused to stand up in the front of the bus. The driver testified that the accused appeared to be drunk. He talked thickly. He smelled of liquor. His face was bloody and his clothes disheveled from the fight (R. 13-19). A female passenger who boarded the bus at Winder first observed the accused exchanging blows with a soldier in the rear of the bus. The driver then brought him to the front of the bus. She testified:

> "Q. When you got out of Winder, did anything happen which attracted your attention, as far as he was concerned?
> "A. We had been gone about three or four miles when apparently he staggered some, and about four miles down the road, between Winder and a small town between Athens, he staggered some, and apparently seemed fixing to fall in my seat. The girl sitting with me slid over and I slid over and left some space in the seat. Apparently he thought we were offering him part of our seat, and he sat down partly on me, and partly on the seat. The girl sitting with me got up and moved across the aisle. I moved over and he sat with me and we rode two or three miles. A lady sitting across from me got off her seat, and I moved over to the seat across from the lieutenant and sat down there the rest of the way to Athens, and the lieutenant had the whole seat to himself.
> "Q. What did he do when he had the whole seat to himself? Did he go to sleep?
> "A. Yes sir. He hung his head over, and his eyes were closed, and propped his face with one hand.
> "Q. When he came up to the front of the bus, and sat down, partly on you, partly on the seat, was he drunk or sober at that time?
> "A. He was drunk." (R. 26-27)

She further stated that accused mumbled his words and smelled very strong of liquor. He also used profane language to another passenger (R. 28).

The accused apparently went to sleep in the seat until the bus arrived at Athens. The bus driver had telephoned ahead to have the military police meet the bus upon its arrival at Athens. Athens

is 25 miles from Winder. At Athens a police officer assisted accused from the bus. As he got off he stumbled and almost fell to the ground. The female passenger said he was drunk then (R. 29). John W. Matthews, local manager of the bus station at Athens, Lieutenant William H. Smith of the Athens police force, First Lieutenant J. B. Clark, Provost Marshal at Athens, and Private Johnnie W. Tisdale of the military police at Athens, testified that when the accused got off the bus at Athens he was drunk (R. 35, 43, 55, 63). Their opinions were based upon the accused's appearance and his conduct described in various ways. He smelled of liquor. He talked thickly and incoherently. He was argumentative. He stumbled and staggered and was unsteady on his feet. The provost marshal got the accused to wash the blood off his face, straighten out his clothes, and permitted him to proceed in the same bus to his destination.

4. The accused, after being duly advised of his constitutional rights to appear as a witness in his own behalf, elected to make a sworn statement and upon being duly sworn, testified that: His arm had pained him for some time, two fingers were paralyzed and caused severe pain; he was granted emergency leave to have an operation performed on his arm and the pain became so great in Atlanta that he took a drink of whiskey (R. 86). About 15 miles out of Atlanta he took a drink from a soldier in an attempt to relieve the pain in his arm (R. 95); just before the bus arrived at Winder, Georgia, two soldiers, one of whom had previously given him a drink, were cursing and making noise and he told them to be quiet "because there are ladies on the bus" (R. 99). One of the soldiers came up to him and said "You think you are something because you got a bar, you think you can run over us" (R. 87). Accused replied that he did not want to argue with him and the other soldier came up and both started striking him (R. 88). He denied that he cursed on the bus or that he was disorderly (R. 89-90). The blows received from the soldiers dazed him and his lip was swollen (R. 93). The defense also called as witnesses Colonel Morrel H. Welch, Colonel Robert A. Strong and Major Claude R. Wood, of the Dental and Medical Corps who testified that accused had performed his duties in an efficient and satisfactory manner while he was stationed at Gulfport Field, Mississippi until the date of the occurrence described above.

5. Specification 1 alleges that the accused was drunk and disorderly in uniform on 3 April 1943 on a Greyhound bus at or near Winder, Georgia. The evidence is clear that the accused on 3 April 1943, clothed in the uniform of an officer of the Army, was on a Greyhound bus, at and near Winder, Georgia. It is equally clear that he was drunk. The bus driver and a passenger so testified. Four other witnesses saw him at Athens, 25 miles from Winder, and all were positive in their statements that he was drunk then. During the journey from Winder to Athens the accused had no intoxicating drinks. It is a reasonable and proper inference under such circumstances that if he was drunk when the bus reached Athens, he was drunk when it left Winder. The only question remaining is whether the accused was disorderly at or near Winder. Counsel for the accused claims that the

fight in which he engaged was not brought about by the accused and therefore should not be chargeable against the accused as disorderly conduct. If this fight were the only disorder that had taken place the Board would no doubt agree with his contention. But, apart from this fight he was disorderly. He openly in a crowded common carrier admittedly drank intoxicating liquor from a bottle handed to him by an enlisted man. The bus carried 37 passengers. Accused stood up in the front of the bus smelling strongly of liquor, blood running down his face, his clothes disheveled and torn, cursed one of the passengers and was so unsteady on his feet that one woman passenger moved away from him. He then seated himself partly on this woman and partly on the seat. She was forced to vacate the seat entirely. Another woman who was left in the same seat with accused removed herself from his proximity. He then proceeded to spread himself over the two seats and fell asleep. The picture he presented - bloody and disheveled, and leaning across two seats asleep in his torn uniform - was enough to bring discredit upon the service and constitute a violation of Article of War 96. Disorderly conduct need not be proven under a charge of violation of Article of War 96. Drunkenness alone is ordinarily sufficient, CM 114900; 121290; 197398. However, disorderly conduct is alleged in this case. The Board of Review is of the opinion that the burden of proving it has been met by the evidence.

Black's Law Dictionary defines disorderly conduct as:

> "A term of loose and indefinite meaning (except as occasionally defined in statutes), but signifying generally any behavior that is contrary to law, and more particularly such as tends to disturb the public peace or decorum, scandalize the community, or shock the public sense of morality."

The accused's conduct on the bus, apart from the fist fight, was such as to scandalize those about him, disturb their peace, and shock their sense of morality and decency. Accused's disorderly behavior was conspicuous. (CM 228894-1943)

6. War Department records show accused to be 34 years of age. He is a high school graduate, attended Wofford College (S.C.) for two years, and graduated from the Atlanta Southern Dental School in 1933 with a degree of D. D. S. He was appointed first lieutenant, Army of the United States, on 14 November 1942, and entered upon active duty 11 December 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 of the sentence. A sentence of dismissal is authorized upon conviction of violation of Article of War 96.

William A. Pounds, Judge Advocate.

Earle Hepburn, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 20 JUL 43 - 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 First Lieutenant C. D. McMillin (0-504601), Dental 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 and 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.
Acting Sec. of War.
Incl.3-Form of action.

(Sentence confirmed but commuted to reprimand. G.C.M.O. 220, 6 Sep 1943)

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

SPJGN
CM 235559

7 AUG 1943

UNITED STATES	)	80TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Camp Forrest, Tennessee, 11 May 1943. Dismissal, total forfeitures and confinement for five (5) years.
	)	
Second Lieutenant CHARLES C. BARTOLD (0-1289370), 319th Infantry.	)	

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

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

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

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

Specification 1: In that Second Lieutenant Charles C. Bartold, Company A, 319th Infantry, Camp Forrest, Tennessee, did without proper leave, absent himself from his post and duties at Camp Forrest, Tennessee from about 6 February 1943 to about 13 February 1943.

Specification 2: In that Second Lieutenant Charles C. Bartold, Company A, 319th Infantry, Camp Forrest, Tennessee, did without proper leave, absent him-

self from his post and duties at Camp Forrest, Tennessee from about 13 February 1943 to about 15 February 1943.

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

Specification: In that Second Lieutenant Charles C. Bartold, Company A, 319th Infantry, Camp Forrest, Tennessee, did at Camp Forrest, Tennessee on or about 13 February 1943, with intent to deceive First Lieutenant Charles A. Weed, Company A, 319th Infantry, his Company Commander, officially state to said First Lieutenant Charles A. Weed that he (Second Lieutenant Charles C. Bartold) had reported to the Adjutant, First Lieutenant Roy E. Thacker, 319th Infantry, and the Regimental Commander, Colonel Jay E. Gillfillan, 319th Infantry, and that he (Second Lieutenant Charles C. Bartold) had an appointment with Colonel Jay E. Gillfillan, the Regimental Commander, to see the Commanding General of the 80th Infantry Division, which statements were known by the said Second Lieutenant Charles C. Bartold to be untrue, in that he (Second Lieutenant Charles C. Bartold) well knew that he had not reported to the Adjutant, First Lieutenant Roy E. Thacker, or the Regimental Commander, Colonel Jay E. Gillfillan, and that he did not have an appointment with Colonel Gillfillan, the Regimental Commander, to see the Commanding General of the 80th Infantry Division.

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

Specification 1: In that Second Lieutenant Charles C. Bartold, Company A, 319th Infantry, Camp Forrest, Tennessee, did, on or about 12 March 1943 without the consent of the owner, wrongfully and unlawfully take and convert to his own use a Studebaker automobile, value about four hundred dollars ($400.00), motor number 27958, bearing Louisiana license plates 176-135, property of First Lieutenant Eugene B. Middleton Jr., Company A, 319th Infantry, Camp Forrest, Tennessee.

Specification 2: In that Second Lieutenant Charles C. Bartold, Company A, 319th Infantry Camp Forrest, Tennessee having received a lawful order from Lieutenant Colonel Hans C. Larsen, Director of Interior Security, Fort Bragg, North Carolina to report to Commanding Officer, Camp Forrest, Tennessee without delay, the said Lieutenant Colonel Hans C. Larsen being in the execution of his office; did, at Fort Bragg, North Carolina on or about 1 April 1943 fail to obey the same.

Specification 3: In that Second Lieutenant Charles C. Bartold, Company A, 319th Infantry Camp Forrest, Tennessee, did, at Fayetteville, North Carolina on or about 1 April 1943 appear wearing the insignia of the rank of First Lieutenant, Army of the United Stated, and did represent himself as a First Lieutenant, Army of the United States to Sergeant Vincent (NMI) Christina, Corps of Military Police, Fort Bragg, North Carolina; First Lieutenant Clinton J. Griswold, Corps of Military Police, Fort Bragg, North Carolina; and Mr. C. C. Schaeffer, Hotel Prince Charles, Fayetteville, North Carolina; the said Second Lieutenant Charles C. Bartold being at the time a Second Lieutenant, Army of the United States.

Specification 4: In that Second Lieutenant Charles C. Bartold, Company A, 319th Infantry, Camp Forrest, Tennessee, did, at Durham, North Carolina, on or about 23 March 1943, with intent to defraud, wrongfully and unlawfully make and utter to cash a certain check in words and figures as follows, to wit; One Hundred Dollars ($100.00) drawn on The First National Bank, Tullahoma, Tennessee, dated 23 March 1943, and by means thereof, did fraudulently obtain from The Fidelity Bank, Durham, North Carolina, one hundred dollars ($100.00), he the said Second Lieutenant Charles C. Bartold, then well knowing that he did not have and not intending that he should have sufficient funds in The First National Bank, Tullahoma, Tennessee, for the payment of said check.

Specification 5: In that Second Lieutenant Charles C. Bartold, Company A, 319th Infantry, Camp Forrest, Tennessee, did, at Manchester, Tennessee on or about 20 March 1943, wrongfully make and utter to Cash a certain check in words and figures as follows, to wit: Seventy-five Dollars ($75.00) drawn on The First National Bank, Tullahoma, Tennessee, dated 20 March 1943, and by means thereof did fraudulently obtain from The First National Bank, Manchester, Tennessee, Seventy-Five Dollars ($75.00), he the said Second Lieutenant Charles C. Bartold then well knowing that he did not have and not intending that he should have any account with The First National Bank, Tullahoma, Tennessee for the payment of said check.

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

Specification: In that Second Lieutenant Charles C. Bartold, Company A, 319th Infantry, Camp Forrest, Tennessee, did, without proper leave, absent himself from his post and duties at Camp Forrest, Tennessee from about 19 March 1943 to about 10 April 1943.

He pleaded guilty to Charge I and the two Specifications thereunder, to Charge II and the Specification thereunder, to Additional Charge I and Specifications 1, 3, 4 and 5 thereunder, to Additional Charge II and to the Specification thereunder except the words 10 April 1943, substituting therefor, respectively the words "1 April 1943", of the excepted words not guilty of the substituted words guilty, and not guilty to Specification 2 of Additional Charge I. He was found guilty of all Charges and Specifications, but of the Specification of Additional Charge II, guilty except the words 10 April 1943, substituting therefor, respectively the words 1 April 1943, and from 1 April 1943, to 6 April 1943, of the excepted words not guilty, of the substituted words guilty. 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 five 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 concerning the three allegations of absence without leave (Specification 1 and 2, Charge I, and the Specification, Additional Charge II) shows that the accused absented himself

without leave from his organization from 6 February 1943 to 13 February 1943, from 13 February 1943 to 15 February 1943, and from 19 March 1943 to 10 April 1943 (R. 6a; Exs. A and B).

The evidence concerning the allegation that the accused made a false, official statement (the Specification, Charge III) shows that on 13 February 1943, the accused reported to his Company Commander, First Lieutenant Charles A. Weed, that he, the accused, had reported to the Regimental Adjutant and the Regimental Commander, Colonel Jay E. Gillfillan, and that the accused and Colonel Gillfillan had been given an appointment to see the Commanding General of the 80th Infantry Division after lunch. The evidence shows further that the accused did not report to either of the above named officers, and that he had not been given an appointment to see his Commanding General (R. 6a-6b).

Concerning the alleged theft of an automobile (Specification 1, Additional Charge I), the evidence shows that First Lieutenant Eugene B. Middleton owned a Studebaker automobile, Louisiana license number 176-135, motor number 27958, which he estimated as of the value of $900, that he had left his car on the battalion parking lot, that it was taken away without his permission, that he was informed by a Mr. Johnson of the Cooksville Motor Company that the accused had left the car there, and that when he talked to the accused, the accused admitted that he had taken the car (R. 6f-6k).

Concerning the allegation that the accused on 1 April 1943, failed to obey an order of Lieutenant Colonel Hans C. Larsen of Fort Bragg, North Carolina, to report to the Commanding Officer, Camp Forrest, Tennessee without delay, the evidence for the prosecution shows that the order was given as alleged. The distance between the two stations was shown to be 600 miles and the traveling time between them, approximately 18 hours (R. 6k). It was further shown that the accused was arrested in Cooksville, Tennessee on 6 April 1943 by the sheriff of Putnam County, Tennessee. In addition the evidence shows that the accused was not released from the Cooksville County jail until 10 April 1943 (Ex. G).

Concerning the allegation of wrongfully wearing the insignia of a first lieutenant, the evidence for the prosecution shows that the accused was wearing such insignia when he was arrested on 6 April 1943 (Ex. G) and that he admitted taking the bars of First Lieutenant Middleton (R. 6g).

Concerning the two Specifications alleging the fraudulent making and uttering of worthless checks for $100 and $75 respectively, (Specification 4 and 5, Additional Charge II) the evidence for the prosecution shows the Fidelity Bank, Durham, North Carolina, cashed a check for the accused for the sum of $100 dated 23 March 1943, and that this check was dishonored and returned by the drawee, the First National Bank of Tullahoma, Tennessee, marked "Insufficient Funds". The evidence shows further that the Fidelity Bank had not been paid by the accused at the time of this trial. The evidence further shows that the First National Bank of Manchester, Tennessee, cashed a check for the accused for the sum of $75, dated 20 March 1943, and that this check was returned by the drawee, the First National Bank of Tullahoma, Tennessee, stating that the accused had no account there. Furthermore, it was shown that the accused had no account in the First National Bank of Tullahoma, Tennessee, since 20 March 1943 and that said bank dishonored the checks of the accused for $100 and $75, dated 23 and 20 March respectively (R. 6k, Exs. G, I, K, R).

4. The accused testified concerning his failure to obey the order to report to the Commanding Officer, Camp Forrest, that he wanted to report promptly but that he could not get transportation for himself and his wife. He explained that Colonel Larsen made arrangements so that the accused could send his wife home but that he had to get to Camp Forrest the best way he could. The accused explained that he did not have any money on 1 April, and could not get any until 3 April, that he left on 3 April and that he returned to Tullahoma on the morning of 6 April. He then learned that Lieutenant Middleton's car had been repaired so he left on the 3 p.m. bus and went to Cooksville to get the car. While there he was arrested by the local sheriff. The accused asserted that he"* * * really was not gone but from the 19th to the 1st of April". He also testified that he "* * * tried to obey the colonel's order to report back to Camp Forrest, Tennessee".

The accused explained that he wrote "these checks" because he was broke and because he wanted to investigate a matter involving his family. He then explained that when he married his wife he did not know that she had a son and that when he "left this last time" he "* * * was just trying to get away from it all" (R. 6m-6q).

5. Except as to Specification 2, Additional Charge I, and the Specification, Additional Charge II, the findings of guilty of each

Charge and each Specification are sustained, not only by the accused's plea of guilty but by the evidence presented in support thereof.

5. Except as to Specification 2, Additional Charge I, and the Specification, Additional Charge II, the findings of guilty of each Charge and each Specification are sustained, not only by the accused's plea of guilty but by the evidence presented in support thereof.

Specification 2, Additional Charge I, alleges that the accused having received a lawful order from Lieutenant Colonel Hans C. Larsen, Director of Interior Security, Fort Bragg, North Carolina, to report to the Commanding Officer, Camp Forrest, Tennessee, without delay, did, at Fort Bragg, on or about 1 April 1943, fail to obey the same. The evidence shows very clearly that the accused received the order as alleged, and that he did not arrive at Tullahoma, the city adjacent to Camp Forrest, and only 18 hours traveling time from Fort Bragg until the morning of 6 April. Even then the accused did not report as ordered, but according to his own testimony he went by bus to Cooksville where he was arrested by the local sheriff, and held in jail until 10 April. The finding of guilty under the above Specification is sustained by evidence beyond a reasonable doubt.

The Specification, Additional Charge II, alleges that the accused absented himself from his post and duties at Camp Forrest, Tennessee from about 19 March 1943, to about 10 April 1943. The accused by exceptions and substitutions pleaded guilty to being absent without leave from 19 March 1943 to 1 April 1943. The proof shows that the accused was absent without leave for the time alleged. The court, however, found the accused guilty of being absent without leave from 19 March to 1 April and from 1 April to 6 April. The court by this finding apparently gave the accused credit for returning to duty on the day he returned to Tullahoma although there is no evidence that he returned to his organization on that date or that he reported for duty. The Manual for Courts-Martial states that a court-martial may not, by exceptions and substitutions "* * * change the nature or identity of any offense charged * * *" (par. 78c, M.C.M., 1928). It follows, therefore, since this finding divides the period of unauthorized absence into two separate periods, constituting thereby, two separate offenses, and changing the identity of the offense charged, that only so much of the finding may be legally approved as involves a finding that the accused was absent without leave from 19 March 1943 to 1 April 1943.

6. The records of the Office of The Adjutant General show the accused to be approximately 26 years of age. He was inducted into the service on 26 November 1940, attended Officer Candidate School, and was commissioned a second lieutenant, Infantry, on 5 August 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 of Charge I and the Specifications thereunder, Charge II and its Specification, Additional Charge I and the Specifications thereunder, Additional Charge II, and so much of its Specification thereunder as involves a finding that the accused, did, without proper leave, absent himself from his post and duties at Camp Forrest, Tennessee, from about 19 March 1943, to about 1 April 1943, legally sufficient to support the sentence, and to warrant confirmation thereof.

Thos. H. Gressons, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

SPJGN
CM 235559

1st Ind.

War Department, J.A.G.O. 13 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 Charles C. Bartold (0-1289370), 319th 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 of Charge I and the Specifications thereunder, Charge II and its Specification, Additional Charge I and the Specifications thereunder, Additional Charge II and so much of its Specification as involves finding that the accused did, without proper leave, absent himself from his post and duties at Camp Forrest, Tennessee from about 19 March 1943 to about 1 April 1943, legally sufficient to support the sentence of dismissal, total forfeitures, and confinement at hard labor for five years, and to warrant confirmation thereof. I recommend that the sentence be confirmed. In view, however, of the youth of the accused, I recommend further that two years of the confinement imposed be remitted, and that the sentence as thus modified be carried into execution.

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 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 confirmed but four years of confinement remitted. G.C.M.O. 259, 22 Sep 1943)

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

SPJGK
CM 235563

31 JUL 1943

UNITED STATES)	EIGHTH ARMORED DIVISION
)	
v.)	Trial by G.C.M., convened at North Camp Polk, Louisiana, 6 May 1943. Dismissal.
)	
Second Lieutenant KENNETH A. BAKER (0-1016862), Infantry.)	

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 2nd Lieutenant Kenneth A. Baker, 80th Armored Regiment, was, at Leesville, Louisiana, on or about April 15, 1943 in a public place, to wit, New Orlando Club, drunk and disorderly while in uniform.

Specification 2: In that 2nd Lieutenant Kenneth A. Baker, 80th Armored Regiment, having been ordered into arrest by Louisiana State Troopers, to wit, C.E. Jones and E. D. Lamberth, did at New Orlando Club, Leesville, Louisiana, on or about April 15, 1943 resist said arrest by abusive speech and physical force.

Specification 3: In that 2nd Lieutenant Kenneth A. Baker, 80th Armored Regiment, having been duly confined to the Vernon Parish jail, Leesville, Louisiana, did on or about April 15, 1943, willfully, wrongfully and unlawfully destroy public property therein, to wit, window sash and panes in lower half of one window, property of Vernon Parish, Louisiana.

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

3. On the evening of 14 April 1943, about 50 or 60 people were present at the Orlando Club in Leesville, Louisiana (R.10,11). Adjacent to the main dining room was a hallway leading to the ladies' and men's rest rooms (R.6; Ex.A). A door separated this hallway from the main room (Ex. A). The cash register was located about 30 feet from the hallway (R.12). During the course of the evening, Third Officer Enid C. Kirkham, 41st W.A.A.C. Training Regiment, noticed accused walking toward the rest room hallway. She testified that he staggered as he walked (R.13).

Inside the hallway, Second Lieutenant Goodwin W. McElroy, 893rd Tank Destroyer Battalion, and Third Officer Edith O. Thompson, 41st W.A.A.C. Training Regiment, were engaged in a private conversation. Neither knew accused (R.6,8,9). Accused entered the hallway, staggering (R.6,7,9). He was in uniform (R.6). He held up his hand "in a sort of gesture" and said, "Hello babe" to Third Officer Thompson (R.6). She and Lieutenant McElroy explained to accused that they were carrying on a private conversation, and they requested him to leave and not bother them (R.6,7,9). Accused "became very insulted" and said that Lieutenant McElroy "would have to beat his ass" (R.7). Requested again to leave, accused refused to do so and used further profane and obscene language. Third Officer Thompson testified that she heard him use the words "hell", "damn", "Jesus Christ", and "fuck" (R.7,9; Ex. B). When Third Officer Thompson asked accused to go, he pushed her aside and told her to "stay out of it" (R.9). Lieutenant McElroy told accused that he was drunk and a disgrace to the uniform (R.7). At this point Third Officer Thompson went to the ladies' room and closed the door (R.9). While in the ladies' room she could hear the argument continuing, accused talking very loudly and Lieutenant McElroy very quietly (R.7,10). She heard Lieutenant McElroy say that if accused were not in uniform, he would hit accused, whereupon accused replied, "'There is my uniform'" (R.9).

Lieutenant McElroy testified that accused took off his blouse, threw it on the floor, and "stomped on it", exclaiming that he "would rather fight than fuck", which remark he repeated several times (R.7,9). Accused also kept shoving Lieutenant McElroy and wanting to fight, which the latter refused to do (R.7).

During the foregoing proceedings, Mr. A.L. Temple, half owner of

the club (R.10) was standing at the cash register (R.11). He did not hear any noise from the hallway, but about 12 o'clock midnight a waitress told him of the disturbance, whereupon he instructed her to call the Military Police, while he proceeded to the door of the hallway (R.11, 12). He could hear someone talking inside. The door being closed, he tried to shove it open, but someone, identified by Lieutenant McElroy as accused, slammed it in his face. This occurred several times until finally he succeeded in pushing open the door and entering (R.7,11).

Accused emerged swearing and swinging at Temple. He said "God Damn, hell" and wanted to know who Temple was. Temple said he was the manager, and after some persuasion, including "grabbing" accused, he succeeded in placating accused with the help of some officers, and inducing him to go back to his table (R.7,9,11).

State Troopers C. E. Jones and Lamberth (full name not given), of the Louisiana State Police, and Corporal Billy Stanley, Military Police Detachment, Camp Polk, Louisiana, appeared at the club between midnight and 1 a.m. in response to Mr. Temple's summons (R.14,19). One of the State Troopers asked Temple what the call was for. Temple escorted the Troopers to the table where accused stood, talking to someone (R.11,12,14,15,19). Jones testified that accused was "halfway causing a dispute about getting out" (R.19). Informed by Jones that the arrivals were State Troopers, and directed to go outside with them, accused refused to do so (R.11,14, 19,20). The Troopers took accused by the arms and led or pushed him toward the door (R.11,14,20). Accused kept protesting that he wanted to walk, but when given an opportunity to do so, he "balked" (R.14,20). During the proceedings, accused continually objected to being "thrown out", and in a loud voice used profane and obscene language (R.12-14). Jones testified that on previous occasions at the club the offenders had always been placed in a taxicab and sent home (R.19). Third Officer Kirkham testified that accused did not use any profanity while the police were ejecting him (R.13).

Lieutenant McElroy and Third Officer Thompson testified that accused was drunk, and Temple, Stanley, and Jones said that he was under the influence of intoxicating liquor (R.7, 9,11,15,20). The odor of alcohol was on his breath (R.7).

Accused was taken to the State Police Station. As he entered the police car he called Lamberth, the driver, a "cocksucker", and said, "You can't do this to me". He made a swing at Lamberth, and Jones grabbed his arms. It was necessary for Jones to hold him all the way to the police station to keep him from hitting Lamberth. At State Police Headquarters he called the Military Police "cocksuckers and sons-of-bitches" (R.14,15).

From State Police Headquarters accused was taken to the Vernon Parish city jail and placed in a cell by himself. Stanley testified that he noticed that the window and sash were intact. After the police had locked the doors and were departing, Stanley heard the sound of breaking glass. Stanley, Lamberth, and a city policeman immediately went to the outside of the building. Accused was standing at the window shouting that he wanted the Corporal or Sergeant of the Guard. The window was broken, and most of it was out except a few splinters in the lower part (R.15).

For the defense, Second Lieutenant William T. King, 80th Armored Regiment, testified that he accompanied accused to the Orlando Club and was with him there for an hour and a half prior to the arrival of the police. He observed accused from time to time, and accused acted as a gentleman should (R.17). Witness knew nothing of any argument and did not know that accused had gone to the men's room (R.16,18). When the State Police entered accused was standing in the aisle talking to an officer. Witness did not know why the police were there. Without warning the police grabbed accused by the arm. Accused was so startled that he tried to resist, and requested that he be allowed to leave under his own free will as a gentleman. At first the police refused, but suddenly they let him go. When accused started to use a few "minor" words of profanity, witness placed his hand over accused's mouth, whereupon accused calmed down and left the club without any assistance. Outside, the police grabbed him again, ordered him into the police car, and told him that he was under arrest. They practically threw him into the car. In the opinion of witness, accused had his senses and knew what he was doing, although he was not in "A-1" condition (R.16-18).

Second Lieutenant Leonard A. Ensminger, 36th Armored Regiment, testified that he was with accused for about three hours during the night in question; that he was not aware of any disturbance caused by accused before the arrival of the police; and that in his opinion accused was sober (R.18-19).

Accused declined to testify or make an unsworn statement.

4. The evidence thus shows that at the place and time alleged, accused was drunk and disorderly in uniform in a public place. He staggered, his breath smelled of alcohol, he became loud, profane, obscene, and pugnacious in the presence of an officer of the Women's Army Auxiliary Corps and others; he slammed the hallway door in the manager's face, and he swore at and used vile epithets toward the manager and the police. In the opinion of several witnesses he was drunk. Even Lieutenant King, a defense witness, admitted that accused was not in "A-1" condition. The

conduct of accused, especially in view of his obscene remarks in the presence of a lady, amounted to a violation of Article of War 95.

Specification 2 alleges that accused, having been ordered into arrest by the Louisiana State Troopers named, resisted arrest at the New Orlando Club by abusive speech and physical force. To warrant a conviction of this Specification, it was necessary to prove that there was an arrest, that it was lawful (Clark and Marshall, Crimes, 3rd ed., sec. 213), and that accused resisted.

An arrest is "the apprehension or taking into custody of an alleged offender, in order that he may be brought into the proper court to answer for a crime" (22 Mich. Law Rev. 543; see also, 6 C.J.S., Arrest, sec. 1a). "A forcible seizure of a person without any pretense of taking him into legal custody is not an arrest * * *" (22 Mich. Law Rev. 544). Putting hands on the accused and subjecting him to control is sufficient from a physical standpoint to constitute an arrest (22 Mich. Law Rev. 553).

The Louisiana Code of Criminal Procedure accords with the foregoing common law principles. It provides in Article 58:

> "Arrest is the taking of one person into custody by another. To constitute arrest there must be an actual restraint of the person, whether such restraint be imposed by force or result from the voluntary submission of the person arrested to the custody of the one arresting him * * *".

Grabbing accused by the arm and leading or pushing him toward the door satisfied the physical requirements of an arrest. But in the opinion of the Board of Review the prosecution did not prove beyond a reasonable doubt that the officers intended to arrest accused at that moment. It is very probable that they intended merely to eject him from the club. However, when they reached the outside, they told him that he was under arrest and put him into the police car. Clearly, that amounted to an arrest.

Article 60 of the Code provides as follows:

> "Any peace officer may, without a warrant, arrest a person - (a) for the commission of any felony or misdemeanor committed in his presence".

Article 740-103 of the Code provides:

> "Disturbing the peace is the doing of any of the following

in such a manner as would foreseeably disturb or alarm the public:

* * * *

(2) Using of any unnecessarily loud, offensive, or insulting language; or

(3) Appearing in an intoxicated condition."

The Article continues with the punishment, which is of a nature to constitute the offense a misdemeanor as defined in Article 740-2 of the Code.

When accused in a loud voice used profane, insulting, and obscene language while the officers were removing him from the club, he violated Article 740-103, and under Article 60 the officers had a right to arrest him.

Article 70 of the Code states:

"When arresting a person, without a warrant, the officer making the arrest shall inform the person arrested of his authority and the cause of the arrest, except when the person arrested is engaged in the commission of a criminal offense, or if he flees or if he forcibly resists arrest before the officer has time to inform him".

The circumstances of the arrest satisfied the requirements of this section.

Article 64 of the Code requires that every one "must submit peaceably to a lawful arrest", and Article 867 makes it "unlawful for any person when placed under arrest by any * * * police officer of the state of Louisiana, * * * to refuse to accompany the said officer to the jail or prison or resist any officer or offer to use force to prevent the execution of such arrest".

Accused's conduct in the police car constituted resistance in violation of the statute.

The Specification alleged that the offense was committed at the club. As noted above, the proof showed that the arrest and resistance occurred outside the club. The variance in place is immaterial.

In the opinion of the Board of Review, resisting arrest is not necessarily a violation of Article of War 95, but when it is accompanied by the language and conduct of which accused was guilty, it becomes a violation of that Article.

The evidence introduced in connection with Specification 3 was sufficient to warrant the finding of guilty. Accused was in an angry mood. Immediately after the police left the cell, they heard the sound of breaking glass and accused appeared at the broken window shouting for the Sergeant or Corporal of the Guard. These circumstances justify the inference that he broke the glass and that he did it purposely. Any other finding would be naive in the extreme. In the opinion of the Board of Review, this malicious destruction of property constituted a violation of Article of War 95.

5. War Department records show that accused is now 25 years of age. He attended high school for three years, but did not graduate. He served as an enlisted man in the Army from 7 January 1937 until 13 March 1943, when, upon graduation from the Armored Force Officer Candidate School, Fort Knox, Kentucky, he was appointed second lieutenant, Army of the United States, and ordered to active duty. At a date not shown, apparently while an enlisted man, he was convicted by summary court-martial of absence without leave for two days.

6. The court was legally constituted and had jurisdiction of the person and of the subject matter. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is mandatory under Article of War 95.

(On Leave), Judge Advocate.

John Tannenbaum, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 4 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 Kenneth A. Baker (O-1016862), 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 and carried into execution.

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 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. Under Sec. of War.
Incl.3-Form of action.

(Sentence confirmed. G.C.M.O. 277, 29 Sep 1943)

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

N.D.

(139)

16 JUL 1943

SPJGH
CM 235573

UNITED STATES	)	SIXTH AIR FORCE
	)	
v.	)	Trial by G.C.M., convened
	)	at Albrook Field, Canal
Second Lieutenant NORMAN	)	Zone, on 27 April 1943.
D. HUTCHINSON (0-568794),	)	Dismissal and total for-
Air Corps.	)	feitures.

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 95th Article of War.

Specification 1: In that Second Lieutenant Norman D. Hutchinson, Air Corps, was at Panama City, Republic of Panama, on or about March 25, 1943, in a public place to wit: #121 Central Avenue, Panama City, Republic of Panama, disorderly while in uniform.

Specification 2: In that Second Lieutenant Norman D. Hutchinson, Air Corps, was at Panama City, Republic of Panama, on or about March 25, 1943, in a public place to wit: Panama National Police Station, Panama City, Republic of Panama, disorderly while in uniform.

CHARGE II: Violation of the 63rd Article of War.

Specification 1: In that Second Lieutenant Norman D. Hutchinson, Air Corps, did, at Panama National Police Station, Panama City, Republic of Panama, on or about March 25, 1943, behave himself with disrespect toward Captain Lewis J. Walker,

Air Corps, his superior officer, by saying to him, "You are a prick, a bastard and an asshole", or words to that effect.

Specification 2: In that Second Lieutenant Norman D. Hutchinson, Air Corps, did, at Panama National Police Station, Panama City, Republic of Panama, on or about March 25, 1942, behave himself with disrespect toward 1st Lieutenant Karl J. Peterson, Quartermaster Corps, his superior officer, by saying to him, "You are a Quartermaster Jew Bastard", or words to that effect.

Specification 3: In that Second Lieutenant Norman D. Hutchinson, Air Corps, did, at Panama National Police Station, Panama City, Republic of Panama, on or about March 25, 1943, behave himself with disrespect toward 1st Lieutenant William J. Freihofer, Quartermaster Corps, his superior officer, by saying to him, "You are a Quartermaster Jew Bastard", or words to that effect.

He pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. An Additional Charge (violation of the 68th Article of War) was withdrawn by entry of a nolle prosequi before arraignment.

3. The evidence for the prosecution shows that about 6:00 p.m., on 25 March 1943, the accused, in uniform and "with a bad gleam in his eyes" ran through an open door into the room of Maria Barria, at 121 Central Avenue, Panama City, struck her and choked and killed her parrot. When the woman called for help, accused left. He next went through a window into a room occupied by Fermin Romero, saw Romero lying on a bed and struck him. Romero's wife tried to separate them, and accused attacked her. Romero stated that the accused smelled of liquor, was cursing, his face was bloody and he appeared to be out of his mind and trying to get away from someone. At about 7:00 p.m., Sergeant James W. Loose, Military Police, was on Central Avenue when a soldier ran out of an alley and told him to run back there quick or there would be a dead Lieutenant. Sergeant Loose went back, heard a lot of noise coming from a house, looked in and saw accused standing in the doorway of No. 121, fighting with a crowd of Panamanians. Accused was in uniform, but his cap and tie were gone and blood was dripping from the left side of his face. He seemed obsessed by the fear that a woman was going to shoot him. Sergeant Loose took accused by the arm, "sat him down" on the steps and kept the crowd away. Accused then began cursing and ordered

Sergeant Loose to shoot "the Panamanian". Captain J. M. Penny, arriving soon after Sergeant Loose, asked accused if natives had jumped him. Accused replied, "Hell no, I started this fight myself"; "You nor no other son-of-a-bitch are going to make me leave here"; "You are a damn chump, Captain". Accused acted like a drunken man, his eyes were blood-shot and he smelled strongly of liquor; he was angry and excited, but he could speak clearly. The city police arrived, followed by First Lieutenant Edward A. Mikulas, who was the military police officer of the day, and accused was taken by Lieutenant Mikulas in the command car to the police station. Accused got in the car without trouble, but cursed and struggled on the way to the station (R. 8, 9, 11-15, 17-24, 26, 27).

When accused was brought into the station he cursed and threatened Lieutenant Mikulas but did not display any physical violence. Captain Walker, in response to a call, went to the police station about 7:45 p.m. and saw accused, who was a new officer and not known to him, in a little room off the main part of the station. Accused was belligerent and in his opinion appeared to have been drinking. He would "go off the handle" but talked rationally at times. Accused couldn't understand why Captain Walker was there, but addressed him as Captain Walker, and called him obscene names. Accused cursed everyone there, the uniform and the Army. First Lieutenant Karl J. Peterson, Q.M.C., on telephone instructions from the alert officer at headquarters, went to the station about 9:00 p.m., accompanied by First Lieutenant William W. Freihofer, Q.M.C., and talked with accused in a little room in front of the jail. He did not know accused, but accused addressed him as "Lieutenant" and called him a "Quartermaster Jew Bastard". In his opinion accused did not appear to be drunk, but he was angry, disrespectful, not mentally sound, afraid of something, and thought he had been done an injustice. Accused also called Lieutenant Freihofer a "Quartermaster Jew Bastard", but in the opinion of Freihofer did not recognize him as a first lieutenant (R. 28, 33-44).

Captain James J. Murphy, Commanding Officer of the accused, had been informed that the accused was under arrest at the City of Panama police station, and that his case was to be tried in the Panama City night court. Captain Murphy arrived at the station about 10:45 p.m. and found accused in a waiting room. Accused was very quiet, rational and sober. Captain Murphy asked him what the trouble was, and accused stated that he had two or three drinks between 7:00 and 8:00 o'clock and from that time on had no knowledge of what happened until he arrived at the station. Accused was then taken across the street to the Police Night Court, where he was charged with disorderly conduct, illegal entry,

breaking furniture, killing a parrot, and assault. He was found guilty, fined $40 and damages. The fine was paid. Captain Murphy accompanied accused to a residence on Central Avenue where $5.00 was paid to a man and $10 to a woman for a parrot. Accused stated at that time that he had no knowledge of killing the parrot, that he had never seen either the man or woman before but that he wanted to pay the money to get it over with and shut them up. The accused was under command of Captain Murphy for three months. During that period the accused had performed his duties in an excellent manner and Captain Murphy had never seen the accused drink. The accused was in no way disrespectful to him at the police station (R. 28, 39, 45-49).

While accused was in the police station, he was examined about 9:00 p.m. by Captain T. L. Pecora, Medical Corps, who had been called to see if accused was under the influence of "dope". Captain Pecora tested the accused's pupils for light reaction and looked him over, but found no evidence of drug intoxication or drinking, no bumps on his head, no cuts except a scratch or two and no serious injury. There was nothing to indicate that accused was mentally ill except his sullenness and refusal to answer questions. He stated that shock or fright might cause an individual to lose control of some of his faculties and yet remain conscious, but oblivious of what was going on around him (R. 51-54).

4. For the defense, Corporal Harold H. Bloxon testified that he spoke to accused about 5:00 p.m. on 25 March in front of the French Bazaar, and that accused was then perfectly sober. Technical Sergeant Pane H. Prescher was of the same opinion. Second Lieutenant Robert Reiter, who roomed with the accused, testified that he had been with the accused on a few parties but had never seen him drunk; that accused would take quite a few beers but never more than two or three drinks of scotch. Lieutenant Reiter saw the accused at the Panama City jail about 11:00 p.m. on the night of 25 March. He asked accused what was wrong, and accused replied, "Don't worry about it". Lieutenant Reiter didn't have much of a chance to talk to him then, but when accused returned to his quarters about 1:00 a.m., Lieutenant Reiter noticed a bruise on his right ear and another on the left side of his jaw. (R.57-59, 63-65)

Captain Marion R. Di Gangi, Medical Corps, called as an expert on mental condition, testified that mental trauma, extreme fright or a severe blow on the head might cause unbalance of the mental faculties of judgment and comprehension, and in such cases the individual might be conscious and able to walk normally "but still have lost control of his

faculties". He stated that it is a common occurrence for a person who has received a severe blow on the head to forget all that has transpired; that alcohol and certain drugs, which can be readily inserted in a drink will cause "mental disruption and result in confusion". (R. 55-65)

Accused made an unsworn statement, in which he stated that on 25 March, after talking to Sergeant Prescher and Corporal Bloxon, he started to go to the National Bar, on the way he went into a little place where he heard a victrola playing, after two or three drinks, he asked for some change, picked up his drink and started toward the victrola, and "that was the last thing I remember until I saw Captain Murphy down at the police station" (R. 66).

5. a. Charge I: After his altercations within the house at 121 Central Avenue, the accused was found by Sergeant Loose standing in the doorway fighting with a crowd of Panamanians. The accused cursed, ordered the sergeant to shoot "the Panamanian", and told Captain Penny that he had started the fight and would not leave. The military police and Panamanian police removed him and took him to the police station.

After arrival at the police station the accused was in a small room off the main part of the station, belligerent, addressed obscene names to Captain Walker, cursed and spoke disrespectfully to two other officers. When his commanding officer, Captain Murphy arrived about 10:45 p.m., the accused was quiet and rational.

The evidence shows as to Specification 1, that the accused engaged in an unseemly altercation outside of the house at 121 Central Avenue and was guilty of disorderly and violent conduct in public in the midst of a crowd of Panamanians. Such conduct is cited by Winthrop as an instance of conduct unbecoming an officer and a gentleman cognizable under the 61st (95th) Article of War (Winthrop's Military Law and Precedents, Reprint, p. 713-718).

With respect however to Specification 2, the evidence shows that he cursed and verbally threatened the Military Police Officer of the Day, and in a small room of the police station used disrespectful and obscene language toward three officers of the Army when he was first brought into the station. In the opinion of the Board this conduct was disorderly as alleged, but not of a sufficiently serious nature to constitute a violation of the 95th Article of War but rather a violation of the 96th Article of War.

b. The three Specifications, Charge II, allege that accused behaved with disrespect, respectively, to Captain Walker (Spec. 1), First Lieutenants Peterson (Spec. 2), and Freihofer (Spec. 3) by the use of insulting remarks. The accused did by his remarks addressed individually show disrespect to each of the officers. Each officer was in fact superior in rank to the accused. The fact that he addressed Captain Walker by his title shows that the accused knew that he was a superior officer. The record fails to establish beyond a reasonable doubt that the accused knew that Lieutenants Peterson and Freihofer were his superior officers, a necessary element in the proof of the offense alleged.

In the opinion of the Board, the evidence supports the finding of guilty of Specification 1, but fails to support the findings of guilty of Specifications 2 and 3, Charge II.

6. Eight of the twelve members of the court recommend commutation or suspension of the sentence in view of the circumstances surrounding the offenses, and in the belief that this officer can be salvaged and be of value to the service.

In an indorsement from Brigadier General Ralph H. Wooten to the reviewing authority upon a letter from accused, General Wooten stated that accused has had a good record and has the capabilities of being a good officer, and recommended that his sentence be commuted.

7. The accused is 35 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 14 March 1942; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty 9 December 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 only so much of the finding of guilty of Specification 2, Charge I, as involves a finding of guilty in violation of the 96th Article of War; legally insufficient to support the findings of guilty of Specifications 2 and 3, Charge II; legally sufficient to support the findings of guilty of Specification 1, Charge I and of Charge I, and of Specification 1, Charge II and of Charge II; and legally sufficient to support the sentence and to warrant confirmation of

the sentence. Dismissal is authorized upon conviction of a violation of the 63rd or 96th Article of War and is 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., 29 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 Norman D. Hutchinson (0-568794), Air Corps.

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 finding of guilty of Specification 2, Charge I (disorderly in uniform) as involves a finding of guilty in violation of the 96th Article of War; legally insufficient to support the findings of guilty of Specifications 2 and 3, Charge II (disrespect to a superior officer); legally sufficient to support the findings of guilty of Specification 1, Charge I and of Charge I (disorderly in uniform) and of Specification 1, Charge II (disrespect to a superior officer) and of Charge II; legally sufficient to support the sentence and to warrant confirmation of the sentence.

The accused was disorderly while in uniform in a public place and in the police station, Panama City, and behaved with disrespect to a superior officer. He was sentenced to dismissal and total forfeitures. I recommend that only so much of the finding of guilty of Specification 2, Charge I, be approved as involves a finding of guilty in violation of the 96th Article of War, that the findings of guilty of Specifications 2 and 3, Charge II, be disapproved, that the sentence be confirmed, but the forfeitures adjudged be remitted, and, in view of the clemency recommendation by eight of the twelve members of the court and by his commanding general, that the execution of the sentence as modified be suspended during the pleasure of the President.

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

Myron C. Cramer

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

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

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but forfeitures remitted. Execution suspended. G.C.M.O. 250, 20 Sep 1943)

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

SPJGN
CM 235574

4 AUG 1943

UNITED STATES	)	NINTH SERVICE COMMAND ARMY SERVICE FORCES
v.	)	
Captain THEODORE R. TYLER (0-506419), Ordnance.	)	Trial by G.C.M., convened at Camp Santa Anita, California, 29-30 April 1943. Dismissal.

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

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

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

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

Specification: In that Captain Theodore R. Tyler, Ord. Dept., did without proper leave absent himself from his post of duty at Camp Santa Anita, Arcadia, California, from about March 15, 1943, to about March 25, 1943.

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

Specification 1: (Finding of not guilty).

Specification 2: In that Captain Theodore R. Tyler, Ord. Dept., was in the "Golden Gopher Cafe" at 417 West 8th Street, Los Angeles, California, on or about March 25, 1943, drunk while in uniform.

Specification 3: In that Captain Theodore R. Tyler, Ord. Dept., was in the hotel grill and lobby of the Clark Hotel in Los Angeles, California, on or about March 21, 1943, drunk while in uniform.

Specification 4: In that Captain Theodore R. Tyler, Ord. Dept., did, at Eaton's Santa Anita Hotel, Arcadia, California, on or about February 17, 1943, take a woman, not his wife,

known as Fay Willis, to said Hotel and introduced her at said place as his wife to divers officers and civilians alike, and did remain in said hotel with said woman for several days thereafter, he at the time being a married man.

He pleaded not guilty to all Charges and Specifications and was found guilty of Charge I and its Specification, and of Charge II and Specifications 2, 3 and 4 thereunder. He was found not guilty of Specification 1, Charge II. 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 14 February 1943, the accused registered at Eton's Santa Anita Hotel, where a double room was assigned to him. A few days later Mrs. Fay Willis came to stay with him there, and remained for about two weeks, during which time he introduced her to fellow officers and represented her generally, around the hotel, as his wife (R. 6-8, 10, 69-72, 74-80).

On 8 March 1943, he absented himself from his organization without leave, and remained absent, drinking and associating with various women for whom, in spite of his decrepit constitution and poor health, he seems to have had some inexplicable attraction, until 25 March 1943, when he was apprehended wearing his uniform in an intoxicated condition in the Golden Gopher, a drinking establishment, whither several solicitous females had accompanied him (R. 5, 8, 12-13, 15-22, 55-61).

In the meantime on 21 March 1943, the accused, while in uniform, was refused a drink because of his intoxicated condition, in the Clark Hotel Bar; whereupon he called the bartender a "God damn goon", said he was sorry, walked out into the lobby, and reclined on a divan there for half an hour with his head in the lap of a woman friend, until another guest with "good Samaritan" tendencies, having engaged a room for him at the desk, a bellboy, with the woman's assistance, manuevered him upstairs and to bed (R. 37-46, 48-54, 118-120).

4. The evidence for the defense consisted largely of the testimony of various feminine acquaintances of the accused, the burden of whose song was that no matter how much he imbibed, he always conducted himself as a gentleman (R. 100-130).

5. The accused, having been fully advised of his rights as a witness, elected to remain silent.

6. The Specification, Charge I, alleges absence without leave from 15 March 1943 to 25 March 1943. The uncontradicted evidence clearly establishes the accused's unauthorized absence from his organization for the period specified.

7. Specifications 2 and 3, Charge II, allege drunkenness in uniform in designated public places. The evidence establishes the drunkenness in uniform, in each instance under circumstances rendering it conduct unbecoming an officer and a gentleman.

8. Specification 4, Charge II, alleges sojourning in a hotel for a specified period with a woman to whom he was not married, introducing and representing her to fellow officers and others as his wife. The evidence establishes the conduct alleged, which has long and consistently been regarded as conduct unbecoming an officer and a gentleman.

9. The accused is 37 years of age. War Department records show appointment as Captain, A.U.S. 4 December 1942; no prior service; entry on active duty 10 December 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. A sentence of dismissal is authorized upon conviction of a violation of Article of War 61, and mandatory upon a conviction of a violation of Article of War 95.

Thos. L. Lawson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

SPJGN
CM 235574

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 Captain Theodore R. Tyler (0-506419), Ordnance.

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 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 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.

(Sentence confirmed. G.C.M.O. 284, 30 Sep 1943)

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

SPJGQ
CM 235607

15 JUL 1943

UNITED STATES v. Second Lieutenant JOSEPH A. POLI (0437334), SCU 1907, Quartermaster Section.	NINTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort Lewis, Washington, 28, 29 April 1943. Dismissal, total forfeitures, and confinement for twenty (20) years.

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 62nd Article of War.

Specification: In that SECOND LIEUTENANT JOSEPH A. POLI, Quartermaster-Reserve, Service Command Unit 1907, did, at the Officers' Club, Fort Lewis, Washington, on or about April 20, 1942, use and publish the following contemptuous and disrespectful words against the President of the United States, to-wit:

> "From the White House the Tory Clique--Roosevelt, Knox, Stimson, and Morgan--have surfeited the country with 'firebrand chats', moronic dribble, oral garbage, and promises--lots of promises***And it was Deceiving Delano (referring to President Roosevelt) who declared 'I hate wah,'" or words to that effect.

CHARGE II: Violation of the 66th Article of War.
(Finding of not guilty.)

Specification: (Finding of not guilty.)

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

Specification 1: (Nolle prosequi.)

Specification 2: In that SECOND LIEUTENANT JOSEPH A. POLI, Quartermaster-Reserve, Service Command Unit 1907, while addressing a class in Police Science and Administration at Washington State College, Pullman, Washington, did, on or about October 17, 1942, state that he was glad to address such an intelligent group, as in the Army it was different; that "you will go where they need you most--of course--if you know the right people, or the right Congressman, or so on, you may become a Military Police;" that, "bulk and little brains seem to be the main requirement in Military Police duty--you must remember that when you write to the War Department, as I know many of you have,***those letters go to the wastebasket--or they may be answered mechanically;" that the men of a certain Army division "knew more than the officers.****I'm not arguing this thing--I'm just telling you what is going on;" that "the chances are good that a Classification Officer himself is misplaced and has no qualifications for the job--so it is not surprising that men are not given credit for their talents," or words to that effect.

Specification 3: (Finding of not guilty.)

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

Specification 1: In that SECOND LIEUTENANT JOSEPH A. POLI, Quartermaster-Reserve, Service Command Unit 1907, did, on or about June 22, 1942, at Fort Lewis, Washington, address a letter to Dellmore Lessard, stating in part: "There exists along the Pacific Coast, especially California, and in some Army camps and forts throughout the nation, an organization known as the National Progressive Legion. Generally speaking the legion is a revoluntionary organization whose members have refused to accept the Tory Oligarchy in Washington and Wall Street. This class was responsible for American entrance into the War of 1917 and again in 1941. Accordingly, we can not succumb to the type of "Pay-triotism"--that we must all join in a common defense'--because the Tory Oligarchy being responsible for our past wars will in the future engender new conflicts unless they are eradicated from the American scene. ** We are anti-soviet and anti-British. In

foreign affairs we recognize England as the source of all our ills.***I trust you will treat this letter confidentially. For the present, our organization must necessarily "underground."

Specification 2: In that SECOND LIEUTENANT JOSEPH A. POLI, Quartermaster-Reserve, Service Command Unit 1907, did, on or about July 2, 1942, at Fort Lewis, Washington, address a letter to Frank May, stating in part: "There exists along the Pacific Coast--especially California--and in some Army camps and forts throughout the nation, an organization known as the National Progressive Legion. Generally speaking the legion is a revolutionary organization whose members have refused to accept the New Deal prating that this is our war. We hold that our real enemies are the Tory Oligarchy in Washington and London. This class was responsible for American entrance into the war of 1917 and again in 1941. We cannot succumb to the tripe of "pay-triotism' and 'National Defense', because the Tory Oligarchy being responsible for our past wars and depressions will in the future engender new conflicts and depressions. It should be obvious that the present system and its proponents have outlived their usefulness. *** We are not a 'loyal opposition'. Accordingly I trust you will treat this letter confidentially."

Specification 3: In that SECOND LIEUTENANT JOSEPH A. POLI, Quartermaster-Reserve, Service Command Unit 1907, did, on or about July 2, 1942, at Fort Lewis, Washington, address a letter to F. H. Surry, stating in part: "There exists along the Pacific Coast--expecially California--and in some Army camps and forts throughout the nation, an organization known as the National Progressive Legion. Generally speaking the legion is a revolutionary organization whose members have refused to accept the New Deal prating that this is our war. We hold that our real enemies are the Tory Oligarchy in Washington and London. This class was responsible for American entrance into the war of 1917 and again in 1941. We cannot succumb to the tripe of "pay-triotism' and 'National Defense', because the Tory Oligarchy being responsible for our past wars and depressions will in the future engender new conflicts and depressions. It should be obvious that the present system and its proponents have outlived their usefulness. ***We are not a 'loyal opposition'. Accordingly I trust you will treat this letter confidentially."

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

Specification: In that 2nd Lt. Joseph A. Poli, QM-Res., Quartermaster Section, SCU 1907, did at Fort Lewis, Washington, on or about January 12, 1943, desert the service of the United States and did remain absent in desertion until he surrendered himself at Washington, D.C. on or about March 20, 1943.

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

Specification: In that 2nd Lt. Joseph A. Poli, QM-Res., Quartermaster Section, SCU 1907 having been duly placed in confinement in Room 34, Building 300-B, Fort Lewis, Washington, on or about December 29, 1942, did at Fort Lewis, Washington, on or about January 12, 1943, escape from said confinement before he was set at liberty by proper authority.

He pleaded not guilty to all of the original Charges and Specifications and to Additional Charge I not guilty but guilty of a violation of Article of War 61, and to Additional Charge II guilty. The court sustained the motion to strike Specification 1 of Charge III on the ground that it did not state an offense (R. 23, 27). He was found guilty of Charge I and its Specification, not guilty of Charge II and the Specification thereunder; guilty of Specification 2 of Charge III, but not guilty of Specification 3 of Charge III and guilty of Charge III; guilty of Charge IV and the 3 Specifications thereunder; not guilty of Additional Charge I but guilty of a violation of Article of War 61, and guilty of Additional Charge II and the Specification thereunder. 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 twenty years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The competent evidence of record with respect to Charge I and its Specification (A.W. 62), discloses that on April 20, 1942, Lieutenant Colonel Allan Johnson, Infantry, discovered a folded mimeographed leaflet entitled "The Enemy is Within" (Pros. Ex. 1), in his locker at the Officers' Club, Fort Lewis, Washington (R. 33). The leaflet contained as paragraph 2 the identical words set forth in the Specification of Charge I. In addition, it contained the following expression in paragraph 3:

> "*** Ask yourself, what are you fighting for? *** Our youths have died in the Orient--10,000 miles away--to save capitalists' interests and investments. American fliers have been killed in Burma--to preserve the British capitalistic interests."

In paragraph 5 this expression occurs:

> "*** The enemies of America are its parasitic class within--the Tory Oligarchy. It is they who have exploited and bled the nation by war and depression. It is they who must be overthrown."

No other person was authorized access to Lt. Colonel Johnson's locker (R. 39). A search of all the lockers in the club (R. 42, 56, 58) revealed seven of the same leaflets folded in identical fashion on other lockers (R. 42, 43, 45, 57). The lockers were of metal, about 12 inches square, with two six-inch vents in each locker door (R. 35, 44, 58). The leaflets as folded could be inserted through the vents (R. 59, 69). The locker room is accessible to the officers of the post, employees of the club, and ladies with escorts (R. 62, 63). The membership of the club is between 1200 and 1400 persons (R. 63). No official of the club had placed or authorized anyone else to place these leaflets in the lockers (R. 49, 59). Another folded leaflet with the same title was found in June 1942 by Lieutenant Fuller of the Military Intelligence Section in one of the club lockers (R. 60, 99, 100; Pros. Ex. 8). Accused was not a member of the Officers' Club (R. 48, 62) and no one recalled ever having seen him in the club building (R. 34, 48, 52, 62).

On 6 July 1942 a search was made of accused's room on the post (R. 70, 71, 95, 110). The room was unlocked but the door was closed (R. 93, 110). From appearances no effort had been made to conceal any of the contents of the room except that the leaflets found therein had been placed in a valise and tied with a rope (R. 86, 88, 89, 111). A canvas valise containing a package of about 100 copies of the leaflet entitled "The Enemy is Within" was found in the room, as was also another package containing 500 copies of the leaflet entitled "The National Honor" (Pros. Ex. 13). A third package containing about 250 copies of another leaflet of a similar nature was also discovered in the room (R. 90, 91, 94, 116). Two copies of the leaflet "The Enemy is Within" were found in the pockets of accused's blouse in the room (R. 75, 102). Another package wrapped and ready for mailing containing the leaflet "The Enemy is Within" was also there (R. 109). The leaflets and certain handwritten notes were removed, photostated and returned (R. 71, 103). On 17 July 1942 a package containing about 1000 leaflets entitled "The Crisis" (Pros. Ex. 9) was received in the Fort Lewis post office addressed to accused. The package and one of the leaflets were photostated and introduced into the evidence (R. 103, 105, 106, 111; Pros. Ex. 10).

By the stipulated testimony of Miss Emma V. Wuerth, of Berkeley, California, the owner and operator of a mimeograph business

in that city, and also of her employee, Miss Lois Hanscom, it was shown that accused had ordered 1000 copies of the leaflet "The Crisis" mimeographed and mailed to him at Fort Lewis, Washington, C.O.D. Miss Wuerth received this order about 8 July 1942 (R. 120, 121, 123; Pros. Ex. 14). She had prepared in January 1942 1000 mimeographed copies of the leaflet entitled "The Enemy is Within". This transaction was made with two unidentified men, one of whom delivered the manuscript, and the second picked up the completed order. In March 1942 the same unidentified man who had delivered the first manuscript again requested 1000 mimeographed copies of the leaflet entitled "The National Honor". He refused to give his name and address. She completed the order and it was picked up by a person unknown to her (R. 125, 126, 127; Pros. Ex. 15).

On 4 December 1942 accused was arrested and his room was searched. A valise was found in his room containing about 800 leaflets entitled "The Crisis" and "The National Honor" (R. 129, 133; Ex. 16, 17, 18). When the room was first entered accused took a leaflet entitled "The National Honor" from his blouse and handed it to the officer searching the room, Captain W. B. Stanard, Assistant Chief of Staff, G-2 (R. 133, 134; Pros. Ex. 19). A leaflet entitled "The Enemy is Within" was also found in his brief case (R. 139; Pros. Ex. 20). After having been fully informed of his rights (R. 141), accused admitted that he wrote the leaflets entitled "The Enemy is Within", and the other two leaflets, "The Crisis" and "The National Honor" (R. 146).

As a witness in his own behalf accused admitted having written the article "The Enemy is Within", that he had 1000 copies mimeographed and that he brought more than 25 of these leaflets to Fort Lewis. He kept them in his room on the post and gave some of them to civilians in Portland, Oregon, and Tacoma, Washington. He refused to disclose the names of these persons because he did not wish to put them in his position (R. 271, 272, 273, 274, 275). To his knowledge the leaflets contained merely political expressions, nothing else (R. 258), and he could not see anything in them which could cause any person to get into trouble (R. 276). He also admitted the authorship of the leaflet "The Crisis", that he had 1000 copies of it mimeographed and sent to him at Fort Lewis, and that he sent some of these to the same civilians (R. 277). He wrote the leaflet "The National Honor" and had it mimeographed by Miss Emma R. Wuerth, of Berkeley, California, while he was a student in that city (R. 278). The words "Deceiving Delano" referred to the President of the United States, but they were not coined by him but were copied from a newspaper and were merely employed as political terms by him, referring to the promises of the political party concerned which had not been fulfilled (R. 296, 297, 298). He was transferred to Fort Lewis early in April 1942 (R. 237) but he never joined the Officers' Club at that post and had been in it only once or twice to go to the barber shop or to the men's toilet. He denies placing any leaflets in the lockers at the Officers' Club either

himself or through any agent sent from him (R. 238). He wrote the leaflet "The Enemy is Within" while a student at the University of California. The thought back of the references to Roosevelt, Knox, Stimson and Morgan contained in that article was that the administration and its advisers were not acting in accordance with the customs of the United States and its Constitution. He had no intention of holding up the President of the United States, either personally or in his capacity as commander-in-chief of the Army, to public ridicule, hatred or contempt (R. 239). The leaflet was along the same lines as articles in newspapers, remarks of Congressmen and Senators contained in certain newspapers, and the Congressional Record, from which parts of it were taken (R. 240). He cannot recall offhand the names of the persons in Tacoma to whom he had distributed certain of his leaflets (R. 299). He gave one leaflet to a lieutenant shortly after his arrival at Fort Lewis (R. 243), and another lieutenant, having learned that he had such leaflets, requested and was given several copies. These are the only officers who saw or knew that he had such leaflets and he did not give them to these officers for purposes of distribution. He can not remember their names (R. 103), and he has no knowledge as to what happened to the leaflets after they left his possession (R. 245).

As to Specification 2 of Charge III (A.W. 95). As the result of correspondence initiated by accused, Professor V. A. Leonard, in charge of the Department of Political Science and Administration at the State College of Washington, located at Pullman, Washington, extended an invitation to accused to speak to his class (R. 170, 177). On 16 October 1942 accused, dressed in uniform (R. 163, 176), addressed a class of about 15 young men students on the topic "The Opportunities for College Trained Men in the Military Police Corps" (R. 171, 177). He spoke for about 30 minutes (R. 175), and a discussion period followed, the whole consuming about an hour (R. 250). Among other things he stated that the personnel system in the Army was not based upon merit; that promotions and appointments were decided by whom you knew, whether you knew a Congressman, how many strings you could pull, and how much pressure you could bring to bear in certain quarters (R. 160, 172); that the classification system in the Army was not effective and did not place men where their special training and ability could be utilized (R. 172); that very often the classification officers themselves were improperly classified and as a result their work could not be relied upon (R. 161); that the chief qualification for the Military Police seemed to be bulk rather than brains; that if the students knew a Congressman they might get into the Military Police, but if they had written to Washington inquiring about an assignment their letters would be put into a wastepaper basket or probably answered mechanically. Professor Leonard and the students interrupted the discussion to question the accused. He replied by citing examples

of improper classification (R. 172), or by saying that he was simply relating facts (R. 161). Professor Leonard cut the speech short because he did not want the students to receive any further contact with remarks of this character. At the end of the speech he said to accused, "You have surely taken the wind out of our sails today. We expected a message of inspiration instead of this" (R. 161). He considered that accused's remarks "discredited his office" (R. 176). Mr. Wayne Murray, Special Agent of the Counter-Intelligence Corps, a member of the audience, characterized the talk not as a frank discussion among a group of young men, one of whom was in uniform, as to what the chances of the other men might be when they went into the military service, but rather a speech made to produce a certain effect on those young men. The accused spoke in a sarcastic and cynical manner.

Accused admits making the address which he had prepared beforehand on a typewritten form. He further admitted making a statement that it was his observation that the Military Police were chosen largely for size and not for training in civil life. He remembers making some of the statements attributed to him by Professor Leonard and Mr. Murray. In one case it was his intent to illustrate the point that students would be placed in the branch of service where their superiors thought they should be placed rather than where the individual thought he could serve best. He was referring to his own experiences, where in one case a letter requesting service with the Military Police was unanswered, as also were two letters to the War Department requesting service with quartermaster troops on the Alcan Highway (R. 248).

As to Charge IV, Specifications 1, 2 and 3 (A.W. 96). The rough draft of a letter bearing pencilled notations in accused's handwriting was taken from accused's brief case and was entered in evidence as Pros. Ex. 91 (R. 193, 194, 197). This letter is almost identical with the letters which accused is alleged to have written to Dellmore Lessard, Frank May, and F. H. Surry. Accused, as a witness in his own behalf, admitted sending the letter to Dellmore Lessard of Portland, Oregon, and the latter testified that he knew accused and had received such a letter but was unable to find it in his correspondence (R. 182, 183). He remembered the words "Tory Oligarchy" and "National Progressive Legion" were mentioned, but understood these words to mean that the Legion was a revolutionary organization only to the extent of influencing the voters against the administration. He recalls the letter contained derogatory statements concerning the British and the "loyal opposition". Accused testified that this letter was a form prepared by the student members of the National Progressive Legion at the University of California but with personal changes by himself. Accused was interested in the America First Committee with which Mr. Lessard was affiliated and the letter was sent as a means of introduction (R. 250). He had no

purpose to create a revolutionary movement or to instigate an uprising against the Government. He admits sending the same form of letter to Mr. May (Specification 2) and to Mr. Surry (Specification 3). It is stipulated that Mr. May would testify that he received this letter about 6 July 1942, through the United States mails and over the typewritten signature "Respectfully Yours, Lt. Joseph A. Poli, 243rd Q. M. BN., Fort Lewis, Washington", and that it was in an envelope showing the accused as the sender and bearing the postmark "Tacoma July 2 1942" (R. 198). The letter received by Mr. May was introduced into evidence as Pros. Ex. 22. Also, during the questioning of accused on 4 December 1942, he admitted writing such a letter to Mr. May. Mr. Surry, Seattle, Washington, received identically the same letter bearing the same typewritten signature and the same postmark and date as the letter to Mr. May. Mr. Surry had no previous connection with accused. Accused also admitted on 4 December that he had written this letter to Mr. Surry (R. 147). The respective letters contain the identical phraseology alleged in each of the three Specifications of Charge IV.

As to Additional Charge II (A.W. 69 - escape from confinement). Colonel Roland D. Johnson, Field Artillery, SCU 1907, executive officer of Fort Lewis, Washington, on 4 December 1942 (R. 202, 203), in accordance with orders from the Chief of Staff, Ninth Service Command (R. 205), placed accused in confinement. The North Fort Lewis Stockade, Fort Lewis, Washington, shows that accused was confined 4 December and transferred to the post guardhouse 29 December (Pros. Ex. 23). Because of the fact that accused wrote a letter to the post commander at Fort Lewis, Washington (R. 204), his place of confinement was changed on 29 December to one of the noncommissioned officer's rooms on the second floor of the barracks occupied by the post guard detachment. Two guards were kept constantly in his room and an armed guard outside the door (R. 205, 211; Pros. Ex. 23). On 11 January 1943 accused, upon inquiry, was told that he would be tried by court-martial and he requested that his trial be closed without publicity. On the morning of 12 January 1943 he was missing (R. 218). A comforter arranged to simulate someone lying in his bed with a blanket pulled over it was found, as well as a rope tied to the radiator in his room hanging from the window. Accused left a note on the table addressed to the post prison officer (R. 218). Accused as a witness in his own behalf admitted that he breached confinement and escaped (R. 254). (He also pleaded guilty to this Charge and Specification).

Additional Charge I (A.W. 61 - absence without leave). After escaping he proceeded to Portland, Oregon, where he secured a job in a defense industry and worked for five weeks under the name of Robert Lenzi, during which time he was dressed in workmen's cloths (R. 255, 256). While working in Portland, he addressed a letter to the post

prison officer at Fort Lewis in which he stated that he would return in the near future. He quit work and purchased a bus ticket to Washington, D. C., where he arrived about the end of the first week of March. He visited Congressman John H. Tolan of California, who made an appointment for him to meet Congressman John M. Costello, a member of the Military Affairs Committee of the House of Representatives. He explained to Mr. Costello the charges against him and his desire to have a closed trial. About a week later he told Mr. Costello that since arrangements had been made by the latter through a colonel in the Army for a closed trial, he was ready to return to Fort Lewis. He surrendered in Mr. Costello's office to Colonel Casteel, Provost Marshal for the District of Columbia (R. 267, 268, 294), dressed in civilian clothing (R. 220, 221), on 20 March 1943. Accused pleaded guilty to the absence without leave in violation of Article of War 61, of which offense he was convicted.

At the request of the President of the Court the law member explained to accused his rights as a witness, which explanation had also been made previously to him by the defense counsel. Accused elected to be sworn as a witness in his own behalf (R. 233). His testimony covers 70 pages of the record (R. 233 to R. 303). So much of his testimony as is pertinent to the offenses of which he was convicted has been set forth above herein.

Accused also introduced five character witnesses. Four of these were civilians, whose testimony was stipulated, and the fifth was an Army officer who testified in court.

Harvey Blair has known accused for the past 18 years and he is unusually bright, industrious and well behaved. As a boy he was very patriotic and had early ambitions to become a member of the United States Army. All of accused's neighbors spoke highly of him and do not question his heartfelt patriotism (R. 309; Pros. Ex. G).

Anna Pedemonte, a citizen of the United States over 21 years of age, has known accused for 18 years and she knows him to be of good and reliable character, patriotic in his ideas, loyal to his country, and capable, industrious and honest (R. 310; Pros. Ex. H).

Mr. T. Lagorio, Bay Farm Island, Alameda, California, a citizen of the United States, has known accused since birth and knows him to be honest, capable and industrious, with a reputation for patriotism and love for his country (R. 310, 311; Pros. Ex. I).

Mr. L. M. Maloyan, a citizen of the United States and a veteran of the World War, has been in the grocery business at Emeryville, California, for the past 25 years. He has known accused for the past 17 years. Accused worked for him in his grocery store for about four years, was an honest, reliable and capable worker. Mr. Maloyan has observed accused's good qualities and character, and his patriotism and love for his country (R. 311, 312; Pros. Ex. J).

First Lieutenant George Hicks, 23rd Quartermaster Battalion, a witness for the defense, testified he first met the accused at Fort Francis E. Warren, Wyoming, a little more than a year previously, and had known him at Fort Lewis for almost ten months, commencing in May 1942; that he had lived in the same barracks with the accused, but they were never room mates (R. 306); that he had occasion to be in accused's room and accused in his room; that other officers were in both rooms from time to time in the customary barracks fraternizing after drill hours; that accused had offered him books on government in which he was interested, but never any leaflets or pamphlets; that accused never said anything to him of a seditious character, or that would induce him to be dissatisfied with the Army, or the established order of things; that he believed accused had a good reputation as a loyal, patriotic officer and citizen (R. 307).

4. Findings - Charge I and its Specification (A.W. 62), disrespect to the President. When an officer of the Army admits, as accused does here, that he is speaking of Franklin Delano Roosevelt, the President of the United States, when he refers to him in a published writing of which he is the author as "deceiving Delano" and characterizes his official presidential utterances as "moronic dribble" and "oral garbage", he employs language which is contemptuous and disrespectful per se. Accused admits personally giving one copy of the leaflet containing such language to a lieutenant stationed at Fort Lewis and several copies to another officer also on that post. Accused admits introducing into his station, Fort Lewis, Washington, more than twenty-five copies of the leaflet entitled "The Enemy is Within", in which this and other contemptuous and disrespectful language toward the President is found. The whole context of this leaflet clearly shows that it was intended for general circulation. The fact that accused had reproduced 1,000 copies of this pamphlet by the mimeograph process justifies a logical inference that he intended it for distribution. He admits mailing this and other leaflets to civilians in Portland, Oregon, and Tacoma, Washington. Accused alone had possession and control of this leaflet. He kept it in his quarters, where a package of these leaflets was found ready for mailing (R. 109). Copies of this identical leaflet were found in the lockers of the Officers' Club at Fort Lewis, to which he had convenient access, either in person or through an agent. When questioned in connection with an investigation of the incident, i.e., the finding of the leaflets in the club lockers, he immediately produced from the pocket of his uniform blouse the very same leaflet, folded in the identical manner as those found in the club lockers. These facts establish a chain of circumstances which excludes any reasonable hypothesis but that of guilt and which are inconsistent with any reasonable hypothesis of accused's innocence. The following precedent cases support the conclusion of the Board as to the issue of disrespect: CM 133505-

Texler; CM 229816-Haardt; CM 120890-Talek; CM 118731-Ungir; CM 118263-Brandon; CM 134107-Coombs; CM 122081-Nolte; and CM 134337-Hendley.

Charge III, Specification 2 (A.W. 95), conduct unbecoming an officer and a gentleman. Accused lectured to a class of young men at Washington State College, Pullman, Washington, on 17 October 1942. Although unofficial, the lecture was delivered in the full uniform of an officer in the United States Army. The subject matter had been carefully prepared and typewritten beforehand. It was not spontaneous or undeliberated. His topic was "The Opportunities for College Trained Men in the Military Police Corps". About fifteen students were in the audience, in addition to Professor Leonard, their instructor, and a Mr. Murray. Members of his audience were soon to enter the armed forces, and naturally were interested in learning how, and by what methods, they would be assigned to military duty and their talents and training assessed and utilized by the Army. The accused's utterances slandered the justice and efficiency of the methods of administration of the Army personnel system. Political influence and ignorance were asserted as the distinguishing characteristics of the Army system. The lecture was obviously designed to shatter the faith of the students in the integrity of the Army's method of assignment of personnel to specific duties in time of war. The sneering, cynical and sarcastic manner of accused's delivery of this lecture emphasized and defined his real purpose, viz., holding the operation of the Army personnel system up to ridicule and to contempt. The intent of a person in making a defamatory statement may be inferred from the language used (CM 168771, 1926).

The uttering and publication by an officer, through the public press, of a statement contemptuous and disrespectful of the administration of the War and Navy Departments with intent to discredit such administration, is conduct prejudicial to good order and military discipline (CM 168771, 1926, par. 454(27), Dig. Ops. JAG 1912-40).

In the instant case the Board of Review is of the opinion that the evidence fully sustains the guilt of accused of the offense set forth in the allegations of this Specification, but that it should be found an offense prejudicial to good order and military discipline in violation of Article of War 96, rather than conduct unbecoming an officer and a gentleman within the purview of Article of War 95.

Charge III, 3 Specifications (A.W. 96), conduct of a nature to bring discredit upon the military service. Accused admits writing the three letters set forth in Specifications 1, 2 and 3 of this Charge to three civilians, Mr. Lessard, Mr. May and Mr. Surry, respectively. Accused had no acquaintance with May or Surry (R. 147-250). The letters are identical in content and expression. The

original draft of this letter, with penciled corrections and amendments in the accused's handwriting, was found in his brief case in accused's quarters at Fort Lewis. The purpose of these letters is to solicit the recipient's cooperation with, and support of, the National Progressive Legion, an organization to which accused belonged while a student at the University of California. The letter states that the principles for which the National Progressive Legion stands includes these:

> "We are anti-Soviet, anti-Nazi, and anti-British. In foreign affairs we recognize England as our hereditary enemy * * * ".
>
> "We are not a 'loyal opposition'. Accordingly, I trust you will treat this letter confidentially".

Accused testified that he included the request that this letter be treated confidentially because he realized it was unbecoming for an officer and a gentleman to write a letter of that nature, but he mailed it nevertheless.

In peace time the sophomoric theories of government disseminated by a callow college student, impressed with his own importance, may perhaps be excused as the expression of an inferiority complex or the natural desire of an obscure and mediocre personality to seek the limelight of publicity, but in time of war the same mental attitude, the same expressions and the same type of propaganda of dangerously subversive ideas, emanating from a commissioned officer of the Army of the United States, who speaks from behind the prestige that automatically goes with the uniform of an officer and who has taken a solemn oath to uphold and defend the Constitution of the United States, may not be lightly dismissed or excused on the ground of youth, ignorance or inexperience. Radicalism of this sort becomes dangerous disloyalty under the changed circumstances.

The accused's exaggerated protestations of love of country and loyalty to the Army made since his disloyalty was unearthed are so clearly contraducted by his actions and spoken and written words that no further argument is needed to establish his hypocrisy or his guilt of the three specific offenses of conduct to the discredit of the military service than the ample and competent proof of record that he wrote, sent through the mail and thereby published the letters in question.

Additional Charge II (A.W. 69), escape from confinement, and Additional Charge I (A.W. 61), absence without leave. Having been legally placed in confinement in the camp stockade at Fort Lewis,

Washington, on 4 September 1942, by order of the commanding general of the Ninth Service Command, accused escaped therefrom on 12 January 1943, five weeks and four days later. After his escape he was absent without leave until he surrendered at Washington, D. C. on 20 March 1943, a period of two months and eight days. The findings of guilty as to both of these Charges are based on clear and conclusive evidence of record, the pleas of guilty of accused and his admissions as a witness in his own behalf.

During this prolonged wartime absence, the accused worked in a civilian defense plant and several other factories, dressed in civilian clothes, and used an assumed name, in Portland, Oregon, for five weeks. Subsequently he crossed the continent to Washington, D. C., where he called on a Congressman for the purpose of arranging a closed trial of the Charges against him. Acting on the Congressman's advice, he surrendered to the Provost Marshal of the District of Columbia.

Notwithstanding that all the essential elements of desertion were established by the prosecution's evidence as to Additional Charge I (desertion), the court found accused guilty of absence without leave only.

When accused broke confinement he left a note in which he complains that his requests for military service in Alaska and Canada had been refused, and states that his attachment to the armed forces remains "unswervingly loyal". While absent without leave and working at Portland, Oregon, he addressed another note to his commanding officer in which he states, "There is nothing in the world which I cherish more than an opportunity to return to the armed forces". Shortly thereafter he purchased a bus ticket for Washington, D. C. These statements are quoted to illustrate the insincerity and hypocrisy of accused's expressions of love of country and service to the Army. His actions indicate clearly that he had no intent whatever to comply either with military law or with his responsibilities as an officer.

5. War Department records disclose that accused is now 23 years of age. He is of Italian descent. His father, born in Italy, was naturalized in 1925. Accused is a legal resident of Oakland, California, and graduated from the University High School in that city in 1938. He had one year's training in the junior R.O.T.C. in high school. He attended the University of California for three and a half years, two years of which he was a cadet in the R.O.T.C. In his senior year he was appointed a second lieutenant, Q.M.C. Reserve, 5 February 1942, executed the oath of office on 11 February 1942, and wa

immediately called to active duty. He was stationed for a short time at Fort Francis E. Warren, Wyoming, and later at Fort Lewis, Washington. The record of trial shows that his father is employed by the Bank of America at San Francisco, California (R. 253). Apparently accused, over a period of about four years, had worked in some capacity, not stated, in Maloyan's grocery store, Emeryville, California (R. 312).

6. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the finding of guilty of Charge I and its Specification; legally sufficient to support only so much of the finding of guilty of Charge III and Specification 2 thereunder as involves a finding of guilty of violation of Article of War 96; legally sufficient to support the findings of guilty of Charge IV and the three Specifications thereunder; legally sufficient to support the finding of guilty of absence without leave in violation of Article of War 61 as to the Specification of Additional Charge I, and a finding of guilty of Additional Charge II and the Specification thereunder. The record of trial is legally sufficient to support and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of violation of Articles of War 62, 69 and 96.

William A. Rounds, Judge Advocate.

Earle D. Behrn, Judge Advocate.

Herbert A. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 31 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 Joseph A. Poli (0-437334), Service Command Unit 1907, Quartermaster Section.

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 of

Charge I (A.W. 62) and its Specification, use and publish contemptuous and disrespectful words against the President of the United States;

Only so much of the findings of guilty of Charge III (A.W. 95) and Specification 2 thereunder, as involves a finding of guilty of Article of War 96, conduct prejudicial to good order and military discipline, by speaking with contempt of the administration of the War Department personnel system with intent to discredit such administration, in a public lecture delivered in uniform to a group of university students;

Charge IV (A.W. 96) and three Specifications thereunder, dissemination, by personal letters to three civilians, of sentiments disloyal to the Government of the United States and to its military allies, constituting conduct of a nature to bring discredit upon the military service;

Additional Charge I (A.W. 61) absence without leave in war-time of two months and eight days, as a lesser included offense under Article of War 58 (desertion);

Additional Charge II (A.W. 69) escape from confinement.

The findings are legally sufficient to support the sentence and to warrant confirmation thereof. An officer convicted of Article of War 62 or 69 "shall be dismissed from the service or suffer such other punishment as a Court-Martial may direct", and, upon conviction of violation of either Article of War 61 or 96, any person in the military service may be punished at the discretion of the court. The confinement of the sentence imposed, 20 years, is legal, but too severe. I recommend that the sentence be confirmed, but because of the youth of the accused (22 years) I further

recommend that 10 years of the confinement of the sentence be remitted, that as thus modified the sentence 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.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but confinement reduced to ten years. G.C.M.O. 275, 29 Sep 1943)

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

N.D.

12 JUL 1943

SPJGH
CM 235624

UNITED STATES v. First Lieutenant ERNEST R. WADE (0-299203), Infantry.	)	ARMY AIR FORCES SOUTHEAST TRAINING CENTER Trial by G.C.M., convened at Stuttgart Army Air Field, Arkansas, 12 May 1943. Dismissal.

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

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

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

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

Specification 1: In that First Lieutenant Ernest R. Wade, Stuttgart Army Air Field, Stuttgart, Arkansas, was, on or about January 6, 1943, drunk in uniform in a public place, to-wit: Pauline's Restaurant, in the City of Stuttgart, Arkansas.

Specification 2: (Finding of Not Guilty).

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

Specification 1: (Finding of Not Guilty).

Specification 2: In that First Lieutenant Ernest R. Wade, Stuttgart Army Air Field, Stuttgart, Arkansas, having received a lawful order from Captain Merril Hallowell to report to the Adjutant's Office at 1:30 P.M. on Saturday, February 6, 1943, the said Captain Hallowell being in the execution of his office, did, at Stuttgart Army Air Field,

Stuttgart, Arkansas, on or about February 6, 1943, fail to obey the same.

CHARGE III: Violation of the 85th Article of War.

Specification 1: In that First Lieutenant Ernest R. Wade, Stuttgart Army Air Field, Stuttgart, Arkansas, was, at Little Rock, Arkansas and Stuttgart Army Air Field and intermediate points, on or about January 25, 1943, found drunk while on duty in charge of the Post laundry truck en route from Stuttgart Army Air Field to Little Rock, Arkansas, and return.

Specification 2: In that First Lieutenant Ernest R. Wade, Stuttgart Army Air Field, Stuttgart, Arkansas, was, at Little Rock, Arkansas, and Stuttgart Army Air Field and intermediate points, on or about February 5, 1943, and early in the morning of February 6, 1943, found drunk on duty while in charge of the Post laundry truck en route from Stuttgart Army Air Field to Little Rock, Arkansas and return.

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

Specification: In that First Lieutenant Ernest R. Wade, Stuttgart Army Air Field, Stuttgart, Arkansas, was, at Stuttgart, Arkansas, on or about May 1, 1943, in a public place, to-wit: STOP INN, drunk and disorderly while in uniform.

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

Specification: In that First Lieutenant Ernest R. Wade, Stuttgart Army Air Field, Stuttgart, Arkansas, did, at Stuttgart, Arkansas, on or about May 2, 1943, wrongfully strike Technician Fifth Grade James Dunson on the face and body with his fists.

He pleaded not guilty to all Charges and Specifications and was found not guilty of Specification 2, Charge I and Specification 1, Charge II, and guilty of all other Charges and Specifications. He was sentenced to dismissal and total forfeitures. The reviewing authority approved only so much of the sentence as involves dismissal and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows as to Specification 1, Charge I, that on the evening of 6 January 1943, accused in uniform was sitting with other military personnel in a booth in Pauline's Restaurant in Stuttgart, Arkansas, where he could be seen by others in the restaurant. The head of accused hung down, but he did not appear to be injured or sick. Upon the request of an officer, Sergeant Haskell Armstrong and an unidentified individual helped accused get to his feet and walk to a car in front of the restaurant. Sergeant Armstrong opened the car door and accused slid into the rear seat but did not slump over. Sergeant Armstrong did not smell liquor on the breath of accused but in his opinion the accused was intoxicated because he staggered and his speech was thick. First Lieutenant Scott M. Davison and his wife were in Pauline's Restaurant on the evening of 6 January 1943 and observed the accused being "partially carried" out of the restaurant by two military policemen. The feet of accused were dragging, his head was dropping over and he had to be supported (R. 8-18; Exs. A & B).

With respect to Specification 2, Charge II, Captain Merrill Hallowell, Post Adjutant at Stuttgart Air Field, on Saturday, 6 February 1943, was ordered by the Commanding Officer of the Stuttgart Army Air Field to check with accused on certain reports as to the latter's conduct. Captain Hallowell discussed with accused his previous conduct and also his work on certain plans and in his capacity as Post Adjutant, ordered accused to report back to him at his office "at 1:30 P.M. on the same date" to deliver the plans and receive further instructions. The accused did not report as ordered, did not call by phone, and apparently made no effort to use any other means of communication to explain why he did not report at the time ordered. At 6 p.m. Captain Hallowell saw accused in the quarters of accused and served an order of arrest on him (R. 32; Ex. F).

As to Specification 1, Charge III, accused was during the months of January and February 1943 on duty as laundry officer at Stuttgart Army Air Field, and had charge of the laundry truck which carried the post laundry to Little Rock, and back. On 25 January 1943, the laundry truck, driven by Corporal Nunzio Schiralli and in charge of the accused, made a trip to Little Rock. On the way, accused bought a pint bottle of whiskey, from which he took two or three light drinks and gave drinks to the enlisted men. The truck arrived at Little Rock about noon and was unloaded. After lunch, Corporal Schiralli returned to the truck, checked the laundry in the absence of accused and had the truck loaded by 3:30 p.m; accused did not return until 4:30 p.m., when he ordered the laundry taken

off the truck, rechecked and reloaded. Accused could walk all right and he was able to give the proper orders, but in the opinion of Corporal Schiralli was drunk in Little Rock and upon return to the Field because of the way he was talking and acting. His breach smelled of liquor and you had to get close to him to understand what he was saying. On the way back to the Field accused bought a quart bottle of whiskey, stopped the truck three times and each time took a drink and offered a drink to the enlisted men. When they reached the post, they went to the 894th Squadron, where there was no one to help unload the truck except a staff sergeant. There was quite a little talk going on and suddenly Lieutenant Wade said "Just drop it on the ground and I don't give a 'hoot' who picks it up" (R. 19-23, 26; 29-32).

As to Specification 2, Charge III, accused was on 5 February 1943 in charge of the laundry truck on a trip to Little Rock with Sergeant Broski as driver. First Lieutenant Farris W. Smith and Staff Sergeant Earl Adkins accompanied them. Accused had about two drinks of whiskey and some beer on the way to Little Rock. After the truck was unloaded, Lieutenant Smith and Sergeant Adkins went to lunch. When they returned at 2:30 p.m., the truck was gone. About 5:30 p.m., accused and the driver returned to the laundry in the truck, and accused helped load the laundry. Lieutenant Smith was of the opinion that accused was then drunk because he staggered when he walked and talked "a little out of the way". Staff Sergeant Adkins based his opinion that accused was then drunk and could not perform his duties in a normal manner upon the facts that accused staggered a little, his eyes were bleary and his speech thick. The driver was also drunk and the accused would not agree to let Sergeant Adkins drive the truck. Sergeant Adkins then left and went back on a bus. En route to the Field the accused took three drinks from a whiskey bottle. At Hazen at about nine o'clock, the accused stopped at a restaurant and had some beer. Accused and the driver then drove off in the truck in the direction of Little Rock leaving Lieutenant Smith behind. Lieutenant Smith secured a ride in a civilian truck and reached the Field about eleven o'clock. In the opinion of Lieutenant Smith the accused was then drunk, and his mental faculties were impaired by alcohol. Corporal F. W. March, Jr., who saw the accused at Hazen, was of the opinion that the accused was drunk, because his conduct was "out of the way" for an officer, and because of his actions and appearance. About three quarters of an hour after accused drove off toward Little Rock, he returned to the restaurant in Hazen and later reached the Field in the laundry truck (R. 33-50).

As to the Specification, Additional Charges I and II, accused was at about 11:30 p.m., 1 May 1943, in the bar room of the Stop Inn, a dance hall and beer tavern at the south end of Stuttgart. Sergeant John T. Rains was standing back of some enlisted men seated at the counter. Accused was walking around the room with a bottle of beer in his hand. Accused said to Sergeant Rains that a dog on the floor should not be there and that the dog had not been vaccinated. When Sergeant Rains pointed out the vaccination tag, the accused continued to talk about the dog. As the talk grew louder, Sergeant Rains walked away, followed by the accused, who called attention to his rank. About that time accused stated "any or all of you that don't like it, can step outside" and walked toward the door. Technician James Dunson was standing in the doorway watching a girl play the pinball machine. As accused approached, Dunson stepped through the door and held the screen open. Accused without any warning struck Dunson in the neck with his fist. Dunson hit back, knocking accused to the ground, and when accused got up and tried to hit him again, Dunson again knocked accused down. Dunson had not heard accused ask anyone to "step outside". He was scared by the blow and didn't know who had struck him until after it was all over. Neither Dunson nor accused said anything during the fracas. Sergeant Rains believed accused was drunk because his eyes were "wild looking", because of his loud talking and because he was staggering a little. Corporal W. H. Crowe was of the opinion that accused was drunk because of his "looks" and his actions. Technician Dunson believed accused was drunk because he was staggering around and talking "awful loud". Second Lieutenant Salvatore Gallo, Jr., of the military police stated that the accused was drunk both before and after the fight, and smelled liquor on his breath. The collar and tie of accused were all "mussed up" and he had blood on his shirt (R. 51-74).

4. For the defense, Captain Daniel J. Smart and Major Ernest H. Miller testified by deposition that they had known accused for ten years and for fifteen months, respectively, that in their experience, accused had always conducted himself as an officer and a gentleman and had never willfully disobeyed a direct order from his commanding officer, that his reputation was excellent, and that in their opinion, accused's personal habits, morals and self-respect were excellent. It was stipulated that Captain Mark M. Young, if present, would testified to the same effect (R. 75-76; Exs. 1 and 2).

The accused elected to remain silent (R. 76).

5. a. Specification 1, Charge I: The evidence shows that the accused was on 6 January 1943, drunk in uniform in a public restaurant as alleged, in the presence of military personnel and civilians. He was not disorderly. When at the request of an officer, a noncommissioned officer and an unidentified individual took accused by his arms and assisted him out of the restaurant, his feet were dragging and his head was dropping over. The drunkenness of accused was not gross, he was not disorderly, nor was his drunkenness characterized by a disgraceful exhibition of himself. In the opinion of the Board the evidence does not support a violation of the 95th Article of War, but does support findings of guilty in violation of the 96th Article of War.

b. Specification 2, Charge II: The evidence shows that on 6 February 1943, the Post Adjutant, after he had discussed certain matters with the accused by direction of the Commanding Officer of the Field, ordered the accused to report to the Adjutant in his office at 1:30 p.m., on the same date for further instructions. The accused did not report nor communicate with the Adjutant. At 6 p.m., the Adjutant saw the accused in the quarters of accused and served on him an order of arrest. The evidence without contradiction supports the findings of guilty of Charge II, and Specification 2 thereunder.

c. Specifications 1 and 2, Charge III: The evidence shows that on the two dates alleged the accused was on duty as laundry officer at the Field and in charge of the laundry truck carrying laundry to Little Rock and returning finished articles to the Field.

On 25 January 1943 (Spec. 1), the accused bought whiskey during the trip to Little Rock, took two or three drinks and gave drinks to several enlisted men. At Little Rock the driver checked the laundry and completed loading the truck by 3:30 p.m. When the accused returned at 4:30 p.m., he ordered the laundry taken off, rechecked and reloaded. On the return trip to the Field, the accused bought a quart bottle of whiskey, stopped the truck three times to take a drink and each time offered a drink to the enlisted men. At the Field, when there were no men present to unload the truck, the accused said "Just drop it on the ground and I don't give a 'hoot' who picks it up". Corporal Schiralli, the driver of the truck, believed accused drunk because his breath smelled of liquor and because of the way he was talking and acting.

On 5 February (Spec. 2) the accused had two drinks of whiskey and some beer while en route to Little Rock. After the truck was unloaded, the accused and the driver left with the truck and did not return

for at least three hours. The accused was drunk and could not perform his duties in a normal manner. He staggered, his eyes were bleary and his speech thick. The driver was also drunk, but accused would not agree to let another soldier drive the truck. On the return trip the accused had three drinks of whiskey. At Hazen the accused went into a restaurant, had some beer, and then he and the driver drove back in the direction of Little Rock, leaving another officer behind. The accused was drunk at Hazen, his mental faculties were impaired by alcohol and his conduct was "out of the way" for an officer. About an hour later the truck returned to Hazen and continued on to the Field.

The evidence shows that both on 25 January and 5 February 1943, while on duty in charge of the post laundry truck, accused was drunk within the definition that any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental faculties is drunkenness within the meaning of the 85th Article of War (par. 145, MCM, 1928).

d. Additional Charges I and II: The evidence shows that on 1 May 1943, just before midnight, the accused was walking around in the "Stop Inn" a tavern and dance hall, and entered into an argument with Sergeant Rains about a dog on the floor. When Sergeant Rains moved away because the accused continued talking loudly, the accused followed him, invited attention to his rank and then stated that anyone who did not like it could step outside. As the accused approached the doorway, Technician Dunson, who was standing near the door watching the play on a pinball machine and had not heard the remark of accused, stepped through the door and held the screen open. The accused without any warning struck Dunson in the neck with his fist. Dunson was scared by the blow, and knocked his assailant down twice before he discovered that the accused was an officer. The accused smelled of liquor, staggered a little, talked loud and had "wild looking" eyes.

The evidence as to the assault (Add. Chg. II) is clear and constitutes a violation of the 96th Article of War.

With respect to Additional Charge I, the evidence shows that the accused was drunk and disorderly. The drunkenness was not however of a gross character, nor was it characterized by peculiarly shameful conduct or disgraceful exhibition of himself by the accused. The striking of the soldier was disorderly but not of such degree as to warrant a finding of guilty in violation of the 95th Article of War. In the opinion of the Board the evidence does not support a finding of guilty in

violation of the 95th Article of War, but does support findings of guilty in violation of the 96th Article of War.

6. The accused is 40 years of age. The records of the Office of The Adjutant General show his service as follows: Federally recognized as second lieutenant, Infantry, Maine National Guard 28 May 1932; appointed second lieutenant, Infantry Reserve, 6 July 1932; appointed first lieutenant, Infantry-Reserve, 30 January 1934; appointed first lieutenant, Infantry, National Guard of the United States, 4 April 1934; active duty 24 February 1941; assigned to duty with Air Corps, 24 September 1941.

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 only so much of the findings of guilty of Charge I and of Additional Charge I as involves findings of guilty in violation of the 96th Article of War, legally sufficient to support the findings of guilty of all other Charges and Specifications, and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 96th Article of War and is mandatory upon conviction of a violation in time of war of the 85th Article of War.

Arthur S. Hill Jr., Judge Advocate

Samuel M. Driver, Judge Advocate

F. J. Lotterhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 17 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 First Lieutenant Ernest R. Wade (0-299203), 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 of Charge I and of Additional Charge I as involve findings of guilty in violation of the 96th Article of War, legally sufficient to support the findings of guilty of all other Charges and Specifications and legally sufficient to support the sentence and to warrant confirmation thereof.

The accused was drunk in uniform in a public place on 6 January 1943, failed to obey on 6 February 1943, a lawful order of his superior officer to report to his office, was drunk on duty on 25 January and 5 February 1943, was drunk and disorderly on 1 May 1943 in a public place while in uniform, and struck an enlisted man with his fist. The reviewing authority approved only so much of the sentence to dismissal and total forfeitures as involved dismissal. Thereafter on 30 August 1943 the reviewing authority, in view of the fact that this officer had given evidence of rehabilitation and was rendering valuable service, recommended that the execution of the sentence of dismissal be suspended. I recommend that the sentence 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 to the President for his action, and a form of Executive action carrying that recommendation into effect.

Myron C. Cramer

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

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

(Sentence confirmed but execution suspended. G.C.M.O. 382, 25 Nov 1943)

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

SPJGK
CM 235644

18 AUG 1943

UNITED STATES	)	30TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Blanding, Florida, 15 May 1943. Dismissal.
Second Lieutenant FRANCIS H. SAUNDERS (0-1293125), Infantry.	)	

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

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

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

CHARGE I: Violation of the 85th Article of War.

Specification 1: In that Second Lieutenant Francis H. Saunders, Headquarters Company, Thirtieth Infantry Division, was, at Camp Blanding, Florida, on or about March 20, 1943, found drunk on duty as Personnel Adjutant.

Specification 2: (Finding of not guilty).

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

Specification: In that Second Lieutenant Francis H. Saunders, Headquarters Company, Thirtieth Infantry Division, did, without proper leave, absent himself from his place of service at Camp Blanding, Florida, from about 0745, April 22, 1943, to about 1345, April 23, 1943.

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

Specification 1: In that Second Lieutenant Francis H. Saunders, Headquarters Company, Thirtieth Infantry

Division, having been accused of absence from duty and being on duty while under the influence of intoxicating liquor, did, on or about March 6, 1943, in order to induce Major Hal D. McCown, his commanding officer, not to prefer charges against him for such conduct and escape trial therefor, make and give his said commanding officer his oral promise and pledge that he would never again come on duty with the smell of liquor on his breath, or be absent from duty at any time during duty hours or words to that effect, whereupon and in consideration of the said promise and pledge, the said Major Hal D. McCown did not prefer charges for said offense; but, notwithstanding the said promise and pledge, the said Second Lieutenant Francis H. Saunders, did violate the same in that he did, on or about March 20, 1943, appear on duty under the influence of intoxicating liquor and did on said date absent himself from duty during duty hours, and did, on or about April 23, 1943, absent himself from duty during duty hours.

Specification 2: In that Second Lieutenant Francis H. Saunders, Headquarters Company, Thirtieth Infantry Division, was, at Camp Blanding, Florida, on or about April 23, 1943, drunk in camp.

He pleaded not guilty to all Charges and Specifications. He was found guilty of all Charges and Specifications except Specification 2 of Charge I, of which he was found not guilty, and Specification 2 of Charge III of which he was found not guilty of a violation of Article of War 95, but guilty of a violation of Article of War 96. Evidence was introduced of one previous conviction by general court-martial for failure to appear at the fixed time and place for duty in violation of Article of War 61. He was sentenced to dismissal, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for twenty 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 is as follows:

Specification 1 of Charge I. On 20 March 1943 the accused was the personnel adjutant for Headquarters Company, 30th Division. He reported for duty at 9:15 a.m. and remained in the office 15 or 20 minutes, during which time he talked with Staff Sergeant John R. Hamilton and some of the other clerks in the office (R. 18, 19). When accused left the office he

said that he was going to Division Headquarters (R. 19). Sergeant Hamilton stated that when he first saw accused he could tell by the expression on his face that there was something unusual or abnormal about him,

> " * * * his eyes were bloodshot, his face was drawn and the manner of his speech was somewhat blurred. I could tell that he had been drinking and was under the influence of liquor at that time. * * * During my conversation with the Lieutenant, I could smell liquor on his breath" (R. 20).

On cross-examination defense counsel insisted that the witness state whether or not accused was drunk. The witness replied,

> "The only way I could answer that question, sir, would be to * * * call the degree of drunkenness. * * * a man could be drunk and still be able to stand up and have normal appearances to some extent. Some people might think, 'drunk', would be in a state where he could not walk or talk or could not act at all. If that is what you call drunk, he was not drunk. If he could not perform his duty as it should be done, I would say he was drunk." (R. 22).

In the opinion of Sergeant Hamilton the accused was drunk to a degree that would impair the performance of his duty (R. 24, 25).

Major Hal D. McCown, Headquarters Commandant, 30th Infantry Division, visited the accused's quarters about 9:25 on the morning of 20 March 1943. Witness knocked on the door twice and called the accused. After a few minutes accused came to the door. The odor of alcohol was very strong. Accused was unshaven, his eyes were bloodshot, his face flushed, and he was "sweating profusely", his collar was open at the neck, and his hair was "mussed up", his speech was thick, and his answers were incoherent. In the opinion of Major McCown, accused was intoxicated and was not fit for duty (R. 39-41).

Major Howell J. Hatcher, Provost Marshal, 30th Infantry Division, stated that upon the direction of the Chief of Staff he went to the quarters of accused about 10 o'clock that morning. Accused was dressed in slacks and undershirt and was perspiring freely, his face was flushed, his manner of speech was abnormal, and his tongue was thick. In the opinion of Major Hatcher, the accused was under the influence of some intoxicating liquor and was in no condition for duty (R. 33-36).

Charge II and its Specification. Absence without leave from place of duty. There was introduced in evidence an abstract copy of the morning

report of accused's organization containing an entry showing accused as absent without leave from 0745, 22 April 1943, to 1345, 23 April 1943 (R. 44; Ex. 1). During this period the accused was acting as an assistant to the supply officer and had not been relieved from that status (R. 43, 51, 56, 58). Major McCown testified that on the morning of 22 April, pursuant to information which he had received, he personally searched for accused throughout the Division Headquarters area and in many other places (R. 45, 46, 50). Warrant Officer Herbert N. Roberts, Assistant Supply Officer, Division Headquarters, 30th Infantry Division, stated that he worked in the office with accused. Accused was not present for duty on the morning of 22 April. Witness had some requisitions for signature of accused, and failing to find him reported his absence to Major McCown (R. 72-74). The accused returned to his quarters about 1:45 on the afternoon of 23 April 1943 (R. 45, 46).

Specification 1, Charge III. Major McCown stated that on 6 March 1943 he visited the quarters of accused and informed accused that he was about to prefer charges against him for drunkenness and absence without leave, to which the accused replied:

> "'If you will not prefer charges nor make anything official on my record over this incident, I promise that I will never again come on duty with the smell of intoxicating liquor on my breath; and that I will never be absent without leave during duty hours'". (R. 42).

Based upon this promise and in consideration thereof Major McCown stated that he did not file charges against accused or make any unfavorable entries on the official record of accused with respect to the subject matter. On cross-examination, the witness admitted that the accused was intoxicated at the time the alleged pledge was made, but stated that in his opinion accused "was fully cognizant of everything that went on". (R. 60, 67).

Specification 2, Charge III. Major McCown testified that he was present when the accused returned to his hut on the afternoon of 23 April 1943,

> " * * * His face was very flush at this time. His eyes extremely bloodshot. More than usual. * * * He had a strong smell of alcohol on his breath. His belt was twisted in two places; his web belt; and his uniform was dirty and wrinkled. * * *." (R. 46).

The witness was of the opinion that accused was drunk (R. 47, 48). The testimony of First Sergeant Raymond L. Collins, Headquarters Company,

30th Infantry Division, with respect to the intoxication of accused on 23 April was substantially the same as that of Major McCown (R. 63, 65).

For the defense the accused admitted that he was personnel adjutant and personnel officer of Headquarters Company on 20 March 1943, and that he reported to the office for duty that morning about 9:15. After looking over some papers on his desk he discussed with the Sergeant Major (presumably Sergeant Hamilton) something about the tentage that the headquarters needed. Accused stated that he then left the office and went to Division Headquarters to see one of the officers of the Adjutant General's Department. The officer whom he wanted to see was not in at that time (R. 91). When asked whether he had been drinking on the morning of 20 March, accused stated that he had spent the night before in Jacksonville and that he took a drink about 2 o'clock before leaving for camp on the 6:45 bus (R. 118).

Concerning Charge II and its Specification and Specification 2 of Charge III, alleging respectively, absence without leave from his place of service from 0745, 22 April 1943, to 1345, 23 April 1943, and drunkenness in camp on 23 April, the accused stated that he did not leave the post at any time during this period. In giving an account of his activities, accused stated that he got up about 7:20 on the morning of 22 April and went to the post carpenter shop. He did not see the foreman and could not recall the name of the carpenter that he saw (R. 96, 109). He left the carpenter shop about 11 o'clock and went to the officers' store and stayed there until about 3 o'clock (R. 108, 109). About 4:45 he returned to his hut, got his bathing suit, and went back to the Officers' Club for a swim. He left the Officers' Club about 9:30 p.m. and visited an officer in the Third Battalion area of the 119th Infantry (R. 110). When asked the name of this officer, accused stated that it was either a Lieutenant "Collins" or a Lieutenant "Colman", whose first name he could not recall. He stated that he had met this officer at the Club, and that he spent the night with him. Accused did not know to what company the officer was assigned (R. 111). Although he met eight other officers at this hut, he could not recall the name of any one of them, except that one was referred to as "the Mad Monk". Accused named the various places visited by him the next morning and stated that he returned to his quarters shortly after noon on 23 April (R. 115). Major McCown was at his hut when he arrived (R. 116, 117).

On rebuttal, First Lieutenant Herbert W. Brown, Jr., Adjutant of the 119th Infantry, stated that he was familiar with the roster of officers of the 119th Infantry as of 22 April, and that to the best of his knowledge there was no lieutenant in the regiment by the name of "Collins" or "Colman", nor did the witness recall any officer of the regiment whose nickname was "Mad Monk" (R. 125, 126).

The accused first stated that he had had nothing to drink on 22 or 23 April 1943 (R. 117, 118). However he later corrected this statement

by saying that he drank during the evening of 22 April at the Officers' Club and in the officers' quarters in the area of the 119th Infantry. He stated that he did not drink anything after midnight of 22 April (R. 119). Accused recalled that when he returned to his quarters shortly after noon 23 April, Major McCown was present in the quarters. He stated that Major McCown had gone through his personal belongings, including his mail, and that later the major ordered him to the orderly room and called the first sergeant (presumably First Sergeant Collins) and had the sergeant smell his (accused's) breath. Then Major McCown gave accused some calisthenics, after which he ordered the sergeant to go with accused to the hospital for a blood test (R. 99). Accused stated that he was placed in arrest in quarters on 23 April 1943 (R. 99).

Concerning Specification 1 of Charge III - violation of a pledge. The accused stated with reference to his conversation with Major McCown on 6 March 1943 that he did not remember all the circumstances (R. 89). He recalled that Major McCown had accused him of drinking and that something was said about preferring charges against him, and that in the course of the conversation he "advised" Major McCown that if charges were not preferred he (accused) would not go on duty with the smell of whiskey on his breath, "or something to that effect". Accused stated "it was an informal conversation. I don't know the exact wording" (R. 99, 101). "It was just flowing conversation. That is all I can describe it as" (R. 102).

4. The evidence in support of the findings of guilty of Specification 1, Charge I and Charge II and its Specification is so clear and convincing as to require no discussion. It is undisputed that the accused reported for duty as personnel adjutant on the morning of 20 March 1943. Three witnesses, Major McCown, Major Hatcher, and Sergeant Major Hamilton, testified unequivocably that the accused at the time was drunk and unfit for the performance of his duties. No evidence was offered by the defense tending to discredit the statements of these witnesses other than the feeble and unsupported denial of the accused. That the accused was absent from his proper place of service from about 0745, 22 April 1943, to about 1345, 23 April 1943, is conclusively shown by the morning report of accused's organization (Ex. 11) and by the testimony of Major McCown and Warrant Officer Roberts, both of whom looked for accused and could not find him.

The finding of guilty of being drunk in camp on 23 April, as alleged in Specification 2, Charge III, is established by the testimony of Major McCown and First Sergeant Collins. Specification 1 of Charge III alleges in substance that accused on 6 March 1943, under promise of immunity for previous misconduct, gave a verbal pledge to Major McCown, his commanding officer, that he would refrain from going on duty with the odor of liquor on his breath, and that accused on 20 March violated his pledge. A restatement of the evidence bearing upon this Specification is unnecessary. Suffice

it to say that Major McCown testified that accused made such a promise and that in consideration thereof he, Major McCown, did not prefer charges against him for the alleged misconduct. The accused in his testimony recalled the occasion, and although in effect, admitted making some such promise, stated that "it was just flowing conversation", and by implication contended that he was under duress, that his sensibilities were impaired by reason of his intoxicated condition, and that he was not conscious of having made a solemn or formal pledge. During the Civil War and for many years thereafter, it was the custom of the service to exact and accept formal (written) pledges from officers not to use alcoholic beverages or drugs, not to enter gambling houses, not to gamble, etc. Violation of such pledges resulted in trial by courts-martial, and conviction and sentences for such violations were repeatedly upheld (Winthrop 1920, p. 718, Dig. Op. JAG, 1912, LXI B 5, p. 141). But on 8 November 1916 the Chief of Staff issued a confidential letter to department and other commanders exercising general court-martial jurisdiction, directing that the acceptance of pledges to abstain from the use of alcoholic beverages, drugs, etc., be discontinued, and that disciplinary measures be applied. Thereafter on 9 May 1922 the War Department reiterated and confirmed its declaration of this policy (AG 250.11 (5/3/22)). This policy is still in force. Independent of the declared policy of the War Department the conviction of the accused under Specification 1 of Charge III cannot be sustained on account of the circumstances surrounding the transaction. It appears from the testimony of the officer to whom the pledge is alleged to have been made, that the pledgor at the time was not only under duress because of a specific threat to prefer charges against him, but that, in addition, he was drunk, or certainly in no condition fully to appreciate or comprehend the force and effect of his promise. Manifestly it would not be in keeping with the traditional concept of fair play which has characterized the administration of military justice, to hold one to strict accountability for a promise made under such circumstances.

5. The accused is 30 years of age and a high school graduate. He attended High Point College (High Point, North Carolina) two years. He was formerly a member of the National Guard of the District of Columbia, and as such was inducted into the Federal service on 3 February 1941. He served as an enlisted man from that date (attaining the grade of sergeant) until his graduation from the Infantry Officers' Candidate School, Fort Benning, Georgia, on 11 September 1942, on which date he was commissioned a second lieutenant, Infantry, Army of the United States. In recommending accused for Officers' Candidate School, his commanding officer stated that he had demonstrated outstanding qualities of leadership, and that his character was good.

6. The court was legally constituted and had jurisdiction of the person and the subject matter. Except as noted, no errors injuriously affecting the substantial rights of accused were committed during the

trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of Specification 1, Charge I and Charge I, Charge II and its Specification, and Specification 2 of Charge III, legally insufficient to support the findings of guilty of Specification 1, Charge III, and legally sufficient to support the sentence as approved by the reviewing authority and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Articles of War 61 and 96, and mandatory upon conviction of violation of Article of War 85.

_____, Judge Advocate.

(On Leave), Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O. 30 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 Francis H. Saunders (0-1293125), 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 of Specification 1, Charge I and Charge I, Charge II and its Specification, and Specification 2 of Charge III; legally insufficient to support the finding of guilty of Specification 1, Charge III, and legally sufficient to support 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. Sec. of War.
Incl.3-Form of action.

(Finding of guilty of Specification 1, Charge III disapproved. Sentence as approved by convening authority confirmed. G.C.M.O. 282, 30 Sep 1943)

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

SPJGQ
CM 235668

9 JUN 1943

UNITED STATES v. Privates FRANK E. UDOVICH (15017143), and WILLIAM A. YARBROUGH (38116552), 14th Service Squadron, Air Service Command.	ARMY AIR FORCES GULF COAST TRAINING CENTER Trial by G.C.M., convened at Randolph Field, Texas, April 30, 1943. Each: Dishonorable discharge and confinement for twenty-five (25) years. Federal Reformatory, El Reno, Oklahoma.

REVIEW by the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, Judge Advocates

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Frank E. Udovich, 14th Service Squadron and Private William A. Yarbrough, 14th Service Squadron, acting jointly and in pursuance of a common intent, did, at Dallas, Texas, on or about March 1st, 1943, by force and violence and by putting them in fear, feloniously take, steal and carry away from the presence of Mrs. V. E. Averett and Miss Willie Gallagher, a 1941 Black Dodge Two Door Sedan, the

property of Mrs. V. E. Averett, valued at about nine hundred and thirty-five ($935.00) dollars.

Specification 2: In that Private Frank E. Udovich, 14th Service Squadron and Private William A. Yarbrough, 14th Service Squadron, acting jointly, and in pursuance of a common intent, did, at Dallas, Texas, on or about March 1st, 1943, by force and violence and by putting her in fear, feloniously take, steal and carry away from the presence of Gena Laird, a 1935 Black Ford Two Door Sedan, the property of the said Gena Laird, valued at about one hundred and fourty-five ($145.00) dollars.

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

Specification: In that Frank E. Udovich, Private, 14th Service Squadron, having been duly placed in confinement in the Post Guard House, Randolph Field, Texas, on or about March 19, 1943, did, on or about April 1, 1943, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that Frank E. Udovich, Private, 14th Service Squadron, did, at Randolph Field, Texas, on or about April 1, 1943, desert the service of the United States and remain in desertion until he was apprehended between Seguin and Lavernia, Texas, on or about April 1, 1943.

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

Specification 1: In that Frank E. Udovich, Private, 14th Service Squadron, and William A. Yarbrough, Private, 14th Service Squadron, acting jointly and with a common intent, did, at or near Selma, Texas, on or about April 1, 1943, by force and violence and by putting them in fear, feloniously take, steal and carry away from the persons of Mr. R. V. Dublin and

Mrs. R. V. Dublin, one 1941 Buick Coupe, the property of Mr. R. V. Dublin and Mrs. R. V. Dublin, of the market value of about Seven Hundred and Fifty Dollars ($750.00).

Specification 2: In that Frank E. Udovich, Private, 14th Service Squadron, and William A. Yarbrough, Private, 14th Service Squadron, acting jointly and with a common intent, did, at Randolph Field, Texas, on or about April 1, 1943, feloniously take, steal and carry away one (1) 1941 Chevrolet Coupe of the market value of about Six Hundred Fifty Dollars ($650.00), the property of Captain Claude E. Tucker.

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

Specification: In that Frank E. Udovich, Private, 14th Service Squadron, and William A. Yarbrough, Private, 14th Service Squadron, acting jointly and with a common intent, did, at Randolph Field, Texas, on or about April 1, 1943, willfully detain Private Dewey D. Dull against his consent by the use of a loaded forty-five (45) caliber revolver, and compel him to accompany them to Seguin, Texas.

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

Specification: In that William A. Yarbrough Private, 14th Service Squadron, having been duly placed in confinement in the Post Guard House, Randolph Field, Texas, on or about March 19, 1943, did, on or about April 1, 1943, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that William A. Yarbrough, Private, 14th Service Squadron, did, at Randolph Field, Texas, on or about April 1, 1943, desert the service of the United States and remain in desertion until he was apprehended between Seguin and Lavernia, Texas, on or about April 1, 1943.

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

Specification 1: In that William A. Yarbrough, Private, 14th Service Squadron, and Frank E. Udovich, Private, 14th Service Squadron, acting jointly and with a common intent, did, at or near Selma, Texas, on or about April 1, 1943, by force and violence and by putting them in fear, feloniously take , steal and carry away from the persons of Mr. R. V. Dublin and Mrs. R. V. Dublin, one 1941 Buick Coupe, the property of Mr. R. V. Dublin and Mrs. R. V. Dublin, of the market value of about Seven Hundred and Fifty Dollars ($750.00).

Specification 2: In that William A. Yarbrough, Private, 14th Service Squadron, and Frank E. Udovich, Private, 14th Service Squadron, acting jointly and with a common intent, did, at Randolph Field, Texas, on or about April 1, 1943, feloniously take, steal and carry away one (1) 1941 Chevrolet Coupe of the market value of about Six Hundred Fifty Dollars ($650.00), the property of Captain Claude E. Tucker.

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

Specification: In that William A. Yarbrough, Private, 14th Service Squadron, and Frank E. Udovich, Private, 14th Service Squadron, acting jointly and with a common intent, did, at Randolph Field, Texas, on or about April 1, 1943, willfully detain Private Dewey D. Dull against his consent by the use of a loaded forty-five (45) caliber revolver, and compel him to accompany them to Seguin, Texas.

Each pleaded not guilty to the Charge and Specifications 1 and 2 thereunder, and each pleaded not guilty to the Specification and Additional Charge II. Each pleaded guilty to the remaining Charges and Specifications. The court found them both guilty of Specification 1, Charge I, excepting the words "at about nine hundred and thirty-five ($935.00) dollars", substituting therefor respectively the words "in excess of Fifty ($50.00) Dollars", of the excepted words not guilty, of the substituted words, guilty. The court found them both guilty

of Specification 2 of Charge I, excepting the words "by force and violence and by putting her in fear, feloniously take, steal and carry away from the presence of Gena Laird, a 1935 Black Ford Two Door Sedan, the property of the said Gena Laird, valued at about one hundred and forty-five ($145.00) dollars", substituting therefor the words "wrongfully take and use without consent of the owner a certain motor vehicle, to wit a 1935 Black Ford two door Sedan, the property of Gena Laird, valued in excess of Fifty ($50.00) Dollars; of the excepted words not guilty, of the substituted words, guilty; guilty of Article of War 93 as to Specification 1; but as to Specification 2, not guilty of a violation of Article of War 93; but guilty of a violation of Article of War 96. The court also found them both guilty of all of the remaining Charges and Specifications. There was evidence submitted of one previous conviction (absence without leave) with respect to the accused Udovich. No evidence of previous convictions was introduced as to accused Yarbrough. They were each sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 47 years. The reviewing authority reduced the period of confinement to 25 years as to each, approved the sentence thus reduced, 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 produced by the prosecution may be summarized as follows:

Between 6 and 7 o'clock P.M. on March 1, 1943, the two accused, Privates Udovich and Yarbrough, engaged Mrs. V. E. Averett and Miss Willie Gallagher in a conversation at the "Rose of The Rancho," Dallas, Texas. The accused made a date with Mrs. Averett and Miss Gallagher for 11 o'clock that night, and Mrs. Averett consented to use her 1941 Dodge sedan. After getting this car, the two couples visited at various lunch stands and dine-and-dance parlors, and upon leaving one of these places, Yarbrough, after considerable persuasion was allowed to drive Mrs. Averett's car. Thereafter the two couples drove into Dallas, and then started off on a "short-cut" to another dine-and-dance parlor, and eventually arrived at the Eagle Ford Road. At this point Yarbrough turned off of the main highway onto a side road, turned around, and then killed the motor. After the motor was killed, Yarbrough said, "Here's where you get out." Mrs. Averett said that they were not getting out and indicated to the accused that they were "just teasing". However, Private Udovich, who was in the back seat of the car, stated, "No, we aren't teasing", and then grabbed

Mrs. Averett by the hair and said, "I'm not soft" and "I'm not teasing; we just need your car". He also told her of the things he could do, such as taking her rings and watch and the like, but he "just wanted the car". Mrs. Averett then asked Miss Gallagher, "Willie, what do you say?", to which Yarbrough said, "She doesn't have a say". After this, both Mrs. Averett and Miss Gallagher got out of the car, Mrs. Averett stating that she was afraid of what the accused might do after he threatened her. Before the accused drove off, they told Mrs. Averett and Miss Gallagher that they had better stay off of the highway because they (the accused) might come back, and if they did, they had better not catch Mrs. Averett and Miss Gallagher on the highway (R. 14; Pros. Ex. 3).

It was stipulated between the counsel for the prosecution and the defense, as well as the two accused (R. 16; Pros. Ex. 4), that if Miss Willie Gallagher were present in court and testified under oath, her testimony would substantiate and be the same as the testimony of Mrs. V. E. Averett, which is set out above.

After the two accused had met Mrs. Averett and Miss Gallagher at about 6 p.m., March 1, 1943, at the Rose-of-The-Rancho, they apparently went to another eating place known as "Bob Crow's Drive-In," also located in Dallas, Texas, arriving there about 7 p.m., March 1, 1943. Mrs. Gena Laird states that as she came out of this place she observed the two accused who asked her to take them downtown, which she agreed to do. The two accused got in the car belonging to Mrs. Laird, which was a 1935 Ford Tudor sedan, and as they passed through an underpass leading to the downtown section of Dallas, one of the accused reached in his shirt, unbuttoned it and pulled out something that "looked like the handle of a gun" and then told Mrs. Laird, "We're not gonna hurt you; we're gonna use your car," to which Mrs. Laird replied, "Just let me out, you can have the car, I don't care just so you don't hurt me". The accused then told her, "If you turn us over to the police, we'll kill you before midnight". The accused then drove her to Marsallis and Lancaster and put her out, giving her $2 for cab fare. However, before getting to the point just mentioned, one of the accused told her to get out from under the wheel of the car, and the other accused went around to the driver's side of the car, but was unable to get in by reason of the door being broken. The accused who was attempting to get to the driver's side of the car then said, "God Damn you, don't try no funny stuff with me" and doubled up his fist, Mrs. Laird then explained to the accused that the door had been broken for sometime, and the other accused, who was in the back seat, crawled under the wheel and started driving off. Mrs. Laird stated that they

wanted to borrow her car for two hours and told her they would leave it back of the place where she worked, which was the place where they had met her. Upon returning to this place, which was a short time later, her car was found in the parking lot (R. 16, Pros. Ex. 5).

Mr. W. A. Davis, Police Patrolman, Dallas, Texas, stated in a deposition (R. 18-19, Pros. Ex. 6) that on March 3, 1943, while stationed at Commerce and Field Streets, Dallas, Texas, he apprehended the two accused driving a 1941 Dodge coach, which had previously been reported as stolen. They admitted their identity and were placed in arrest in the Dallas City Jail.

It was stipulated between the counsel for the prosecution and the defense and the accused that the market value of Mrs. Averett's 1941 black Dodge sedan and the market value of Mrs. Laird's 1935 Tudor Ford sedan was in excess of $50.00 (R. 19, Pros. Ex. 7).

The accused were returned to Randolph Field and placed in the Post Guard House by order of Captain Hussa, Provost Marshal of Randolph Field, on March 19, 1943 (R. 19-20). Thereafter, on the morning of April 1, 1943, while still in confinement awaiting trial by court-martial under charges pending against them, the accused were assigned certain work under the guard of Private Dull, who was armed with a 12-gauge riot gun and a 45-caliber revolver. Private Dull testified that after the accused had worked about an hour and fifteen minutes, they asked him if they could go to Hangar "R" for a drink of water. After getting a drink of water, they then requested permission to go to the latrine, and upon leaving the latrine, they "rushed" the guard, Private Dull, one of them, apparently Udovich, grabbing hold of him around the shoulders, and the other, apparently Yarbrough, grabbing the riot gun. Yarbrough succeeded in getting the riot gun from Dull, cocked the gun, and told Dull to throw up his hands or he would shoot. The revolver was then removed from Dull, the riot gun was emptied and handed back to Dull, and the accused instructed Dull to take the riot gun and follow them out of the building, telling him to keep behind them with the gun over his shoulder until they were able to get a car. Private Dull did as he was directed by the accused, and after disposing of their tools which they had been using, they spotted a 1941 5-passenger Chevrolet coupe, later established to be the property of Captain Claude E. Tucker, and of a value of $650.00 (R. 41). Yarbrough got into the car and Udovich told Private Dull to get in beside Yarbrough. Udovich then got in the back seat and kept the revolver pointed at Dull

The car was then headed toward the main gate of Randolph Field, and the accused decided that they had better not stop at the main gate. Accordingly, they put the car in second gear as they went through the gate. They went from Randolph Field directly out to the Austin Highway, and upon reaching the Austin Highway, they turned to the right. At this time, they noticed a Buick 5-passenger coupe, and Udovich told Yarbrough that it would be a good car to get since they were low on gasoline (R. 21-25).

The Buick car just referred to was being driven by Mr. R. V. Dublin, who was accompanied by his wife. They, as well as Private Dull, testified that as the car driven by the accused passed them, the accused honked the horn of the Chevrolet car quite a bit, and upon passing the Buick car being driven by Mr. Dublin, they forced him to a stop. The two accused immediately got out on the road, one of them waving the revolver, and ordered Mr. and Mrs. Dublin to "get out of the car". (R. 31, 33-34). Both Mr. and Mrs. Dublin testified that they had experience in dealing with used cars and that it was their opinion that the car they were driving had a market value of from $750.00 to $800.00 (R. 35, 37). At the time the accused forced the Dublin car to stop, Private First Class Hanagan, a member of the Guard Squadron, Randolph Field, Texas, who was on duty at the main gate and who had seen the accused go through the gate without stopping, came up in a truck which he had commandeered from Mr. Cheney and Mr. Crisp, two civilians who were at the gate at the time the accused went through (R. 42). Hanagan recognized the accused as being escaped prisoners. Hanagan had his gun out and was covering the accused, who were, however, pointing a gun at him. They ordered him to drop his gun or they would shoot the guard (R. 43). Desiring to avoid any danger to the life of the guard or of the civilians, Hanagan did not fire at the accused and allowed them to get into the Dublin car. Hanagan then got into the car abandoned by the accused, and upon the accused leaving in the Dublin car, he proceeded to follow them as far as the Bellstein Service Station, where he placed a call to the New Braunsfels Sheriff's office (R. 44).

Apparently notice of the escape of the prisoners was relayed to Randolph Field, and a posse was organized to apprehend the accused. In this connection, Sergeant Vaughn testified that he went to Seguin, Texas, and upon contacting Private Dull, who had been let out of the car by the accused, they followed the accused to a small town where they obtained more information as to the route followed by the accused. Shortly thereafter they found the accused lying on the side of the railroad tracks. Sergeant Vaughan, upon discovering them, ordered them to "come out with their hands up" (R. 47).

Private Dull testified that during the time the accused were attempting to make their escape, they "talked of quite a few different towns and Udovich told Yarbrough that they would like to get out of the state and across the line into Mexico" (R. 27). Private Dull also testified that from the time he was ordered in the car taken by the accused at Randolph Field, Texas, until he was let out of the Dublin car outside of Seguin, Texas, he was under continual restraint by reason of the revolver being held by Udovich and pointed towards him (R. 27-28).

4. The evidence produced by the defense may be summarized as follows:

Both the accused were fully advised as to their rights with regard to testifying or making a statement to the court (R. 50), and Private Yarbrough took the stand as a witness in his own behalf but testified only as to Specifications 1 and 2 of the original Charge (R. 50). As to Specification 1 of the Charge, the substance of his testimony was that upon meeting Mrs. Averett and Miss Gallagher and upon taking them out on a date, the two accused had drunk so much that they didn't know what they were doing, and that it was not their intention to keep the car but to only use it for a few hours in order to get back the car owned by the two accused and which was apparently being guarded by the Dallas police, who were on the lookout for the accused (R. 54). However, after getting Mrs. Averett's car, they found themselves in Waco, which is about 100 miles away from Dallas, and decided they should get the car back to Mrs. Averett as soon as possible. However, before being able to return the car, they were apprehended by the police in Dallas (R. 53-56).

As to Specification 2 of the Charge, Private Yarbrough testified that after meeting Mrs. Averett and Miss Gallagher and making a date with them, he returned to his home and found that the police were looking for him. Not desiring to be apprehended by the police at this time, he and Udovich eluded the police and ran to Bob Crow's place in Dallas. They talked with Mrs. Laird, and she agreed to take them into town. Yarbrough also testified that he subsequently asked Mrs. Laird if she minded his driving the car, to which she answered "No". Accordingly, Yarbrough took over the driving of the car. Thereafter he asked her if he and Udovich could use the car and gave her $2 to catch a cab back and told her that her car would be back at the stand at the same place where they had been picked up, and she told them that it would be all right but "please don't harm" her car. After driving by his home and discovering that the police were still there and looking for him, he returned the car in about twenty minutes (R. 51-52).

5. The prosecution by competent evidence proved each and every element of the offenses of which the accused were found guilty. The rulings of the law member of the court favored the accused in every instance. With regards to the Charges and Specifications to which the accused pleaded guilty, there was ample evidence produced to show that the plea was not entered improvidently or through any lack of understanding. The two prisoners by force, violence and threats overpowered their guard and made a prisoner of him, escaped from the post in an automobile that they stole, drove until the gas was low, stopped another automobile, ejected the driver and a passenger by threatening to shoot them if they did not do as they were told, drove that car until it ran low in gas, and planned to escape into Mexico. They displayed an utter disregard for the safety or property rights of others. Their intent to desert was displayed by their escape, their partial change of clothes, and their plans to get to Mexico discussed while driving in that direction. They were both absent from their post without leave or authority and intended to remain away permanently. Their recapture alone frustrated their plans. All of the elements of desertion were therefore present. This offense alone was sufficient to warrant the penalty finally imposed.

With respect to the two Specifications under Charge I to which they pleaded not guilty, notwithstanding the uncorroborated story of the accused Yarbrough that they borrowed the two automobiles involved, from their owners, it was clearly shown by the owners and an additional witness that they took the Dodge Sedan away from Mrs. Averett by putting her in fear with threats. These acts constituted robbery. The court could properly have come to the same conclusion as to the Ford car of Gena Laird. The accused admitted taking the car. The owner said it was without her consent, explaining the incident of being ordered out of her own car. The court concluded this to be larceny only. The competent evidence therefore clearly proves that the two accused on March 1, 1943, at Dallas, Texas, robbed Mrs. Averett of her Dodge automobile worth over $50; that on the same day and same city they stole the Ford automobile of Gena Laird, worth over $50; that on April 1, 1943, at Randolph Field, Texas, they escaped from confinement, forced Private Dewey D. Dull, their guard, to accompany them, stole Captain Tucker's Chevrolet Coupe, valued at over $50; attempted to reach the Mexican border, ran low of gas, stopped Mr. and Mrs. Dublin, riding in a Buick, and robbed them of that automobile, also valued at more than $50. The maximum punishment alone for the two robberies and the two larcenies is 30 years (M.C.M., 104c, p. 99).

6. The record showed the accused Frank E. Udovich to be 25 years of age. He was inducted into the service June 15, 1942, to serve for the duration and six months. It showed William A. Yarbrough to be 24 years of age. He enlisted February 3, 1941, for three years. There was evidence of one previous conviction (absence without leave) introduced against Udovich.

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.

William A. Lowndes, Judge Advocate.

Earle Stephens, Judge Advocate.

Herbert R. Frederick, Judge Advocate.

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

SPJGN
CM 235676

4 AUG 1943

UNITED STATES	)	4TH DISTRICT ARMY AIR FORCES
	)	TECHNICAL TRAINING COMMAND
v.	)	
	)	Trial by G. C. M., convened
Second Lieutenant ARTHUR W.	)	at Fresno, California, 15
DAVIS, JR. (0-358228), Air	)	May 1943. Dismissal and
Corps, 806th Training Group.	)	total forfeitures.

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

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

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

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

Specification: In that Second Lieutenant Arthur William Davis, Jr., AUS, Air Corps, 806th Training Group, did, without proper leave, absent himself from his station at Basic Training Center (No. 8), Army Air Forces Technical Training Command, Fresno, California, from about April 9, 1943 to about April 12, 1943.

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

Specification 1: In that Second Lieutenant Arthur William Davis, Jr., AUS, Air Corps, 806th Training Group, being indebted to Hull Californian Company, a Corporation, owner of Hotel Californian, Fresno, California, in the sum of One Hundred Nineteen Dollars and twenty-nine cents ($119.29) for room rent and telephone bills, which amount became due and payable on or about December 8, 1942, did, at Fresno, California, from December 8, 1942 to April 14, 1943, dishonorably fail and neglect to pay said debt.

Specification 2: In that Second Lieutenant Arthur William Davis, Jr., AUS, Air Corps, 806th Training Group, being indebted to The General Properties Company, Inc., a corporation, owner of the Hotel Roney-Plaza, Miami Beach, Florida, in the sum of One Hundred and Fifty Dollars and ninety-nine cents ($150.99), for room, board, and hotel services, which amount became due and payable on January 23, 1943, did, at Miami Beach, Florida, from January 23, 1943 to April 14, 1943, dishonorably fail and neglect to pay said debt.

Specification 3: In that Second Lieutenant Arthur William Davis, Jr., AUS, Air Corps, 806th Training Group, having received a lawful command in writing from Colonel P. C. Wilders, his superior officer, to report his action taken in liquidating his indebtedness to the Roney-Plaza Hotel, Miami Beach, Florida, a copy of which order is as follows:

201 - Davis, Arthur W, Jr.(Off) 2nd Ind. 10/hn

Hq. AAF BTC #8, Fresno, California, February 26, 1943.

TO: 2nd Lt. Arthur W. Davis, Jr., AC, BTC #8, Fresno, Calif.

1. You are requested to indicate by indorsement hereon action you have taken to liquidate this indebtedness. This office has tendered you extraordinary consideration in this matter, but as yet you have failed to report your action. It is directed that you do so immediately.

2. You are further reminded of disciplinary measures available under the circumstances and are directed to prevent further recurrences of such matters.

By order of Colonel WILDERS:

1 Incl: n/c
Bill in the amount of $200.99
owing the Roney Plaza Hotel,
Miami Beach, Florida.

A. W. TOLEN,
Major, Air Corps,
Asst Adjutant (S-1)

did, at Basic Training Center (No. 8), Army Air Forces Technical Training Command, Fresno, California, on or about February 26, 1943, fail to obey the same.

Specification 4: (Finding of not guilty)

He pleaded guilty to Charge I and the Specification thereunder and not guilty to Charge II and the four Specifications thereunder. He was found guilty of Charge I and the Specification thereunder, of Charge II and Specifications 1, 2, and 3 thereunder and not guilty of Specification 4, Charge II. 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 pursuant to Article of War 48.

3. The accused pleaded guilty to Charge I and the Specification thereunder, with reference to which the evidence for the prosecution shows that he failed to report for duty on Friday, 9 April 1943, when he and his wife went shopping, and again on Saturday 10 April 1943, when he was downtown most of the day. His group commander sent Lieutenant William J. Curry to inquire after him on the 9th, but Lieutenant Curry's rings and knocks at the accused's door evoked no response, although, through the front window, Curry saw the accused's cap and blouse hanging on a chair. On the 10th, his group and wing commanders went to his house about noon. After they had rung several times, his wife finally came to the door, and told them he had gone downtown to a doctor, whose name she did not know. The wing commander asked the accused's wife to tell him, on his return, that he should report to his commanding officer immediately. He had not reported on Monday the 12th so the group and wing commanders again visited his home. When no one answered their repeated rings at the front door, they went to the rear door and entered, knocking loudly. They found the accused and an enlisted man with their respective wives. The accused had been drinking. He said he was sick, and they had him taken to the station hospital, where the cyst on his backside, of which he complained, was found to be neither inflamed nor infected, but the accused suffering from an attack of jitters, diagnosed as probably a "hangover" (R. 11-25).

Relative to Specification 1, Charge II, it was stipulated that from 30 November 1942, to and including 31 March 1943, the accused received, exclusive of travel pay, the sum of $1,286.03. He was a guest at Hotel California, Fresno, from 8 November to 8 December 1942, at which time his unpaid account amounted to $119.29. No payment was made on this account

until 8:30 a.m., 15 May 1943, the day of the trial, when it was paid in full.

While the accused was a guest in the hotel, he told the manager he appreciated the hotel's taking care of this account for his then fiancee, now his wife, who had secured the room for him; and verbally promised to pay it. The manager did not know the accused had left the hotel until his room was vacant. When three statements, mailed to the accused, evoked no response, the post inspector was notified, between the 22nd and 26th of March.

The inspector informed the accused of this report and told him that recent War Department directives required him to pay it; and that his failure to do so would be reported. The accused assured the inspector he was attempting to make a loan to pay the hotel, but shortly thereafter the inspector learned the account had not been paid. Several days before 1 April 1943 the accused told the inspector that on pay day he would discharge part of the bill, and that he was still attempting to secure a loan (R. 6-10).

Relative to Specifications 2 and 3, Charge II, there were introduced, without any objections, the deposition of the managing director of the Roney-Plaza Hotel, Miami Beach, Florida; the registration card showing that the accused arrived at the hotel on 13 December 1942, and departed on 23 January 1943; statement of his account there amounting to $200.99; a letter from the accused dated 18 February 1943, enclosing $50 on account of this bill, promising to send the balance after the first of the month; and the deposition of Captain Harvey D. Davidson. After the accused's departure, the delinquency was reported to the military authorities at Miami Beach, where the accused had attended school while residing at the Roney-Plaza. All officers at the school had been instructed that, before leaving, their debts must be settled; and directed to obtain clearance certificates. However, the accused had neither turned in a clearance, nor signed out in the officers' register. After he left, correspondence between the hotel and headquarters with reference to his delinquent account was forwarded to him at Fresno, where Major Adrian W. Tolen, S-1 at the Air Corps Post, also received a communication pertaining to the accused's debt to the Roney-Plaza, which he forwarded to the accused 26 February 1943, directing him to indicate, by indorsement, what action he had taken to liquidate the indebtedness, and calling his attention to the fact that disciplinary action could be taken. At a prior date - about 1 February - Major Tolen had talked

with the accused about this bill, and the accused had stated he would pay half of it out of his travel money, and the other half at the beginning of the next month. Major Tolen asked the accused to send a postal money order in payment of the account, and to show him the stub; later the accused exhibited a receipt for a $50 money order payable to the Roney-Plaza. The accused neither complied with the order to reply by indorsement, nor replied orally to Major Tolen after the latter had informed him that his delinquency would have to be made a matter of record and that it would appear in his 201 file (R. 45; Exs. E-I).

The investigating officer showed the accused the charge sheet, and fully advised him of his rights, whereupon he made and signed a sworn statement reciting that, as to the money he owed the Hotel Californian, he had written the manager he would pay the debt from his next check, but had not been able to do it. He returned to Fresno from Miami about 1 February; was advised the post inspector had received notice of the bill; told him he would arrange for a loan to pay it; and tried to get money from a loan company for that purpose, but was not successful. He then voluntarily told the inspector he would pay the bill out of his next pay check, and cashed it for that purpose; but, on the evening of 1 April 1943, about $290, comprising the entire proceeds of his pay check and every cent he had, was either stolen or lost; so nothing more was done about the bill. The last day he was at Miami, he was advised of his debt to the Hotel Roney-Plaza, but merely had money enough to get home; he had tried there - unsuccessfully - to borrow additional funds before leaving. He paid $50 on the bill when he received his travel money in Fresno, advised Major Tolen of such payment, and showed him the money order receipt. He did not remember ever receiving a notice to reply by indorsement concerning this debt; as a matter of fact, he did not look inside the only letter he ever received from Major Tolen, assuming it merely enclosed the bill from the Roney-Plaza Hotel. His base pay had been $150 per month until 20 March 1943. When he entered the service in October, 1942, having no money, he borrowed from his father to see him through the first month. His fiancee came to Fresno in November so they could get married; she stayed first at the Californian Hotel, then found an apartment, and he took her room at the hotel. He took her to St. Louis to be with relatives while he was in Miami, and when he got back to Fresno, he sent for her. When she received word there that her father was dying in Spokane, he gave her money to go to his bedside. Her father recovered, she came back to Fresno, and they were finally married on 20 March 1943, after which they resided together at the Virginia Hotel. He had had no trouble about his bills until the last two or three weeks they lived there (R. 47, 48; Ex. K).

4. The evidence for the defense shows that First Lieutenant Joseph R. Noland, Jr., Air Corps, who roomed with the accused at Miami Beach, lent him about $85, all of which has been repaid, though the accused was usually short of money (R. 50-51).

The wife of the accused went to the Californian Hotel late in March to tell the management they were going to try to settle their bill there on the first of the month, but did not see the manager. The first of April she cashed the accused's salary check, about $257, and gave the money to the accused next day. He put it in his hip pocket in a billfold, and it was lost on 2 April. Two or three days later, in an effort to secure additional funds, she applied to the Fresno Loan Corporation for a loan of $300, but could not get the required signatures of two co-makers. She personally did not have money to pay the accused's bills. Much of their money had gone for her travelling expenses; also board, amusements, and a portion of it for liquor (R. 52-62).

5. The accused, after being advised of his rights as a witness, was sworn and testified that when he went on active duty he had to borrow about $250 from his father. He also borrowed about $90 from Lieutenant Noland at Miami. Both these items have been repaid. He incurred various expenses for his wife's travelling, sending her $60 to come to Fresno, then about $75 to go to St. Louis, and about $100 for her living there. When he arrived in Fresno, coming back from Miami, he sent her about $100 to St. Louis to get back to Fresno. The financial condition of her family is very bad, so he was obliged to pay all her expenses. He spent about $290 for uniforms and books, and around $40 to get from Denver to Fresno. At the Virginia Hotel he paid about $130 rent, and then $75 for rent of a house where Mrs. Davis is now living. In Fresno, he paid $45 for an apartment for her to live in before they were married, while he occupied the room she had engaged at the Californian Hotel. He lost his billfold containing $290; paid $50 to the Roney-Plaza Hotel; and for food and clothes from October 27, 1942, to April 12, 1943, spent some $375. These various items aggregate in the neighborhood of $2,200.

Since entering the service on 13 October 1942, he had received as travel pay, from Spokane to Denver, approximately $60; balance October pay $30, November, December, January and February pay $216 each; March $360, the increase being due to longevity, allowances; uniform allowance $250; and travel to Miami and back $350. He entered the service "behind" financially, and has not been able to catch up. He was staying at the Virginia Hotel

when he missed his billfold containing $290 and immediately asked the manager about it. He also searched the car in which he had been riding before the loss was discovered, but it was never found. His wife had to borrow money from the Red Cross to live on; $85 first, then $25 so she could pay the rent. All of the bills to the three hotels mentioned in the Specifications have been paid. (The prosecution agreed they were paid the morning of 15 May 1943). While he had had no money to pay the bill at the Californian, he had been there frequently, for eating and other purposes, since he checked out, and made no effort to avoid the place. He wrote to the hotel explaining the situation, and his letter was never returned. He had expected to make a payment on 1 April, but was prevented because he lost all his money. The bill at the Roney-Plaza in Miami Beach finally amounted to $200.99; he did not pay it because he had no money, and no means of getting any. Out of the money he received, he paid Lieutenant Noland $65, sent $100 to his wife, and it cost him well over $2 a day to live. Before leaving Miami he tried unsuccessfully to borrow money from the Army Emergency Relief, and had talked to the manager of the Roney-Plaza Hotel about possible arrangements he might make with the hotel, so he could clear the station and leave. After he left, he sent $50 to the hotel; as he had additional expenses getting his wife back from St. Louis, he could not then pay any more. He did not take a sleeper from Miami to Fresno, but sat up in a chair car all the way to save money.

The letter written to him by Major Tolen, by order of Colonel Wilders, was handed to him by Major Tolen the latter part of February, when he told Major Tolen he had sent $50 to the Roney-Plaza Hotel. He did not open the envelope nor read the letter until a few days ago, assuming it was merely the correspondence from Miami Beach to Major Tolen, who stated he had received letters about the bill. No one explained to him what the disciplinary measures referred to were, and he did not know he had disobeyed an order until he saw it in the charge; he would have obeyed it, had he understood.

He was absent without leave, from 9 April 1943, to 12 April 1943, because he was not feeling well, by reason of a cyst; he had called a civilian doctor to attend him on the 10th, after his wife's treatment on the 9th had failed to relieve it. However, he admitted he was down town when the doctor arrived. He stayed home all day Sunday, the 11th, prior to his apprehension and returned on the 12th. He had desired to make the Army his life work, and if severed from the service now, would see his draft board to get back in, or go into the military service of some other country. He knew he was absent without leave from 9 April to 12 April; and it was merely neglect that pre-

vented his calling his commanding officer to say he was sick (R. 63-87).

6. Lieutenant Curry, of the accused's company, recalled by the prosecution, testified he had a telephone conversation with the accused about 1 April, relative to a lost wallet. The accused called the orderly room, to report that his hotel room had been ransacked, that his blouse and wallet were missing, and that he was busy with the police; so would not be able to report for work. When Lieutenant Curry, later the same day, called the accused by telephone, Mrs. Davis answered and said he was down town. Two or three days later when Curry noticed the accused wearing his blouse, the accused said it had been recovered by the police from a stolen car (R. 90-92).

Sergeant Arnold G. Yank, of the accused's company, testified the accused stated early in April that somebody broke into his room and stole his coat and wallet (R. 93).

7. The accused, being recalled testified that at first he thought the wallet had been stolen from his room, but later concluded he had lost it in a car. He had not, however, told Lieutenant Curry or Sergeant Yank, of this altered conclusion.

8. The Specification, Charge I, alleges absence without leave from Friday, 9 April 1943, until Monday, 12 April 1943. Not only did the accused plead guilty to the Specification and the Charge, but the evidence clearly shows that he failed to report for duty on the dates alleged, spending his time, instead, at home and down town, allegedly because of a minor ailment, a cyst near the lower end of his spine, which he had never reported to the military medical authorities, and which, when examined after his apprehension, by a medical officer, showed no outward and visible sign of irritation, infection or inflammation. The accused asserted that sheer neglect on his part was the reason he had not notified his commanding officer that he was staying at home and not reporting for duty on account of this alleged indisposition; but his evasive thwarting of his commanding officer's efforts to get in touch with him, during his absence, indicates that this was a deliberate rather than a negligent omission. His testimony with reference to his absence without leave appears as "slippery" and as uncooperative as his conduct during that period. The evidence corroborates the plea, and fully sustains the findings of guilty of Charge I and its Specification.

9. Specifications 1 and 2, Charge II, allege dishonorable failure

to pay hotel bills. The record discloses no false representations, fraud, deceit, evasion or dishonorable conduct in connection with the accused's protracted delay in the payment of these bills.

> "Neglect on the part of an officer to pay his debts promptly is not of itself sufficient grounds for charges against him. * * * when the * * * proof does not show such conduct with reference to the debts as would constitute an offense, although some of the debts have been due for more than seven months, a finding of guilty cannot be sustained. C. M. 121207 (1918)."
>
> "* * *. The record shows no false representations by the accused, nor a failure to pay, characterized by deceit, evasion or dishonorable conduct. Neglect on the part of an officer to pay his debts promptly is not of itself sufficient ground for charges against him. Conviction disapproved. C. M. 123090 (1918)." (Sec. 453 (14) (15), p. 344, Dig. Ops. JAG, 1912-1940).

To the same effect are the opinions of The Judge Advocate General in C. M. 220760 (1942) and C. M. 221833 (1942). In the light of the precedents cited, the Board of Review is of the opinion that the record does not sustain the findings of guilty of Specifications 1 and 2, Charge II.

Specification 3, Charge II, alleges failure to obey a lawful command in writing from his superior officer to "indicate by indorsement hereon what action you have taken to liquidate this" (the Roney-Plaza) "indebtedness", in violation of Article of War 95. The offense is admitted, but the accused testified that his failure to comply resulted solely from his failure to read the written command, although it was handed to him by the adjutant. Disobedience of superiors based on such indifference as the accused's failure to read the written order manifests, is patently a neglect to the prejudice of military discipline, indicating a lack of any real conception of a subordinate officer's responsibility to his superiors. In this connection, it may be stated that the record as a whole discloses that the accused's standards of personal and official conduct are not commensurate with his obligations and responsibilities as an officer in the Army of the United States. However, "neglects to the prejudice of * * * military discipline" are specifically denounced under

Article of War 96, and, since offenses falling in this category constitute specific violations of that article, they should be charged thereunder, rather than under Article of War 95. The record supports the conviction in violation of Article of War 96.

10. The accused is 28 years of age. The records of the Office of The Adjutant General show that the accused received a reserve commission on 20 July 1937, and entered on active duty 13 October 1942.

11. 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 insufficient to support the findings of guilty of Charge II and Specifications 1 and 2 thereunder, legally sufficient to support the findings of guilty of Charge I and its Specification, and Specification 3, Charge II, in violation of Article of War 96, and 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 61 or Article of War 96.

Chas. L. Grossman, Judge Advocate

Abner E. Lifsconb, Judge Advocate

Benjamin R. Sleeper, Judge Advocate

SPJGN
CM 235676

1st Ind.

War Department, J.A.G.O. 3 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 Arthur W. Davis, Jr. (O-358228), Air Corps, 806th Training Group.

2. I concur in the opinion of the Board of Review that the record of trial is not legally sufficient to support the findings of guilty of dishonorably failing to pay two hotel debts (Charge II, Specs. 1 and 2 thereunder), legally sufficient to support the findings of guilty of being absent without leave (Charge I and its Spec.), and legally sufficient to support the finding of guilty of failure to obey the command of his superior officer (Spec. 3, Chg. II), in violation of Article of War 96; 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 as thus modified, the execution of the sentence be suspended during the pleasure of the President.

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 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. of Under 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 forfeitures remitted. G.C.M.O. 266, 24 Sep 1943)

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

SPJGQ
CM 235707

16 JUL 1943

UNITED STATES	)	SECOND AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at Smoky Hill Army Air Field, Salina, Kansas, 7 May 1943. Dismissal, total forfeitures, confinement 5 years.
	)	
Second Lieutenant JAMES H. JOHNSON (O-733434), Air Corps.	)	

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.

Specification 1: In that 2nd Lt. James H. Johnson, AC attchd unassgnd 1st Heavy Bombardment Processing Headquarters, did, without proper leave, absent himself from his post at Smoky Hill Army Air Field, Salina, Kansas from about March 19, 1943 to about April 22, 1943.

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

Specification 1: In that 2nd Lt. James H. Johnson, AC attchd unassgnd 1st Heavy Bombardment Processing Headquarters, did, at Salina, Kansas, on or about March 10, 1943, with intent to defraud, wrongfully and unlawfully make and utter to the Smoky Hill Army Air Field Exchange, Salina, Kansas, a certain check, in words and figures as follows, to wit:

Salina Kansas 3 - 10 - 19 43

Chase National Bank of New York, N.Y.
(Write Name of Bank or Trust Company on above line) (Town and State)

PAY TO THE ORDER OF SMOKY HILL ARMY AIR FIELD EXCHANGE SALINA, KANSAS $25.00

Twenty Five----------Dollars

For Value Received, I represent the above amount is on deposit in said Bank or Trust Company, in my name, is free from claims and is subject to this check.

For _____ James H. Johnson
0-733434

and by means thereof, did fraudulently obtain from the Smoky Hill Army Air Field Exchange, Salina, Kansas, $25.00, he the said 2nd Lt. James H. Johnson, then well knowing that he did not have and not intending that he should have any account with the Chase National Bank of New York, N.Y. for the payment of said check.

Specification 2: Making and uttering false check at Salina, Kansas, in amount of $25.00 drawn on Chase National Bank, New York, N.Y.

Specification 3: Making and uttering false check at Salina, Kansas, in amount of $25.00 drawn on Chase National Bank, New York, N.Y.

Specification 4: Making and uttering false check at Salina, Kansas, in amount of $20.00 drawn on Chase National Bank, New York, N.Y.

Specification 5: Making and uttering false check at Salina, Kansas, in amount of $10.00 drawn on Chase National Bank, New York, N.Y.

Specification 6: Making and uttering false check at Salina, Kansas, in amount of $20.00 drawn on Chase National Bank, New York, N.Y.

Specification 7: Making and uttering false check at Salina, Kansas, in amount of $20.00 drawn on Bank of America, Sacramento, Calif.

Specification 8: Making and uttering false check at Salina, Kansas, in amount of $15.00 drawn on Bank of America, Sacramento, Calif.

Specification 9: Making and uttering false check at Wichita, Kansas, in amount of $25.00 drawn on Pierre National Bank, Pierre, South Dakota.

Specification 10: Making and uttering false check at Wichita, Kansas, in amount of $20.00 drawn on Pierre National Bank, Pierre, South Dakota.

Specification 11: Making and uttering false check at Wichita, Kansas, in amount of $25.00 drawn on Pierre National Bank, Pierre, South Dakota.

Specification 12: Making and uttering false check at Salina, Kansas, in amount of $10.00 drawn on Pierre National Bank, Pierre, South Dakota.

Specification 13: Making and uttering false check at Wichita, Kansas, in amount of $10.00 drawn on Pierre National Bank, Pierre, South Dakota.

Specification 14: Making and uttering false check at Wichita, Kansas, in amount of $20.00 drawn on Pierre-National Bank, Pierre, South Dakota.

Specification 15: In that 2nd Lt. James H. Johnson, AC attchd unassgnd 1st Heavy Bombardment Processing Headquarters, being indebted to the Broadview Hotel, Wichita, Kansas in the sum of $52.05 for a hotel bill, which amount became due and payable on or about March 30, 1943, did, at Wichita, Kansas, from on or about March 30, 1943 to on or about April 15, 1943, dishonorably fail and neglect to pay said debt.

Specification 16: In that 2nd Lt. James H. Johnson, AC attached unasgnd 1st Heavy Bombardment Processing Headquarters, did at the Clayton Hotel, Salina, Kansas, from about February 11, 1943 to about March 1, 1943, wrongfully and unlawfully live and cohabit with one Dorothy Smith, a woman not his wife.

Specification 17: In that 2nd Lt. James H. Johnson, AC attchd unasgnd 1st Heavy Bombardment Processing Headquarters, being indebted to Mrs. Mabel Clark, Salina, Kansas in the sum of $18.00 for room rent, which amount became due and payable on or about April 7, 1943, did, at Salina, Kansas, from on or about April 7, 1943 to on or about April 22, 1943, dishonorably fail and neglect to pay said debt.

Specification 18: In that 2nd Lt. James H. Johnson, AC attchd unasgnd 1st Heavy Bombardment Processing Headquarters, being indebted to the Station Hospital, Smoky Hill Army Air Field, Salina, Kansas in the sum of $11.00 for board, which amount became due and payable on or about February 28, 1943, did, at Smoky Hill Army Air Field, Salina, Kansas, from on or about February 28, 1943 to on or about April 22, 1943, dishonorably fail and neglect to pay said debt.

He pleaded guilty to and was found guilty of all of the Charges and Specifications. There was no evidence of any prior convictions submitted. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, to be confined at hard labor at such place as the reviewing authority may direct for five years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The accused was arraigned upon the two Charges and nineteen Specifications. He pleaded guilty to both Charges and all Specifications. The prosecution offered no evidence and presented no witnesses.

4. The accused elected to remain silent and presented no witnesses.

5. The Charges and Specifications as to which the accused has admitted his guilt allege that he was absent without leave from 19 March to 22 April 1943 in violation of Article of War 61, that in violation of the 96th Article of War on fourteen separate occasions he made and uttered false checks or drafts upon banks in which he had no deposits in amounts varying from $10 to $25 and totaling $270; that on three occasions he failed to pay his lawful debts; and that he wrongfully and unlawfully cohabited with a woman not his wife.

6. Because of his previous good record and his value to the service three members of the court recommend clemency for the accused. Defense counsel also recommend clemency giving the following reasons: the accused served as an enlisted man from 14 October 1940 to 21 November 1942 with an excellent record. He also served well and without charges or convictions

until he became involved in the difficulties described by the Specifications of the Charges. His troubles are traced to an association with a woman of questionable morals for whom he left his post without authority, cashed fourteen worthless checks, and failed to pay two hotel bills, and a room rental bill. All of these obligations have since been paid in full by accused's father. The requests for clemency are attached to the record. The accused has since married another woman.

7. The record shows the accused to be 25 years of age. He enlisted in the service on 14 October 1940 and was commissioned a 2nd Lieutenant on 21 November 1942 in the Air Corps.

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 and sentence, and to warrant confirmation thereof. Dismissal and confinement at hard labor are authorized upon conviction of violation of Articles of War 61 and 96.

William A. Rounds, Judge Advocate.

Charles LeBlum, Judge Advocate.

Herbert B. Fredrick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 29 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 James H. Johnson (0-733434), 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 of Charge I (Article of War 61) and its Specification, absence without leave for one month and three days, and of Charge II (Article of War 96) and 18 Specifications thereunder wherein on fourteen separate occasions accused made and uttered checks or drafts on banks in which he had no deposits or accounts, on three occasions he failed to pay his lawful debts and, in addition thereto, cohabited with a woman not his wife, and legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the confinement thereof be reduced to two years, that the sentence as thus modified be carried into execution and that the United States Disciplinary Barracks at 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.
1 - Record of trial
2 - Dft. ltr. for sig. ASW
3 - Form of action

(Sentence confirmed but confinement and forfeitures remitted. G.C.M.O. 257, 22 Sep 1943)

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

SPJGH
CM 235717

6 JUL 1943

UNITED STATES v. Second Lieutenant THOMAS E. BICKMORE (0-1844426), 376th Infantry.	94TH INFANTRY DIVISION Trial by G.C.M., convened at Camp Phillips, Kansas, 14 May 1943. Dismissal.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that, 2d Lieutenant Thomas E. Bickmore, Service Company 376th Infantry was, at Salina, Kansas, on or about March 28, 1943, in a public place, to wit, Blue Pacific Cafe, Salina, Kansas, drunk while in uniform.

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

Specification: In that 2d Lieutenant Thomas E. Bickmore, Service Co, 376th Infantry, did, without proper leave, absent himself from his organization and duties at Camp Phillips, Kansas from about 0615 10 April 1943, to about 2245 20 April 1943.

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

Specification: In that 2d Lieutenant Thomas E. Bickmore, Service Co, 376th Infantry, having been restricted to the limits of the Regimental Area, did, at Camp Phillips, Kansas, on or about 10 April 1943, break said restriction by going beyond the limits of said restriction.

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

3. On 28 March 1943, about 12:30 or 1:00 a.m., Sergeant Leon Olson and Private First Class Jack Lapin, Military Police Detachment, Camp Phillips, Kansas, went to the "Blue Pacific", a night club near Salina, Kansas, in response to a call which did not concern the accused. While they were there, Sergeant Olson observed the accused in uniform, holding a private who was ill and trying to go out, and pulled them apart. The accused then fell down. Sergeant Olson called Private Lapin, and they took the accused to the station and turned him over to Second Lieutenant Donald P. Copper. At the night club, the accused fell to the floor, could not take care of himself, appeared to have lost control of himself, could not stand very well, and his speech was not clear or coherent. He was not "actually disorderly" and had no intoxicating liquor on his person. The place was crowded with military personnel and civilians. Sergeant Olson was of the opinion that the accused was drunk and unable to walk by himself. Private Lapin stated at first that he could not say the accused was drunk and that he did not know whether he was drunk or not, but in response to a direct question from the court he said that in his opinion the accused was drunk. When the accused was brought to the office of Lieutenant Copper, he had difficulty in taking out his billfold and finding his "identification", dropped two dollar bills, reached over to pick them up, fell over on the floor, had difficulty in "getting his words out", and his "tongue seemed thick". The accused "reeked of alcohol". Lieutenant Copper expressed the opinion that the accused was drunk and under the influence of alcohol (R. 10-18).

On 3 April 1943, Captain Alexander Hughes, Jr., Adjutant, 376th Infantry, upon the orders of the regimental commander, called the accused to his office to restrict him to the regimental area pending investigation of court-martial charges. The accused was advised of the restriction and knew the bounds of his restriction. It was not thereafter lifted (R. 19-21).

The accused was assistant to Second Lieutenant Charles P. Macke, regimental Special Services Officer. He did not report to the office of Lieutenant Macke on the morning of 10 April 1943. When he saw that the accused was absent, Lieutenant Macke called and informed the First Sergeant. The accused did not report to the office at any time during the period

10 April to 20 April. Lieutenant Macke next heard from him on 20 April by telephone. Lieutenant Macke had not given the accused authority to leave the "bounds of the company" and had not assigned him to any specific duty that would keep him absent between these dates (R. 21-23).

An entry in the morning report of 11 April 1943 of the Service Company showing the accused from duty to absent without leave at 6:15 a.m., 10 April 1943, was received in evidence over the objection of the defense. Technician Fourth Grade Paul H. Meyer, acting First Sergeant of the Service Company, testified that he made that entry based upon information furnished him by Lieutenant Macke and Captain Buehrle, and that he made no personal check to ascertain if the accused was present. Captain William H. Buehrle testified that he initialed the morning report of 11 April 1943, based upon information furnished him by Lieutenant Macke, that he received an "official report" from another noncommissioned officer whom he had directed to look in the quarters of accused, but that he made no personal check to see if accused was absent. Captain Buehrle did not see the accused at any time between 11 April and 20 April 1943 (R. 24-34; Ex. A).

An entry in the morning report of 21 April 1943, showing the accused from absent without leave to arrest in quarters at 10:45 a.m., 20 April 1943, was received in evidence (R. 31; Ex. A).

4. The defense presented no testimony. The accused did not testify nor make an unsworn statement.

5. a. The Specification, The Charge: The evidence shows without contradiction that the accused was drunk in uniform in a public place, the Blue Pacific Cafe, as alleged. The accused could not stand very well, appeared to lose control of himself and fell to the floor, was unable to walk by himself and in the opinion of the two military policemen who took him back to town to keep him out of trouble, was drunk. In the Military Police office, acoused had difficulty in taking out a billfold, dropped two bills on the floor, fell over on the floor in reaching to pick them up, his tongue was thick in speaking, he had difficulty in getting his words out, had no control over himself and in the opinion of Lieutenant Copper was drunk.

b. The Specification, Additional Charge I: The morning report entry of 11 April 1943 was inadmissible to prove the beginning of

the absence, because the acting First Sergeant who made the entry and Captain Buehrle who initialed the entry both testified that the entry was based upon information furnished them, neither made any personal check to ascertain if accused was absent, and they had no personal knowledge of the initial absence (Dig. Ops. JAG 1912-30, sec. 1507).

The absence for substantially the period alleged is however otherwise shown by testimony of Lieutenant Macke that accused, his assistant, did not report to his office on the morning of 10 April 1943, and did not report to the office during the period 10 April to 20 April 1943, and the testimony of his company commander, Captain Buehrle, that he did not see the accused at any time between 11 April and 20 April 1943. The erroneous receipt in evidence of the morning report entry of 11 April 1943 showing the initial absence did not prejudice any substantial right of the accused.

c. The Specification, Additional Charge II: It is shown that the accused was duly restricted to the regimental area, but is not shown that he went beyond the limits of the restriction. Although absent from his company and from his office, there is nothing in the record to show that he was at any time outside of the regimental area. The record does not support the findings of guilty of Additional Charge II, and the Specification thereunder.

6. The accused is 34 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 6 May 1942; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty, 9 December 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 insufficient to support the findings of guilty of Additional Charge II and the Specification thereunder, legally sufficient to support the findings of guilty of all other Charges and Specifications, 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.

Carlos E. Wade Jr., Judge Advocate

Samuel M. Driver, Judge Advocate

F. J. Lotterhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 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 Thomas E. Bickmore (0-1844426), 376th Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Additional Charge II and the Specification thereunder (breach of restriction), legally sufficient to support the findings of guilty of all other Charges and Specifications and legally sufficient to support the sentence and to warrant confirmation of the sentence. The accused was found drunk in uniform in a public place (Spec., Chg.), in violation of the 96th Article of War, and was absent without leave from 10 April to 20 April 1943 (Spec., Add. Chg. I), in violation of the 61st Article of War. 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 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 of guilty of Additional Charge II and the Specification thereunder disapproved. Sentence confirmed. G.C.M.O. 188, 4 Aug 1943)

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

SPJGK
CM 235738

19 AUG 1943

UNITED STATES	PANAMA COAST ARTILLERY COMMAND
v.	Trial by G.C.M., convened at Fort Randolph, Canal Zone, 6 April 1943. Dismissal.
Second Lieutenant FLORIAN J. KUENNEN (O-1040420), Coast Artillery.	

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

CHARGE: Violation of the 95th Article of War.

Specification: In that Second Lieutenant Florian J. Kuennen, 88th Coast Artillery (AA), then Second Lieutenant, 719th Coast Artillery Battery (Separate) (AA) (SM), was, at Colon, Republic of Panama, on or about February 19, 1943, in a public place, to wit, La Conga Bar, drunk and disorderly while in uniform.

He pleaded not guilty to and was found guilty of the Charge and the Specification. Evidence was introduced of one previous conviction by general court-martial for being drunk and disorderly in violation of Article of War 96. He was sentenced to dismissal. 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 as follows:

On 19 February 1943, shortly after midnight, accused was in the La Conga Bar, a public place in Colon, Republic of Panama. Complaint was made to Maximo Moreno, A Panamanian policeman that accused was

bothering two men and a woman who were sitting at a table in the bar. Moreno approached the accused who was standing near the complainant's table, placed his hand upon the shoulder of accused and advised him to "keep away". Accused left the table but returned. He was again warned by Moreno to "keep himself off from trouble". Accused continued his disregard of the warning. He did not stagger but in the opinion of the Panamanian policeman accused was drunk (R. 7-10, 14). Moreno called the Military Police (R. 8-9). Second Lieutenant William R. Gragg, Company D, 760th Military Police Battalion, and officer of the day, and Private Ernest L. Riley, commander of the Military Police guard, responded to the call. Arriving at the La Conga Bar at 1:15 o'clock a.m. the accused dressed in uniform was cursing, raving and threatening the Panamanian policeman and the Panamanian race as a whole. Accused said, "I am going to kill every God damn Spic I can kill" (R. 15). Lieutenant Gragg and Private Riley took accused outside the bar "and tried to quiet him down but could not do so" (R. 15). The eyes of accused were "very blood shot". He was unsteady on his feet and smelled of liquor. His speech was thick and he was "wobbly" as he walked. He was cursing in a loud tone. - "You might even call it raving" (R. 17). He used the expression, "you damn son-of-a-bitch * * * it seemed to be (sic) he was speaking to everybody" (R. 21). Lieutenant Gragg stated that he had been a civilian policeman two years before entering the Army and a member of the military police one year. He had seen "quite a few drunken men" and in his opinion the accused was drunk (R. 16). Lieutenant Gragg placed accused in arrest and with the aid of Riley put him in the military police command car and took him to Fort DeLesseps guardhouse (R. 22). He was placed in a cell block with a number of prisoners, one of whom was a Mexican private. Accused tried to start a fight with the Mexican and threatened to kill him (R. 18, 23). Accused was then taken to Cristobal prison (R. 19). Corporal Frank Moeller, 760th Military Police Battalion was on duty in the guardhouse as Corporal of the Post when accused was brought in. He noticed that accused staggered as he walked into the guardhouse. Accused's eyes were "glassy", his speech was thick and hard to understand. Accused started a "commotion" with another soldier and, in the opinion of the witness, the accused was drunk (R. 26-27).

4. For the defense Lieutenant Colonel Isaac J. Dalrymple, the investigating officer, testified that he had known accused about nine months during which time accused was under his command. He had never seen accused act in any manner which would reflect discredit upon himself. He had observed the work of accused and stated that he would like to have accused again in his command. Continuing, Lieutenant Colonel Dalrymple stated,

> " * * * he is a conscientious and a hard working officer and at no time have I ever seen him in any misconduct or anything of a derelict nature which might belittle him as an officer" (R. 30).

Lieutenant Colonel William S. Waldo, Second Battalion, 88th Coast Artillery

(AA) stated that accused belonged to his battalion. He stated that accused showed interest in his work and was learning the 40 millimeter gun satisfactorily and that accused was energetic and willing to work. Witness stated that he had requested that accused be assigned to him; that accused had met his expectations and that he would be glad to retain the accused as an officer of his command (R. 32-34). Major Harold G. Haskell, 88th Coast Artillery (AA) stated that he was at one time accused's battery commander. The first month that accused was in his command his services were rated as "very satisfactory" and for the succeeding months as "excellent". Witness stated "* * * he is a smart man and knows his job well * * *" (R. 36-37). Major Thomas H. Mayers, Second Battalion, 88th Coast Artillery, and Captain John R. Bealle, 719th Coast Artillery Battery Separate (AA) SM, each stated that accused had served under his command, that accused's services were satisfactory and that he would like to have accused continue in his command (R. 39, 42, 43). First Lieutenant Benedict Arthur Henderson, Regimental Chaplain, 88th Coast Artillery (AA), stated that he had known accused for five months; that accused was a regular attendant upon religious services and encouraged others to attend.

> "He has been a great deal of help to me in inspiring the men with spirituality - the men under him - and encouraging them to attend church services, both Catholic and Protestant. As far as I know, he has always given a good example on that score. I likewise would estimate his character as being very exemplary and becoming an officer" (R. 45).

The accused declined to testify or make an unsworn statement.

The undisputed evidence shows that accused on the night of 19 February 1943, while in uniform was drunk and disorderly in a public place, to wit, the La Conga Bar. His conduct was such that one of the civilian patrons of the La Conga Bar requested a Panamanian policeman to keep accused away from his table. Accused persisted in his disregard of the admonition of the Panamanian policeman who finally called the Military Police. Lieutenant Gragg, officer of the day, and Private Riley, commander of the Military Police guard, responded to the call. When they arrived at the La Conga Bar the accused was "cursing and raving" and using such expressions as "you damn son-of-a-bitch" and "I am going to kill every God damn Spic I can kill". His voice was loud and boisterous and "he was threatening to kill people". His eyes were bloodshot, he staggered as he walked and he talked with difficulty. The lieutenant of the Military Police tried to quiet him but to no avail. He was placed in arrest and taken to the guardhouse at Fort DeLesseps where he continued his disorderly conduct by trying to engage in a fight with another prisoner.

In the opinion of the Board of Review the drunkenness of the accused was so gross and his conduct so disorderly as fully to warrant the court

in finding him guilty of a violation of Article of War 95.

The record of trial of this officer upon other offenses (CM 238792) now before the Board of Review should be considered in connection with action upon this record.

5. War Department records show that the accused is 26 years of age. He attended high school four years and was graduated from Loras College (B.A.) in 1940. He served as an enlisted man from 1 January 1941 to 5 June 1942, upon which latter date he was graduated from Anti-aircraft Artillery School, Camp Davis, North Carolina, and appointed a second lieutenant, Army of the United States. In recommending accused for the Officer Candidate School his commanding officer stated that accused was of "excellent character, necessary background and education either formal or practical to make probable the successful completion of the course".

6. The court was legally constituted and had jurisdiction of the person and subject matter. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of violation of Article of War 95.

_____, Judge Advocate.

(On Leave), Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

(Filed without further action in view of the execution of the sentence to dismissal in a subsequent case, C.M. 238792, confirmed in G.C.M.O. 279, 30 Sep 1943)

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

SPJGN
CM 235746

18 JUN 1943

U N I T E D S T A T E S	)	EIGHTH SERVICE COMMAND ARMY SERVICE FORCES
v.	)	Trial by G.C.M., convened at Camp Hood, Texas, May 15 and 19, 1943. Dismissal.
Second Lieutenant GLOVER L. SAMUELS (0-1823216), 758th Tank Battalion (L).	)	

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 2nd Lt. Glover L. Samuels, 758th Tank Battalion, did, at Camp Hood, Texas, on or about April 21, 1943, wrongfully and indecently place his hand on the leg of Technician 5th Grade Glenn D. Chaffin, and attempted to unbutton the front of his coveralls near the private parts of Technician 5th Grade Glenn D. Chaffin.

Specification 2: In that 2nd Lt. Glover L. Samuels, 758th Tank Battalion, did, at Camp Hood, Texas, on or about April 25, 1943, wrongfully and indecently approach Corporal John Hubiak and ask him the following obscene question: "Corporal, how would you like to have your nuts blowed?" or words to that effect.

He pleaded not guilty to and was found guilty of the Charge and both Specifications. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority disapproved so much of the finding of guilty of Specification 1 as involves a finding of guilty of the words, "place his hand on the leg of Technician 5th Grade Glenn D. Chaffin", approved the sentence, remitted the forfeiture of pay and allowances and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution, in brief, shows that on April 21, 1943, on the Government reservation at Camp Hood, Texas, Corporal Glenn D. Chaffin, 113th Cavalry, first saw the accused when the latter was assigned, in the course of a training maneuver, to the car which Chaffin was driving. About 15 minutes after the reconnaissance patrol problem got under way, the accused tried to unfasten the fly of Chaffin's overalls, below the belt. Chaffin told the accused to quit, which he did; but, about 15 minutes later, he again tried to unbutton the fly of Chaffin's overalls, and succeeded in unbuttoning the first button. Chaffin pushed the accused's hand away and told him to stop, which he did. Then, in about 20 minutes, he made a third attempt, and, this time, Chaffin told him to stop or he would knock him down. When the accused asked Chaffin his name, the corporal told him, "Richard Jones, Troop A", because he did not want the accused to contact him any more.

The accused took from his billfold and gave to Chaffin the calling card, introduced in evidence as Exhibit "A", and told the corporal if he wanted to get in touch with him, to call the number written on the back. This card is engraved, "Glover Lawrence Samuels, Lieutenant United States Army". Chaffin next saw the accused on April 27 in Colonel Heavey's office, later over at the BOQ when he asked Chaffin some questions, and next in court. He had not been around negro troops in the Army, and did not know any negroes at his home. He had heard, a few times at "bull" sessions in his organization, some discussion of abnormal relationships between men.

The terrain over which Chaffin drove the truck was rough. However he drove slowly, and the accused was not thrown against him, but moved over of his own accord. In the investigation before the four colonels, Chaffin stated that he had told the accused he would knock him down if he did not leave him alone, or rather he told the accused he had better stop if he wanted to live. The investigating officer, Lieutenant Wells, had requested him to go to the accused's quarters, and he was there asked by the accused if he had reported the matter before Corporal Hubiak had made his report (R. 5-12).

The first time Corporal John Hubiak, 113th Cavalry, saw the accused was Thursday night, April 22, on the way to the canteen. When the accused, who is a colored officer, called to Hubiak, the latter saluted and was asked by the accused, "Would you do me a favor?" Hubiak said he would if he could, he was going to the canteen. In reply to the accused's question as to how long he would be at the canteen, Hubiak answered about 10 or 15 minutes, whereupon the accused said he would wait until he came back; but Hubiak went off with some friends whom he met at the canteen and did not come back. He next saw the accused on Sunday night, April 25, at the same place, 172nd Street and South Avenue, at a quarter to ten. The accused called "corporal", and again asked if he would do him a favor, then, if he was not the same corporal he had stopped the other night. Being informed that he was, the accused inquired, "How would you like to have your nuts blowed?" This, coming from the Lieutenant, "kinda stunned" the corporal who went on to his barracks.

Hubiak did not know Chaffin personally, but had seen him in the regiment. Both times he saw the accused, the latter was in the same place, at night, right by the motor pool, but the corporal had no engagement to meet him there. On cross-examination by the defense, it was shown that Private Perna had asked Hubiak if he had not met this same colored officer. Private Perna had then related an experience practically identical with Hubiak's. The latter had heard a lot of discussion about abnormal relationships involving the use of the term, "blowing nuts", and knew what the officer meant (R. 14-18)

4. The evidence for the defense was adduced from three character witnesses and the accused. Second Lieutenant Adolph Holmes, 827th Tank Destroyer Battalion, a friend of the accused, had known him for twelve years, ten of them at Leavenworth; he also knew his friends and acquaintances, and his reputation among them was good. Lieutenant Holmes was in

the 10th Cavalry for seven years. The accused was in the same organization for one year. They both went to Officer Candidate School at the same time, graduating together with the 13th Class. The accused's reputation among his friends there was good during the thirteen weeks when they were in the same company. Since the accused had received his commission, they had been together as friends and associates for four months, during which his reputation was good. Lieutenant Holmes did not know of his ever having been accused on a similar charge (R. 20-22).

Second Lieutenant George H. Couch, 1st Company, Officer Candidate School, was also in the same company as the accused at Officer Candidate School, knew his associates and friends, and considered him an excellent man (R. 23).

First Lieutenant Evan R. Yazetich, Officer Candidate School Regiment, was also in the same company as accused at the school, and knew his friends and associates; his reputation was excellent (R. 24).

5. After being advised of his rights, the accused was sworn and testified in his own behalf. He said he never made any such advances or statements to Chaffin, as those charged, nor was there any discussion of that nature. The terrain over which they drove on the problem was fairly rough, and it is possible he had bounced against Chaffin, accidentally, once or twice. He did not give him the card introduced as Exhibit "A", which is his card however, and the phone number is his; he put it there, but did not write "747 TR" on it. This he explained, is an abbreviation for tank battalion, and the 747th Tank Battalion is right across the street from the 758th, of which the accused is a member. He did not put the "G 8 C" on the card either. He testified that the card might have dropped out of his pocket into the vehicle, as, at that time he had some of his cards with him. He carried them in one of the compartments of his billfold and admitted that it would have been difficult for one to have dropped out. He habitually wrote his telephone number on his cards, and had written it on Exhibit "A" about a week before Easter, April 25, 1943. He first testified he might have some cards with him at the trial; later that he did not have any. When the accused got into the truck with Chaffin, and told him he would use him as communication, Chaffin had reddened slightly and said, "All right". Later when the accused asked him what he thought their position was, Chaffin said, "you are in charge, you ought to know where we are", and turned his back on the accused. (R. 25-30).

He had no agreement to meet Hubiak at 172nd Street and South Avenue, had never seen him before the investigation on April 27, and never made the statement "Do you want to have your nuts blowed"? He did not know this remark was an abnormal one; he had been normal all his life. He had been in the service since April 11, 1941, as enlisted man, corporal and sergeant, about eighteen months in all. He was a sergeant when he went to Officer Candidate School, graduated there in the First Company, 13th Class.

6. Chaffin, recalled by the prosecution, testified he did nothing to indicate his displeasure at having to drive for a colored officer; that he has no prejudice against them, as such. When they were in the car, the accused said he had a white doctor friend in California withwhom he had done "this sort of thing" before; also that he and another friend of his, an enlisted man, had been together and done "this sort of thing". The accused told Chaffin this after the latter had "refused" him three times. The corporal actually saw the accused write the phone number on the card which he had given him (R. 30-33).

7. The accused, being recalled by the defense, admitted mentioning to Chaffin that he had a good friend in California, a white doctor, who holds the Congressional Medal of Honor. This doctor, whom he identified by the name of Spargard, was employed by his father and mother; he "threw a party" in honor of the accused, and invited "quite a few movie stars"; but accused had never had abnormal relations with that doctor or any other person. During the first world war the doctor was an aviator, had shown the accused his Congressional Medal (R. 34).

8. There is a sharp conflict between the testimony of the accused in his own defense, on the one hand, and that of Corporal Chaffin and Corporal Hubiak, on the other. Weighing the testimony of the two corporals, it supports the findings of guilty beyond a reasonable doubt. Corporal Chaffin's testimony is supported by his production of the accused's calling card, which Corporal Chaffin testified the accused had given him. The accused admitted the card was his, and that he had written his telephone number on it. The accused stated he kept his cards in one of the compartments of his billfold, and that it would have been difficult for one of the cards to have dropped out; but in another part of his testimony, in an endeavor to account for the card being in the possession of Corporal Chaffin, he states it might have dropped out of his pocket into the vehicle. The conclusion may be drawn that, as to the card, the testimony of Corporal Chaffin is true; that of the accused, a mere denial in an endeavor to escape being found guilty.

The testimony of Corporal Chaffin concerning the details of statements made to him by the accused about a doctor friend in California, including the statement that the accused and his doctor friend had engaged in abnormal relations, is substantiated in part by the testimony of the accused wherein he admitted that he had mentioned to Corporal Chaffin that he, the accused, had such a friend. The accused described this doctor friend as a holder of the Congressional Medal of Honor who "threw a party" for him to which "quite a number of movie stars" were invited. Obviously Corporal Chaffin could not have known of this asserted friendship except from the accused.

The testimony of Corporal Hubiak, with its detailed account of his being accosted twice at night in the same place by the accused, indicates this testimony was true, not fabricated, and that the accused really asked him the "favor" mentioned. The expression employed by the accused is an unusual one; and though the accused testified he did not know that the remark was an abnormal one, Corporal Hubiak could hardly have imagined it. The defense, on cross-examination of Corporal Hubiak, brought out the fact that one Private Perna had related an identical experience with this same colored officer.

It was shown that Corporal Hubiak did not know Corporal Chaffin, personally, so it is not plausible that they framed up their stories together.

To establish the guilt of the accused, there is the testimony of the two corporals, and the mute evidence of the accused's calling card, contradicted merely by the testimony of the accused, which is not altogether consistent. Considered in its entirety the record sustains beyond a reasonable doubt the findings of guilty and shows a clear and unequivocal violation of Article of War 95.

9. The accused is 20 years of age. The records of the Office of The Adjutant General show that he was inducted into the Army on April 11, 1941. Upon graduation from the Tank Destroyer School on January 14, 1943, he was commissioned a temporary second lieutenant, Army of the United States.

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. A sentence of dismissal is mandatory upon conviction of a violation of Article of War 95.

Chas. L. Cresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 24 JUN 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Glover L. Samuels (0-1823216), 758th Tank Battalion (L).

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 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 foregoing recommendation should such action meet with approval.

Myron C. Cramer

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

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

(Sentence as approved by reviewing authority confirmed. G.C.M.O. 175, 30 Jul 1943)

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

SPJGQ
CM 235753

UNITED STATES	)	FOURTH AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at McChord Field, Washington. 10 May 1943. Dismissal.
	)	
First Lieutenant CALVERT W. CANNON (0-342720), Air Corps.	)	

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 85th Article of War. (Finding of not guilty.)

Specification 1: (Finding of not guilty)

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

Specification 1: In that 1st Lt. Calvert W. Cannon, AC, 33rd Base Hq & Air Base Squadron, was, on train #93 of the Louisville & Nashville Railroad between Chicago, Ill. and Nashville, Tennessee, on or about Dec. 29, 1942, drunk and disorderly, to the disgrace of the military service.

Specification 2: In that 1st Lt. Calvert W. Cannon, AC, 33rd Base Hq & Air Base Squadron, did, on train #93 of the Louisville & Nashville Railroad between Chicago, Ill. and Nashville, Tennessee, on or about Dec. 29, 1942, wrongfully kick Sergeant Milford J. Fleagle in the eye with his foot.

He pleaded not guilty to the Charges and Specifications. He was found not guilty of Charge I and the Specification thereunder, guilty of Specification 1, Charge II, except the words "drunk and ", guilty of Specification 2, Charge II, and guilty of Charge II. There was no evidence of any prior

convictions submitted. He 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 Article of War 48.

3. The pertinent evidence for the prosecution shows that the accused, by Special Order 334, Air Base Headquarters, Paine Field, Washington, dated 26 December 1942, was designated escort to accompany the body of Second Lieutenant Charlie G. Tison, deceased, from Paine Field to Gainsville, Florida. The accused had accompanied the body to Chicago and there transferred it to one of the sections of a Louisville and Nashville Railroad Company train for Jacksonville, Florida. According to the testimony of Arthur R. Reynolds, a Pullman conductor on the section upon which the accused had his accommodations, along about midnight of 29 December 1942 he was called by the porter and found accused in the wrong berth of a Pullman car. He was drunk and refused to get out. He cursed everybody in the car and tried to kick the conductor in the face (Ex. 3). The conductor then went for assistance and procured a military police sergeant. In the meantime the accused got out of the berth and got into his own berth. When the accused saw the MP coming he proceeded to curse him. The MP tried to quiet him but the accused kicked the MP in the eye, knocking him down from the Pullman ladder and splitting his lower eye lid. Accused continued to use foul language and to curse. The conductor then asked the MP to desist and wired ahead to Nashville to have the military police meet the train on its arrival there. A squad of military police met the train there and two of them questioned the accused and after ascertaining his identity and duty permitted him to proceed with the train (Ex. 3). A sample of the language used by the accused was related by the witness. He called the sergeant of military police a "God damned little sawed off son-of-a-bitch * * *. If you don't get out of here I will break your fucking neck" (Ex. 3). The whole car was full of ladies.

Sergeant Milford J. Fleagle of the military police happened to be on the train escorting a prisoner when he was requested by Conductor Reynolds to lend him his aid in one of the Pullmans. He accompanied the conductor to a pullman and saw the accused in an upper berth clothed in pajamas and slippers. He observed by the uniform hanging from a hook that he was an officer. As soon as accused saw the sergeant he called him "a sawed off son-of-a-bitch" and threatened to break his "fucking" neck. Two women were standing nearby weeping. A mother in the car became hysterical. He approached the accused by means of the ladder and asked him to please be quiet, whereupon accused kicked him in the face splitting his lower eye lid. The witness succeeded after a time in quieting the accused and was walking away when the accused started cursing and threatening again. He went back up the ladder and was struck by the accused in and about the head, face, and neck (R. 20-22, 30-33). The witness had thrown his gun on the floor so that it would not become involved in the scuffle that might ensue and had a handcuff in his hand to use for his own protection (R. 27-28). At one time during the altercation the accused got out of the berth and stood in the aisle in his pajamas and cursed the civilians present and said

that they were no good deserters (R. 31). The witness was emphatic that the accused at the time was drunk (R. 34).

By deposition three passengers on the train who witnessed the occurrence testified. Mr. and Mrs. John G. Royster told of the refusal of the accused to get out of the berth, which belonged to Mrs. Royster, when asked, first, by Mr. Royster, then, by the porter, and then, by the conductor. To all of them he said "shut up". After the conductor left to get an MP the accused got out of the berth and went to the one in which he belonged (Ex. 5,6,7). Mr. Royster stated he was not abusive, nor obscene (Ex. 6), but would repeat "Shut up" in "a sing-song fashion". Miss Bertha Weishauple who was awakened by the commotion of the porter trying to get the accused to get out of the wrong berth stated that the language used by the accused was very vile and abusive; that he was very intoxicated. Accused told her the next morning that he did not remember anything about it (Ex. 7).

Corporal Joseph Zandy stated through deposition that he was a military policeman and met the train at Nashville, Tennessee. He talked to the accused as he lay in his berth. At that time accused was not drunk but answered his questions courteously. He permitted him to continue on his journey.

4. Upon the opening of the trial the defense counsel made a motion that Charge II should be brought under Article of War 96 rather than 95 on the theory that the Specifications as then worded could constitute a violation of the former article only. This motion was denied.

The defense counsel proceeded to introduce three depositions, each attesting to the excellent character and record of the accused (Exs. 8,9,10).

Accused took the stand on his own behalf. He related the circumstances leading up to the incident involved in these proceedings, namely: that he was assigned to escort the remains of Lieutenant Tison to Gainsville, that the latter was his cousin and very close friend, that from the evening of the 26th until the morning of the 29th he was on the Great Northern train en route from Everett to Chicago and had very little sleep during such time, that he did not drink any liquor on the trip (R. 45-47). On reaching Chicago he had one drink at lunch, and two later in the afternoon about 4 p.m. (R. 48). At Evansville he purchased a fifth of Scotch and had one drink from his bottle around 9:30 or 10 p.m. (R. 49). He slept immediately upon going to bed but was awakened by the conductor who informed him that he was in the wrong berth. The conductor left to get a military policeman. The porter convinced him of his error so he changed to his correct berth and tried to sleep (R. 52). Sometime later he saw the military policeman standing beneath his berth and telling him to get out of the berth. The accused first told him to "beat it", and later invited him "to come ahead if he thought he could get me out of my berth" (R. 52). He kicked the sergeant to keep him from climbing into the bed and to get rid of the latter's gun. After this scuffle the others left and he went back to sleep only to be awakened around midnight by the

military policeman in Nashville. After explaining, he was permitted to continue.

On cross-examination the accused explained the manner in which he had checked the accommodations arranged for the transportation of the remains of Lieutenant Tison. He also explained that his berth was the second on the left from the entrance to the car and that his mistake in getting into the wrong berth that night was due to the fact he came into the car from the opposite end (R. 59). His refusal to leave the berth when the conductor informed him of the error was due to his being confused at the sudden awakening from a sound sleep (R. 59). Upon fully waking he changed to his proper berth. The witness could not remember cursing the conductor although he was certain that he did not kick him. He did try to kick the military policeman in order to keep the latter from entering the berth and from using his gun. The witness was then excused (R. 64).

ERROR: It is noted that two of the persons whose depositions were taken are referred to in the record of the proceedings as "Mr. and Mrs. J. B. Royster". Actually, however, the middle initial should be "G" rather than "B" as is evidenced by their signatures on Exhibits 5 and 6. This discrepancy is of no material importance.

Further error is noted in that the trial judge advocate in his summation to the court incorrectly explained the law of evidence on the burden of proof assumed by the prosecution in any criminal case, stating:

> "Now by the burden of proof that we must carry and the weight of the testimony, I will express it in this way. Most of you have seen the old fashioned beam type scale, or type of scale where you put weights on one side and any other product or article you wish to weigh on the other side. If the beam balances, then the prosecution has not carried the burden of proof and your verdict would not be guilty, but if one side comes down, even the slightest amount, then the burden of proof has been carried by the prosecution."

This is an improper summary of the well-established rule of criminal law that the prosecution must present a quantum of evidence which is sufficient to convince the court of the guilt of the accused beyond all reasonable doubt (Winthrop's Military Law and Precedents, pp. 315, 316; MCM 1928, pp. 62, 63). However, the defense counsel in his summation attacked this interpretation and gave a brief but correct statement of the law on the point (R. 85, lines 4-16, Incl.). In view of the satisfactory nature of this refutation and explanation offered by the defense, it is believed that the court was in no way misled and that the accused was not seriously prejudiced.

5. The accused was convicted of disorderly conduct to the disgrace of the military service and of wrongfully kicking Sergeant Milford J. Fleagle in the eye with his foot on 29 December 1942 while on a train proceeding from Chicago, Illinois, to Nashville, Tennessee.

The evidence was clear that the accused was on a train proceeding from Chicago, Illinois, to Nashville, Tennessee on the night alleged and became involved in an altercation with the Pullman conductor and a sergeant of the military police. The two issues of fact are (1) was the accused's conduct disorderly, and (2) did he wrongfully kick the sergeant?

Black's Law Dictionary defines disorderly conduct as

"A term of loose and indefinite meaning - but signifying generally any behavior that is contrary to law, and more particularly such as tends to disturb the public peace or decorum, scandalize the community, or shock the public sense of morality."

The testimony of the Pullman conductor and the military police sergeant established a clear case of disorderly conduct on the part of the accused. His loud use of vile and obscene language in the presence of female spectators; his threats to break the sergeant's "fucking" neck; his abuse of the Pullman conductor and other civilians; and his kicking at the conductor and kicking the sergeant - all constituted conduct that disturbed the peace, scandalized the immediate community, and shocked those who witnessed it. That it was a disgrace to the military service need not be argued. There was no substantial evidence to the contrary and they were corroborated in part by the testimony of Miss Weishauple who described his language as vile and abusive. The evidence was therefore ample and overwhelming in support of the accused's disorderly conduct.

The evidence was equally strong that the accused kicked the sergeant in the face injuring his eye. The kick was wrongful and unjustified. It was clearly shown that the sergeant was in the performance of his duty as a citizen and soldier in endeavoring to get the accused to desist from the use of his vile and profane language. He made no threat or attempt to harm the accused in any way. Without provocation or justification he was kicked in the face by the accused. Needless to say such conduct was wrongful and disgraceful in a crowded Pullman car.

An issue of law has been raised. Assuming the accused's conduct to be as described by the prosecution's witnesses, did that constitute a violation of the 95th Article of War? It is conceded that such conduct constitutes a violation of the 96th Article of War because it tends to bring discredit upon the military service. The test for a violation of the 95th Article of War appears in paragraph 151, MCM 1928:

"The conduct contemplated is action or behavior * * * in dishonoring or disgracing the individual personally as a gentleman* * *."

It should not be necessary to review again the accused's conduct to show that it disgraced the accused personally as a gentleman. No gentleman worthy of that name would use such language and cause such a commotion in the presence of ladies in a crowded Pullman car at night. Notwithstanding the overwhelming evidence that he was drunk the court struck out of its findings the word "drunk". The accused is even more responsible for his conspicuously disorderly conduct if he were sober.

It is therefore the opinion of the Board that all of the elements of the offenses charged have been proven by substantial, competent evidence.

6. In view of the alleged excellent previous military record of the accused, his good reputation and his value to the service, the Staff Judge Advocate recommended in his review that the sentence of dismissal be suspended. The reviewing authority adopted this recommendation and forwarded it with the record. Defense counsel have filed a similar request.

7. War Department records show the accused to be 28 years of age. He was commissioned second lieutenant, Field Artillery Reserve 8 June 1936, having served in the ROTC from 12 September 1932 to 7 June 1935 and attended Field Artillery ROTC training camp at Fort Benning, Georgia from 7 June 1935 to 18 July 1935. He was on active duty from 30 July 1939 to 12 August 1939. He was promoted to first lieutenant, Field Artillery, Army of the United States on 20 April 1940, and transferred to the Inactive Officers Reserve Corps on 8 November 1940. He was ordered to active duty 13 July 1942.

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

William L. Saunders, Judge Advocate

Dale Hoflum, Judge Advocate

Herbert R. Friedrich, Judge Advocate

1st Ind.

War Department, J.A.G.O., 26 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 First Lieutenant Calvert W. Cannon (O-342720), 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. I recommend that the sentence be confirmed but that the execution thereof be suspended during the pleasure of the President.

3. Consideration has been given to the attached radiogram and letter from Honorable Lex Green, House of Representatives, Washington, D. C., dated 27 May 1943 and 7 June 1943, and to brief filed by Ansell, Ansell & Marshall, Attorneys at Law, Washington, D. C., on behalf of accused.

4. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action, and a form of Executive action 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.

6 Incls.
Incl.1-Record of trial.
Incl.2-Draft of let. for sig. A.Sec. of War.
Incl.3-Form of action.
Incl.4-Radiogram 27 May 1943.
Incl.5-Let. Cong Green 7 June 1943
Incl.6-Brief

(Sentence confirmed but execution suspended. G.C.M.O. 193, 6 Aug 1943)

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

SPJGN
CM 235782

27 JUL 1943

UNITED STATES v. Private PETER J. VREDEVOOGD (36199310), Air Corps, Unassigned, Attached 806th Training Group.	4TH DISTRICT ARMY AIR FORCES TECHNICAL TRAINING COMMAND Trial by G.C.M., convened at Fresno, California, 12 May 1943. Dishonorable discharge and confinement for life. Penitentiary.

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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 Charge and Specification.

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Peter J. Vredevoogd, ACU, attached 806th Training Group, did, at Fresno, California, on or about April 29, 1943, forcibly and feloniously, against her will, have carnal knowledge of Frances Waltz.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of two previous convictions for violation of the 96th and 61st Articles of War was introduced. He was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The prosecution introduced the following evidence.

On the 28 April 1943, Mrs. Frances Waltz, who is 39 years of age, a registered nurse employed by Dr. G. W. Olson, lived at 4826 Inyo Street, Fresno, California. That evening she had been down town with a girl friend, Aleta Slusher, a nurse, returned home about 12:40, put on her nightgown, got into bed and about 1 o'clock there was a knock at her door.

She asked who it was, the reply was "Telegram", so she went to the door, turned the knob so the lock snapped open, put on the front porch light, did not open the door and then the accused broke in, threw the door open and slapped her in the face. He knocked her backwards. She started to scream as loud as she could, and told him to get out. He then struck her three or four blows in the face and on her shoulders, which cut her mouth, and bruised her shoulders and back. Next he choked her with his hands on her throat, put his hand over her mouth and nose so she could not breathe and she became momentarily unconscious twice before the intercourse. During most of this time she was fighting on the floor where he had thrown her. She knew his intentions; he said he was after one thing and one thing only, told her if she kept quiet he would not hurt her, otherwise he would kill her. When she was on the floor of the living room his knees were on her thighs; prior to this in the course of the struggle a small table was turned over and broken, the coffee table pushed across the room, and a chair upset, while she was trying to resist. He had his hand over her mouth so she could not make an outcry, she tried to push him off her; then he unbuttoned his trousers, his private parts penetrated hers and he had an emission. During the scuffle she felt his wallet in his hip pocket, pulled it out for identification, put it under her back, kicked him away, ran into the bathroom, and after copying his name and serial number on the water heater door, threw the wallet behind the water heater. She then took a douche; the accused kept hitting on the bathroom door, which she had locked. He wanted her to come out, and demanded his wallet. Her wallet and purse were on the chair in the front room. She missed them when the MPs came. After the accused left her house she wanted to go to her neighbors, Sergeant and Mrs. Haynes, about twenty-five feet away, but did not because she was afraid, so she telephoned them. Sergeant Haynes called the MPs and then came to her house. She related the circumstances to them and in about half an hour she again saw the accused, when the MPs brought him back, and she identified him. He was searched at her home and her wallet was found in his possession. She had been divorced seven years previously. She had a boy and a girl, eight and ten years old, who lived with her mother in Modesto, but she lives alone. She struggled her utmost to prevent the act but was unsuccessful. The act of intercourse was performed entirely against her will and she did not offer to prostitute herself to the accused. The accused at the time he was in her house did not act like a normal man, but he did not talk like a drunken man. He did not stagger and there was nothing wrong with his speech. She had never seen him before. Prosecution's Exhibits C,D,E, and F, photographs of Frances Waltz taken by J. E. Martin (R. 29) the morning after the attack, showing her bruises, were identified by her and introduced in evidence without objections (R. 30). During the accused's attack on her she struggled constantly, kicked, pushed, scratched, broke two of her fingernails, tried to run out the front door, but he grabbed her (R. 5-28).

On 29 April 1943, Sergeant Lewis Pellatiro, 1106th Guard Squadron, had a call to go to 4826 Inyo Street, the home of Mrs. Frances Waltz, where he found her and Sergeant and Mrs. Haynes. Mrs. Waltz's lip was

cut and bleeding, her hair all mussed up and she had been crying. The house showed signs of disorder - A flower pot had been broken, a curtain pushed away, the divan pulled away from the wall, a coffee table upset, a chair out of order, and a window in the corner broken. He took a statement from Mrs. Waltz and got a dark brown wallet containing pictures of the accused, and a pass for Peter J. Vredevoogd, which he took back to the field and turned over to the officer of the guard. At about 2 a.m. Sergeant Pellatiro, Corporal Bohnert, and Sergeant Waltz arrested the accused at the Maple Avenue gate. The accused gave his name, said he had not been any place but they took him to Mrs. Waltz's home for identification. Before they arrived there the accused, after being warned and told to keep quiet, said - "Theres no use taking me over there. I am guilty as hell, I raped her". After arriving at her residence the accused was searched by Sergeant Pellatiro and her pocketbook was found on him. He took his underwear from him at the guardhouse and turned it over to the officer of the guard. When he arrested the accused, his speech was clear, he walked straight, was not weaving nor staggering (R. 31-39).

Sergeant Jack C. Waltz, 1106th Guard Squadron, who is not related to Mrs. Frances Waltz, and who was with Sergeant Pellatiro, when they arrested the accused on 29 April 1943, and took him to 4826 Inyo Street, testified, in substance, to the same effect as Sergeant Pellatiro, and corroborated his testimony (R. 40-43).

4. The defense introduced as Exhibits 1,2,3,4 and 5 photographs of 4826 Inyo Street and adjoining properties, taken by Staff Sergeant William J. Dubois and identified by him (R. 47-48).

5. The accused, after being advised of his rights, elected to make a sworn statement and testified as follows:

On the evening of 28 April, in Class A uniform, with a pass, he went to "Johnny's Place" by himself, starting drinking, and left there between 11 and 12 o'clock, feeling intoxicated, or light-headed. He was able to walk, knew he was late, headed for the gate and Mr. Bryant's house. When about two blocks from Maple and Ventura Streets he was all muddled up, did not know where he was going and the first house he came to he knocked on the door. There was a light showing on the lawn, he could not see inside the house, no one said anything to him and he did not say anything about a telegram. A woman in a nightgown, or slip, opened the door, he put his foot in the doorway and she started hollering. He wanted to ask her where Walter Bryant lived, but she started screaming at him and he got scared. He tried to stop her hollering by holding his hand over her mouth and then he went into the house. She then said that what he came for would cost him more than he had. He had no idea of attacking her at that time, but thought she meant if he wanted intercourse that would cost him more than he had. After that he started struggling with her, the rug shifted to one side, and a big vase fell on the floor and broke. He put her on the floor, without much force; she was struggling, screamed quite a bit, and he then started talking to her. She calmed down, he had intercourse with her, she

resisted during the act, but after a while did not seem to care and just lay there. He was under the impression she was asking for money. At the end of the act she gave in, enjoyed every bit of it, moved her hips and never made any effort to phone. After she relaxed he had his hand on the floor, but she did not kick him, nor grab his privates, nor attempt to. He missed his wallet when on the street and wanted to comb his hair, but does not remember when she got it. He went back into the house, she was in the bathroom, he asked her for his pocket book. She said she did not have it, so he took hers and left the house. He had no difficulty in having intercourse, but had no idea of doing so when he went into the house. He had seen her in the yard when he visited Mr. Bryant but never paid any attention to her. By her telling him what he came for would cost him more than he had, first gave him the idea of having intercourse with her. He thought she was a prostitute, selling it. He did not know that evening of what the crime of rape consisted, and Sergeant Pellatiro did not advise him about it, nor ever warn him of his rights, but Lieutenant Harris did when he took the statement of the accused on 29 April.

After he left Johnny's he knew what he was doing, everything was a little foggy but he remembered conversations pretty clearly. He had always been that way. He had his hand over her mouth to prevent her from screaming; when she screamed she started running around. He held on to her, the rug pulled and the furniture moved. He remembers the conversation when she locked herself in the bathroom. His statement to Lieutenant Harris that he got crazy ideas was not "about raising heck", and did not mean anything. Sergeants Waltz and Pellatiro practically made him say he was as "guilty as hell", there was no use taking him over. They jumped off the truck and said, "you are the guy", they did not compel him but hollered at him and "I said that". The woman ceased struggling when she and the accused were on the living room floor. He had to hold her, but not very long. Then he had sexual intercourse with her. There was no petting or love making before. They were on the floor and she was asking him why he wanted to do that. She ceased struggling before he started. He did not admit to the guard it was rape he committed, and does not know exactly what rape is. When she was calm, he had intercourse with her, did not kiss her, she did not put her arms around him, she moved her hips, and worked up to a climax. After he had her on the floor he unbuttoned his pants and started having intercourse with her. After he let her up she said he had better get back to camp before he got into trouble. She then walked into the bathroom and locked the door. She did not ask him for any money, and he did not offer to pay her anything. He did not think it unusual to choose the floor to have intercourse. He was there about half an hour, did not hold on to her after she got up. He knew what he was doing at the time and so did she.

6. Technical Sergeant James H. Haynes, a witness for the court, who lived at 4830 Inyo Street, had known Mrs. Frances Waltz for four months. On the night of 28-29 April he did not hear screams coming from her house. He and his wife were sound sleepers. When the phone rang his wife answered it and they went right over to Mrs. Waltz's house where

they found the furniture disarranged with other signs of a struggle. Mrs. Waltz had her lip cut, was very excited, nervous and in bad shape. Since he has known Mrs. Waltz he has not seen her in the company of men. He has seen cars there and a lieutenant and some boys talking to her once in a great while. She had been out with Sergeant and Mrs. Haynes, and was always respectable. They never had to question the truth of any statements she made. He had seen her take a drink, but never drunk (R. 70-75).

Major Frank H. Prior testified that to resist a criminal attack a woman could run away, call for help, telephone, run out on the street, or scratch, claw the eyes of her attacker, kick him in the stomach and private parts. Major Prior thought a nurse should have some experience in taking care of anyone who was violent and would be able generally to protect herself. In his opinion it would be possible for a man of 23 to accomplish sexual intercourse with a woman of 39, by striking her. Through struggling, her strength would be dissipated and choking her would also effect this result, but the marks might not show on her throat after an hour or two or three days. Temporary suffocation could cause a momentary lapse of consciousness and the thinking capacity would be decreased indefinitely (R. 76-79).

7. The Specification alleges that the accused did, at Fresno, California, on or about 29 April 1943, "* * * forcefully and feloniously against her will, have carnal knowledge of Frances Waltz". 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, it becomes apparent that the accused is guilty of rape as charged.

The testimony of Frances Waltz 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 against her will. The essential elements of the offense of rape relative to the use of force, and honest resistance by the victim are shown not only by the testimony of Frances Waltz, but by several corroborating circumstances - by the physical evidence of her beaten and bruised face, by the disordered condition of her house, showing that a struggle was engaged in there, and by the admissions of the accused that he was "guilty as hell". Considered in its entirety, the evidence shows beyond a reasonable doubt every element of the crime alleged, and justifies the findings of guilty.

8. The charge sheet shows the accused is 23 years of age, with no prior service. He was inducted 21 March 1942, for the duration of the war plus six months.

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 thereof. A sentence of death or imprisonment for life is mandatory upon conviction of a violation of Article of War 92.

Thos. 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.

(251)

15 JUL 1943

SPJGH
CM 235849

UNITED STATES	)	NEW ORLEANS PORT OF EMBARKATION
	)	
v.	)	Trial by G.C.M., convened
	)	at New Orleans Staging
Second Lieutenant RALPH	)	Area, New Orleans, Louisiana,
N. MATHENY (O-C050366),	)	24 May 1943. Dismissal.
Coast Artillery 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 95th Article of War.

Specification 1. In that 2nd. Lt. Ralph N. Matheny did, at New Orleans, Louisiana, on or about April 18, 1943, with intent to defraud, wrongfully and unlawfully make and utter to the St. Charles Hotel, a certain check, in words and figures as follows, to wit:

New Orleans, La., April 18, 1943.

Third National Bank BANK

Dayton, Ohio

Pay to the order of ST. CHARLES HOTEL $25.00

Twenty-Five----------Dollars,

value received, I represent that the above amount is on deposit in said bank and in my name subject to this check and is hereby assigned to the payee or holder hereto.

Ralph N. Matheny
2nd. Lt.-C.A.A., A.U.S.

and by means thereof, did fraudulently obtain from the St. Charles Hotel the sum of $25.00, he, the said 2nd. Lt. Ralph N. Matheny, then well knowing that he did not have and not intending that he should have any account with the Third National Bank, Dayton, Ohio for the payment of said check.

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

Specification 1. In that 2nd. Lt. Ralph N. Matheny did, without proper leave, absent himself from his station at New Orleans Staging Area, New Orleans, Louisiana from about May 1, 1943 to about May 6, 1943.

He pleaded not guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service. The findings and sentence were not announced. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

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

a. Charge I. It was stipulated that the accused wrote, signed and presented on 18 April 1943 to the St. Charles Hotel for cash or other full and sufficient consideration received by him, a check on the Third National Bank, Dayton, Ohio, payable to the order of St. Charles Hotel in the amount of $25, signed "Ralph N. Matheny, 2nd Lt., C.A.C., A.U.S.", and that on that date accused had no checking or savings account in that bank in that name. The check referred to in the stipulation, with an attached slip of the Third National Bank stating "No account with us", was received in evidence (R. 10-11; Exs. A & C).

b. Charge II. An extract copy of the morning report of the 3rd Provisional Battalion, Casual Officers Detachment, New Orleans, Louisiana, for the month of May 1943, was introduced in evidence showing the accused from duty to absent without leave on 1 May, and "from AWOL" on 6 May. It was stipulated that the accused absented himself without leave on 1 May 1943 and returned to military control on 6 May 1943 (R. 10-11; Exs. A & B).

4. For the defense, Captain Cassius M. De Bellevue testified that he was Commanding Officer of the Casual Officers Detachment, of which

accused was a member. About 1 May 1943, the accused brought him a telegram indicating the birth of a child. When he congratulated accused, the accused asked if that was all. When asked what he meant the accused stated that he would like to get a leave to go home. Captain De Bellevue stated that since no emergency was involved it would be impossible to grant a leave. The accused saluted and left. Captain De Bellevue had been instructed to submit no applications for leave to higher authority, except in cases of emergency, as the officers in the battalion were all awaiting orders to move out to some place. On the morning of 1 May, when Captain De Bellevue was unable to find accused, he ascertained that accused had left but had not signed out as going on leave. The officers in the detachment had been alerted frequently, but Captain De Bellevue thought that the accused was not in alert status when he absented himself. Some officers remained in the Staging Area only three hours while others had remained as long as eight months. The officers were informed that they were in the detachment for processing preparatory for overseas duty. After roll call each morning at 8:30 a training schedule was carried on until 4:00 p.m. (R. 11-18).

The accused testified that he enlisted 20 August 1942 and was first stationed at Camp Wallace, Texas. He was graduated from an Officers Candidate School as a second lieutenant 21 January 1943, and arrived at New Orleans on 17 March 1943. The accused had been married eight years. A child born in November 1936, died five days after birth. When he arrived at New Orleans he was worried because his wife was not in any too good condition and was to have another baby. The telegram was his first intimation of the birth of the child. He had told his mother-in-law to get in touch with the Red Cross if anything went wrong. He received no word and around 10:30 showed the telegram to Lieutenant De Bellevue, asked for a leave, and was told that it was impossible to get one under those conditions. He absented himself without leave because he wanted to make sure that his wife and baby were getting along all right.

He had sent quite a bit of money home, had borrowed some money because he had played cards three or four times a week and several times lost money. He drew the check so that he would have some money to go home on in case he secured a leave. He was not on alert at the time he left and knew that leave had been granted to others while he had been there. He had paid off his gambling debts out of his own money, and the proceeds of the check were for himself.

On cross-examination and examination by the court he stated that his home was in Dayton, Ohio and that he had a high school education.

He did not ask permission to see the next higher officer, because Captain De Bellevue had on his desk a stack of returned applications for leave. He drew pay on 30 April 1943. It was his intention to stop at the hotel to see if the check (dated 18 April) had come back, but found that he could get a seat on a plane for Dayton and left hoping when he returned to New Orleans that he could still catch the check. He did not have a personal account in the Third National Bank but several years earlier was in charge of a Boy Scouts fund deposited in that bank. He did not attempt to open an account in the bank when he was home, nor did he attempt to cover the check with the bank while in Dayton, because he figured that the check had gone back to New Orleans. He thought that he could cover the check upon his return, and thought that the hotel "would simply get in touch" with him. He reported back on 6 May and was placed in arrest. On 8 or 9 May he gave the investigating officer money to make good the check (R. 19-30).

5. The evidence shows without dispute that the check for $25 which the accused cashed on 18 April 1943 at the St. Charles Hotel was deliberately drawn on a bank in which the accused had never had a personal account, and that the accused was deliberately absent without leave from 1 May to 6 May, 1943, after his request for leave had been denied by his commanding officer. All of the essential elements of the offenses were stipulated by accused.

The accused testified that he cashed the check on 18 April to have money on hand in case he secured a leave, because he had used his available funds to send money home and to pay his gambling debts, and with the belief that the hotel "would simply get in touch" with him when the check came back to it unpaid. He drew his pay on 30 April, but did not redeem the check at the hotel, because he was able to get a plane at once to his home, and took no steps to redeem it while in Dayton because he thought the check had gone back to New Orleans and that he could cover it on his return. After he received the telegram announcing the birth of a child, he was anxious to get home because their first child died five days after birth, and just left when his request for leave was denied because only emergency leaves were being granted. After he had been placed in arrest he gave the investigating officer money to make good the check. The testimony of accused discloses the deliberate commission of both offenses.

The evidence with respect to Charge I shows a deliberate cashing on 18 April 1943 of a check, containing a printed representation that the amount of the check was on deposit in the named bank subject to his check, drawn upon a bank in which the accused never had

a personal account. The failure of accused, who is 30 years of age, to redeem the check or take any steps to reimburse the hotel, until he gave the investigating officer money to make the check good on 8 or 9 May after his arrest, 20 days after the date of the check and 8 days after he received his pay check, warrants the conclusion that the check was uttered with intent to defraud, and negatives any contrary intention based on the assertion of belief by the accused that the hotel "would simply get in touch" with him when the check was not paid. Such an act of fraud is cited by Winthrop as an instance of conduct unbecoming an officer and gentleman in violation of the 61st (95th) Article of War (Winthrop's Military Law and Precedents, Reprint, p. 716).

6. The accused is 30 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 20 August 1942; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty 21 January 1943.

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 61st Article of War, and is mandatory upon conviction of a violation of the 95th Article of War.

Curtis S. Hill Jr., Judge Advocate

Samuel M. Driver, Judge Advocate

F. J. Fotterhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 29 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 Ralph N. Matheny (0-0050366), Coast Artillery 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 deliberately made and cashed a check for $25 drawn upon a bank in which he had never had a personal account. Restitution of the money obtained upon the check was made after his arrest. After his request for leave had been denied because it was not of an emergency nature, the accused deliberately absented himself without leave for six days. I recommend that the sentence to dismissal be confirmed and carried into execution.

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

Myron C. Cramer.

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

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

(Sentence confirmed. G.C.M.O. 288, 2 Oct 1943)

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

SPJGK
CM 235865

UNITED STATES v. Second Lieutenant MARVIN A. TINKHAM (0-1823518), Field Artillery.	104TH INFANTRY DIVISION Trial by G.C.M., convened at Camp Adair, Oregon, 25 May 1943. Dismissal and total forfeitures.

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

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Marvin A. Tinkham, Company A, Seven Hundred Fifth Tank Destroyer Battalion, did, without proper leave, absent himself from his organization at Camp Adair, Oregon, from about May 7, 1943, to about May 18, 1943.

He pleaded not guilty to and was found guilty of the Charge and the Specification thereunder. No evidence of previous convictions was introduced. He was sentenced to dismissal and forfeiture of 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:

First Lieutenant Harold L. Petrie, 705th Tank Destroyer Battalion, Camp Adair, Oregon, stated that he knew the accused and that accused was a

member of his organization. On the morning of 7 May 1943, the accused did not report for duty. Lieutenant Petrie made a search of accused's quarters and of the entire battalion area but accused could not be found. Witness thereupon ordered First Sergeant Merwin R. Laddusire to make an entry on the morning report of the organization showing the accused absent without leave (R. 6a, 6d). Lieutenant Petrie next saw the accused on the morning of 18 May 1943. Witness stated that he had been present with the organization during the period between 7 May and 18 May and if accused had presented himself for duty between those dates he (witness) would have known it (R. 6a). Lieutenant Petrie identified the morning report of Company A, 705th Tank Destroyer Battalion, and testified to the authenticity of the entries therein relating to the accused, showing accused absent without leave from 7 May to 18 May 1943 (R. 6b, 6d; Ex. A).

On the day of his return accused made no explanation of his unauthorized absence but stated to Lieutenant Petrie "that he knew he had done wrong, and that he came back ready to take his due punishment" (R. 6b).

The accused did not testify or make any statement and no evidence was introduced by the defense.

4. The accused is 36 years of age. The records in the Office of The Adjutant General relative to the service of the accused are limited to a report of the Federal Bureau of Investigation No. 1039558, showing that accused was arrested and tried at Cedar Rapids, Iowa, on 9 June 1935 for operating a motor vehicle while intoxicated and fined $100 and costs and placed under bond of $500. The Charge Sheet shows: Data as to service:

> "Prior service Jan. 1, 1932 to Sept. 5, 1934 (Enlisted Regular Army). Enlisted on Jan. 24, 1942 and discharged Jan. 27, 1943, per par. 60, Section X, AR 615-360 (Convenience of Government to accept commission). Commissioned second lieutenant A.U.S., Jan. 28, 1943, for duration of war plus six (6) months."

5. 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 of trial is legally sufficient to support the findings of guilty and the sentence. Dismissal is authorized upon conviction of violation of Article of War 61.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J. A.G.O., 30 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 Marvin A. Tinkham (O-1823518), Field Artillery.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. I recommend that the sentence be confirmed, but that the forfeitures adjudged 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,
Major General,
The Judge Advocate General.

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

(Sentence confirmed but forfeitures remitted. G.C.M.O. 243, 18 Sep 1943)

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

SPJGK
CM 235946

UNITED STATES	)	28TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Camp Gordon Johnston, Florida, 27 May 1943. Dismissal and total forfeitures.
	)	
Second Lieutenant ERNEST L. PARSONS (O-1293463), 112th Infantry.	)	

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. 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 Ernest L. Parsons, 112th Infantry, having been restricted to the limits of his post, Camp Gordon Johnston, Florida, pursuant to General Court Martial Order No. 16, Headquarters, 28th Infantry Division, dated March 23, 1943, did, at Camp Gordon Johnston, Florida, on or about May 3, 1943, break said restriction by going to Apalachicola, Florida.

Specification 2: In that 2nd Lieutenant Ernest L. Parsons, 112th Infantry, did, at Camp Gordon Johnston, Florida, on or about May 5, 1943 with intent to deceive, wrongfully make statements under oath to Captain Chester N. Bennett, Cavalry, Station Complement, Camp Gordon Johnston, Florida, Claims Investigating Officer, and to Major Rayburn H. Miller, 112th Infantry, Line of Duty Investigating Officer, then investigating the matter, to the effect that he had picked up Private 1st Class Irwin V. Milner, Anti-Tank Company, 112th Infantry, in Apalachicola, Florida, at about 2230, May 3, 1943, to bring him back to Camp, which

statement was false, in that he had in fact picked up the said Private 1st Class Irwin V. Milner at the Beachcomber Cafe, near Carrabelle, Florida, about 2000, May 3, 1943 and had been in company with him, had driven him by automobile from the said Beachcomber Cafe to Apalachicola, Florida, and had been drinking intoxicating liquor with him at various places from about 2000 to about 2230, May 3, 1943.

Specification 3: In that 2nd Lieutenant Ernest L. Parsons, 112th Infantry, did, at Camp Gordon Johnston, Florida, on or about May 7, 1943, wrongfully, wilfully and knowingly solicit Private 1st Class Irwin V. Milner to testify falsely if called before a military board, to the effect that he, the said 2nd Lieutenant Ernest L. Parsons had picked up the said Private 1st Class Irwin V. Milner at Apalachicola, Florida, in a drunken condition about 2230, May 3, 1943, and to suppress the truth, to wit, that he the said 2nd Lieutenant Ernest L. Parsons had about 2000, May 3, 1943 picked up the said Private 1st Class Irwin V. Milner at the Beachcomber Cafe, near Carrabelle, Florida, and had been in company with him during the intervening two and one-half hours.

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

Specification: In that 2nd Lieutenant Ernest L. Parsons, 112th Infantry, did, at Camp Gordon Johnston, Florida, from about 2000, May 3, 1943 to about 0400, May 4, 1943 absent himself without leave from his properly appointed place of duty as Duty Officer, Headquarters Company, 1st Battalion, 112th Infantry, after having repaired thereto for the performance of said duty.

He pleaded guilty and was found guilty of all Charges and Specifications. Evidence was introduced of one previous conviction by general court-martial for being drunk in uniform in a public place, in violation of Article of War 96. He was sentenced to dismissal, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one year. The reviewing authority approved the sentence, remitted the confinement imposed and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution consisted of (a) the testimony of First Lieutenant Thomas B. Clark, Service Company, 112th Infantry, Camp Gordon Johnston, who stated that he was the investigating officer; that he had known the accused since the latter part of December 1942, and that the accused was a member of the military service (R.7); (b) stipulation as to introduction of General Court-Martial Order No. 16, Headquarters

28th Infantry Division, dated 23 March 1943, promulgating the sentence of the accused to restriction to the limits of his post for three months and forfeiture of $50 per month for six months (R.8, Ex.1); and (c) stipulation as to introduction of "List Of Company Duty Officers", Headquarters Company, Service Battalion, 112th Infantry, dated 28 April (R.8, Ex. 2).

4. The accused did not testify or make any statement, and no evidence was introduced by the defense.

5. The record of trial discloses that the law member carefully and fully explained to the accused the meaning and effect of his plea of guilty, in response to which the accused reaffirmed his desire to plead guilty to all Charges and Specifications. Thus, by his plea, the accused admits his guilt of breaking restriction in violation of General Court-Martial Order No. 16, Headquarters 28th Infantry Division, dated 23 March 1943; of making certain false official statements with intent to deceive; of attempting to induce an enlisted man to give false testimony, and by so doing to suppress the truth; and of absence without leave, as alleged in Charges I and II and their respective Specifications.

6. The accused is 25 years of age. The records in the Office of the Adjutant General show enlisted service in the regular Army from 6 January 1938 until his transfer to the Infantry Officers' Candidate School, Fort Benning, Georgia, 17 June 1942. He was commissioned temporary Second Lieutenant, Infantry, Army of the United States, 14 September 1942, on which date he was ordered to active duty by paragraph 1, Special Orders No. 223, Headquarters The Infantry School, Fort Benning, Georgia. The indorsements accompanying accused's application for transfer to officers' candidate school give him an excellent character rating and refer to him as possessing educational qualifications and practical military experience.

7. 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 of trial 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 the 61st or the 96th Article of War.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 29 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 Ernest L. Parsons (0-1293463), 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 thereof. I recommend that the sentence as approved by the convening authority be confirmed but that the forfeitures adjudged 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,
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. G.C.M.O. 310, 14 Oct 1943)

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

SPJGN
CM 236017

19 JUN 1943

UNITED STATES	38TH INFANTRY DIVISION
v.	Trial by G.C.M., convened at Camp Livingston, Louisiana, May 21, 1943. Dismissal:
First Lieutenant WILL L. SELSER (0-386257), 151st Infantry.	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: (Finding of not guilty.)

Specification 2: (Finding of not guilty.)

Specification 3: In that First Lieutenant Will L. Selser, 151st Infantry, at Apalachicola, Florida, on or about November 19, 1942, with intent to deceive, wrongfully and unlawfully make and utter to J. B. Spear, who trades and does business as Spear's Jewelry Store, a certain check in words and figures as follows:

"First National Bank. Gainesville, Fla. 19 Nov 1942. Pay to the Order of Spear's Jewelry Store $2.50. Two & 50/100 Dollars. Counter Check. s/Will L. Selser, 1st Lt. Inf., Hqrs. 38th Div.",

and by means thereof, did fraudulently obtain from Spear's Jewelry Store an article of jewelry, he, the said Lieutenant Selser, then well knowing

> that he did not have and did not use due diligence to ascertain that he should have sufficient funds in the bank for the payment of said check.

He pleaded not guilty to the Charge and all Specifications and was found guilty of the Charge and of Specification 3 and not guilty of Specifications 1 and 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.

3. The evidence for the prosecution relative to Specification 3, the only Specification of which the accused was found guilty, shows that about January 7, 1943, Colonel William S. Taylor, the accused's commanding officer, received a letter from the Spear's Jewelry Store, Apalachicola, Florida, concerning a check for two dollars and some cents which had been given by the accused to the Spear's Jewelry Store, and which had been subsequently dishonored. Colonel Taylor promptly transmitted this letter to the accused and on January 8, received from him a Western Union Money Order Receipt certifying to the payments of this and other items. The accused also stated in this reply that he had requested on January 4, 1943, that his name be removed from the list of officers authorized to cash personal checks at the Post Exchange, Camp Carrabelle, and that he also closed his checking account in the First National Bank, Gainesville, Florida. Colonel Taylor stated that the accused had been under his command 8 or 9 months, that he had been promoted to a first lieutenant, and recommended for promotion to the rank of captain (R. 9-10).

The prosecution introduced the deposition of J. B. Spear wherein Mr. Spear asserted that he operates the Spear's Jewelry Store and that on November 19, 1942, the accused gave him the attached check for $2.50 on the First National Bank, Gainesville, Florida, in consideration for a piece of sea shell jewelry and fifty cents change. After the check had been returned marked "not sufficient funds" with a charge of 50¢ to the depositor, Mr. Spear reimbursed the bank at which he cashed the check, twice wrote to the accused at Camp Carrabelle, Florida, requesting payment, and then wrote to a colonel at Camp Carrabelle. On January 8, 1942, the bill was paid by the accused with a Western Union money order. (R. 8; Ex. B)

The prosecution also introduced the deposition of Mr. Morris E. Stults, an officer of the First National Bank, Gainesville, Florida, which states that from November 12, to November 18, 1942, the balance of accused's account at the First National Bank was $3.55, and that on November 19 and 20, it was $3.30. On January 8, 1943, the bank received a telegram from the accused directing them

to close his account, and forward a statement. (R. 8; Ex. C)

4. The defense introduced no evidence except that of the accused who, after his rights as a witness had been explained to him, was sworn and testified under oath. That part of his testimony relative to Specification 3 states that he did not remember what his bank balance was on November 19, 1942, the date of the check to J. B. Spear for $2.50, but it was shown to be $3.30. He further stated that he had assumed that there was sufficient money on deposit on November 19, to meet the check and that he had no reason to believe otherwise. He admitted that he had received a letter concerning the $2.50 check from the Spear's Jewelry Store, which he misplaced in his foot locker and had not taken care of it right away. However, when he was reminded by Colonel Taylor of this check he took care of the problem on the same day. He had been on maneuvers and had not received his bank statement till he finally returned to his residence in Gainesville, in December. He kept a record in his check book but it must not have been accurate since there was less money in the bank than his check book indicated. He probably made his last deposit sometime during the month of October. He believed that on November 19 when he wrote a $2.50 check to Spear's Jewelry Store that there was enough money to his credit to cover that check, and the itemized statement of his account shows that he had $3.30 to his credit on that day. Although on November 2, he had learned that his account was overdrawn for a larger check to a hotel, on November 19 he still had $3.30 to his credit, enough to cover the $2.50 check to the Spear's Jewelry Store. (R. 12-19)

5. In order to sustain the findings of guilty under Specification 3 it is necessary that the proof establish that the accused made and uttered the $2.50 check in question with an "intent to deceive" and that by means thereof he "fraudulently" obtained from the Spear's Jewelry Store an article of jewelry, "well knowing that he did not have *** sufficient funds in the bank for the payment of said check".

The evidence does not sustain these allegations. The proof shows that on November 19, 1942, the accused made and uttered to the Spear's Jewelry Store a check for $2.50 for which he received an article of jewelry. The proof shows further that although the accused had previously been notified on November 2, that one check for $10.73 and another check for $20 had been rejected by the bank because of insufficient funds, the evidence offers no proof that his bank account was completely depleted on November 19, the date of the uttering of the check for $2.50, and in fact the evidence shows that on that day and the day following the accused had $3.30 to his credit, an amount more than sufficient to pay this check. Although the evidence does show that the $2.50 check was dishonored by the bank, and that the

account of the accused was reduced on November 21, to 30¢, the proof fails to show any means by which this credit of $3.30 was withdrawn from the bank or allocated by the accused. Furthermore, the evidence shows that when the accused was directed by his commanding officer to pay this obligation of $2.50, he did so at once. Considered in its entirety, the evidence fails to show that the accused had knowledge that his check for $2.50 would be dishonored, or that he "intended to deceive" the Spear's Jewelry Store. We must conclude, therefore, that the findings of guilty should be disapproved.

6. The accused is 27 years of age. The records of the Office of The Adjutant General show that he was appointed a second lieutenant, Infantry Reserve, on December 21, 1939. He entered upon active duty July 10, 1940, and was promoted to temporary first lieutenant on February 1, 1942.

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

Thos. L. Bresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 24 JUN 1943 - To the Commanding General, 38th Infantry Division, Camp Livingston, Louisiana.

1. In the case of First Lieutenant Will L. Selser (0-386257), 151st Infantry, I concur in the foregoing opinion of the Board of Review holding the record of trial legally insufficient to support the findings of guilty and the sentence, and for the reasons stated therein I recommend that the findings of guilty and the sentence be disapproved. You are advised that the action of the Board of Review and the action of The Judge Advocate General have been taken in accordance with the provisions of Article of War 50½, and that under the further provisions of that Article and in accordance with the fourth note following the Article (M.C.M., 1928, p. 216), the record of trial is returned for your action upon the findings and sentence, and for such further action as you may deem proper.

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

(CM 236017).

Myron C. Cramer

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

1 Incl
Record of trial

RECEIVED
JUN 28 1943
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38th DIV.

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J.A.G.O.

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

SPJGQ
CM 236069

20 JUL 1943

UNITED STATES v. Second Lieutenant JOHN H. HERDFELDER, (0-1170775), Field Artillery.	CAMP ROBERTS, CALIFORNIA Trial by G. C. M., convened at Camp Roberts, California, 21 May 1943. Dismissal and confinement for five years.

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.

Specification: In that Second Lieutenant JOHN H. HERDFELDER, F.A. 53rd Field Artillery Training Battalion, Camp Roberts, California, did, without proper leave, absent himself from his organization at Camp Roberts, California, from about February 18, 1943, to about April 13, 1943.

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

Specification 1: In that Second Lieutenant JOHN H. HERDFELDER, F.A., 53rd Field Artillery Training Battalion, Camp Roberts, California, did, at Los Angeles, California, on or about March 23, 1943, with intent to defraud, wrongfully and unlawfully make and utter to Desmond's, a California Corporation doing business at Los Angeles, California, a certain check in words and figures, as follows, to wit:

"

90-61 NORTH PARK BRANCH 90-61
2897 University Avenue

BANK OF AMERICA
National Trust & Savings Association

NO. 5 (Ink)

San Diego, Calif., 3/23/ 1943

Pay to the
Order of Desmonds Dept. Store (written in ink) $20.00 (ink)

Twenty 00/100 Dollars

Member
Federal Reserve System

Camp Roberts
Calif.

/s/ JOHN H. HERDFELDER "
2nd Lt. F. A. O-1170775

and by means thereof did fraudulently obtain from the said Desmond's, the sum of twenty dollars and no cents ($20.00), lawful money of the United States, he, the said Second Lieutenant JOHN H. HERDFELDER, then well knowing that he did not have, and not intending that he should have, any account with the Bank of America, North Park Branch, San Diego, California, for the payment of said check.

The allegations set forth in Specifications 2 to 10, inclusive, Charge II, are identical with those stated in Specification I, above, except as to dates and amounts of the checks involved and the firms and corporations to whom they were uttered and by whom they were cashed, and except as to the names of the different branches of the Bank of America National Trust & Savings Association on which they were drawn, namely,

	DATE OF CHECK	AMOUNT	BRANCH	UTTERED TO
Spec. 2:	27 Feb. 1943	$30.00	Salinas	The Biltmore Hotel, Los Angeles.
Spec. 3:	28 Feb. 1943	$30.00	"	The Biltmore Hotel, Los Angeles.
Spec. 4:	26 Feb. 1943	$10.00	"	Pig'n Whistle Corp., Los Angeles.
Spec. 5:	11 Mar. 1943	$ 5.00	"	Pig'n Whistle Corp., Los Angeles.
Spec. 6:	19 Feb. 1943	$10.00	Camp Roberts	Drake Wiltshire Hotel, San Francisco.
Spec. 7:	20 Feb. 1943	$10.00	"	Drake Wiltshire Hotel, San Francisco.

	DATE OF CHECK	AMOUNT	BRANCH	UTTERED TO
Spec. 8:	20 Feb. 1943	$15.00	Camp Roberts	Drake Wiltshire Hotel, San Francisco.
Spec. 9:	21 Feb. 1943	$15.00	"	Drake Wiltshire Hotel, San Francisco.
Spec. 10:	23 Mar. 1943	$30.90	North Park	F. B. Silverwood Corp., Los Angeles

He pleaded guilty to Charge I and the Specification thereunder; guilty to Specifications 1 and 10, Charge II, except the words "with intent to defraud, wrongfully and unlawfully make and utter", "fraudulently", and "well knowing that he did not have and not intending that he should have, any account with the Bank of America, North Park Branch, San Diego, California;" guilty to Specifications 2, 3, 4 and 5 of Charge II, except the same words as applied to the Salinas Branch, Salinas, California; and guilty to Specifications 6, 7, 8 and 9 of Charge II, except the same words as applied to the Bank of America, Camp Roberts Branch, Camp Roberts, California; of the excepted words in the Specifications, not guilty; and guilty to Charge II. He was found guilty of both Charges and of the Specifications thereunder. No evidence of previous convictions was submitted. He was sentenced to be dismissed the service and to be confined at hard labor for five years. The reviewing authority approved the sentence, designated the Disciplinary Barracks, Fort Leavenworth, Kansas as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. Evidence for the Prosecution:

The morning report of accused's organization, Battery B, 53rd Field Artillery Training Battalion, 11th Field Artillery Training Regiment, Camp Roberts, California, stated that he was absent without leave from 19 February 1943 until 14 April 1943 when he was placed in arrest in quarters (Exs. B, C, D, G). His actual absence was verified by First Lieutenant Douglas J. Ripley and Second Lieutenant Glenn S. Reznor (R. 17, 20). By stipulation it was established that accused voluntarily made a statement which was reduced to writing and signed by the accused (Ex. U). Therein he stated that he went on leave on 17 February 1943 and failed to return when his leave expired 19 February 1943, but remained absent from duty until 10 April 1943 when he surrendered to the local police authorities of Los Angeles, California.

In the same statement he admitted that he issued approximately 16 worthless checks among which were:

At Los Angeles, two $30 checks to Biltmore Hotel.
At Los Angeles, a $10 and a $5 check to Pig and Whistle Restaurants.
At Los Angeles, a check for approximately $30 to Silverwoods Dept. Store.
At Los Angeles, a check for $20 to Desmonds Department Store.

At San Francisco, checks of indefinite amounts to Drake-Wiltshire Hotel.

On 20 April 1943 the accused, having been properly warned of his rights voluntarily signed a statement wherein he set forth that he went on leave to San Francisco with no intention of remaining absent without leave. At the Drake-Wiltshire Hotel he indulged in drinking and "woke up" on 21 February or 22nd. He then went "haywire". When his money ran out he wrote checks to cover expenses. He "realized" that they would all have to be paid by him and "realized" the consequences. Shortly thereafter he left San Francisco and visited Salinas, Santa Monica, Los Angeles, Las Vegas, San Diego, and Riverside. During the entire period of absence he was continuously under the influence of liquor. He finally surrendered to the police at Los Angeles on 10 April 1943 (Ex. V).

First Sergeant Frederick F. Brady identified ten checks described in the ten Specifications of Charge II as having been received by him through the mail from the Los Angeles Police. By stipulation (Ex. I) it was agreed that no question as to their admissibility in evidence would be raised by the defense based upon genuineness, or that they are not the instruments referred to in the Specifications, or that the instruments are not offered in evidence through person who received the instrument from the accused. A substitution of photostatic copies of the original as to two of the instruments was also permitted by stipulation. There were therefore introduced into evidence without objection the ten checks described in the Specifications summarized as follows (R. 24-26):

Ex.	Amount	Date 1943	Payee	Drawee	Spec.
K	$20	3/23	Desmonds Dep't Store	Bank of America North Park Branch	1
L	30	2/27	Cash	Salinas Branch	2
M	30	2/28	Cash	Salinas Branch	3
N	10	2/26	Pig & Whistle	Salinas Branch	4
O	5	3/11	Cash	Salinas Branch	5
P	10	2/19	Drake-Wiltshire	Camp Roberts Branch	6
Q	10	2/20	Drake-Wiltshire	Camp Roberts Branch	7
R	15	2/20	Drake-Wiltshire	Camp Roberts Branch	8
S	15	2/21	Drake-Wiltshire	Camp Roberts Branch	9
T	30.90	3/23	Silverwoods	North Park Branch	10

By further stipulation dated 14 May 1943 (Ex. J) it was admitted by the accused that he made and signed each of the checks described and referred to in Specifications 1 through 10 of Charge II at the time and place alleged, and did at the same time and place obtain in exchange for the checks lawful money of the United States in the sums respectively stated therein from persons, firms, or corporations respectively named therein.

By the same stipulation it was also admitted that the accused had no account at any time in the Salinas or North Park branches of the Bank of America.

The ledger sheets of the Camp Roberts Branch of the Bank of America showing the accused's account from 25 January to 22 April 1943 was received in evidence without objection (R. 38, 39, 40 Ex. Z). Mr. Marion R. Gates, manager of the Camp Roberts Branch of the Bank of America was called as a witness and identified the ledger sheets referred to above. When asked to testify regarding the insufficiency of the funds on hand with which to meet the checks (Ex. P,Q,R,S,) drawn on that bank, the defense conceded that these four checks were presented to that bank and were returned for insufficient funds (R. 42). On 20 February 1943 the accused's balance in the bank was $1.49. He made no further deposits until 22 April 1943 and made no arragnements for credit during the period of time covered by the Specifications (R. 41).

4. For the Defense:

By stipulation (Ex. 1) it was shown that the accused had paid in full to the holders thereof the checks described in Specifications 1 through 9 of Charge II and had made satisfactory arrangements to pay the check described in Specification 10 of Charge II.

First Lieutenant Douglas J. Ripley, Second Lieutenant Glenn S. Reznor, Captain Sterling F. Price, and Chaplain Richard J. Parr, testified that the accused was an officer of ability, integrity, and good character (R. 46, 51), dependable and efficient (R. 47), and was a good and punctual worker (R. 48).

If called, Major Don H. Van Dam and Major Herbert H. Gottschall would have testified that the accused's reputation for truth, veracity and integrity in the regiment was good (Ex. 2, 3).

The accused having been advised of his rights elected to submit as an unsworn statement his statement made under oath on 20 April 1943 appearing as Prosecution's Exhibit V, summarized above.

5. The unauthorized absence of the accused for the period of 19 February 1943 to 12 April 1943, was established by properly identified entries in the morning report of the accused's organization and by stipulation as to the time and place of return to military control.

The making and uttering of each of the checks covered in Specifications 1 to 10, inclusive, of Charge II, the acceptance of said checks for value by each of the several persons, firms and corporations as alleged, was admitted by the accused as to each said check and specification and was corroborated by competent evidence. The accused, as to each specification, denied that the several checks were issued by him with the intent to defraud and further denied that they were issued with knowledge that he did not have and did not intend that he should have an account or sufficient funds in the bank to cover payment of said checks. As to Specifications 1 and 10, it was established by stipulation that the accused did not at this time have, and never had had, an account in the North Park Branch, Bank of America, San Diego, California. Likewise it was established in connection with Specifications 2, 3, 4 and 5 that the accused did not now have, and never had had, an account in the Salinas Branch, Bank of America, Salinas, California. It was established through the testimony of the manager of the Camp Roberts Branch, Bank of America, Camp Roberts, California, that on 20 February 1943, the accused had a balance of $1.49; that he had made no deposits whatever during the period covered by the specifications of Charge II and that he had not obtained a line of credit or made any arrangements with the bank to cover any overdraft. The accused stated that his failure to change the names of the branches of Bank of America on those checks drawn on the Salinas and North Park Branch to Camp Roberts Branch was due to inadvertence. The credibility of this statement can well be doubted for the reason that the accused did insert a check number on each of said checks. The check numbers however do not run serially, although the checks were otherwise properly and completely filled out.

The accused certainly knew that he did not have an account in either the North Park Branch or the Salinas Branch of the Bank of America. He admitted in his unsworn statement (Exhibit V) that

> "When, of course, money ran out I wrote checks to cover expenses, always making sure that my signature was correct and that my serial number was shown. Of course, I realized that inasmuch as there was no thought of desertion in my mind, that they would all be paid back and I realized the consequences."

As to the account in the Camp Roberts Branch (Specifications 6, 7, 8 and 9), the accused must have known the status of his own account. The passing of checks by an officer in uniform, drawn on banks in which he did not have an account, and on a bank in which he must have known did not contain sufficient credits to cover his checks, and the obtaining of value for said checks, constitutes a set of circumstances from which fraudulent intent may properly be inferred by the court. As to each of the Specifications 1 to 10, inclusive, of Charge II, there is ample competent evidence to support the findings of the court.

6. War Department records show that accused is 28 years of age. He graduated from high school and attended Columbia University for 1½ years. He served as a member of the National Guard of the State of New York from 26 January 1937 to 3 February 1941. He was inducted into Federal service on 16 February 1941. Upon completion of a course at the Field Artillery Officer Candidate School he was appointed a second lieutenant and ordered to active duty 1 October 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 of the sentence. A sentence of dismissal is authorized upon conviction of violation of Article of War 61 and 96.

William A. Pounds, Judge Advocate.

Earle D. Hopkins, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 26 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 John H. Herdfelder (O-1170775), Field Artillery.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the period of confinement be reduced to two 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,
Major General,
The Judge Advocate General

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

(Sentence confirmed but confinement reduced to two years. G.C.M.O. 208, 1 Sep 1943)

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

SPJGH
CM 236070

26 AUG 1943

UNITED STATES	)	CAMP ROBERTS
v.	)	Trial by G.C.M., convened at Camp Roberts, California, 18 May 1943. Dismissal.
First Lieutenant FREDERIC M. WANNER (O-410784), 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 Specification:

CHARGE: Violation of the 95th Article of War.

Specification: In that First Lieutenant Frederic M. Wanner, 16th Infantry Training Regiment, Camp Roberts, California, did, at Monterey, California, on or about March 18, 1942, with intent to defraud the San Carlos Hotel, a corporation doing business at Monterey, California, wrongfully and unlawfully make and utter to the said San Carlos Hotel a certain check in words and figures as follows:

Columbus, Georgia March 18 1942 No._____

TENTH STREET BRANCH
COLUMBUS BANK and TRUST COMPANY
of Columbus, Georgia

Pay To The Order of San Carlos Hotel $30.15

Thirty and 15/100----------Dollars

/s/ FRED M. WANNER
Frederick M. Wanner

> in payment of his bill for lodging at said hotel in the amount of thirty dollars and fifteen cents ($30.15), he, the said Frederic M. Wanner then well knowing that he did not have and not intending that he should have any account with the Columbus Bank and Trust Company of Columbus, Georgia for the payment of said check.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction was introduced. He was sentenced to be dismissed the service. The reviewing authority approved the sentence, and the record of trial was forwarded for action under the 48th Article of War.

3. The evidence for the prosecution shows that according to the records of Columbus Bank and Trust Company, Columbus, Georgia, accused deposited $115 in a checking account with that bank on 6 November 1941, the account was closed by a return check charge handled for accused on 26 November 1941, and there was no account in the name of accused on the books of the bank or any of its branches after 26 November 1941. On or about 18 March 1942 accused drew a check for $30.15 on Columbus Bank and Trust Company, Columbus, Georgia, payable to San Carlos Hotel, Monterey, California, and gave this check to the hotel in payment for lodging (Exs. A and B).

Mr. Peter W. C. Watson, manager of Hotel San Carlos, Monterey, California, who did not know accused, identified a guest registration card of the hotel (Ex. D), with statement of account on the reverse side, showing that "Lt. & Mrs. Fred M. Wanner" registered at the hotel on 13 March 1942 and remained there until 18 March, at which time the total bill was $30.15. He also identified a check (Ex. C) given in payment of this bill, drawn by "Fred M. Wanner" for $30.15 on Columbus Bank and Trust Company, Columbus, Georgia. The check was presented for payment in regular course of business, but was returned by the bank, marked "No account". The hotel wrote letters about the check as follows: to "Lt. Fred M. Wenner 164th Inf. A.P.O. #1117" (Def. Ex. 1) on 21 April 1942 and to "Commanding Officer 164th Infantry A.P.O. #1117" on 12 June 1942, 21 January 1943, and 13 February 1943 (Def. Exs. 2, 3 and 4) referring to "Lt. Fred Wenner". No replies were received except one to the letter of 21 January, stating that the last known address of accused was at Camp Roberts, California. After the hotel communicated with authorities at Camp Roberts, accused paid the hotel the amount of the check (R. 9-19).

4. For the defense the accused testified substantially as follows: He had been on active service since 10 February 1941, was first stationed

at Camp Claiborne, Louisiana, went to Fort Benning, Georgia the latter part of August 1941, returned to Camp Claiborne the last week in November, remained there a week or 10 days and went to San Francisco until 24 December 1941. He was stationed at Yumatilla Ordnance Depot, Yumatilla, Oregon and at The Dalles, Oregon, until 8, 9 or 10 March 1942, when he went to Fort Ord, California. He left there on 18 March, sailed from San Francisco 19 March, arrived in Australia early in April, and returned to the United States in August 1942. While at Camp Claiborne accused opened an account at Avoyelles Trust and Savings Bank, Bunkie, Louisiana. When he went to Fort Benning he left with his wife several blank signed checks on the Bunkie bank to be used in paying some bills amounting to about $100. Unknown to accused his wife, with whom he was having marital difficulties and from whom he was subsequently divorced, filled in and used these blank checks for a total amount of approximately $280, including one check for $150. During this time his pay checks were usually deposited in the Bunkie bank, and his October check was deposited there (R. 25, 27, 29-31, 33-34, 38, 40, 49).

About the end of October 1941 accused drew a check for $115 on his account at Bunkie, to pay some bills at Fort Benning, and cashed it at Columbus Bank and Trust Company. A few days later he learned that the check for $150 filled in and used by his wife had been turned down by the bank because of insufficient funds. It required two or three weeks for a check to clear. Accused obtained money from his father to take up the $150 check. He obtained money from North Dakota, and deposited $115 in the Columbus bank to protect the bank if his check on the Bunkie bank which he had cashed should be returned. He did not know that the check would be returned, but after learning that his wife had drawn unauthorized checks he deposited this amount to cover the check if it should come back. When he left Fort Benning the latter part of November he was not sure whether the check was good or not, on account of the time required for checks to clear, and therefore left the $115 on deposit at the Columbus bank. Before he left Fort Benning he gave his Camp Claiborne address to the bank at Columbus so they could send the returned check to him in the event it was returned, and asked the bank to notify him if the account was closed out (R. 28-32, 37, 39-40, 45-47, 49, 51-52).

On his return to Camp Claiborne accused did not have an opportunity to go to Bunkie to check his account with the bank. He heard nothing further from the Columbus bank and did not write to that bank. His mail from Camp Claiborne did not "catch up" to him until he was at

Fort Ord shortly before he sailed. There was no letter or notice in that mail from the Columbus bank that his account had been closed out. He assumed and was of the opinion that he had $115 on deposit with the Columbus bank, and in February and March 1942 drew checks totaling $110 to $115, including the check to Hotel San Carlos. He was "fairly sure" of his financial status when he left the United States and the checks on the Bunkie bank used by his wife had been accounted for. His "APO" number was not 1117, but was 502 and later 709. He did not receive a letter from the Hotel San Carlos. On 19 April 1943 he learned for the first time that his check to the hotel (Ex. C) had been dishonored. He then sent to the hotel a new check for $30.15 (Def. Ex. 5) dated 20 April 1943, which was paid, and the hotel acknowledged receipt on 22 April (Def. Ex. 6). Accused wrote to the persons to whom other checks on the Columbus bank had been drawn in February and March 1942, but had not heard from them (R. 25-26, 28, 31-32, 34-37, 43-44, 48, 50-51).

5. The evidence shows that accused opened a checking account with Columbus Bank and Trust Company, Columbus, Georgia, on 6 November 1941, by depositing $115, that the deposit was made to protect the bank if a check in that amount, of doubtful value, which it had cashed for accused should be returned, that the bank closed the account on 26 November 1941 by a return check charge, that thereafter accused had no account with the bank, that on 18 March 1942 accused drew a check for $30.15 on the bank to pay a hotel bill in Monterey, California, and that the check was not paid. It is not shown that accused ever received notice from the bank that his account had been closed by a return check charge. From the latter part of November 1941 until March 1942 accused was at various stations at a distance from Columbus, Georgia. He testified that he had left an address with the bank, with the request that he be notified if his account should be closed by return of the $115 check, and that, at the time when he drew the check for $30.15, he had not heard from the bank and assumed or believed that he had $115 on deposit.

A material part of the Specification is that accused made and uttered the check "then well knowing that he did not have and not intending that he should have any account" with the Columbus bank. Accused had deposited $115 in the bank in November and had not closed the account by any act of his own, such as drawing checks against it. (The other checks which he drew in February and March 1942 were not in such amount as to reduce the account below $30.15). The account had actually been closed by a return check charge, of which accused was not given notice.

An accused is properly chargeable with knowledge as to the status of his bank account (CM 202601, Sperti). But this rule applies only in those cases where the status of the account results from acts of the accused, such as making deposits or drawing checks, or from changes otherwise made in the account which have been brought to the attention of accused.

> "On October 21, 1918, accused opened an account in a bank by depositing a check. The bank cashed several checks on this account, but on October 31, the check he had deposited was returned to the bank, dishonored. The bank then stopped payment on checks drawn by the accused, but there is no evidence that he was notified to that effect. The check complained of in this case was dated and cashed November 1, 1918. There was no evidence that accused had knowledge that the check he had deposited was not good or had any reason to believe that the check he passed on November first would not be paid. In other words, the proof failed to show that accused knew he had no funds in the bank to cover the payment of the check given. No false pretenses were proved." (Dig. Op. JAG, 1912-40, sec. 453 (23); CM 124572).

The Board of Review is of the opinion that the record of trial is legally insufficient to support a finding of guilty of the Specification and Charge.

6. The accused is 35 years of age. The records of the Office of The Adjutant General show his service as follows: Federally recognized as second lieutenant, Infantry, National Guard of North Dakota, 9 October 1940; appointed second lieutenant, Infantry, National Guard of the United States, 10 February 1941; inducted 10 February 1941; promoted temporarily, first lieutenant, Infantry, Army of the United States, 31 July 1941.

7. The court was legally constituted. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

1st Ind.

War Department, J.A.G.O., 4 - SEP 1943 - To the Commanding Officer, Camp Roberts, California.

1. In the case of First Lieutenant Frederic M. Wanner (0-410784), Infantry, I concur in the foregoing opinion of the Board of Review holding the record of trial not legally sufficient to support the findings of guilty and sentence, and, for the reasons therein stated, recommend that the findings of guilty and the sentence be disapproved. You are advised that the action of the Board of Review and The Judge Advocate General is taken under the provisions of Article of War 50½ and in accordance with note 4 following that article (M.C.M., 1928, p. 216), and that under the further provisions of that article the record of trial is herewith returned to you for a rehearing or such other action as you may deem proper.

2. When copies of the published order in this case are forwarded to this office together with the record of trial, they should be accompanied by the foregoing opinion and this indorsement, except that in the event a rehearing is directed the foregoing opinion and this indorsement should be returned alone and the disposition of the record of trial and the publication of the general court-martial order in the case shall follow the provisions of paragraph 89, Manual for Courts-Martial, 1928. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM 236070).

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 236101

26 JUN 1943

U N I T E D S T A T E S	)	ARMY AIR FORCES GULF COAST TRAINING CENTER
v.	)	Trial by G.C.M., convened at AAFBS Childress, Texas, May 25, 1943. Dishonorable discharge and confinement for twenty (20) years. Penitentiary.
Corporal REECIE BARKER (38234655), 331st Aviation Squadron, Army Air Forces Bombardier School, CAAF.	)	

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 Corporal Reecie Barker, 331st Aviation Squadron did, at Childress, Texas, on or about May 10, 1943, with intent to commit a felony, viz, rape, commit an assault upon Dollye Moore Rogers, by willfully and feloniously grabbing the said Dollye Moore Rogers, holding his hands over her mouth, face and neck while attempting to have carnal knowledge of her against her will.

He pleaded not guilty to the Specification and Charge, but guilty to the lesser included offense, assault with intent to commit bodily harm. He was found guilty of the Specification and the Charge, and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for twenty 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 pursuant to Article of War 50½.

3. The accused by his plea of guilty established the fact that at the time and place alleged he committed an assault upon Dollye Moore Rogers. To prove his intent to rape her and substantiate his plea, the prosecution introduced in brief, the following evidence.

On 10 May 1943, Mrs. Dollye Moore Rogers, was living at 600 Avenue "H", N.W., Childress, Texas, with her husband, Lieutenant Rogers. When she went to bed between 11:15 and 11:30 p.m. that night, Mrs. Rogers was alone in the house. After falling asleep, she was awakened by a man straddling her in bed with his hands over her mouth. It was quite dark and the bed clothes had been pulled off her bed. She was very frightened, not knowing who he was, but hoping against hope that he might be her husband. She reached up and pulled the man's fingers from her mouth, and asked him to let her talk to him. She requested him please to go away and leave her alone, telling him that her husband would be home soon; that she would give him money or a check if he would only depart; and that, if he were caught, he would be lynched and hanged. He kept repeating, "Let me fill you up, let me do it", and more in the same vein, but these were his only words which she could remember. Despite the darkness, she became aware that the intruder was a negro when she pulled his cap off and felt his short, wiry, kinky hair. Then she continued fighting even harder. When she jerked her head back, his hand went into her mouth. She bit one of his fingers very hard, tasting the blood - and screamed. His left hand was in her mouth; with his right he was trying to pull up her gown. After she screamed, he put his hand on her throat, telling her was going to choke her. She kicked him off the bed, and continued to scream as loud as she could, calling her neighbor, Mrs. Chambers. Her attacker jumped up, started first to run to the door, then leaped out of the window. She turned on the light, and found blood -- it was all over the bed, her face and her gown. She concluded her teeth must have cut his hand badly, and that she must also have scarred his face,

when she was scratching at him. There were no cuts on her, only a few skinned places. After he left, she went into the bathroom, taking the telephone with her. She locked the door and placed some drawers against it, then tried to telephone; but the instrument was out of order. She heard someone on the wire, and yelled, "Please get the police" into the transmitter. Shortly after that, Mr. and Mrs. Chambers came over to her house. Mrs. Rogers found, at the head of the bed, the man's cap she had knocked off. It had the accused's name and serial number on it. She gave it to Mr. Chambers, who in turn gave it to the military police. During the attack Mrs. Rogers' nose was skinned and her lip cut; she acquired a bruise under her right eye and a long jagged cut on her gum; the skin on the inside of her jaw was scraped, and her throat and shoulder were bruised; but the attacker had not succeeded in having intercourse with her. He was on the bed between five and ten minutes - it could have been longer. All of the time, he kept saying the same sentence over and over. Though it seemed like a hundred times, it was probably only three or four. He never raised his voice or cursed her. However, he did try to pry her legs apart, choked her and held her down, so that she could not get up. His shoes were off while he was on the bed, and when he went out the window (R. 6-10).

It was stipulated that Dr. W. R. Moore, a physician, of Vernon, Texas, if present, would testify that, early on the morning of 11 May 1943, he made an examination of Mrs. Dollye Moore Rogers, which

> "revealed that her right shoulder was bruised; that there was a bruised blue spot under her left eye; that there was a skinned place on her nose; that her gums were cut over the first jaw teeth on the right; and that there was a 3" bruise on her neck that was black in appearance" (R. 11).

On the night of the attack, Mrs. Rogers' next door neighbors, Mr. and Mrs. J. W. Chambers heard terrible screams about 11:40 p.m., which caused them to get up and look toward the Rogers' home. Mrs. Chambers knew Mrs. Rogers was alone, and tried, at first unsuccessfully, to reach her by telephone. Finally, she heard Mrs. Rogers' voice on the wire, crying, "Call the police". Mr. Chambers got his gun, and he

and his wife went next door, where they found Mrs. Rogers on her front porch. She was hysterical and appeared scared to death. There was blood on her nightgown, and she was holding her dressing gown in front of her. They went into the house, and she told them of the attack. Mr. Chambers then called the police and, shortly afterwards, Fireman John Ballew and two military policemen arrived. All saw the bed, covered with blood and dirty tracks. Mrs. Rogers, at that time, had the cap, with the accused's name and serial number in it, which was later given to the military policemen by Mr. Chambers (R. 12-14).

On the same evening, Privates Philip R. Welfield and Samuel Aromando, then on military police duty patrolling the Childress streets, received a call to the Rogers' home, whither Fire Chief John Ballew accompanied them. When Mrs. Rogers - still hysterical - and Mr. and Mrs. Chambers had explained the situation to them, Private Welfield telephoned the main gate to look out for negro soldiers without hats, and to check all passes for the accused. These military policemen then went to the accused's barracks, where they found that his bed had not been slept in. They stayed there about fifty minutes, but the accused did not appear. Around 2:50 that morning, they went to the field and saw the accused, dressed in a clean suit, with the little finger on his left hand wrapped in a polka dot bandage. The cut on his finger looked like someone had bitten it, and there was blood on the left side of his flight jacket. The accused stated to Private Welfield that he had been at the picture show, but would not tell what it was about; also, that Private O. Z. Guyton had borrowed his flight cap, and that he - the accused - had cut his finger, the night before, on a slicing machine (R. 16-21).

Private Guyton testified he borrowed the cap of the accused only one day, April 29th, to wear to a ball game. He had returned it, and had seen the accused wearing it on May 8th (R. 35).

4. The accused, after his rights as a witness had been explained to him, was sworn, at his own request, and testified as follows:

On the night of 10 May 1943, he clipped the finger of his hand with the meat slicer; later, he went to the show for about thirty minutes, and then, on his way to the colored barracks, he stopped outside the Rogers' house. The lights were on and the shades up, and Mrs. Rogers was getting ready to go to bed. In about twenty minutes, the

lights went off and Mrs. Rogers raised the windows. When she was asleep, the accused climbed in through the bedroom window, and woke her up. He had carried a saw-horse over to the window; and, knowing that it was wrong, he had, nevertheless, gone in. On entering he found himself near the bed. He went up to the sleeping woman's head; she awoke when he got on the bed; he kept talking to her, - asking her to "let him do it" - while she screamed and kept pushing him back. He put his hand on her mouth because he did not want her to "holler", and she bit the same finger that he had cut on the meat slicer. She said her husband would be back in a few minutes, finally pushing him off the bed. He jumped up, and made his exit via the window (R. 44-50).

On cross-examination, the accused admitted he had "hot pants" that night. The last time he had relations with a woman was in April. In his squadron, he had never heard of any colored boys having relations with a white woman, and although Mrs. Rogers was a white woman, the accused, a colored man, who had never had intercourse with a white woman before, thought he could easily talk her into submitting. Prior to going in through the window, he had taken off his shoes, so that he would not make any noise; he left them outside, picked them up when he came out, put them on, and hit the road. Scared - knowing that he had done wrong - he ran back across the field and fences to the latrine, where he left his shoes; then he walked back to his barracks barefooted, and got into bed. While he was in the latrine, he saw that his hand was bleeding, so he wrapped it up in a red dotted piece of cloth. When the military policemen came, he lied, telling them he had not been in town, because he did not want them to know what a serious offense he had committed. When he had got to Mrs. Rogers' bed he had just pushed back the covers as he was talking to her, and laid down beside her. He denied that he tried to pull up her nightgown, or that he straddled her, or that he tried to pry her legs apart. She kept refusing, and, after she said her husband was coming, he jumped up and got out. He admitted that she had told him she would give him money to leave. After he got away, he remembered that he had lost his hat in Mrs. Rogers' room (R. 44-59).

5. The only evidence for the defense, besides that of the accused himself, was the testimony of 1st Lieutenant Joseph W. Bailey, commanding the 331st Aviation Squadron, and that of Staff Sergeant Fred W. Smith, a personal friend of the accused, both of whom stated, in substance, that the accused was of a quiet type, efficient and conscientious; and that he had never been in trouble (R. 60-62).

6. The accused pleaded guilty to an assault upon Dollye Moore

Rogers, with intent to commit bodily harm, and the defense conceded that the accused was at the Rogers' house at the time the offense was committed, so the question of intent is the only one left for consideration. In his sworn testimony, the accused stated that he entered Mrs. Rogers' room in the night-time stealthily, through the window, first removing his shoes, in order not to make any noise. He further stated that, although he was a colored man and Mrs. Rogers, the wife of Lieutenant Rogers, was a white woman, he thought he could easily talk her into having intercourse with him. That this idea was preposterous and false, and that his intent was to rape her, is clearly shown by all the evidence.

She fought the accused fiercely, biting his finger, scratching his face, and offering him money to desist, though he choked and threatened her. He only ceased his vicious attempt when she kicked him off the bed. Then, frightened by her screams and her threat that her husband was coming back, he jumped out of the window and ran away. At first he lied about many things, but finally admitted he knew he had done wrong.

The Manual for Courts-Martial, page 179, states, "Once an assault with intent to commit rape is made, it is no defense that the man voluntarily desisted".

7. The charge sheet shows the accused to be 21 years of age, with no prior service; and that he was inducted, 26 August 1942, for the duration of the war, plus six months.

8. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence of dishonorable discharge, total forfeitures, and confinement for twenty years is authorized upon conviction of an assault with intent to rape in violation of Article of War 93. Confinement in a penitentiary is authorized by Article of War 42 and Title 18, U.S.C. 455.

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.

SPJGK
CM 236102

7 AUG 1943

UNITED STATES V. First Lieutenant GORDON E. MONDAY (O-244325), Air Corps.	ARMY AIR FORCES GULF COAST TRAINING CENTER Trial by G.C.M., convened at Randolph Field, Texas, 21 May 1943. Dismissal.

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 Charge and Specification:

CHARGE: Violation of the 85th Article of War.

Specification: In that First Lieutenant Gordon E. Monday, 734th Basic Flying Training Squadron, was at Randolph Field, Texas, on or about April 24, 1943, found drunk while on duty as Adjutant of the 734th Basic Flying Training Squadron.

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. 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: It was stipulated that accused is a First Lieutenant of the 734th Basic Flying Training Squadron and that since his commission on 23 June 1943 he has been and is now a member of the armed forces of the United States and therefore subject to military law (R.6; Ex. 1).

It was stipulated that the accused on 24 April 1943 was the duly

appointed adjutant of the 734th Basic Flying Training Squadron, Randolph Field, Texas (R.6; Ex. 2).

About 4:30 o'clock in the afternoon of 24 May 1943 Major Walter G. Eissler, Jr., Air Corps, 12th Air Base and Headquarters Squadron, Randolph Field, Texas, called the office of the Commanding Officer of the 734th Basic Flying Training Squadron (R.7). Accused was on duty as the adjutant and answered the telephone. Major Eissler recognized the voice of accused. The conversation lasted about a minute (R.8. Major Eissler asked for Major Atkins. Accused asked Major Eissler to wait a moment. Major Eissler waited quite a while and when no one came to the telephone Major Eissler spoke loudly into the telephone and again asked for Major Atkins. At this time the accused stated that Major Atkins was not there (R.9). The voice of accused sounded unusual and "thick". Major Eissler then conferred with Lieutenant Colonel Roy P. Ward, Executive Officer of Randolph Field (R.9,16), who suggested that he and Major Eissler go to see accused. When Lieutenant Colonel Ward and Major Eissler entered accused's office the accused was seated behind his desk talking to Second Lieutenant Fred W. McElwee, Jr. (R.5,7). Lieutenant McElwee snapped to attention. Accused stood up behind the desk but had difficulty in rising and maintaining the position of attention (R.17). Lieutenant Colonel Ward asked accused where his Commanding Officer was and accused replied that he did not know. Observing the condition of accused, Lieutenant Colonel Ward directed him to get in his (Lieutenant Colonel Ward's) car and accompany him to the hospital - warning accused that anything that he said might be used against him (R.9, 10,18). As accused left the office for the purpose of entering the car, he was unstable and had to steady himself by putting his hand on the side of the door (R.10). His voice was thick and of an abnormal tone. His walk was unnatural. "He had the gait of a person who was not in possession of all of his faculties, particularly his equilibrium" (R.10, 17,18). Lieutenant Colonel Ward asked accused if he had been drinking and accused replied, "No" (R.17). The breath of accused was "heavy" with the odor of alcohol and, in the opinion of Lieutenant Colonel Ward, the accused was drunk (R.18). Lieutenant Colonel Ward took accused to the office of the adjutant at the station hospital. Colonel Walter C. White, commanding officer of Randolph Field, saw the accused in the office at the hospital and observed his condition. He ordered accused to walk toward him. Accused almost toppled over as he walked. His eyes were bloodshot; he did not have control of his facial expressions and he talked in a thick voice. It was the opinion of Colonel White that accused was drunk. Colonel White asked accused if he had been drinking and accused replied that he had not. Colonel White then said, "Now, it's very foolish for you to stand up there and tell me that you haven't been drinking * * *. How many beers did you have?" Accused answered, "About three". Accused

was then asked if he had had anything else to drink, to which he replied that he had "tamped" it down with "a couple of slugs" of brandy or rum. Colonel White then ordered Lieutenant Colonel Merrill J. Reeh, Medical Corps and post surgeon, to examine accused for sobriety, and ordered Colonel Ward to place accused in arrest in quarters and prefer charges against him for being drunk on duty (R.21,22). The accused was thereupon examined by three officers of the Medical Corps, Lieutenant Colonel Reeh, Major Ridings E. Lee and First Lieutenant Luther S. Gartrell. A blood test was made to determine the alcoholic content of the blood of accused, which test revealed an alcoholic content of 3 milligrams per 1 cubic centimeter of blood (R.25,31). Lieutenant Colonel Reeh stated that there was eminent medical authority supporting the theory that the presence of as much as 2 milligrams of alcohol per 1 cubic centimeter of blood indicated a state of intoxication (R.30,31).

Independent of the blood test, three medical officers each expressed the unqualified opinion, based upon observation, that the accused was drunk. Lieutenant Colonel Reeh stated that accused's speech was "thick", his face was flushed, and his eyes were red. He walked unsteadily and when asked to do an about-face, he "nearly fell down". In addition to being unable to speak coherently accused was unable to walk in a straight line.

> "* * *he walked in a bow-shape, back and forth. He stopped jerkily; turned about jerkily. His hands were unsteady when asked to coordinate, such as touching the tip of his nose with his eyes open and with his eyes shut, and he touched on his forehead rather jerkily * * *." (R.32)

There was a strong smell of alcohol on his breath (R.32). Major Lee and Lieutenant Gartrell testified substantially the same as did Colonel Lee with respect to the condition of accused and each stated that in his opinion the accused was intoxicated (R.26-27,38-39). Lieutenant Colonel Reeh and Major Lee testified that accused during the examination stated that he had consumed "the better portion of a pint" (R.73,75).

4. For the defense, Staff Sergeant Kenneth L. Knight, Staff Sergeant Robert F. Bush, First Sergeant George E. Langton, Sergeant Walter M. Kozowski, Sergeant Walter R. Metzler, and Staff Sergeant Claude R. Sauvain, each testified that he saw the accused between 4 and 4:30 o'clock on the afternoon of 24 April. Sergeant Knight delivered to the accused some statements of charges to be signed by accused but did not talk to accused. Although the witness was within 5 or 6 feet of accused he observed nothing abnormal about his manner or appearance (R.41). Sergeant Bush had some

vouchers signed by the accused about 4 p.m. and talked to accused at length about a rug which had been purchased for the squadron. In the opinion of Sergeant Bush accused was not intoxicated (R.45). Sergeant Langton talked to the accused on 2 or 3 occasions around 4 o'clock. One of the conversations lasted some time. Accused was intelligent in his conversation and there was nothing about his manner to suggest that he was under the influence of liquor (R.47,48). Sergeant Kozowski stated that he saw the accused about 4 o'clock. He saw accused walk and heard accused talk and in his opinion the accused was not drunk (R.50,51). Sergeant Metzler stated that about 4:30 p.m. he carried an affidavit to accused for his signature. The accused intelligently discussed the contents of the affidavit and the reason its execution had been delayed. Witness stated that he was within 4 feet of accused and that in his opinion the accused was not drunk (R.52). Sergeant Sauvain stated that he went to the office of accused about 4:15 to remind him of an inspection that was due. Accused noticed that he was late. Witness accompanied accused on the inspection, which was conducted in the usual manner, and stated that he did not observe anything wrong with accused and that in his opinion accused was not drunk (R.53-55).

Second Lieutenant Frank W. McElwee testified that,with the exception of two 15-minute intervals, he was with the accused during most of the afternoon - until accused was taken to the hospital by Colonel Ward. The witness stated that he saw accused take two drinks of rum in the adjutant's office, - one at about 4 and the other at about 4:15 o'clock. Both drinks were taken from a bottle which accused had in his desk drawer. In the opinion of Lieutenant McElwee the drinks did not impair the ability of accused to carry on an intelligent conversation. Witness heard accused talk to some noncommissioned officers who came to the office in the transaction of routine business and did not observe anything abnormal (R.58). Lieutenant McElwee stated that he was present when Colonel Ward and Major Eissler entered the office; that he saw accused as he accompanied Colonel Ward to the car; and that he did not see the accused stagger. In the opinion of Lieutenant McElwee accused was not drunk (R.59).

5. The accused testified that on the afternoon of 24 April 1943 he was in his office as adjutant of the 53rd Flying Training Squadron. He had planned to go to his quarters about 4 o'clock, but was detained on account of the transaction of official business. He had invited Lieutenant McElwee to dinner with him that evening. Accused stated that at about 4 o'clock he took from his desk drawer a bottle of rum which had been given to him earlier in the week and had two drinks from the bottle. He stated that he felt no exhilaration, that he was in full control of his faculties, and that he could walk (R.65). He attended

to routine business, signed such papers as were brought to him and made the usual afternoon inspection (R.63). He stated that he remembered the telephone conversation with Major Eissler. Accused was of the opinion that his conversation with Major Eissler was continuous. He recalled that during the conversation Major Eissler made some inquiry with reference to a soldier who had been confined in the guard house for absence without leave and suggested that squadron punishment should be sufficient (R.64). Accused recalled that when Lieutenant Colonel Ward and Major Eissler entered the office Lieutenant McElwee "snapped" to attention and that when he attempted to do so, his foot became entangled in the rug which caused him to come to the position of attention with some difficulty (R.64). Accused stated that he had "never overcome the enlisted man's fear of rank" and that when Lieutenant Colonel Ward and Major Eissler came into the office he was afraid of their rank and was fearful that they would smell his breath (R.65). He stated that he tried to cooperate with the doctors in their examination but that he had taken part in 150 professional and amateur boxing bouts, as a result of which his coordination and sense of balance is none too good at its best. He also stated that he was afraid the doctors would smell liquor on his breath (R.66). Accused stated that with one exception this was the first drink he had taken since New Year's Day. He maintained that he was not drunk but scared and nervous because he thought "he was on the spot" (R.66).

Major Kenneth L. Johnson, 32nd Flight Training Wing, Perrin Field, stated that he had known the accused for about one year. Accused had served under him. Major Johnson made the further statement that he had never known the accused to take a drink while on duty and that the accused had always performed his duties in a superior manner (R.68).

6. The Board of Review has carefully considered the evidence, from which it clearly appears beyond any reasonable doubt that at the time and place alleged the accused was drunk while on duty as adjutant of the 734th Basic Flying Training Squadron.

7. The accused is 42 years of age. The records in the Office of The Adjutant General show that accused was graduated from Richland High School, Richland, Missouri, in 1921 and attended Missouri University, Columbia, Missouri, four years, specializing in medicine, but did not graduate. He served as an enlisted man from 8 May 1917 to 14 April 1919 attaining the grade of corporal, and from 15 April 1919 to 14 April 1920 attaining the grade of corporal. Character given on each discharge was "Excellent". He was commissioned second lieutenant in the Medical Administrative Corps, Officers' Reserve Corps, 14 July 1927 and served as such until 7 July 1937. He served as First Sergeant, Randolph Field, from 9 June 1941 to 17 June 1942, on which latter date he was honorably discharged and commissioned as First Lieutenant Army

of the United States, effective 23 June 1942.

8. There is attached to the record of trial a petition signed by 8 of the 10 members of the court, requesting that the s entence to dismissal be suspended during the pleasure of the President. The petition is based upon the long, honorable and efficient service of the accused. There is also attached to the record of trial a petition for clemency signed by the defense counsel and assistant defense counsel.

9. 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 of trial is legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of violation of Article of War 85.

Jerry E. Egan, Judge Advocate.

Alva Fauntleroy, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 11 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 First Lieutenant Gordon E. Monday (0-244325), 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 that the execution thereof be suspended during the pleasure of the President.

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 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. Under Sec. of War.
Incl.3-Form of Ex. action.

(Sentence confirmed but execution suspended. G.C.M.O. 261, 22 Sep 1943)

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

SPJGH
CM 236112

24 JUL 1943

UNITED STATES v. Private OWEN MOORE (15043855), Headquarters 4th Armored Maintenance Battalion.	)	4TH ARMORED DIVISION Trial by G.C.M., convened at A.P.O. 254, c/o Postmaster, Los Angeles, California, 25 May 1943. Dishonorable discharge, total forfeitures and confinement for life. United States Penitentiary, McNeil Island, Washington.

REVIEW by 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 soldier named above.

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

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

Specification: In that Private, then Technician 5th Grade, Owen Moore, Headquarters, 4th Armored Maintenance Battalion, did, in the vicinity of Parker, Arizona, on or about May 15, 1943, forcibly and feloniously, against her will, have carnal knowledge of Elaine Louise McLaren, an infant girl eleven years of age.

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

Specification: In that Private, then Technician 5th Grade, Owen Moore, Headquarters, 4th Armored Maintenance Battalion, did, in the vicinity of Parker, Arizona, on or about May 15, 1943, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per os with Elaine Louise McLaren, an infant girl eleven years of age.

The accused pleaded not guilty to and 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 the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution is substantially as follows: On the evening of 15 May 1943, Elaine Louise McLaren, aged 11 years, attended the movies in Parker, Arizona with her young brother, her mother, Mr. and Mrs. Beverly Bob and their son Warren, aged 10. The children found seats near the front of the theatre, at some distance from their parents. At about 10:40 p.m. the children, thinking that they had seen Mrs. McLaren and the others leave, went out to look for them and saw the accused standing in front of the theatre. He spoke to the children and as Elaine started to walk away, said to her, "Hey, shorty, I'll give you the money to get into the show". Elaine replied that she was looking for her mother and father. A little later, while the children were in a car waiting for their parents, accused and another soldier drove up in a quarter-ton jeep. Accused stated that he was an M.P. Corporal and said, "Don't you know you should not be out after curfew time?" He then asked their names and ages, and when Elaine told him she was eleven years of age, said he didn't believe it, but offered to take Elaine to the "Field Office" to locate her parents. Elaine hesitated, but when accused said there was nothing to be afraid of, she entered the car and accused drove out of town on the road leading to Phoenix. After about three miles, accused turned off the road, stating that the "Field Office" was in back of some nearby bushes. When Elaine refused to leave the car, accused took her by the arm, dragged her out and threw her on the ground. He then "said a lot of bad words", took off her pants and asked her whether she wanted to "fuck or suck". Elaine said she didn't want to do either one and accused said, "Then we'll wrestle here all night". He was very rough. When Elaine was on the ground he put his hand on her shoulders so she couldn't get up and he tried to choke her by putting an arm around her neck when she "didn't want to do it". Accused asked her if she had ever had intercourse before and when she denied it, said "You must have". After that he made her "suck it and fuck". He put his penis "inside of" her and in her mouth. When she was asked by the court if he put his penis in her body any other place besides in her mouth, Elaine placed her hand upon her crotch and answered, "Yes, right down here", "The front part". She testified that she did not want him to do it, but in answer to the question, "Did you tell him he could" she stated "I had to. He said 'Do you like it' and I had to say 'yes' because I didn't know

what he might do." When asked if she was afraid of him she replied, "I was afraid that he would get his knife out". Later they went back to the jeep but found that it was stuck in the sand. Elaine got out and tried to push it but was unsuccessful, and then suggested that they hitch-hike back to town. After walking some distance, accused pulled Elaine to the side of the road and "started doing it again". He put his penis "inside of" her and in her mouth. Then they continued walking toward town and had gone a long way when a car drove up containing Mr. Bob and Mrs. McLaren. When Mr. Bob inquired what this meant, neither Elaine nor accused replied, but Elaine got in the car and accused asked, "May I ride also?" Elaine gave no indication of nervousness or fright. Mr. Bob drove them back to Parker, where accused was taken into custody and Elaine was questioned by her father. Mr. McLaren testified that she was at that time angry and trembling and did not speak very coherently. Accused and Elaine were then examined by Dr. Robert L. Currie of the Indian Hospital. Dr. Currie testified that Elaine was nervous but was trying to control herself, that she showed a moderate degree of excitement and a moderate degree of poise. There was a red spot on her neck about an inch in diameter, a slight blood stain at the left side of her mouth, bloodstains on her legs and genitals, blood cells and spermatozoa in the vagina, and the hymen was lacerated. Dr. Currie was informed that her menstrual period had ended about four days before. The examination of accused showed a blood stain on his penis (R. 6-14, 16, 20-30, 32-34, 49, 50, 54).

Elaine was born in Hawaii, had lived there for more than ten years. There was a curfew in Hawaii after the war began and they could not stay on the streets after dark, and there was an Army guard on the campus where her family lived (R. 14, 15, 59).

Upon cross-examination, Dr. Currie testified that Elaine was more mature than her years would indicate and would be capable of sexual desire. He was informed that her menstrual period had ended four days before (R. 26-27).

Elaine upon cross-examination stated she did not know whether accused had a knife, but she was afraid that he was going to pull one. She did not scream because they were too far out in the desert, did not bite, kick or scratch accused, or try to run away. She had to tell accused that she liked "these things" because she was afraid he would choke her or pull his knife out. After reaching town she told Mr. Bob that accused was just a big bluff (R. 18-19).

The clothing worn by Elaine on 15 May was received in evidence as Exhibits A, B, C and D (R. 56-58).

Private First Class Glenn Smith and Sergeant William J. Kilgore, from information furnished by accused, located the jeep about three and one-half miles out of town. They had observed footprints and a scuffed-up area about four feet in diameter in the sand nearby (R. 41, 42, 46, 48).

4. For the defense, it was stipulated that if Lieutenant Colonel Richard B. Euller, Commanding Officer, 4th Armored Maintenance Battalion, were called as witness, he would testify that accused had been under his command since 15 April 1941, that during the period the conduct of accused and his ability to carry out orders had been excellent, that he was neat and smart and that he always demonstrated the greatest respect toward his superior officers. Lieutenant Frederick R. Hamm, the Battalion Adjutant, testified that accused had worked at message center, had done his work satisfactorily, and that he was always soldierly and had a good appearance (R. 62-64).

The accused elected to remain silent (R. 66).

5. The evidence shows that the accused had carnal knowledge by force of Elaine McLaren, a girl eleven years old.

The question remains whether it was without her consent. The accused met Elaine outside of the theatre, offered her money to pay her admission to the theatre and when she said she was looking for her parents, induced her to enter the jeep to go to the "Field Office" to locate them. Elaine refused to get out of the jeep, after accused had turned off the road some three miles from town. Accused took her by the arm, dragged her out and threw her on the ground. Accused said a lot of bad words and took off her pants. He was very rough, put his hand on her shoulder so that she could not get up, and tried to choke her by putting his arm around her neck when she said that she "didn't want to do it". When she replied to his question if she wanted to "fuck or suck", that she did not want to do either, accused replied that they would have to wrestle all night, if she did not do it, and was very rough. She told accused he could because she "had to" and was afraid he would get his knife out. She had to tell him that she liked it in response to his question because she did not know what he might do.

Resistance on the part of the female is an essential element of rape, unless circumstances make resistance unnecessary. The test of sufficient resistance is a resistance to the limit of the female's ability to resist, a resistance proportionate to the occasion, having in mind the relative physical strength of both parties. The resistance of the female must show the utmost effort on her part to resist the assault, taking into

consideration the relative strength and size of the parties and the surrounding circumstances (52 C.J. 1032).

"The nature and extent of the resistance, which ought reasonably to be expected in each particular case, must necessarily depend very much upon the peculiar circumstances attending it, and it is hence quite impracticable to lay down any rule upon that subject as applicable to all cases involving the necessity of showing a reasonable resistance" (Anderson v. State, 104, Ind. 467, 474).

"In Huber v. State the court held that 'the rule does not require that the woman shall do more than her age, strength, and the attendant circumstances make it reasonable for her to do in order to manifest her opposition'. The better rule is that it is not necessary that a woman should use all the physical force she has in resistance; but it must be real, and must have been overcome by the force of the defendant" (Rahke v. State, 81 N.E. (Ind.) 584, 585).

In State v. Wamsley (W. Va.; 156 S.E. 78), the court said:

"Barely across the line of demarcation, so far as age is concerned, as between statutory rape and common-law rape, her case necessarily appeals with a higher degree of force than if she were a mature woman. For, according to the modern and humane rule, 'If the girl is very young, and of a mind not enlightened on the question, this consideration will lead the court to demand less clear opposition than in a case of an older and more intelligent female, or even lead to a conviction where there was no apparent opposition.' 22 R.C.L. p. 1181".

The rule is similarly stated in State v. Cross (12 Iowa 66), citing 2 Bishop Criminal Law 939, in Bailey v. Commonwealth (82 Virginia 87), and in 44 American Jurisprudence, page 906.

In the CM 212505, Tipton, the Board of Review said:

"The Board of Review, in scrutinizing proof and bases of inference does not weigh evidence or usurp the functions of the courts and reviewing authorities in determining controverted questions of fact. In its capacity as an appellate body, it must, however, in every case determine whether there is evidence of record legally sufficient to support the findings

of guilty (AW 50½). If any part of the finding of guilty rests on an inference of fact, it is the duty of the Board of Review to determine whether there is in the evidence a reasonable basis for that inference".

In this case, Elaine, an 11 year old girl was driven by accused three miles out into the desert and off the road on a pretext of helping to find her parents, dragged from car, held on the ground so that she could not get up; accused tried to choke her when she said she did not want "to do it", was very rough and told her they would have to wrestle all night, and forced her to permit him to have intercourse with her. It is the opinion of the Board of Review that the evidence is legally sufficient to support the findings that accused at the time and place alleged had carnal knowledge of Elaine McLaren by force and without her consent.

6. As to Charge II the evidence shows that accused committed sodomy per os with Elaine as alleged.

The maximum limit of punishment upon conviction of sodomy in violation of Article of War 93 is dishonorable discharge, total forfeitures and confinement for five years (par. 104c, MCM 1928).

7. The charge sheet shows that accused is 22 years of age and enlisted 22 July 1940 to serve three years.

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 either of death or of imprisonment for life is mandatory upon conviction of rape in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offenses of rape and of sodomy, each recognized as an offense of a civil nature and so punishable by penitentiary confinement by sections 278 and 279, Criminal Code of the United States (18 U.S.C. 457, 458), and by section 22-107 of the District of Columbia Code, respectively.

Arthur S. Hill Jr, Judge Advocate

Samuel M. Driver, 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 236126

22 JUL 1943

UNITED STATES	)	SECOND AIR FORCE
v.	)	Trial by G.C.M., convened at Fort George Wright, Washington, 28 May 1943. Dismissal and confinement for two (2) years.
Second Lieutenant JESSE S. LOWE (0-1308231), 318th Infantry.	)	

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

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

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

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

Specification 1: In that Second Lieutenant Jesse S. Lowe, 318th United States Infantry, 80th Division, did, at the city of Coeur d'Alene, County of Kootenai, State of Idaho, on or about the 17th day of April, 1943, wrongfully and unlawfully marry, and take and have for his lawful wife, one Alice M. Goldsby, the said Second Lieutenant Jesse S. Lowe then have a living wife, to-wit, Mary C. Lowe, nee Ellis.

Specification 2: In that Second Lieutenant Jesse S. Lowe, 318th United States Infantry, 80th Division, did, at the City of Nashville, State of Tennessee, on or about February 14, 1943, with intent to defraud, wrongfully and unlawfully make and utter to the Deluxe Cab Company, Nashville, Tennessee, a certain check in words and figures as follows, to-wit:

Feb. 14 1943

City National Bank, Metropolis, Ill.

PAY TO THE ORDER OF Cash - - - - - - - - $20.00

Twenty & no/100 - - - - - - - - - - - - - - DOLLARS

J. S. Lowe
Camp Forrest, Tenn.

and by means thereof did fraudulently obtain from the said Deluxe Cab Company cash in the amount of Twenty Dollars ($20.00), the said Second Lieutenant Jesse S. Lowe then well knowing that he did not have and not intending that he should have sufficient funds in the said City National Bank, Metropolis, Illinois, for the payment of said check.

Specification 3: In that Second Lieutenant Jesse S. Lowe, 318th United States Infantry, 80th Division, did, at the City of Nashville, State of Tennessee, on or about March 8, 1943, with intent to defraud, wrongfully and unlawfully make and utter to the Hi-Ho No. 2, a certain check in words and figures as follows, to-wit:

City National Bank
87-4
Metropolis, Illinois

March 8 1943

PAY TO THE
ORDER OF Cash $10.00

Ten & no/100 - - - - - - - - - - - - - - - Dollars

For

0-1308321 J. S. Lowe
Co "D" 318th Inf
Camp Forrest, Tenn.

and by means thereof did fraudulently obtain from the Hi-Ho No. 2 cash and services of the value of Ten Dollars ($10.00), the said Second Lieutenant Jesse S. Lowe, then well knowing that he did not have and not intending that he should have sufficient funds in the said City National Bank, Metropolis, Illinois, for the payment of said check.

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

Specification: In that Second Lieutenant Jesse S. Lowe, 318th United States Infantry, 80th Division, did, at Camp Forrest, Tennessee, without proper leave, absent himself from his proper station at Camp Forrest, Tennessee, from about March 2, 1943, to about April 22, 1943.

The accused pleaded guilty to and was found guilty of all the Charges and Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor 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 Article of War 48.

3. The accused having pleaded guilty to all Charges and Specifications, the prosecution did not introduce any witnesses, but by stipulation agreed with the defense that the statements and documents marked Prosecutions Exhibits 1, 2, 3, 4, 5, 6 and 7 should be received in evidence and considered in the case for the assistance of the court. Without any objection by the defense, the prosecution then read to the court and introduced in evidence the documents marked 1 to 7, inclusive (R. 6a).

Prosecution's Exhibit 1, a true certified copy of the statement of Mrs. Mary Ellis, sets out in substance that on 3 March 1943 she and the accused were married by Justice of the Peace A. E. French at Rossville, Georgia. They stayed that night at the Hotel Plaza, Chattanooga, Tennessee; next day returned to Shelbyville, where the accused stayed with her at the Hotel Dixie for one day, then left saying he would return to her the next evening, but she had never seen him again.

Exhibit 5 is a true certified copy of the certificate of A. E. French, Justice of the Peace, stating that he united in marriage Jack S. Lowe and Mary C. Ellis, on 3 March 1943, in Catoosa County, Georgia. Exhibit 6 is a true certified copy of the marriage certificate by R. J. Hunter, Presbyterian Minister, setting out that on 17 April 1943, at Coeur d'Alene, Idaho, he united in marriage Jack S. Lowell and Alice M. Goldsby.

Exhibit 7 is the affidavit of said Alice M. Goldsby setting out that she met the accused on 11 April 1943, at Madges' Resort, under the name of Lieutenant Jack S. Lowell, but learned later that his name was Jessie S. Lowe. They were married on 17 April 1943, by Presbyterian Minister Hunter at Coeur d'Alene, Idaho. She understood the accused was in the Infantry at Camp Forrest, Tennessee, and on a furlough in Spokane, whence he had gone to the McCaw Hospital, Walla Walla, Washington. She saw him for twenty minutes at the Base Hospital, Fort George Wright, Spokane, Washington on 8 May 1943, where they just talked about things in general; and she has not seen him since. He gave her some rings at the time of their marriage, which he got from the Nelson Jewelry Company; but she later took them back because they were paid for by bad checks. He never said anything to her about his previous marriage; she learned of it from the prosecuting attorney in Spokane. During the time she knew the accused, he always wore a Second Lieutenant's uniform.

Exhibit 4 is a true certified copy of a check for $20.00, on the City National Bank, Metropolis, Illinois, dated "Feb. 14, 1943", signed "J. S. Lowe, Camp Forrest, Tenn.". Exhibit 3 is a true certified copy of a check for $10.00, on the same bank dated "March 8, 1943", signed J. S. Lowe", bearing the words "Co. 'D', 318th Inf., Camp Forrest, Tenn".

Exhibit 2 is an extract of the morning report of Company "D", 318th Infantry on 3 March, 1943, showing the accused from arrest in quarters to A.W.O.L. as of 2 March 1943.

4. The defense introduced no witnesses but by agreement submitted true certified copies of two letters written by William L. Parker, Cashier, Peoples National Bank, Shelbyville, Tennessee, as Defense Exhibits 1 and 2. These, in substance, refer to a $35.00 check on the City National Bank, Metropolis, Illinois, not involved in the case, and a letter from said bank stating that the accused had been of good standing in Metropolis, and his family, though poor, were honest and highly regarded (R. 6b).

The defense counsel also introduced as their Exhibit 3, a carbon copy of a letter dated 2 March 1943, addressed to the American National Bank, signed by James J. Hea, Colonel, 318th Infantry, stating, in substance, that the accused was absent without leave, then broke his arrest, and again went absent without leave; that Colonel Hea was ashamed of the accused's actions and would be glad to assist the bank in the collection of its money (R. 6e).

5. The accused did not testify under oath, but submitted an unsworn statement authorizing application of any pay due him, to reimburse the payees of his "hot" checks.

6. The plea of guilty by the accused is not impeached in any way by the documents introduced, but is fully substantiated. The court was warranted in finding him guilty of all Charges and Specifications.

7. The accused is 28 years of age. War Department records show enlisted service from 7 August 1936 to 7 January 1943 and commissioned as second lieutenant A.U.S., effective 8 January 1943.

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 authorized upon conviction of a violation of Articles of War 96 or 61.

Blasil Bresson, Judge Advocate.

Abner E. Lifecomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

SPJGN
CM 236126

1st Ind.

War Department, J.A.G.O., 31 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 Jesse S. Lowe (0-1308231), 318th 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 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 - Dft. ltr. for sig. Acting Sec. of War.
Incl 3 - Form of Executive action.

(Sentence confirmed. G.C.M.O. 274, 29 Sep 1943)

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

SPJGN
CM 236138

22 July 1943

UNITED STATES v. First Sergeant MARSHALL G. STEELE (6288800), Company A, 187th Glider Infantry.	)))))))))	11TH AIRBORNE DIVISION Trial by G.C.M., convened at Camp Mackall, North Carolina, 20 May 1943. Dishonorable discharge (suspended) and confinement for three (3) years. Rehabilitation Center, Fourth Service Command, Fort Jackson, South Carolina.

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

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1. The record of trial in the case of the soldier named above, having been examined in the office of The Judge Advocate General, and there found legally insufficient to support the findings and sentence, has been examined by the Board of Review and held to be legally sufficient to support the findings and sentence.

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that First Sergeant Marshall G. Steele, Company A, 187th Glider Infantry, did, at Camp Mackall, North Carolina, on or about April 23, 1943, feloniously and unlawfully

inflict injuries upon Tech. 5th Gr. John L. Hebert, Headquarters Company, 17th Airborne Division, by driving a motor vehicle against him, from which injuries the said John L. Hebert died on or about April 28, 1943.

The accused pleaded not guilty to and was found guilty of the Charge and its Specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct, for three years. The reviewing authority approved the sentence, ordered its execution but suspended the dishonorable discharge and designated the Rehabilitation Center, Fourth Service Command, Fort Jackson, South Carolina, as the place of confinement. The result of trial was published in General Court-Martial Orders # 5, Headquarters 11th Airborne Division, 5 June 1943.

3. The evidence shows that near midnight on 23 April 1943, a Ford V-8 automobile was proceeding along the highway near Post # 1 at Camp Mackall at about 40 miles an hour, when it came upon two soldiers who were walking in the same direction. The car ran into the two pedestrians, hurling them to the pavement. The car then swerved toward a ditch, slackened in speed, and then speeded away. A nearby sentinel called upon the driver of the car to halt but instead of responding to the command, "it went around the corner as fast as it could go". The driver or occupants of the car were not recognized (R. 7-8, 8-11, 11-13).

A few minutes later, the two men who had been struck down were found lying on the highway. One was lying on the right hand shoulder of the road, the other was lying about two yards from the edge of the right side of the pavement, and about twenty yards from the other man. The two injured men were carried away in an ambulance and one of them who was identified as Technician 5th Grade John L. Hebert, died as the result of injuries which he had received, on or about 28 April 1943 (R. 8-9, 26-27).

The car in question was identified as being the car of the accused, and was found within a short time after the accident parked in its usual parking place near the quarters of the accused (R. 8-13, 23-25).

The evidence shows further, that the accused, during the early evening of 22 April 1943, had driven his V-8 Ford automobile to a roadhouse called "Scotty's", and that he had remained there until the orchestra finished playing about 12 o'clock. The accused was not seen by the witnesses to leave Scotty's. During the evening, the accused drank both whiskey and champagne and was described as being drunk. In response to the question "Had he all his physical faculties about him", the witness replied, "Yes, I guess. He always kept requesting pieces and asking me what my favorite music was and said he would have it played for me". In response to the question "How drunk would you say you think Sgt. Steele was at that time?", the witness answered, "I think if I were in that condition I would not drive a car. He might have been able, but I would not have done it". A second witness stated that when he last saw the accused at Scotty's between 11:30 and 12 o'clock, the accused "* * * seemed to know what he was doing" and that he "* * * was moving from table to table from the band stand" (R. 17). The evidence shows further that earlier in the evening the accused had been in Aberdeen, and that before leaving there for Scotty's, he had stated that "he was driving himself". None of the witnesses who observed the accused in Scotty's, saw him leave there (R. 13-17).

At about 1:45 in the morning following the fatal injuring of Technician Hebert, Majors Roy E. Stout with Howard W. Decker interviewed the accused in the orderly room of the organization of accused. They found the accused asleep and fully clad, except that his shoes had been removed. After about 20 minutes, the officers succeeded in awaking the accused, informed him of the accident, warned him of his rights in regard to statements which he might make in connection therewith, and then questioned him. The accused appeared at that time to be drunk but to be aware of what he was saying. According to the testimony of Major Decker, "His first statement was that he came out of Scotty's, got into the back seat of his car and went to sleep; thus, implying someone else drove the car to camp" (R. 20). The accused stated that he returned to camp about 12:30. When asked where his car was parked, he pointed in the direction of the building where the car was. He had the keys of the car in his pocket and papers showing his ownership of it. The accused stated "* * * definitely that a soldier from the 17th Division drove him back". The witness then continued with the assertion, "The point I want to bring out is that he couldn't remember anything and yet he said that a soldier drove him back". The accused

stated that he did not know that an accident had occurred (R. 18-23).

4. The defense presented as a witness Technician Lester Perkins, who testified that the accused had taken him to Scotty's, on the evening of 22 April, that the accused had drunk heavily during the evening, and had been "pretty drunk". He testified further that on the evening in question he last saw the accused about 12:15. He described the accused' car as having either a broken windshield or window with tape on it (R. 33-34).

The defense also presented as its witness Private First Class Joseph Frino, who testified that on the night in question the accused was "* * * feeling pretty good" and that "he was frequently over to the band stand and he was going from table to table asking for songs and then asking us to play them". When asked the question, "In your opinion was Sgt. Steele in a condition to drive an automobile", the witness replied, "It is hard to answer that. I wouldn't have rode with him". When questioned as to whether the accused had any trouble walking, the witness testified, "If I recall correctly, at one time he made a little mistake and hit a stand which almost toppled over. That is the only incident I remember" (R. 34-35).

Private First Class Martin E. Wahl, Military Police Detachment, testified for the defense that he was on duty at Gate # 1, Camp Mackall, on the night of 22-23 March 1941, and that he admitted the car alleged to have been in the accident. He testified that the car passed his post between 11 and 12:15, that two enlisted men were riding in the front seat and that he did not see anyone on the back seat. On cross-examination the witness was asked the question, "Are you willing to swear that there were two persons in the car", to which the witness replied, "No, Sir; that question is difficult to answer" (R. 35-37).

Captain Isaac Hoppenstein testified that he was the accused's company commander and that he considered the accused the best first sergeant in the regiment, and had wanted to see him become a warrant officer (R. 25-26).

The accused in his own defense testified that at about 6:30 o'clock on the evening of 22 April 1943, he had driven to "Jack's Grill" in Southern Pines, had eaten dinner there, and bought some whiskey. He was then joined by two boys, one of whom was a member

of the orchestra at Scotty's. He testified to having several drinks. He then drove to Aberdeen where he met Sergeants Tolppi and Fossoul who invited him to go with them to Scotty's. The accused, however, declined the invitation stating that he would rather drive his own car. When he reached Scotty's, he drank both whiskey and champagne and "wandered around and had a few drinks and talked to the boys in the orchestra very smartly and talked to a sailor and his girl friend and then I don't remember anything after that". He testified further that he did not remember leaving Scotty's or entering Camp Mackall or going to his orderly room (R. 30-33).

5. The Specification alleges under Article of War 93 that the accused, did, at Camp Mackall, North Carolina, on or about 23 April 1943, feloniously and unlawfully inflict injuries upon Technician John L. Hebert, by driving a motor vehicle against him, from which injuries the said Hebert died, 28 April 1943. In order to sustain the findings of guilty under this Specification, it is legally necessary that the evidence show the following facts: (1) that accused killed the person named in the Specification; (2) that the death of such person occurred within a year and a day of the act of the accused; and (3) that the act of the accused which caused the death in question was felonious and unlawful within the contemplation of Article of War 93. Manslaughter, one of the offenses designated in Article of War 93,

> "* * * is unlawful homicide without malice aforethought and is either voluntary or involuntary.
>
> * * *
>
> Involuntary manslaughter is homicide unintentionally caused in the commission of an unlawful act not amounting to a felony, nor likely to endanger life, or by culpable negligence in performing a lawful act, or in performing an act required by law."

The evidence clearly shows that the death of Technician John L. Hebert was caused by the culpable negligent driving of the accused's Ford V-8 automobile on the night of 23 April 1943, and that as a result thereof Technician John L. Hebert died on 28 April 1943. The culpable negligence of the accused is shown specifically

by the fact that the driver of the car overtook the deceased on the highway near the entrance to Camp Mackall, and without observing that care and caution which the necessity of the occasion required, drove his automobile against him. The culpability of the driver of the car is further shown by the fact that after striking down two men he fled from the scene of the accident without stopping to render aid or assistance to either of them.

In fact the only serious problem which the case presents, involves the identity of the accused as the driver of the hit and run automobile which ran down the deceased. Concerning this problem we must observe that on the evening of the accident, the accused drove his automobile to Scotty's and that he declined to go there with others stating that he preferred to drive his own car. The facts show further that while the accused was at Scotty's, he was in an hilarious drunken condition as distinguished from the staggering or drowsy stage of drunkenness. Furthermore, when the accused was awakened in his orderly room he had the keys to his car in his own pocket, and his car was parked in its usual place. Although the accused when awakened stated that he did not remember anything of the evening in question after he had gotten into the back seat of his car at Scotty's, he inconsistently stated that he had returned to camp at 12:30, and that a soldier from the 17th Division had driven the car for him. Furthermore, when questioned as to where the car was, he pointed in the direction of the building where the car was parked. On the witness stand he enlarged the inconsistencies of his statements by testifying that he did not remember anything after talking with a sailor and his girl at Scotty's. Such diverse statements indicate the unworthiness of the accused's testimony. Moreover, his possession of the keys to his car, his indication as to where it was parked, his expressed preference during the evening for driving his own car, his correct statement as to when he had returned to camp, his gayety during the evening, combined with the natural tendency of a youthful car owner to drive his own car, present a factual basis for the logical inference that the accused drove his automobile on his return to Camp Mackall.

Concerning the force of circumstantial evidence, the Manual states that:

> "There is no general rule for contrasting the weight of circumstantial and direct evidence. The assertion of an eyewitness, who is absolutely trustworthy in every respect, may be more convincing than the contrary inferences that appear probable from

circumstances. Conversely, one or more circumstances may be more convincing than a plausible witness." (M.C.M., 1928, par. 112b).

In the case of State v. Durham, 201, N.C. 724, 161 S.E. 398, a deceased was killed by a car similar to the one used and driven by the defendant, and similar to the one identified at the scene of the accident. The defendant on the day in question had taken a young woman home just before dark, and the car seen at the accident had come from the direction in which the defendant had previously gone. The defendant produced no evidence, but denied his presence at the scene of the accident. The court held that the evidence was sufficient to go to the jury on the question of whether the defendant drove the car, and that the evidence was sufficient to sustain the jury's finding of guilty. In the case of People v. Smaszcz, 344 Ill., 494, 176 N.E. 770, a car causing a death on the highway was identified as the car belonging to the defendant. The hat of the deceased was found lodged on the car. A conviction of manslaughter was affirmed, and the court held that the jury might justifiably find beyond a reasonable doubt that the deceased was killed by the defendant while driving his own automobile.

In the light of the above precedents, and in view 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. For the reasons stated, the Board of Review holds that the record of trial is legally sufficient to support the findings of guilty of the Charge and the Specification thereunder.

Bhasil Jaresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Shepherd, Judge Advocate.

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

SPJGK
CM 236149

(321)

UNITED STATES	)	2D INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Camp McCoy, Wisconsin, 28 May 1943. Dishonorable discharge and confinement for twenty (20) years. Penitentiary.
	)	
Private JOE GOINS (6292685), Company E, 9th Infantry Regiment.	)	

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. The accused was charged with murder in violation of Article of War 92. He pleaded not guilty to murder in violation of Article of War 92, but guilty of voluntary manslaughter in violation of Article of War 93. He was found guilty as charged. 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 only so much of the findings of guilty as involves findings of guilty of manslaughter in violation of Article of War 93, approved the sentence, but reduced the period of confinement to 20 years, 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 supports the findings of guilty as approved by the reviewing authority. The only question requiring consideration is the legality of the approved sentence. Under the table of maximum punishments, the maximum punishment imposable upon conviction for voluntary manslaughter in violation of Article of War 93 is dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement for 10 years (MCM 1928, par. 104c).

4. For the reasons above 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 10 years. Confinement in a penitentiary is authorized by Article of War 42 for the offense of manslaughter, recognized as an offense of a civil nature and so punishable by penitentiary confinement by Section 22-2405 (6.25) of the Code of the District of Columbia (1940).

Judge Advocate.

Judge Advocate.

Judge Advocate.

1st Ind.

War Department, J.A.G.O., 9 AUG 1943 - To the Commanding General, 2d Infantry Division, Camp McCoy, Wisconsin.

1. In the case of Private Joe Goins (6292685), Company E, 9th Infantry Regiment, I concur in the foregoing holding of the Board of Review and for the reasons therein stated recommend that only so much of the sentence be approved as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 10 years. Upon compliance with this indorsement 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 236149).

T. H. Green,
Brigadier General, U. S. Army,
Assistant Judge Advocate General,
In Charge of Military Justice.

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

SPJGQ
CM 236173

22 JUN 1943

UNITED STATES v. Technician 5th Grade JOHN A. ALGER (6996695), and Private EDGAR B. BRIGHT (15044571), both of Battery B, 363rd Field Artillery Battalion.	96TH INFANTRY DIVISION Trial by G.C.M., convened at Fort Lewis, Washington, May 20, 1943. Each dishonorable discharge and confinement for sixteen (16) years. Penitentiary.

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 soldiers named above.

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

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

Specification: In that Technician Fifth Grade John A. Alger, Battery B., 363rd Field Artillery Battalion, and Private Edgar B. Bright, Battery B., 363rd Field Artillery Battalion, acting jointly and in pursuance of a common intent, did, at or near Yakima, Washington on or about April 15, 1943 by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of C. E. Clements about sixty-five dollars ($65.00) lawful money of the United States, the property of C. E. Clements.

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

Specification: In that Technician Fifth Grade John A. Alger, Battery B., 363rd Field Artillery Battalion, and Private Edgar B. Bright, Battery B., 363rd Field Artillery Battalion, acting jointly and in pursuance of a common intent, did, at Yakima, Washington on or about April 15, 1943 feloniously

take, steal and carry away one Forty-five Caliber automatic pistol model 1911 of the value of about twenty-six dollars and forty-two cents ($26.42) property of the United States furnished and intended for the military service thereof.

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

Specification: In that Technician Fifth Grade John A. Alger, Battery B., 363rd Field Artillery Battalion and Private Edgar B. Bright, Battery B, 363rd Field Artillery Battalion, acting jointly and in pursuance of a common intent, did, at or near Yakima, Washington on or about April 15, 1943 wrongfully take and use without the consent of the owner, a certain automobile; to wit Oldsmobile Taxi-cab, property of the Reliable Cab Company of a value of more than fifty dollars ($50.00).

Accused pleaded not guilty to and were found guilty of all Charges and Specifications. As to accused John A. Alger, no evidence of previous convictions was introduced. As to accused Edgar B. Bright, evidence of three previous convictions, two by summary court-martial for absence without leave in violation of Article of War 61, and one by special court-martial for being drunk and disorderly in uniform in violation of Article of War 96, was introduced. Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for sixteen years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that on April 15, 1943 First Lieutenant Jack L. Monk, 363rd Field Artillery Battalion, commanding Battery D, left his .45 caliber army pistol, which had been issued to him by the United States Government for use in the service, in the orderly room (R. 14). The accused Alger was in charge of quarters on that day and was in attendance when Lieutenant Monk returned from the field (R. 14). Later that evening Lieutenant Monk's pistol was found to be missing and at the same time it was discovered that both accused, Alger and Bright, were AWOL (R. 13). Lieutenant Monk identified his pistol at the trial by the serial number and by the memorandum receipt he had signed for it (R. 15). Later the same evening, about midnight, C. E. Clements, a cab driver of Yakima, Washington, was flagged by both of the accused near the Firing Center, outside Yakima, and directed to drive to another nearby town (R. 19). The accused Alger rode in the front seat and the accused Bright in the rear. The driver heard Bright in the rear seat throw a shell into a gun and looking in the rear mirror saw that Bright had pointed the gun

at him (R. 19, 20). Bright ordered him to drive ahead and, about a mile further on, he was ordered to stop the car. He was ordered into the back seat while Bright drove and Alger, sitting sidewise on the front seat, held the gun on him (R. 20, 21). After driving down a side road the car was stopped and the cab driver ordered to get out. Bright, who now held the gun, told Alger to "shake him (Clements) down" and at the same time struck Clements over the right eye with the gun (R. 21). Both of the accused then took about $65.00 from Clements. He was then ordered down the road and one of the accused said it would only take one shell to kill him (R. 23). While his back was turned he was struck on the head and knocked down. He heard one of the accused say "hit him again and make sure he is out" (R. 23). He was hit again and when he came to both of the accused and the taxi were gone (R. 24). He found his way to a nearby ranch and reported the robbery to the police.

D. B. Jeffries, of Ellensburg, a farmer, testified that about 2 a.m. on April 16, 1943, Clements came to his farm in a dazed condition, covered with blood, and telephoned the police (R. 27, 28). At the trial Clements identified both accused as the robbers (R. 18).

Late in the morning of April 16, H. J. English, an officer of the Washington State Police Patrol, having been advised of the crime and the abandonment of the taxi near Oddessa, Washington, picked up both of the accused riding in the rear seat of an auto in which they had obtained a ride (R. 32, 33). Their stories were inconsistent, they had no identification tags or furlough papers, one was without a hat (R. 34), and their clothes were bloodstained (R. 36, 39). They were given a scanty search and loaded in the back of the patrol car, with officer English driving, and another police car following (R. 34). Two or three days later (R. 37) as a result of a telephone call from the Yakima police, officer English searched the rear of his patrol car and found the pistol in a locked compartment under a seat (R. 35). When he removed the prisoners from the car he noticed that the box was locked, and it was locked when he made the search. He sometimes ran with the box unlocked. No other persons had been carried in the back of the patrol wagon between the arrest of the accused and the discovery of the pistol, and the officer had possession of the only key to the box during that time (R. 35, 36). The pistol was turned in to the Spokane Patrol Office (R. 35). Officer Hyatt of the Spokane Patrol, who assisted in the arrest, identified the pistol in question by the serial number as the pistol which had been given him to deliver to the Yakima Patrol for return to the military authorities (R. 40). The serial number (R. 35) was the same as Lieutenant Monk's pistol which had been stolen and which was returned to him by the Yakima Patrol (R. 15). The value of the pistol was established at $26.42 by the testimony of an Ordnance Company Sergeant (R. 16) and reference to the SNL (Standard Nomenclature List, or Ordnance catalogue) (R. 17), and the market value of the taxicab was established at $1150.00 by the testimony of Bert Baker, the owner of the stolen taxi, and of a fleet of cabs, who had bought and sold between 63 and 66 new and used cabs (R. 30, 31).

4. Both accused having been advised as to their rights elected to remain silent.

5. The evidence clearly establishes that the accused jointly robbed C. E. Clements of $65.00 when they pointed a loaded revolver at him and forced him through fear to turn over to them the money he had on his person. It was also clearly shown that the accused in the same manner took an automobile from C. E. Clements owned by the Reliable Cab Company valued at more than $50.00. The revolver used by the accused in the robbery was shown to be the property of the United States Government issued to Lieutenant J. L. Monk and left by him in his company's orderly room accessible to the accused Alger who was in charge of quarters that day. The evidence shows beyond a reasonable doubt every element of the crimes alleged in the various Charges and Specifications.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence as to both accused. Dishonorable discharge, total forfeitures, and confinement at hard labor for 16 years are authorized upon conviction of the combined offenses of robbery in violation of Article of War 93, larceny of property of a value of more than $20 but less than $50, in violation of Article of War 93, and wrongfully taking and using an automobile valued at more than $50 without the owner's consent in violation of Article of War 96. The maximum confinement provided for by the District of Columbia Code for the unlawful taking and using of an automobile without the owner's consent is five years (Sec. 22-2204 (6:62), D. C. Code. CM 208699; CM 193315).

William A. Bounds, Judge Advocate.

Earle Stephens, Judge Advocate.

Herbert B. Roderick, Judge Advocate.

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

SPJGQ
CM 236204

22 JUL 1943

UNITED STATES	)	EIGHTH SERVICE COMMAND
	)	
v.	)	Trial by G.C.M., convened at Camp Barkeley, Texas, 24 and 25 May 1943. Dismissal.
	)	
Major PAUL M. BARTH, (0-120440), Dental Corps.	)	

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

1. The record of trial in the case of the officer 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 Major Paul M. Barth, Dental Corps, Medical Department Replacement Pool, Medical Replacement Training Center, Camp Barkeley, Texas, being indebted to his wife, Mrs. Gayle Barth, in the amount of $200 per month for alimony and support, which said amount was agreed to in open court by the said Major Paul M. Barth and reduced to judgment in the District Court, Ninth Judicial District, Polk County, Iowa, on or about March 3, 1941, and which said amount of $200 became due and payable on the first day of each month from and after April 1, 1941, did, at Fort Leonard Wood, Missouri, Camp Young, California, Torney General Hospital, Palm Springs, California, and Camp Barkeley, Texas, from on or about September 1, 1941, to on or about April 1, 1943, dishonorably fail and neglect to pay said debt.

Specification 2: In that Major Paul M. Barth, Dental Corps, Medical Department Replacement Pool, Medical Replacement Training Center, Camp Barkeley, Texas, having been

> lawfully ordered by a decree of the District Court, Ninth Judicial District, Polk County, Iowa, dated March 3, 1941, to pay to his wife, Mrs. Gayle Barth, the sum of $200 per month for alimony and support from and after April 1, 1941, did, at Fort Leonard Wood, Missouri, Camp Young, California, Torney General Hospital, Palm Springs, California, and Camp Barkeley, Texas, from on or about September 1, 1941, to on or about April 1, 1943, wrongfully fail to obey the said decree of said court to the prejudice of good order and military discipline, and to the disgrace of the military service.

Accused pleaded not guilty to the Charge and its Specifications. A motion for a finding of not guilty as to Specification 2 was denied. Accused was found guilty of the Specifications and Charge. No evidence of prior convictions was introduced during the trial. 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. For the prosecution it was shown that on 3 March 1941 accused and his wife, Gayle Barth, entered into a separation agreement which was embodied in a formal decree of the District Court of Polk County, Iowa. The decree recites that accused, who was plaintiff in a divorce action then pending in said court had failed to sustain the material allegations of his petition and that it was, therefore, dismissed and all relief prayed for was denied; that under the testimony in the cause and "by agreement of the parties" a decree granting separate maintenance to the wife and awarding support money and alimony for the care and support of the wife and of the minor child of accused and his wife should be entered. A decree was accordingly entered on said date whereby Mrs. Gayle Barth was granted judgment against accused for alimony and support money as follows:

$100 to be paid upon the entry of the decree;
$200 to be paid by the 1st day of April 1941 and
$200 to be paid on the first day of each and every month thereafter. "For so long as accused shall remain in the armed forces of the United States."

The court specifically retained jurisdiction of the cause so that it could again be heard "at such time as this plaintiff (accused) shall be discharged from the armed service of the United States of America."

A certified copy of the decree was admitted in evidence (R. 13 Ex. B).

It was further shown that, on 1 September 1941, accused, having instituted divorce proceedings in Boone County, Arkansas, was granted a divorce from his wife, Gayle Barth. This decree was appealed to the Supreme Court of Arkansas where it was held that the decree had been improperly granted for

the reason that accused had not complied with the divorce laws of Arkansas in the matter of his residence. By its mandate it directed the vacation and annulment of the decree of 1 September 1941 and on 8 September 1942 the Chancery Court of Boone County, in obedience to said mandate, did vacate the decree. A certified copy of this decree was admitted in evidence (R. 15; Ex. C).

On 22 September 1942 accused was granted a decree of divorce from his wife, Gayle Barth, in the Circuit Court of Jefferson County, Missouri, a certified copy of which decree was admitted in evidence (R. 15; Ex. D).

L. H. Doran, of Boone, Iowa, testified that he had practiced law since 1 August 1920 (R. 16) and that in this capacity he had represented accused's wife since 1937. He was counsel for her at the time of the entry of the separate maintenance decree in Iowa. Neither Mrs. Barth nor he had received any notice whatever of the institution and prosecution by accused of the divorce proceedings in Arkansas and it was not until after the decree had been entered that he learned of it and took such action as he believed was necessary and which resulted in the appellate proceedings whereby the decree was vacated (R. 17, 18).

In his brief filed with the Supreme Court of Arkansas, counsel for accused stated:

> "As to the subject matter of alimony and maintenance, the Arkansas courts in this cause, never have had, or assumed jurisdiction. Major Barth testified at the divorce hearing that property rights had been settled between the parties. The certified record of the Iowa court, introduced in this cause, sets out that it retains jurisdiction and power to again hear the parties on alimony and maintenance, after Major Barth leaves the army. At the hearing of this cause in the lower court, at specific request of the Appellant (Mrs. Barth), the Court found: 'That the decree in Iowa was not affected in any way', and that he had no jurisdiction over the decree, or the property rights of the parties.
>
> "There is no doubt that Appellant could have asked the court here to award her alimony, and same could have been awarded her. However, she chose to rely on her decree in Iowa, and asked that no order be made here that might affect her rights under the Iowa decree. By what authority or jurisdiction a court of Arkansas could make an order affecting one's rights under this Iowa judgment was something beyond the ability of the Chancellor, and there is nothing more to be said on the subject before this Court" (R. 22).

From an abstract of the record filed with witness' brief in the same proceeding and in the same court, the following comments made by the Iowa court at the time the Arkansas divorce decree was signed appear:

"The Court finds that her decree in Iowa is not affected in any way. This Court does not desire to interfere with any decree rendered in Iowa. And the Court finds he would have no jurisdiction over that decree or the property rights of the parties (Tr. 106)" (R. 23).

When divorce proceedings were later instituted by accused in the State of Missouri, Mrs. Barth and her counsel were again kept in ignorance, had no notice thereof and, in fact, knew nothing about the action until the decree had been granted, whereupon witness immediately took necessary steps to have it set aside. A hearing in the matter was held on 12 May 1943 and the matter is now pending before the court (R. 23, 24).

On 23 October 1942 The Adjutant General, by order of the Secretary of War, and through 1st Indorsement to a basic communication which was not admitted in evidence because of objection, directed that accused

"* * * will be advised of the contents of the basic communication and attached inclosures, particular attention being invited to * * * copy of court decree of September 8, 1942.

"Major Barth will be informed that he is expected to abide by the stipulations of said decree until relieved therefrom by competent authority, and that failure to meet his legal and moral obligations to the best of his ability, may result in the initiation of disciplinary action.

"He will state by indorsement hereon, what action he intends taking to effect an adjustment of the matter concerned in basic communication and inclosures."

To this in due course, accused, by 4th Indorsement, dated 11 November 1942, replied that

"* * * I am relieved of stipulations of decree issued in Iowa by a divorce decree awarded me September 1942. This is on the advice of my attorney.

"The decree also relieves me of adjustment spoken of in * * * 1st Indorsement."

A copy of the decree of divorce therein referred to, having been requested as an inclosure, was furnished, whereupon the entire file was, by 8th Indorsement, dated 26 November 1942, submitted to The Judge Advocate General with a request for a decision "as to what further action should be taken by the military in the case."

The Judge Advocate General, by 10th Indorsement dated 28 December 1942, advised as follows:

"The War Department may not with propriety inquire into the validity of decisions of the civil courts and must therefore recognize them until they are set aside or otherwise altered by courts of competent jurisdiction. It is therefore assumed for present purposes that the order of the Iowa court for separate maintenance and the subsequent Missouri court decree of divorce are both valid. This latter decree does not, however, appear to have the effect of terminating the Iowa decree for separate maintenance. It is my opinion that Major Barth is obligated to make the so-called alimony payments due pursuant to decree of the Iowa court since September 1, 1941 and that his liability for current payments continues until that decree is modified or terminated by a civil court of competent jurisdiction. It is therefore recommended that Major Barth be forthwith informed that it is incumbent upon him to comply with the orders of the Iowa court and that a failure to do so, within a reasonable time, will be considered dishonorable conduct constituting a proper basis for disciplinary action."

This recommendation and advice were approved by order of the Secretary of War on 29 December 1942 and the papers were then returned for necessary action in compliance with the recommendation.

By 13th Indorsement, dated 23 January 1943, accused stated:

"I do not intend to disobey any lawful military order issued to me but I believe that in accordance with the enclosed opinion rendered by William H. Westover, and the citation quoted by him, I am relieved from payment of separate maintainence."

This being deemed insufficient and unsatisfactory, the Commanding General, 6th Motorized Division, returned the correspondence to accused on 27 January 1943, inviting attention to the provisions of the 1st Indorsement.

Thereupon, accused by 16th Indorsement, dated 2 February 1943, submitted, as additional inclosures, a copy of a bill of sale whereby he transferred his dental office equipment to his wife on 8 May 1937; a copy of a quitclaim deed whereby, on 22 March 1937 he conveyed the property in which they had resided to his wife; and a copy of a quitclaim deed to Arthur C. Herman, "so Gayle Barth could give Herman clear title to the property which she sold." He also stated therein that at the time of the conveyance of the residence property he turned over to his wife the furniture therein, which had cost $4000; that he had sent his daughter $100 monthly in September, October, November and December, 1941, and $50 in January 1942; that his present obligations in excess of his living expenses amounted to $342.50; that he had since married again; and that, in his opinion,

the order contained in the last sentence of the 10th Indorsement by The Judge Advocate General "would constitute a personal hardship." He therefore, requested that, in the light of the new evidence thus furnished by him, the matter be again referred to The Judge Advocate General for further consideration.

It was so referred and, by 19th Indorsement, dated 2 February 1943, Brigadier General E. C. McNeil, Acting The Judge Advocate General, advised that the views previously expressed were adhered to and recommended that all of the papers be referred to the officer exercising immediate general court-martial jurisdiction over accused for appropriate action in harmony with the views expressed.

By 22nd Indorsement, dated 10 March 1943 accused stated that upon the advice of "competent counsel" he took the position that the "valid divorce" granted in Missouri on 22 September 1942 terminated the right of his former wife to payments for separate maintenance and he felt that "the facts in this case, as evidenced by the papers attached and competent testimony will * * * give me a complete defense to any charges that may be preferred." (The indorsements referred to above were all admitted in evidence and are attached to the record as Exhibit A).

Witness Doran with reference to the transfer of property and office equipment testified that he had personal knowledge of the matters. He stated that the residence property, at the time of the conveyance to Mrs. Barth, was worth not more than $3,500; that there was a mortgage encumbrance in excess of that amount on the property at the time; and that it was sold in 1942 for $4000. As to the dental equipment he stated that it was likewise encumbered by a lien; that a bank was claiming a landlord's lien upon it at the time of the transfer and less than $400 was realized for it when it was sold (R. 27-30). He stated that he had received no compensation for his services rendered to Mrs. Barth other the $150 which she paid following the entry of the decree in the Iowa court (R. 31).

In his opinion neither the decrees of the Arkansas courts or the Missouri court had any legal effect upon the payments accused was obligated to make under the Iowa maintenance decree. (R. 26, 27).

Accused having been advised of his rights, elected to be sworn as a a witness and testified, substantially, as follows:

He and his first wife, Gayle Barth, were married on or about 16 February 1918 and lived together as man and wife until they separated on 4 July 1937 (R. 34).

He admitted entering into the maintenance agreement in Iowa on 3 March 1941 (R. 54) and stated that he made all of the payments required by it until September 1941 when, acting on advice of counsel, he felt he was no longer obligated to make them. However, he testified:

"* * * I did not want to appear too hard on the family, wanted to see them get along, and I of my own free will and accord sent them $100, which I figured, with what other income they had from property I had given them before, should be enough to keep them" (R. 56).

He made payments of $100 a month in September, October, November and December of 1941 and in January 1942 but he sent only $50 in February and nothing thereafter for the reason that he was obliged to pay $250 to his attorney for representing him on the appeal of the Arkansas divorce decree to the Supreme Court of Arkansas and, as he said, "I figured if I sent them money at this time they would use it to persecute me in carrying out this Supreme Court action" (R. 56, 57).

Accused stated that he had obtained a scholarship for his daughter; that at the time she was employed by N.Y.A. and that his wife had an income besides from property that he had given to her. He had invested $6,500 in the home which he conveyed to his wife and the furniture in it had cost $4,500. He also turned over to his wife about $1000 worth of accounts receivable at the time when he transferred the office equipment to her. He admitted that the equipment had a lien of $250 against it (R. 59).

Shortly after obtaining the Arkansas divorce decree accused married again. When the Supreme Court vacated this decree his counsel had advised him to institute a divorce action in the state of Missouri in order to prevent a prosecution for bigamy and he, accordingly, sought and obtained a divorce in Missouri (R. 65).

He had consulted a number of lawyers with regard to his obligations under the Iowa decree (R. 65, 66, 77), obtained several written opinions with respect to the effect of the Missouri divorce upon it (R. 77, Ex. 1, 2 and 3) and Colonel Huddleston, his Commanding officer, Lieutenant Colonel Bruscas, Adjutant General of the 6th Motorized Division and Captain Predtie, of The Judge Advocate General's Department had each given him advice in the matter, all agreeing that he was not required to continue payments to his wife and child (R. 58, 67, 68, 69).

After court-martial charges were preferred against him, accused voluntarily submitted to the investigating officer a sworn statement in which he said:

"That it is hereby admitted that the sum of $2400.00 is due my former wife as back payments for the period from September 1, 1941 to September 1, 1942 during which time I had an Arkansas decree of divorce.

"That I am willing and able to now pay off that sum due at the rate of $100.00 per month. That at the present time I am not in a position and have no means to pay a sum greater than $100.00 a month.

"That because of the present responsibility and obligations to my present wife, it is almost impossible to pay my former wife more than $100.00 a month. My present income is $408.33 a month. I have contracts amounting monthly to $97.34, insurance $46.40, bonds U.S. $75.00, clothing $20.00 * * * " (R. 88-90; Ex. 4).

He admitted that the amount of $408.33 given therein as his income did not include rent and subsistence allowances which totaled to $183 additional (R. 90).

By stipulated testimony it was shown that Charles T. Bloodworth, Sr., of Poplar Bluffs, Missouri and Sam M. McKay of Desoto, Missouri, members of the Missouri bar for 39 and 40 years, respectively, had professionally advised accused regarding his obligations under the Iowa maintenance decree.

When the Arkansas divorce decree was granted, Mr. Bloodworth, who was counsel for accused in that suit, advised him that the decree nullified the Iowa decree. Subsequently, when the divorce was set aside he again advised accused and informed him that the vacation of the Arkansas decree "had no bearing upon the agreement for separate maintenance" and that accused "was still not legally obligated to pay and should not pay under the terms of that agreement." He had received a fee of $350 from accused.

Mr. McKay represented accused in the Missouri suit for divorce and likewise advised him on about 1 September 1942 that he was not legally obligated to make any further payments under the Iowa decree. He had also in February and May 1943, made unsuccessful attempts to effect a settlement between accused and his former wife (R. 99-102).

4. The issue in this case, while bitterly contested before and during the trial, is not difficult to decide; nor should it have been necessary for accused to invoke the advice and recommendations of the highest legal authority of the Army in a matter in which it seems apparent that he was determined to act as he saw fit, notwithstanding.

While there was much ado over the purportedly controversial point as to whether a divorce decree of one state is entitled to such full faith and credit in another state so that a separate maintenance decree entered by a court of competent jurisdiction in the latter became nugatory upon the entry of a divorce decree by an equally competent court in the former, this is of no great moment in determining the guilt or innocence of accused in this case.

The court martial was not obliged to consider any other phase of the case than that presented by the voluntary, sworn statement of accused made and submitted after charges were preferred against him, in order to justify a finding of guilt. In that statement he admitted that on 23 April 1943 he did owe the sum of $2400 as a total of payments due for the support and maintenance of his wife and child from 1 September 1941 to 1 September 1942, in the payment of which he had been, for a long time and still was, in

default, without offering any valid defense for his failure to pay.

It is the announced policy of the War Department not to countenance any evasion by an officer of the legal or moral obligations toward his wife or dependents and that disciplinary action will be taken against officers who do not make provision for the support of those members of their families who are legally entitled to such support (Sec. 454, par. 48, subpar. 7, Dig. Ops. J.A.G. 1912-1940) A fortiori such action will be taken against an officer who, when he has voluntarily permitted himself to be bound to the performance of this duty by court decree, not only disregards the order but seeks to destroy its effect.

Accused's showing of his gratuitous conveyance of the home property and its furniture, his dental equipment and some accounts receivable to his wife at or about the time of their separation in 1937 cannot be counted much in his favor for the reason that they were so encumbered that little was realized by the intended beneficiaries. Nor would it be just and equitable to consider these property settlements in accused's behalf at this time inasmuch as they must have been in contemplation in 1941 when the maintenance agreement was made.

Furthermore he swore that his "present income is $408.33 per month" but he failed to mention that he received $183.00 in addition thereto which actually brought him total receipts of $59133 monthly. No detailed account of his necessary expenditures was disclosed though he added, in his statement, that "of this, I have contracts amounting monthly to $97.34, insurance $46.40, bonds, U.S. $75.00 and clothing $20.00". These total $238.74, leaving a balance of $352.59 unaccounted for. Notwithstanding the sum of $75 of these listed expenditures was being invested monthly in bonds, accused concluded that "from this it can be seen that I cannot make payments of more than $100 a month to pay off the admitted amount of $2400 to my former wife".

Even though nothing else were shown, this state of affairs, by accused's own admissions is sufficient to sustain the findings.

A willful failure of an officer to support and maintain his wife and child who, by a valid decree of a court of competent jurisdiction are shown to be entitled to such assistance is dishonorable and disgraceful conduct. In civil life, the behavior of a husband and father who, without legitimate excuse, fails to care for his dependents, is looked upon as criminal in many jurisdictions. To say that a gentleman in "the honorable profession of arms" is immune from such responsibility and ought not to be punished for evading it would reflect discredit upon the entire service.

But there is an aggravated situation presented here. Accused, after living separate and apart from his wife since 1937 attempted to secure a divorce from her in the state of Iowa, where he resided. Being unsuccessful in maintaining his charges, he then, voluntarily, entered into a separate maintenance agreement with his wife whereby he obligated himself to pay certain sums monthly for the support of his wife and minor child so long as he remained in the military service. The terms and conditions were manifestly satisfactory to him then. This agreement was embodied in a court decree and jurisdiction over the matter was therein specifically retained.

There cannot be the slightest doubt of what accused freely, voluntarily, without coercion and with advice of counsel promised to do when he entered into the compact and no reasonable person could have then honorably believed that he was justified in resorting to subterfuge in order to evade the plain import of the decree.

How then can accused excuse his later actions? He did comply with the terms of the decree for five months. Then, instead of appealing to the Iowa courts for a modification of the decree if he was, in fact, unable because of changed circumstances to comply with its terms or if it could have been shown that his wife and child were no longer in need of and entitled to the sums provided, he obtained a divorce in the State of Arkansas. That he did so for the sole purpose of legally justifying his refusal to further aid his dependents is an inescapable conclusion, for the burden of his defense is that ever since then he has had the honest conviction that he owed nothing <u>legally</u> to his dependents.

When the Arkansas divorce was later vacated by the Supreme Court because of accused's failure to comply with the residence requirements of the law he instituted proceedings in Missouri, and there obtained another divorce which is presently under attack in that jurisdiction.

While the processes, procedures and pleadings whereby accused prevailed in obtaining these divorces are nowhere apparent in the record, it is evident that, although he knew, at all times, where his former wife was residing and was fully cognizant that she was represented by counsel with whom he was intimately acquainted, no notice of any kind was ever given to either throughout any stage of the respective suits and this, of itself, is most persuasive evidence of accused's disgraceful and dishonorable actions.

Good citizenship requires not only an adherence to the strict letter of the law but an honorable respect for the spirit of the law as well, and

any attempt to evade the spirit by a show of compliance with the letter is shameful hypocrisy often more damaging in its effects upon good government and a well ordered society than outright breach of the law itself. Certainly an officer and a gentleman understands these principles and is willing to be and should be bound to an observance of the moral as well as the legal bonds of the obligation which he assumes.

Accused has admittedly failed for a period of one year to pay the moral and legal debt of support and maintenance to his wife and child when he was able to do so and such neglect was dishonorable. At the same time he disobeyed the valid and continuing order of a civil court which he was morally and legally obliged to obey and this was behavior which, though in an unofficial and private capacity, dishonored and disgraced him personally and as a gentleman and seriously compromised his position as an officer.

5. The records in the Office of The Adjutant General disclose that accused enlisted in the Medical Reserve Corps on 17 January 1918. He was called to active duty on 11 August 1918 and served at Camp Beauregard, Louisiana, until 12 November 1918 and in France thereafter until 9 July 1919. On 31 January 1919 he was appointed 1st Lieutenant, Dental Section Officers' Reserve Corps. He was honorably discharged at Camp Dodge, Iowa 16 July 1919. He has been an officer in the Dental Section of the Officers' Reserve Corps since then, receiving promotion to captain on 10 March 1924 and to major on 25 January 1933. He was again called to active duty on 9 December 1940, and has been serving at various stations since.

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

William T. Pounds, Judge Advocate.

Charles Fahy, Judge Advocate.

Herbert B. Pedersen, Judge Advocate.

1st Ind.
31 July 1943

War Department, J. A. G. O. . - 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 Paul M. Barth (0-120440), Dental Corps.

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

3. Consideration has been given to the attached three letters from Mrs. Paul M. Barth, addressed to The Adjutant General and The Judge Advocate General.

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

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

6 Incls.
Incl. 1-Record of trial.
Incl. 2-Dft. let. sig. Act. Sec. of War.
Incl. 3-Form of action.
Incl. 4-Let. fr. Mrs. Barth, 16 March 1943.
Incl. 5-Let. fr. Mrs. Barth, 13 April 1943, w/incls.
Incl. 6-Let. fr. Mrs. Barth, 2 July 1943, w/incls.

(Resigned)

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

SPJGH
CM 236207

16 JUL 1943

UNITED STATES	)	PANAMA MOBILE FORCE
	)	
v.	)	Trial by G.C.M., convened
	)	at Fort William D. Davis,
Second Lieutenant ELBERT	)	Canal Zone, 15 May 1943.
R. CARTER (0-439629),	)	Dismissal.
14th 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 I: Violation of the 95th Article of War.

Specification 1. In that Second Lieutenant Elbert R. Carter, Fourteenth Infantry, did, at Outpost 217A, Pina, Canal Zone, on or about April 26, 1943, with intent to deceive Captain Harold Brewer, Fourteenth Infantry, make an official signed report to the said Captain Harold Brewer, that he had inspected Outpost 217A at 0405 hour, April 26, 1943, which report was known by the said Lieutenant Elbert R. Carter to be untrue.

Specification 2. Same as to Outpost 217B at 0400.

Specification 3. Same as to Outpost 218 at 0415.

Specification 4. Same as to Outpost 218A at 0425.

Specification 5. Same as to Outpost 218B at 0440.

Specification 6. Same as to Outpost 218C at 0418.

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 under the 48th Article of War.

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

The accused, Company E, 14th Infantry, Fort William D. Davis, Canal Zone, was instructed to inspect the OPs for which the company was responsible, 217A, 217B, 218, 218A, 218B and 218C, on 26 April 1943, once between reveille and midnight and once between midnight and reveille. Reveille was at 0555. It was the duty of the officer making the inspection to sign the inspection sheet (R. 8-10).

OPs 217A (R. 16), 217B (R. 16-17), 218 (R. 14), 218A (R. 14), and 218C (R. 15) were not inspected by a commissioned officer between 2400 and 0800, 26 April 1943.

On the morning of 26 April 1943, Captain Harold Brewer, Commanding Company E, 14th Infantry, told accused that he was to go out with the company on the obstacle course that morning. Accused replied that he wanted to go to the OPs to do some work. Captain Brewer permitted accused to do so and sent another officer out with the company. After the accused left, Captain Brewer called Sergeant N. A. Camby, in charge of OP 218, and directed him to check the inspection sheet and note when it was last signed and by whom. When accused came back from the OPs, Captain Brewer sent him to the company and himself went out to inspect the OPs. He examined the inspection sheet of OP 217A, which showed that it was last signed at about 0815 that morning and showed that the last preceding signature between 0400 and 0500 was the signature of accused. Captain Brewer inspected the inspection sheet at OP 217B and found it and the sheets at the other OPs for which the company was responsible, 218, 218A, 218B and 218C, similarly signed by accused between 0800 and 0900 and between 0400 and 0500, 26 April. Upon identification by Captain Brewer the inspection sheets were received in evidence as Exhibits A (217A), B (217B), C (218), D (218A), E (218B) and F (218C). Once each week the inspection sheets were taken up by the company and turned in to the regiment (R. 6-9).

Upon cross-examination, Captain Brewer stated that he saw accused in the orderly room at about 1130, 26 April. When he asked accused if he had made the inspection between midnight and reveille the accused replied "No", but gave no reason for that statement (R. 9-10).

When Sergeant Camby examined the inspection sheet at OP 218 at the direction of Captain Brewer, he found that the last signature on the sheet was that of accused showing the date 0810 on the morning of 25 April. When Private Norborne L. Whittemore, the sentry at OP 218B between the hours of 0800 and 1600 26 April 1943, examined the inspection sheet at about 0750, he found the last signature to be that of accused at 2000 or 2100 the previous night. The accused thereafter inspected the post between 0800 and 0900 and signed the sheet. Whittemore then found that two signatures of accused had been added, one showing 0850, and the other 0440 before Whittemore came on duty (R. 10-13).

Technician Fifth Grade Anthony Bouzakis identified a paper (Ex. G), containing a signature of accused for a cleaning rod which he issued to accused from the company supply room, which was received in evidence as Exhibit G upon an affirmative statement of no objection by the defense (R. 17-18).

4. For the defense, the accused testified that he obtained his commission through the CMTC in 1937-40 and came on active duty in April 1942. He had served three and one-half months at Camp Robinson, Arkansas, as a recruit instructor, and eight months at Fort Davis as a company officer. On the morning of 26 April he went out to OPs 217A, 217B, 218, 218A, 218B and 218C and signed at the same time the inspection sheets as of between the hours of 0400 and 0500 and for the hours between 0800 and 0900. After he came in from the OPs, Captain Brewer asked him if he had made the inspection between the hours of 0400 and 0500. The accused told Captain Brewer that he had not done so and as a reason told Captain Brewer that "I didn't want any trouble or restriction from Battalion Headquarters. I knew this report went through the Company and was looked over by Battalion Headquarters". The accused stated to the Court that he did not realize at the time what he was doing but fully realizes the importance now (R. 19-20).

Upon cross-examination and examination by the court, the accused identified as his own the last two signatures upon Exhibits A, B, C, D, E and F, the inspection records for the six OPs. The accused realized that he was signing a false statement. He signed them with intent to deceive higher authority, but did not intend to deceive Captain Brewer. He came after his inspection and explained to Captain Brewer that he did not make the inspection as shown (R. 20-22).

5. The evidence clearly shows and the accused frankly admits in his testimony, that he failed to inspect--as was his duty--at some time between

midnight and reveille 26 April 1943, the six OPs which were manned by members of his company. At about 0800, 26 April he secured relief from another company duty to do some work on the OPs, went to the six OPs and signed each inspection sheet twice, once for the actual time of that inspection, and once as of between 0400 and 0500, 26 April. It was brought out by the defense upon cross-examination that when Captain Brewer at about 1130, 26 April asked accused if he had made an inspection between midnight and reveille, the accused replied that he did not. The accused testified that he realized that he signed false statements on the inspection sheets but stated that he did it with intent to deceive higher authority, but not to deceive Captain Brewer.

The evidence clearly supports without contradiction the findings of guilty of each of the six specifications. Winthrop cites the making of a false official report to a commanding or superior officer as an instance of conduct unbecoming an officer and a gentleman (Winthrop's Military Law and Precedents, Reprint, p. 713).

6. Six of the nine members of the court join in a recommendation of clemency in view of the youth, inexperience and background of accused, of his failure to appreciate the seriousness of his act and his subsequent remorse as evidenced during the trial.

7. The accused is 23 years of age. The records of the Office of The Adjutant General show his service as follows: Appointed temporary second lieutenant, Army of the United States, from C.M.T.C., 25 February 1942; active duty 30 April 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 mandatory upon conviction of a violation of the 95th Article of War.

Curtis S. Hill Jr, Judge Advocate

Samuel M. Driver, Judge Advocate

F J Lotthus, Judge Advocate

1st Ind.

War Department, J.A.G.O., 29 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 Elbert R. Carter (0-439629), 14th 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 signed with intent to deceive his commanding officer an official report at each of six outpost stations in the Canal Zone that he had inspected the station at a certain time, when in fact he had not made those inspections, but signed each inspection sheet twice upon a subsequent inspection. I recommend that the sentence to dismissal be confirmed, but in view of the recommendation of clemency by six of the nine members of the court because of the youth, inexperience, and background of accused, of his failure to appreciate the seriousness of his act and his subsequent remorse as evidenced during the trial, that the execution of 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 carrying into effect that recommendation.

Myron C. Cramer.

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

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

(Sentence confirmed but execution suspended. G.C.M.O. 305, 8 Oct 1943)

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

(345)

SPJGK
CM 236209

26 AUG 1943

UNITED STATES	)	4TH MOTORIZED DIVISION
	)	
v.	)	Trial by G.C.M., convened at Fort Dix, New Jersey, 1 June 1943. Dismissal.
	)	
Second Lieutenant HENRY H. JORDAN (0-1283786), Infantry.	)	

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

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

Specification: In that 2d Lieutenant Henry H. Jordan, 12th Infantry, having been duly placed in arrest at the officers quarters, 12th Infantry, Camp Gordon, Georgia, on or about April 9, 1943, did, at Fort Dix, New Jersey, on or about May 16, 1943, break his said arrest before he was set at liberty by proper authority.

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

Specification 1: In that 2d Lieutenant Henry H. Jordan, 12th Infantry, did, at Browns Mills, New Jersey, on or about May 16, 1943, wrongfully drink alcoholic beverages with enlisted men in a public place, to wit: "Rosie's Luncheonette", Browns Mills, New Jersey.

Specification 2: In that 2d Lieutenant Henry H. Jordan, 12th Infantry, did, at New Egypt, New Jersey, on or about May 16, 1943, wrongfully drink alcoholic beverages with enlisted men in a public place, to wit: "Hopkins Laurel Inn", New Egypt, New Jersey.

He pleaded not guilty to and was found guilty of all Charges and Specifications. Evidence was introduced of one previous conviction by general court-martial for absence without leave (1 day), in violation of Article of War 61 and failure to sign the "Regimental In and Out Register" as required by standing orders, in violation of Article of War 96. He was sentenced to dismissal 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 is as follows:

Colonel H. M. Henderson, 12th Infantry, placed the accused in arrest at Camp Gordon, Georgia, on 9 April 1943. He told the accused that he would remain in his room in the officers' barracks, leaving it only to go to the latrine and the officers' mess. On the impending movement from Camp Gordon to Fort Dix, New Jersey, Colonel Henderson told the accused that he would not leave the car in which he was traveling unless it was with the authority of his company commander and that upon his arrival at Fort Dix he would be subject to the same restrictions as those ordered at Camp Gordon. The accused stated that he understood the orders. The restrictions were not lifted or removed (R. 5-7). Lieutenant Colonel Donald A. Fay, Executive Officer of the 12th Infantry, stated that in company with the "officer of the guard" he inspected the room of accused in the officers' quarters, Fort Dix, New Jersey, at about 9:50 Sunday morning, 16 May 1943. Accused "was supposed to have been in his quarters". Witness stated:

> "His bed appeared as if he were in bed with the covers drawn over his head. I took off the blanket and found a comforter rolled up in the middle of the bed, a bundle of clothes rolled up making it seem like a head in the bed, and two rubber boots at the foot of the bed."

When the covers were removed it was discovered that no one was in the bed. Accused was not in his quarters (R. 10-11).

With respect to Charge II (2 Specifications), wrongfully drinking alcoholic beverages with enlisted men in public places, to wit: Rosie's Luncheonette, Browns Mills, New Jersey, and Hopkins Laurel Inn, New Egypt, New Jersey. Lieutenant Colonel Fred W. Urick, 20th Field Artillery Battalion, Fort Dix, New Jersey, stated that on Sunday morning, 16 May 1943, he went to Browns Mills, New Jersey, to get some cigarettes. The store which he first visited did not have any cigarettes. He was advised that he could get them next door. As he entered this place he noticed that it was crowded with soldiers and civilians. The place was named "Rosie's Luncheonette". Witness stated that he recognized the accused sitting on a bench between two soldiers. A bottle was on the seat or

bench in front of the accused. While witness was being waited on someone placed a nickel in the "Juke box" -

> "With that, Lieutenant Jordan (accused) got up from the bench, walked over to the enlisted man who was sitting at a table to my left, * * * laid his hand on his knee and said 'Can I have this next dance, dearie?'".

Having knowledge that accused at the time was in arrest, witness stated that he reported the presence of accused in Rosie's Luncheonette to the military authorities and requested that accused be arrested under his authority (R. 7). Lieutenant Colonel Urick was of the opinion that accused was under the influence of intoxicants. His conduct was "decidedly" different from what it had been on other occasions. He did not see accused drink anything. Shortly thereafter (about 10 o'clock) Captain Arthur A. Gardner, Corps of Military Police, Assistant Provost Marshal, arrived at Rosie's Luncheonette, took the accused into custody and turned him over to "Captain Boyd" at the 12th Infantry Headquarters. Witness stated that when he entered the place the accused was sitting at a long bench or stool with two enlisted men. Accused had a glass in his hand which appeared to contain Coca Cola. "It appeared * * * he had been drinking * * * He seemed to be slightly unsteady". Witness ordered his sergeant to obtain the names of the two enlisted men with whom accused was sitting (R. 9-10). Staff Sergeant James A. Schuler, Cannon Company, 12th Infantry, stated that he and Private First Class Thomas Kissner met accused at Browns Mills, New Jersey, around 7:30 o'clock that morning (16 May 1943). Accused was in a cab with a "Private". Sergeant Schuler and Kissner joined the accused and the "Private" and the four went to a place in New Egypt, New Jersey, called "Hopkins Laurel Inn". After the party had "a couple of beers" they left and went to a restaurant in Browns Mills (R. 11-12). Witness stated that he did not actually see the accused drink the beer but saw it put before him (R. 11-16). Private First Class Kissner stated that accused and the rest of the group drank two or three beers at Hopkins Laurel Inn and that when they returned to Browns Mills they went to a place known to him as "Rosie's" (evidently Rosie's Luncheonette) and had some food. While in Rosie's place the accused poured one or two drinks of whiskey from a bottle belonging to witness into a glass, mixed it with Coca Cola and drank it. Witness stated that a captain of the military police came to Rosie's place and walked away with the accused (R.16-18).

4. For the defense Captain Harold L. Vyner, Medical Corps, Assistant Chief Neuropsychologist, Station Hospital, Fort Dix, stated that he made an examination of the accused on 27 May 1943 and found accused "depressed, worried and preoccupied". Accused gave witness a history of having been worried about his wife, starting from about the time he became a commissioned officer approximately a year ago, since which time accused stated that he had been drinking excessively and had been unable properly to perform his duties.

Captain Vyner was of the opinion that accused was a psychoneurotic, mixed type, meaning in nontechnical language, that accused had a mental illness "based on an inadequate personality" which rendered him unable to cope with the ordinary problems of life (R. 19-20). On cross-examination Captain Vyner stated that his opinion was based on hearsay and subjunctive remarks of accused made in the course of his physical examination which extended over a period of about an hour and a half. In conclusion his opinion was that accused was not normal "mentally" but had not suffered to the extent that he would be deprived of the ability to exercise his will power (R. 22).

The accused after being fully advised of his rights in the premises elected to remain silent and offered no additional evidence (R. 22-23).

5. The evidence in support of Charge I and its Specification is too clear and conclusive to warrant discussion. It affirmatively appears that accused while in arrest in quarters, prepared a dummy figure which he placed in his bed and left his quarters before he was set at liberty by proper authority. It is likewise shown that while thus a fugitive from his arrest, accused visited two nearby public places wherein he drank beer and whiskey with enlisted men as alleged in the Specifications, Charge II. With respect to Charge II and the Specifications thereunder, although the behavior of accused reflects an utter lack of appreciation of the standard of conduct required of an officer, since there is no evidence that accused was grossly drunk or conspicuously disorderly, the Board of Review is of the opinion that the record is legally sufficient to support only so much of the findings of guilty of Charge II and its Specifications as involves findings of guilty of the Specifications in violation of Article of War 96. The Specifications under Charge II do not allege, and there is no affirmative proof that accused at the times referred to was in uniform. Manifestly the facts alleged in the Specifications and implied therefrom constitute an offense. The accused was not misled and his substantial rights were not injuriously affected. No objection was offered to the form of the Specifications. While there is no affirmative evidence that accused was in uniform there is evidence of record from which this fact may be inferred.

6. The record of trial of this officer upon other offenses (CM 235408) now before the Board of Review should be considered in connection with action upon this record.

7. The accused is 28 years and 7 months of age. The records of the Office of The Adjutant General show that he attended Wheeler (Texas) High School two years but did not graduate. He served as an enlisted man in

the Regular Army:

> "Enlisted October 6, 1933; honorably discharged May 29, 1935, reenlisted May May 29, 1935, honorably discharged June 16, 1937; reenlisted June 26, 1937; honorably discharged April 12, 1940; reenlisted February 12, 1941; honorably discharged October 18, 1941; reenlisted October 19, 1941; honorably discharged May 14, 1942 * * *"

on which date he was graduated from the Infantry School, Fort Benning, Georgia, and commissioned a temporary second lieutenant, Army of the United States. In recommending accused for Officer Candidate School his commanding officer stated that his character was excellent and "As leader of a Machine Gun Section he has shown that he possesses the qualities of a leader". On 12 May 1943 the accused submitted his resignation as an officer in the Army of the United States for the good of the service. The resignation was disapproved.

8. The court was legally constituted and had jurisdiction of the person and subject matter. Except as noted, 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 of Charge II and the Specifications thereunder as involves findings of guilty of the Specifications 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 Article of War 69 or 96.

Jerry G. Gore, Judge Advocate.

Jon Wanamaker, Judge Advocate.

(On Leave), Judge Advocate.

(Filed without further action in view of the execution of the sentence to dismissal, total forfeitures, and confinement at hard labor for six months, against the same officer in a different case, C.M. 235408, confirmed in G.C.M.O. 281, 30 Sep 1943)

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

SPJGN
CM 236216

27 JUL 1943

UNITED STATES	)	FIFTH DISTRICT ARMY AIR FORCES TECHNICAL TRAINING COMMAND
v.	)	
First Lieutenant HENRY L. RICHARDS (0-560269), Air Corps.	)	Trial by G.C.M., convened at Miami Beach, Florida, 25 May 1943. Dismissal, and total forfeitures.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that 1st Lieutenant Henry L. Richards, attached to Headquarters and Headquarters Squadron, Officer Candidate and Officers' Training School, Army Air Forces Technical Training Command, Miami Beach, Florida, did, at Miami, Florida, on or about May 4, 1943, at about 2330 o'clock, in Room B, in the Y.M.C.A., being a large room holding ten beds and occupied by sailors and enlisted men, did approach a sailor (name unknown)

> who was sitting in a chair in front of the window in said room in the Y.M.C.A., unlighted at the time, and did then and there wrongfully and unlawfully play with the penis of said sailor (name unknown) until said sailor had an erection and did attempt to cause said sailor (name unknown) to have seminal emission, being conduct of a nature to bring discredit upon the military service.

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 six months. The reviewing authority approved only so much of the sentence as provides for dismissal and forfeiture of all pay and allowances due or to become due and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that before midnight, on 4 May 1943, the accused - wearing his uniform and pith helmet - registered under an assumed name at the Miami Y.M.C.A. He was assigned to bed 4 in dormitory B, containing, in all, ten beds. When Machinist Mate Carl G. Marks arrived to occupy bed 5, adjacent to the accused's, he noticed an officer's uniform and pith helmet on the center table, near the foot of the bed (R. 7-8, 10, 12, 13, 18-19; Ex. 1).

After midnight, Seaman William C. Howell, sleeping in bed 8, was awakened by someone "fooling" with him in the dark - "He had my shorts about half off", the sailor asserted. Just as Howell "raised up" to drive his fumbling visitor away, someone came into the room, and the prowler departed (R. 16).

Marks, who had fallen asleep about 12:30, was also awakened by someone "messing around" with his drawers. Finding a man in bed over him playing with his penis, Marks growled, "What the hell is going on here?" Without replying, the intruder jumped into bed 4, on Marks' left (R. 18).

Turning on his right side, Marks observed a cigarette smoker take a chair near the window. Soon the occupant of bed 4 joined him; and, after some brief whispering, dropped to his knees in front of the smoker. "I heard some kind of gurgling noise", Marks testified, "and after a minute this man got up and got back in bed 4 and the other man walked out, * * *" (R. 18).

Howell too, dozing fitfully after his recent visitation, awoke to an awareness of someone smoking a cigarette in a chair by the window, and another person "down on him going through some motions". The darkness

precluded identification of the individuals involved, but in a short time the man who was on his knees got up and retired to bed 4. After lying there a few minutes, he arose, donned shirt, tie, shoes and pith helmet, and, carrying his pants, left the room (R. 16-17, 19).

Howell heard footsteps ascending the stairs, and somebody suggested, "We ought to get that fellow", whereupon Howell, Marks and a soldier named Green "went up to the third deck", where they found the accused in the washroom putting on his pants. Remarking that there was a cocksucker in the room, Marks asked the accused to show him his identification card; the accused denied having one.

In the meantime the manager, investigating "a report that there was a man up there who had molested the occupants of B", found bed 4 vacant. Arriving at the wash room on the third floor, he found the accused, dressed and helmeted, seated on the toilet. Marks and Howell were also in the wash room. The manager asked the accused what he was doing there. The accused replied, "I'm visiting on this floor". "At this time of night", demanded the manager, "who were you visiting?" The accused explained that he was just visiting the toilet. He denied possessing identification of any kind, but when someone suggested calling the military police, he produced his army identification card, asserting he had just found it. To the manager's inquiry if he had registered at the Y.M.C.A. earlier in the evening, the accused replied that he had not. He appeared perfectly sober. He remarked that he was to become a captain in a few days, and "all the time we were down there," Marks testified, "this officer" - the accused - "tried to tell us to forget all about it and shake hands and let him go * * *". The military police, having arrived and taken the accused into custody, found, in a wastebasket in the washroom, the dormitory key, which the accused had received when he registered (R. 9-17, 19, 26-28; Exs. 2, 3).

Two days after his arrest, the accused, after being properly warned by the investigating officer, made and signed a confession, admitting continuous homosexual practices since the age of 14; the registering at the Y.M.C.A. under an assumed name, as specified; and indecent familiarities in the dormitory with a naked sailor whom he started to "jerk off", desisting, however, when he heard someone in the hall (R. 29-30, 32; Ex. 4).

A neuropsychiatric examination at the station hospital

disclosed that the accused was sane; and that, on the date of the offense, he was able to distinguish between right and wrong, and to adhere to the right. He was diagnosed as a constitutional sexual psychopath; the sexual psychopathy, in his case being homosexuality (R. 34-35).

4. The evidence for the defense, consisting solely of the accused's sworn testimony, after he had been properly advised of his rights as a witness, shows that the accused was taken to France at the age of six months, lived there until he was eleven, and only came back to this country six months of each year up to and including 1939. The other six, he was studying "in France, Scandanavia, Russia, all Europe". He was commissioned second lieutenant from Officers Candidate School and promoted to first lieutenant four months later. On the evening of 4 March 1943, "a little distraught" because he had been sent back to Officers Training School he started drinking, making the rounds of the beach bars, and those in Miami. "Then", he testified:

> "* * * suddenly I realized that perhaps I would be apprehended if anyone saw me swinging around, and I thought it would be better if I got a few hours' rest, and as I was next to the Y.M.C.A. I went in and asked if I could have a room there for a few hours. * * * I went to bed and as I lay there I saw someone across the way get up and go to the door and close the door — it was slightly open — and then I saw the same person with a cigarette in his mouth sitting there on a chair, and I guess - - I'm sure he had seen me. He was conscious that I was awake, and there seemed to be like an invitation on his part for me to go over to him. * * * I went over to him and I placed my hands on his shorts, and I knew I was doing wrong. I didn't want to do it. I knew I wasn't doing right. I started fooling around but I didn't finish it. I went back to bed and I sort of cursed my self-control. I picked up my things, took my clothes, and walked out" (R. 42-45).

The accused testified that all his life he has been attracted by men - ever since he was a child. In France, he asserted, homosexuality was neither uncommon nor denounced, and practicing it had become natural

for him. He thought there was nothing wrong with it. That night, in the dormitory, he could not control his feelings, which drink intensifies. Then too, he had thought, there in the Y.M.C.A., he was out of the line of duty - "and it wouldn't make any difference. I've kept my army record very clear" he proclaimed, "I thought the Army would be the solution for me". He neither molested nor touched any occupant of the dormitory, except the naked sailor in the chair (R. 46).

"When I left the room", he continued:

> "* * * I knew I had done something wrong, and I went upstairs to put on my trousers and leave the place. Then I was approached by these people and they asked me questions and I tried to be decent about it. I said I was expecting to be raised to a captaincy and I had army ambitions, I had great plans for the future, I liked the army very much. I thought the army was doing something for me — was solving my problem -- at the time. * * * At first I denied. * * * I just wanted to get out of there as soon as I could. * * * I've been a good soldier, to my line of thinking. I respected my uniform and I respected my reputation in the army, and I didn't want any mud thrown at it. I didn't want to be a disgrace to the army" (R. 46-47).

On cross-examination, he testified "Most of my contacts were literary people, artists. I paint. I write. I've written a few books in French; all that before I came into the army". Every homosexual relationship in which he had participated in civilian life "had always been a mutual affair. I'm not promiscuous", he protested, "I've never been promiscuous" (R. 50-51).

5. The Specification alleges that the accused wrongfully and unlawfully played with the penis of an unknown sailor until the latter had an erection, and that he attempted to cause said sailor to have a seminal emission, to the discredit of the military service. The uncontradicted evidence establishes the commission of the offense as alleged. Its effect of discrediting the military service - to say nothing of its prejudice to good order and military discipline - is too obvious to require elucidation. Neither the accused's status as

a constitutional homosexual, nor his long continued indulgence of perverted tendencies in an environment where homosexuality was neither uncommon nor denounced, render his conduct with the sailor any less of an offense. Although he testified that he had had the feeling, since he was out of the line of duty there at the Y.M.C.A., that "it wouldn't make any difference", he admits that, at the very time of the occurrence, he was planning his getaway; manifesting a sense of guilt, inconsistent with any but a criminal intent in the perpetration of the offense specified. Regardless of his conscientious scruples in such matters, however, this offense is of a nature to reflect such discredit on the military service, and is so patently prejudicial to good order and military discipline, that the mere proof of its commission establishes the offender's unfitness for the service, and particularly for the high calling of a commissioned officer therein.

6. War Department records show the accused to be 28 years of age. He was inducted in November, 1940, commissioned a second lieutenant 24 June 1942, and was promoted to first lieutenant 26 October 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 96.

Charles Gressoy, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleafer, Judge Advocate.

SPJGN
CM 236216

1st Ind.

War Department, J.A.G.O., 31 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 First Lieutenant Henry L. Richards (0-560269), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence as approved by the reviewing authority, 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 carried into execution.

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

Myron C. Cramer

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

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

(Sentence as approved by reviewing authority confirmed but forfeitures remitted. G.C.M.O. 241, 17 Sep 1943)

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

SPJGK
CM 236250

12 AUG 1943

UNITED STATES v. Private MICHAEL GUERRIERO (32561186), 408th Base Headquarters and Air Base Squadron, Air Corps.	CARIBBEAN WING AIR TRANSPORT COMMAND Trial by G.C.M., convened at Morrison Field, Florida, 16 April 1943. Dishonorable discharge and confinement for life. Federal Reformatory, Chillicothe, Ohio.

REVIEW 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 tried upon the following Charges and Specifications:

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

Specification: In that Private Michael (NMI) Guerriero, 408th Base Headquarters and Air Base Squadron, Army Air Base, 36th Street Airport, Miami, Florida, did, at or near Homestead, Florida, on or about March 22, 1943, forcibly and feloniously, against her will, have carnal knowledge of Mary Gaydon.

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

Specification: In that Private Michael (NMI) Guerriero, 408th Base Headquarters and Air Base Squadron, Army Air Base, 36th Street Airport, Miami, Florida, did, at or near Miami, Florida, on or about March 22, 1943, wrongfully and without proper authority apply to his own use, one Government vehicle, of a value of more than fifty ($50.00) dollars, property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty to Charge I and its Specification and guilty to Charge II and its Specification. He was found guilty of both the Charges

and their Specifications. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the Federal Reformatory at Chillicothe, Ohio, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. Evidence introduced by the prosecution showed that accused, a private, 408th Base Headquarters and Air Base Squadron, Air Corps, Miami, Florida (R.45), was dispatched, shortly before midnight, 21 March 1943, to drive Miss Mary Gaydon, age 27, a civilian employee, from the Base Telephone Office to her home, in an Army staff car (R.25). The car was the property of the United States, was worth more than $50 and accused had authority to use it only to take his passenger directly home and to return to the Army Air Base (R.24). Accused, accompanied by "Private Miller" (R.6,8), called for Miss Gaydon at about 12:20 a.m. In about ten minutes they left, Miss Gaydon sitting in the front seat of the staff car between accused, who was driving, and Miller (R.6,7). Instead of taking Miss Gaydon home and despite her statement that she was tired and wanted to go home, and that her mother was expecting her, accused drove to a point south of Homestead in the Everglades (R.7-9). He turned off the main highway onto a dirt road, and went through a field out to a roadbed that was being "worked on". There he stopped and turned off the lights (R.9). Accused then turned and grabbed Miss Gaydon "like he was crazy". She begged him not to do that. But he said, "No * * * he came down to get a loving and he was going to get it. * * * they were going to Africa and there was only black meat over there." (R.9,10). He then asked Miller to help him "love her up". Miller "acted as if he didn't want a part of it". Accused then asked Miller "to get out of the car and take a walk". The girl put her arm through Miller's and begged him not to leave her alone. Accused again told Miller to leave and when the latter started to get out she "did, too". Accused grabbed her, pulled her back in, down in the seat and "in some way" was on top of her. His hands were on her throat. He told her: "You might as well give in". She said, "No". They talked for a while. He again took her by the throat and told her that "he would push harder if" she "didn't say 'Yes'". Miss Gaydon again refused. Accused "acted like he was wild". He started to take the sash off her dress. She explained to the court that she feared he would tear it if she did not take it off herself, and, further, that if he tore her clothes off he would be afraid to take her back in that condition, would kill her and leave her out there (R.9,10). Accused ripped her dress along the neck and sleeves, so she started to take her other clothes off "so he wouldn't tear them, too" (R.10). Following

this, accused told her if she would get in the back seat, he would not make her take her clothes off (R.10). She got out of the car. She testified she might have run away had she not lost her shoes and had she known where to run. "There weren't any houses around anywhere". Accused grabbed her arm and "hurled" her into the back seat. There accused pulled her down in the seat and had intercourse with her. The act was completed. There was penetration. It was stipulated that a physical examination made by a duly qualified physician at 4 a.m., 22 March 1943, indicated "vaginal bleeding and hymen torn and bleeding. Vaginal outlet showed evidence of trauma and bleeding. Smears from hymen and cervix revealed spermatazoa present in both smears." (R.11, 22). Miss Gaydon testified that she did not kick accused (R.11) or fight, scream (R.13), or yell (R.18), or cry (R.14). She did say she "begged him all the time to let her go" and that she "was struggling against him because he was "hurting" her, "terribly". She said she was in constant fear of his killing her, that she was afraid for her life (R.11). After the act Miss Gaydon got out of the car. Blood was coming down her legs. Accused told her he thought she had done it before (R.11,12). On the way home, accused let Miller drive and persuaded the girl to sit in the back seat with him to "talk it over". He told her he was sorry; that he knew he had done wrong, and asked if there was anything he could do. She said the damage had been done, "to just forget it", never to do it to another girl. Accused told her to report him if she wished and that he might get six or eight years for it. He wrote a fictitious name on a piece of paper for her. Later, he demanded it back (R.12). Accused and Miller drove her to her house. She arrived there about 3:30 a.m., ran in the house, met her mother and said "Oh, Mother, they took me to the Everglades and raped me" (R.12, 20). The police were notified at once and the physical examination already mentioned was had at 4 a.m. with the findings as stated (R.13).

Accused testified in his own behalf. He stated that on the night in question he was detailed to take Miss Gaydon, the telephone operator, home (R.30). He used an "official" car for this purpose and his instructions were "just to take them where they wanted to go" (R.31). When Miss Gaydon came out of the office she got in the front seat between accused and Miller. Accused drove (R.25). He drove toward Homestead, away from her home, through quite a few busy sections. Miss Gaydon did not object to going that far except that she asked accused to let her call her mother. On the way she put her head on his shoulder (R.23). Accused did not stop until he had gone through Homestead, when he turned off, stopped the car, and extinguished the lights (R.26). He then put his "hand around her", but she didn't want him to (R.26). Accused then

told Miller to get out of the car. Miller got out of the car and went away. As he was leaving, the girl "grabbed Miller's hand". Accused asked her what was the matter. He said that "she laughed". Accused then started "loving her up", and finally got her pants down to her knees, whereupon she took them off the rest of the way (R.26,27). He suggested they get in the back seat where there was more room. She agreed. Accused said she lay down in the back seat and that he lay on top of her and started playing with her breasts. He said that he "couldn't get worked up so" he "asked her to play with his privates". According to accused, "she didn't want to" and he asked her a second time "and she took it in her hand and started playing with it" (R.27).

Miss Gaydon, on cross-examination, testified that when she got in the back seat she was sitting up and that accused took her hand and put it on his privates (R.17).

Finally, accused put it in and asked her "Is it in" and she said, "Yes". After it was "in" she told accused "it hurts". Accused stated that he then asked her if she was "telling" him that she had "never had this done" to her before. She replied, "That's right". After this statement, accused said he was "done and didn't stay down another minute". He had had an emission. She got up and the blood was pouring down her leg. There was a spot on the ground * * * six or seven inches (R.32). She asked for his handkerchief and he gave it to her. She put on her pants, got in the front seat with accused, Miller came back, got in the other side of her, and they started back. On the way back, accused said, he "got scared". He asked Miller to drive and Miss Gaydon to get in the back seat. Accused testified:

> "* * * At first she didn't want to; I guess she figured I wanted to have intercourse with her again, but I said, 'Get in the back seat and I promise you nothing will happen' so she got in the back seat. I got in and pleaded with her not to turn me in because I was afraid her mother would find out and turn me in".

Accused testified further that the girl said she had nothing against him. They drove her home,where she said, "Forget it", and went in the house (R.27,31).

Private Francis J. Miller, 408th Base Headquarters and Air Base Squadron, Miami, Florida, testified for the defense. He accompanied accused and Miss Gaydon on the trip. According to him, they drove toward Homestead and finally turned on Red Road. Miss Gaydon asked to phone her mother. During the trip down, there was singing, no

dirty talk. He put his arm on the back of the seat. But she put it down. The witness explained: "She didn't like it there, I guess". She was sitting close to accused. Her head was not on his shoulder (R.34-36). When they stopped the car, accused asked Miller to get out. Miss Gaydon hung on to his arm. But he got out and walked away about 30 yards. He observed accused and the girl change to the back seat. As they got out accused had his arm about her shoulder. Accused did not throw her in the back of the car (R.37,40). Driving back he heard Miss Gaydon asked by accused if "she was going to turn him in". She answered, "No" - because it wouldn't help her any. She told accused "she never wanted him to do to another girl what he had done to her that night" (R.37).

4. It is unnecessary to recapitulate the evidence. Accused and the prosecution are in agreement on most of the important facts, even that there was penetration. The only conflict is that the prosecutrix testified that she repeatedly refused the requests of accused for intercourse, begging him to desist and proceed no further, while accused's story is one of cooperation. The prosecutrix accounted for her failure to offer physical resistance and to scream on the ground of fear for her life. Odd bits of evidence, found here and there in the record, corroborate the story of the prosecutrix.

Accused testified that on the drive out, Miss Gaydon had her head on his shoulder. Were this a fact it would have been significant of a possible receptive mood on her part. But Private Miller, a defense witness, denied it. Accused, himself, said that when he stopped the car he "put his hand around her" but she didn't want him to.

When accused asked Miller to leave, accused said that the girl grabbed Miller's hand and laughed. Miss Gaydon testified she put her arm through Miller's and begged him not to leave her alone. Miller said, referring to this incident, "she hung on my arm". The words "hung on" fully corroborate the girl. Miller's version, of itself, shows her at this point fearful and terrorized. Accused testified that, on the way home, he "got scared". He said, "I pleaded with her not to turn me in". Then, conscious of the incriminating implications of this statement, he continued "because I was afraid her mother would find it out and turn me in". Only a wrongdoer is "turned in". It is clear accused knew he was guilty of rape. A mere seduction would have held no fear for him.

Furthermore, accused's story, which is based on a theory of complacency, omits any item of complaint by the girl until after his person had penetrated her. This element of his account is absolutely

inconsistent with the findings of the physical examination.

Thus we have the story of the girl corroborated not only as a matter of law by the prompt complaint made to her mother, but in striking part, by the testimony of accused. The physical examination revealed a recent violation of virginity.

5. There were substantial grounds on which the court was justified in accepting the testimony of the prosecutrix and rejecting the version of the affair as presented by accused. The question is whether the facts accepted by the court constituted rape in violation of Article of War 92. Although the girl did not consent she did not resist physically. In fact she cooperated to the extent that she assisted in removing her pants and in transferring to the rear seat. She explained this on the ground of fear for her life. It will be recalled that she was afraid that if he tore and ruined her clothes he would destroy her rather than take her back in that condition. It is not for a court to determine that such fear is or is not justified. Its presence in the mind of the victim is the only fact to be determined. The girl's story of her terror was plausible. This attack occurred sometime between 1 and 3:30 a.m. in the darkness of the night, on a lonely road in the Everglades. The lights of the car were off. There was no one to respond to a call for help. There were no houses nearby. The road was unused. Physical resistance would have been but a gesture. Against male strength, her agonizing pleas were her only weapon. In these days when the newspapers are lurid with photographs of outraged girls and women, their bodies cold in death in lonely spots, it is not unreasonable to believe that sex attacks often find the victims frozen in fear, unable to resist. The fact that a girl in such surroundings, under such circumstances, finding her pleas to chivalry unavailing, fails to present physical resistance is not astounding. Nor does failure to resist under such circumstances minimize the outrage or make it less than rape.

"Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient when there is no consent" (M.C.M. 1928, par. 148b).

The kind and degree of resistance which must be exerted, and which may be reasonably expected, depend upon the physical and mental condition of the parties, their ages and the relations existing between them, and the surrounding circumstances (Sec. 675, Underhill's Criminal Evidence, 4th Ed., 1935).

"Consent, however reluctant, negatives rape; but when the woman is insensible through fright, or where she ceases resistance under fear of

death or other great harm, the consummated act is a rape" (Wharton's Criminal Law, Vol. 1, Sec. 701).

There was substantial, credible evidence to support a determination by the court that the prosecutrix in this case did not consent in her heart, and that her resistance ceased through fear of death or other great harm, and to support all the essentials of Charge I and the Specification.

In addition to accused's plea of guilty of the Specification of Charge II and guilty of the Charge, the prosecution presented conclusive proof of the unauthorized use by accused of a Government vehicle, as alleged in the Specification of Charge II in violation of Article of War 96.

6. The reviewing authority erroneously designated a Federal Reformatory as the place of confinement. Under the instructions contained in a letter dated 26 February 1941 (AG 253, 2-6-41,E), from The Adjutant General, a penitentiary should have been designated as the place of confinement.

7. The court was legally constituted and had jurisdiction of the person and the offense. 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. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by Section 22-2801, District of Columbia Code.

Penry E. Gray, Judge Advocate.
Wm Tompkins, Judge Advocate.
Fletcher R. Andrews, Judge Advocate.

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

(367)

SPJGQ
CM 236301

- 1 JUL 1943

UNITED STATES	ALASKA DEFENSE COMMAND
v.	Trial by G. C. M., convened at Cordova, Alaska, 8-11 March 1943. Dishonorable discharge and confinement for life. Penitentiary.
Private FLOYD R. STEPHENSON (20728898), Company H, 138th Infantry.	

REVIEW by the BOARD OF REVIEW
ROUNDS, HEPBURN and FREDERICK, Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Floyd R. Stephenson, Company H, 138th Infantry, did, at Cordova, Alaska, on or about January 2, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, purposely, maliciously, and with premeditation kill one Lena Allen, a human being, by cutting her with a knife.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction by summary court-martial for absenting himself from guard post, in violation of Article of War 96, was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the remainder of his natural life. The reviewing authority approved the sentence, designated the Federal Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The pertinent evidence produced at the trial shows that on 2 January 1943 accused was stationed outside of the small town of Cordova, Alaska. On that day he obtained a pass and went to Cordova about noon. He did some shopping around the town and consumed from time to time intoxicating drinks.

It was contrary to Army Regulations for soldiers to associate with the native girls. About 5 p.m. accused was in the Club Bar and there saw three native girls seated at one end of the bar: Ann Stevens, Nancy Eli and Lena Allen. He spoke to the girls. He had never seen Lena Allen before. The other two he had previously known. Because of the presence of a military policeman he said very little. Lena Allen suggested that he follow them after they left. They left the Club Bar shortly thereafter and he followed them to a cabin located on a hill in the back of the Holland House, fifty or more feet off Ocean Dock Road, Cordova. It was a one-room cabin containing a few chairs, a table and a folding bed (Ex. 2). The three girls were there. They sent him for liquor. He returned with a quart of whiskey which was almost entirely consumed by the four. About 7:30 p.m. two military policemen came to the cabin and took accused away. Ann and Nancy left the cabin at 8 o'clock, leaving Lena Allen there alone and in a drunken condition (R. 14-19). The accused was taken to the military police station but released about 8:30. He thereupon returned to the Club Bar and asked Nancy Eli where Lena Allen was. She testified that she replied she did not know (R. 16). The accused testified that she told him she was still up at the cabin. According to the verbal admissions made by accused to the Deputy United States Marshal, Dan Manning, accused returned to the cabin and Lena Allen let him in (R. 100-101). She was drunk. He talked to her for a while. She lay down on the bed and he lay down beside her. She put her hand in his pocket. He either pushed her away or slapped her. He went "hay wire". He recalled taking his knife out of his pocket and opening the blade. He thought he used it, but did not recall where he cut her. He got up off the bed. The girl's weight caused the side of the bed toward the wall to go down and the outside to tilt up. He picked up his gloves and cap; put the knife in one glove; left the cabin; and went to the U.S.O. in Cordova. There he washed the blood off his hands and off his knife (R. 101).

About 9:30 p.m. accused approached Corporal Adolph J. Gruner, 761st Military Police Battalion, who was on duty in Cordova - only a

few blocks away from the cabin - and handed to him his knife. The accused said, "You better take this before I hurt somebody else ***. I just cup up a Klootch" (R. 7). A "Klootch" is a native female. Gruner placed him under arrest and together with Sergeant John C. Tobin went to the cabin where they found the body of Lena Allen lying on the tilted bed. Doctor Caroll D. Parkinson, Chief of Police Preston Williams and Dan Manning were summoned. Photographs of the interior of the cabin and of the body were taken (Exs. 2, 3, 4 and 5). Dr. Parkinson examined the body and pronounced her dead at 10:05 p.m. He observed three wounds. The windpipe was severed by a cut leaving a hole large enough to insert two fingers; a cut on the face extending down to the mouth; and a double cut 10 to 11 inches long on the left thigh to the bone. A later examination disclosed a chest wound into the lung cavity and about six cuts on the right hand. Death was caused by the severed trachea and the resulting loss of blood (R. 51-52). The body was identified as that of Lena Allen (R. 71-72). The women in the Holland House heard someone leaving the cabin and using the only path to the road about 9 p.m. They looked out and saw it was a man dressed like a soldier (R. 41-47).

Corporal Gruner described accused at 9:30 p.m. as excited and talking rapidly as if insane. He smelled liquor on him but he was not drunk. He asked accused if he killed her. Accused said he did not know (R. 11-12). Sergeant Tobin observed that accused had been drinking but was not drunk (R. 20). He was nervous and crying after he was arrested (R. 26-27). Private Richard F. Nabe was present when accused was brought into the military police station on the afternoon of 2 January 1943 and observed that he had a pocketknife similar to the one produced at the trial (R. 37-39).

Private First Class Tom Polk was present when Corporal Gruner arrested accused. He described the accused as excited and repeatedly stating he was sorry and that he did not mean to do it. He said they probably "had a murder on your hands" (R. 49-50). Bloodstains were found on the knife, the left cuff of accused's blouse, the left cuff of his shirt and the left glove (R. 83). The accused was left handed. The accused orally related to the local police officers his actions during the day and evening leading up to his valuntary surrender to Corporal Gruner in the manner described above (R. 100). They prepared two written confessions but neither was permitted in evidence (Exs. 9, 10).

Three members of a medical board appointed to determine the sanity of accused at the time of the alleged murder and also at the time of the examination testified regarding their investigation and that the board was unanimously of the opinion that accused was sane upon both occasions (R. 154-161).

4. The accused's rights were explained to him and he elected to testify in his own behalf in substance as follows: He had no emotional trouble before getting into the Army, after which he started drinking and learned that he did things when intoxicated of which he had no knowledge until he was told about them. He came to Cordova about noon on 2 January 1943; purchased a watch and ring; ate dinner with Corporal Gruner; bought and consumed a pint of whiskey; and went to the Club Bar. There he met the three native girls. He was warned by a military policeman to stay away from them, but he followed them to the cabin. He bought a quart of whiskey which was almost entirely consumed by the four of them in the cabin. About 7:30 p.m., two military policemen came in and took him to the military police station. He was released about 8:30. Learning that Lena Allen was still in the cabin he returned there for the sole purpose of having sexual relations with her. Lena let him in and shortly thereafter sat on his lap on a chair. He remarked that the chair was broken, so Lena lay down on the bed and motioned for him to do likewise. He got upon the bed and embraced Lena for about 15 minutes when she put her hand into his pocket. He either pushed her away or slapped her. The next thing he knew she was lying there all bloody with her hair matted down over her face. He got up and the bed tilted. He grabbed his cap, gloves and whiskey bottle and left. He threw the bottle behind the house and went down the path, putting on his gloves, and noticed for the first time that he had his knife in his hand. He stopped at the U.S.O. and washed blood off his hands and his knife. He did not know whether he used the knife or not (R. 134-141). He just "blew up" when she put her hand into his pocket. The sight of her lying there was horrible and sobered him up. In explanation of his remark to Corporal Gruner that he had cut up a "Klootch", he said that he had concluded he had done that from the fact that he had a knife in his hand and had blood on his hands. He had no ill-will or hostility toward her and would not have done such a thing if he had been in his right mind.

5. It was clearly shown by competent evidence in the record that Lena Allen was killed on 2 January 1943 at Cordova, Alaska, by having her trachea severed by a sharp instrument. All of the surrounding circumstances disclose beyond a reasonable doubt that the sharp instrument

used was the knife of the accused and wielded by him as he and the deceased lay on a bed in a cabin. The viciousness of the attack and its purpose is shown by the nature and size of the wounds inflicted. The pocketknife was wielded with such force as to sever her windpipe; to open a hole in her throat large enough to insert two fingers; her hand was cut in six places; her thigh laid open to the bone with a cut 14 inches long; her face slashed. The only question left to determine is whether the act was committed by the accused in such a manner as to constitute murder as described in the Specification.

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 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" (par. 148a, p. 163, M.C.M.).

When the evidence is examined in the light of the above concepts, it becomes apparent that the accused is guilty as charged. The circumstances show beyond any reasonable doubt that the accused killed the deceased at the place and time alleged. There was no claim of justification or self-defense. He cruelly slashed and cut the deceased and left her to bleed to death. Drunkenness was no excuse. His acts were willful, deliberate, felonious, unlawful and premeditated. Every element of the crime has been shown beyond a reasonable doubt.

6. The charge sheet shows that the accused is 19 years of age, that he enlisted in the National Guard on 20 December 1940 and was inducted into the Army of the United States 23 December 1940.

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).

William H. Lounds, Judge Advocate.

Carle E. Stebbins, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

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

SPJGN
CM 236309

17 JUL 1943

UNITED STATES	)	5TH DISTRICT ARMY AIR FORCES TECHNICAL TRAINING COMMAND
v.	)	
Second Lieutenant SIDNEY J. MASON,(0-922985), A. C.	)	Trial by G.C.M., convened at Miami Beach, Florida, 26 May 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 96th Article of War.

Specification: In that 2nd Lieutenant Sidney J. Mason, Air Corps, Attached to 304th Technical School Squadron, Officer Candidate and Officers' Training School, Army Air Forces Technical Training Command, Miami Beach, Florida, was at Miami Beach, Florida, on or about May 1, 1943, drunk in quarters.

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

Specification: In that 2nd Lieutenant Sidney J. Mason, Air Corps, Attached to 304th Technical School Squadron, Officer Candidate and Officers' Training School, Army Air Forces Technical Training Command, Miami Beach, Florida, did without proper leave, absent himself from his station at Miami Beach, Florida, from about 1300 o'clock, April 29, 1943, to about 1300 o'clock, May 1, 1943.

He pleaded not guilty to and was found guilty of the Charges and Specifications. There was evidence submitted of one previous conviction of having been drunk in uniform and in quarters. 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 six months. The reviewing authority approved of only so much of the sentence as provides for dismissal and forwarded the record of trial for action pursuant to Article of War 48.

3. The evidence for the prosecution shows that on 20 April 1943 accused was assigned by verbal order to duty with Captain H. M. Bremer S-4 of OC & OTS at Miami Beach, Florida. On 29 April 1943 accused left his post for lunch but failed to return that day and remained away the following day 30 April 1943 and 1 May 1943 (R. 19). Because of this absence Captain Harvey D. Davidson on 1 May 1943 telephoned the Sinclair Hotel in Miami, Florida, where the accused was quartered, and after talking to the accused, went to his room in the hotel. The accused came out of his room and was visibly drunk. He staggered. He stumbled down the stairs. He fell down. When told to get into the back of the Captain's car he fell flat on his face in the rear (R. 7). His speech was unintelligible and he smelled of alcohol. The Sinclair Hotel was not within the command area of OC or OTS (R. 9).

Private H. J. Fisher who drove the car corroborated that accused was drunk (R. 10).

Master Sergeant L. J. Longacker who observed the accused when he arrived at the Helen Mar Hotel with Captain Davidson testified that the accused was drunk (R. 12). Sergeants Delbert Reese and Robert C. Anderson similarly testified (R. 15, 17). Captain John B. Nicholson, Medical Corps, examined the accused at 4:30 p.m., 1 May 1943 and found him in a drowsy condition and smelling of alcohol. A blood test showed acute alcoholism (R. 18).

On 2 May 1943 the investigating officer, Major G. W. Kreye, interviewed the accused. The accused voluntarily signed a confession in which he admitted that he had intended to return to work on 29 April 1943 but for no reason did not do so. Instead he went to his hotel room and had a few highballs before he retired. On 30 April 1943 he went to Miami to see a man, but could not locate him, so he had a rye highball and returned to his quarters about noon. He knew that he had no permission to leave his duties and should have reported to duty. He drank a pint of liquor. On 1 May 1943 everything was hazy. He was drunk in quarters all morning and also when Captain Davidson found him. He blamed his "drunken spells" on his loneliness. It was not an attempt on his part to get out of the service. (Ex. 1)

4. In defense the accused established by stipulation that he was 40 years of age, married ten years, father of two children, and for 12 years was a professor of physics at Niagara University. His rights regarding testifying were explained to him. He elected to remain silent (R. 25-26).

5. The specification under Charge I charges the accused with being drunk in quarters on 1 May 1943. The evidence was overwhelming that the accused emerged from his quarters on that date in a visibly drunken condition. Many witnesses testified as to his inebriated condition. He admitted that he was drunk in quarters on that date in his written statement. Drunkenness alone may constitute a violation of Article of War 96. Proof of disorderly conduct is not necessary CM 114900; 121290; 197398. There was ample evidence to sustain the finding of guilty of the Charge and Specification.

With reference to Charge II and its specification the prosecution clearly proved by Captain Bremer, his immediate commanding officer, that the accused failed to return to his place of duty from noon of 29 April 1943 through 1 May 1943. The accused admitted that he remained away during this period of time without leave or authority. The evidence was therefore sufficient to support the charge of being absent without proper leave from his station from 1 p.m. 29 April 1943 to about 1 p.m. 1 May 1943.

6. The record shows the accused to be 40 years of age. He was commissioned a 2nd Lieutenant on 3 March 1943 without prior military service. On 12 April 1943 he was convicted by a General Court Martial of being drunk in uniform in a public place and in quarters on 25 March, 8 April and 9 April 1943 and sentenced to forfeit $50 per month for six months. The sentence was approved and ordered executed on 29th April 1943 (Ex. A.)

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, as approved by reviewing authority and to warrant confirmation of the sentence. A sentence of dismissal is authorized upon conviction of violation of War 61 and 96.

William L. Rounds, Judge Advocate.

Charles Blum, Judge Advocate.

Herbert R. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 26 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 Sidney J. Mason (0-922985), 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 of the sentence. I recommend that the sentence as approved by the reviewing authority be confirmed and carried into execution.

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

Myron C. Cramer

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

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

(Sentence as approved by reviewing authority confirmed. G.C.M.O. 212, 2 Sep 1943)

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

SPJGH
CM 236323

4 - AUG 1943

UNITED STATES	)	26TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Gordon, Georgia, 8 June 1943. Dishonorable discharge (suspended) and confinement for five (5) years. Rehabilitation Center.
Private HARRY C. McCLAIN (6883413), 39th Signal Company, alias Private LARRY McNEIL (34548017), Headquarters Company, 2nd Battalion, 424th Infantry.	)	

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Harry C. McClain, 39th Signal Company alias Private Larry McNeil, Headquarters Company 2nd Bn., 424th Infantry Regiment did, at A. P. Hill Military Reservation, Virginia, on or about September 7, 1942, desert the service of the United States and did remain absent in desertion until he was apprehended at Fort Jackson, South Carolina, on or about May 6, 1943.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority approved the sentence, ordered it executed, but suspended the dishonorable discharge, and designated the

Rehabilitation Center, Fourth Service Command, Fort Jackson, South Carolina as the place of confinement. The proceedings were published in General Court-Martial Orders No. 25, Headquarters 26th Infantry Division, 12 June 1943.

3. The absence of accused as alleged is shown by morning report entries (Exs. A and C). Shortly before accused absented himself without leave (7 September 1942), he borrowed money from various enlisted men, with which he started a laundry in the company. About the beginning of April 1943 Warrant Officer (Junior Grade) William Bowler saw accused in the lobby of a hotel in Columbia, South Carolina, called him by name but the accused did not turn around, and in a conversation called him "McClain" but the accused said "my name is McNeil". Later Mr. Bowler spoke to the company commander, who sent him over to Headquarters Company, 424th Infantry, with two other men, for the accused. A lieutenant there asked accused whether he knew Mr. Bowler and these men, and the accused said "he never saw any of us before", and did not indicate that he was "McClain". First Lieutenant Emil J. Schmidt, 39th Signal Company, who saw accused at the orderly room of "this company" of the 424th Infantry, stated "From all outward appearances, he didn't seem to recognize me". When Second Lieutenant William S. Crosby investigated the charge, the accused did not indicate that he was Harry McClain. Larry McNeil (34548017) and Harry C. McClain, Jr. (6883413) were positively identified as the same person by a certificate of identity from the Adjutant General's Office (Ex. D), fingerprints of Larry McNeil (Ex. E), fingerprints of Harry C. McClain (Ex. F), report of physical examination of Larry McNeil (Ex. G), Form 20 card of Larry McNeil (Ex. H), Form 20 card of Harry C. McClain (Ex. I), and numerous witnesses who knew the accused (R. 5-20).

4. The accused testified that according to the old service records his name was Harry C. McClain, that the first thing he recalled was walking on a highway, and being picked up by a man, that he read papers, noticed that men were being inducted, wondered what it was all about, and found himself in Fort Pierce, Florida. He worked on a citrus farm in Florida under the name of Larry McNeil and could not say where he got the name. He was not sure who he was and had a feeling something was wrong. He was inducted at Miami Beach, Florida. He went to Camp Blanding and from there to Fort Jackson. He studied hard and was made an acting corporal. He did not feel that he had been in the Army before, but everything seemed very easy to him. One night at a hotel he was accused of being McClain, but "the name was not familiar to me. I thought they had the wrong person. I explained to him that I was McNeil,

and that I had a pass to come in town * * * Then I didn't hear any more for about three or four weeks". He stated that he had not seen the persons who identified him before he saw them at Fort Jackson, did not remember being in the State of Virginia, had never heard of A. P. Hill Military Reservation until he was in the guardhouse, and his head was aching "quite a bit" when he was picked up on the road (R. 21-23).

On cross-examination, redirect examination and examination by the court, he could remember practically nothing about his past, did not know that he had a wife, could not identify a photograph, and stated that he had talked to no one about his amnesia, that no one outside the Army knew the situation, and that he named Mr. Howes, the man for whom he worked in Florida, as his beneficiary because he was the only man the accused knew (R. 23-31).

5. On rebuttal the prosecution introduced a photograph of a young woman (Ex. K), which was found in the barracks bag of accused after he left the 39th Signal Company (R. 31-32).

6. At the arraignment, the defense requested a continuance on the grounds that there had been insufficient time to prepare the case, that witnesses were located at a great distance, and that it was believed that if a continuance of two weeks should be granted the defense would be able to show that the accused was a victim of amnesia and might obtain witnesses or depositions to sustain the defense. The prosecution objected to a continuance, offered to stipulate what the witnesses would testify if the defense would state what the testimony would be, and suggested that the court reserve its decision and hear the case. The court was closed, and then announced through the president that the trial would continue, and that the accused was given fifteen days in order that witnesses or depositions could be produced (R. 4).

At the conclusion of defense testimony the prosecution made a motion to vacate the "motion of the defense" for a continuance, which was granted, and the continuance originally granted was vacated (R. 31).

None of the evidence adduced at the trial conflicted in any substantial particular with the claim of amnesia, and it appeared that the request for time to prepare a defense based thereon was made in good faith. The charge sheet was served on accused on 4 June and the trial was on 8 June.

7. "To try a man for charges upon which he is ignorant until he comes into court is not due process of law. It deprives him of all opportunity to consider or prepare his defense, and thus deprives him of a most substantial and well recognized right. The question of a continuance is one for the sound discretion of the court. It is believed, however, that when it is apparent upon the record that the court has abused its discretion, the conviction should be held illegal" (CM 126651)

"The right to prepare for trial is fundamental. To deny this right is to deny a trial. Article of War 70 provides '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 upon him'. This does not mean that during war an accused may be deprived of the right to prepare his defense. Nor does it mean that in time of war such preparation shall be limited arbitrarily to five days. The limitation by implication contained in this Article should be applied with great care and only when the rights of the accused are not prejudiced thereby". (CM 231119, Lockwood)

Although the provision in the Manual for Courts-Martial that the refusal by a court to grant a continuance where a reasonable cause is shown will not nullify the proceedings, but may be good ground for directing a rehearing (MCM, 1928, par, 52b), will normally vest full discretion in the court, yet where it clearly appears that an accused has been deprived of the fundamental right to prepare and present a defense made in good faith, by the action of a court in denying a reasonable continuance, the conviction should be held illegal.

8. The absence as alleged was conclusively proved, and the length of absence would normally be sufficient to sustain a finding of the intent to desert. The Board of Review is of the opinion, however, under the circumstances and within the rule stated above, that it was an abuse of discretion for the court to vacate the continuance which had been granted, and that this action of the court injuriously affected the substantial rights of the accused. If in fact the accused was a victim of amnesia (and there was no substantial evidence to the contrary), it would necessarily require more than four days to make an investigation, locate witnesses, obtain their testimony, and consult medical experts.

9. The Board of Review is, therefore, of the opinion that the record of trial is legally insufficient to support the findings of guilty and legally insufficient to support the sentence.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

(384)

1st Ind.

War Department, J.A.G.O., 5 AUG 1943 - To the Secretary of War.

1. Herewith transmitted for action of the Under Secretary of War under Article of War 50½ as amended by the act of 20 August 1937 (50 Stat. 724; 10 U.S.C. 1522), and Executive Order 9363 dated July 23, 1943, is the record of trial in the case of Private Harry C. McClain (6883413), 39th Signal Company, alias Private Larry McNeil (34548017), Headquarters Company, 2nd Battalion, 424th Infantry.

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

3. Inclosed is a form of action carrying into effect the recommendation above made.

T. H. Green,
Brigadier General, U. S. Army,
Assistant Judge Advocate General,
In Charge of Military Justice.

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

(Findings and sentence vacated, by order of the Under Secretary of War. G.C.M.O. 202, 13 Aug 1943)

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

SPJGK
CM 236351

4 AUG 1943

UNITED STATES v. Private AUGUST J. AMBUTAVICZ (36183843), 898th Guard Squadron, Army Air Forces School of Applied Tactics.	ARMY AIR FORCES SCHOOL OF APPLIED TACTICS Trial by G.C.M., convened at Army Air Forces School of Applied Tactics, Orange County, Florida, 26 May 1943. Dishonorable discharge (suspended) and confinement for two (2) years. Rehabilitation Center, Fort Jackson, South Carolina.

OPINION of 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 in the Office of The Judge Advocate General and there found legally insufficient to support the sentence in part. The record 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 86th Article of War.

Specification: In that Private August J. Ambutavicz, 898th Guard Squadron, being on guard and posted as a sentinel at Orla Vista, Florida, on or about May 1, 1943, was found drunk upon his post.

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 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 only so much of the findings of guilty of the Specification and Charge as involves a finding of guilty of the lesser included offense of being found drunk while on guard as a sentinel at the place and time alleged in the Specification and Charge, in violation of Article of War 96. He approved the sentence, remitted one year of the

confinement, ordered the execution of the sentence as thus modified, but suspended the execution of the dishonorable discharge until accused's release from confinement. He designated the Rehabilitation Center, Fort Jackson, South Carolina, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 39, Headquarters Army Air Forces School of Applied Tactics, Orlando, Florida, 10 June 1943.

3. The evidence shows that accused was a member of the guard on 1 May 1943 and was sober when he went on post as a sentinel at 7 p.m. (R.5, 7,8,9). The sentinels were supposed to report hourly from their posts to the Corporal of the Guard, who remained in the orderly room. At 8 p.m. accused made his report. The Corporal of the Guard recognized his voice and testified that he was "completely sober". Accused did not report at 9 p.m., and a few minutes later the Corporal of the Guard went to investigate. He found accused's gun in a building and found accused lying on the ground at a distance of at least 300 yards from his post. Deciding that accused was drunk, the Corporal of the Guard reported the matter to the Sergeant of the Guard (R.7-8). The Sergeant of the Guard arrived and saw accused lying in the road. He smelled whiskey on accused and in accused's raincoat he discovered a pint bottle of rum, in which only a small amount of liquor remained (R.6,8). The Sergeant of the Guard attempted to arouse accused, but was unable to do so. Outside of some incoherent mumbling, accused said nothing. Since accused was unable to walk the Sergeant of the Guard carried him to his hut (R.6,7,9). In the opinion of the Sergeant of the Guard accused was drunk (R.6).

4. As noted, the reviewing authority approved only so much of the findings of guilty as involves a finding of guilty of the lesser included offense of being found drunk while on guard as a sentinel, in violation of Article of War 96. The action of the reviewing authority undoubtedly was predicated upon the absence of accused from his post when found drunk. The finding, as modified by the reviewing authority, constitutes a lesser included offense, for the only element missing is that of being on his post. In essence, the finding as approved is that accused was found drunk on duty, the duty consisting of his being on guard as a sentinel. This violated Article of War 85, for the members of the guard are considered on duty during their entire tour, within the meaning of that Article (M.C.M., 1928, par. 145, p. 160).

The designation by the reviewing authority of Article of War 96 instead of Article of War 85 does not affect the validity of his action (C.M. 191638, Giles; C.M. 192530, Browne). However, since the approved findings in effect convicted accused of being found drunk on duty while on guard under Article of War 85, the sentence is limited to the maximum

prescribed for that offense. That maximum is confinement at hard labor for six months and forfeiture of two-thirds pay per month for a like period (M.C.M., 1928, p. 99).

5. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty as approved by the reviewing authority, but legally sufficient to support only so much of the sentence as involves confinement at hard labor for six months and forfeiture of $33.33 of his pay per month for a like period.

Percy G. Gay, Judge Advocate.
Thos Hammitt, Judge Advocate.
Fletcher R. Andrews Judge Advocate.

1st Ind.

War Department, J.A.G.O., 6 AUG 1943 - To the Secretary of War.

1. Herewith transmitted for your action under Article of War 50½ and Executive Order No. 9363, dated July 23, 1943, is the record of trial in the case of Private August J. Ambutavitz (36183843), 898th Guard Squadron, Army Air Forces School of Applied Tactics.

2. I concur in the opinion of the Board of Review, and for the reasons stated therein, recommend that so much of the sentence as is in excess of confinement at hard labor for six months and forfeiture of $33.33 pay per month for six months be vacated, and that all rights, privileges and property of which accused has been deprived by virtue of that part of the sentence so vacated be restored.

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

T. H. Green,
Brigadier General, U. S. Army,
Assistant Judge Advocate General,
In Charge of Military Justice.

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

(So much of sentence as in excess of confinement at hard labor for six months and forfeiture of $33.33 pay per month for like period vacated, by order of the Under Secretary of War. G.C.M.O. 201, 13 Aug 1943)

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

SPJGQ
CM 236359

26 JUN 1943

UNITED STATES v. Private BOYD E. TINDELL (33093618), Headquarters Section, 1550th Service Unit, Fort Knox, Kentucky.	FORT KNOX, KENTUCKY Trial by G.C.M., convened at Fort Knox, Kentucky, 4 June 1943. Dishonorable discharge (suspended) and confinement for five (5) years. Rehabilitation Center, Fort Knox, Kentucky.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Boyd E. Tindell, Headquarters Section, 1550th Service Unit, Fort Knox, Kentucky, while a member of Company A, 6th Armored Replacement Battalion, did, at Fort Knox, Kentucky on or about September 28, 1942 desert the service of the United States and did remain absent in desertion until he was apprehended at Black Water, Va. on or about the 17th day of May 1943.

He pleaded guilty to the Specification, 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 to the Charge but guilty of violation of Article of War 61. He was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due,

and to be confined at hard labor at such place as the reviewing authority may direct for twenty years. The reviewing authority approved the sentence, reduced the portion relating to confinement to five years, directed execution of the sentence as thus modified, except the dishonorable discharge, which was suspended, and designated the Rehabilitation Center, Fort Knox, Kentucky, as the place of confinement. The proceedings were published in General Court-Martial Order No. 149, Headquarters, Fort Knox, Kentucky, June 9, 1943.

3. The record is unique in that it contains no evidence whatsoever to support the facts alleged in the Specification. The findings and sentence can be supported, if at all, only by the plea of accused. No effort was made by the prosecution to establish any of the elements of the offense charged by any evidence, competent or otherwise.

4. While it is true that a plea of guilty admits the facts set forth in the Specification, it has always been deemed to be the better practice for the prosecution to present a prima facie case against accused by competent evidence notwithstanding the plea. Moreover, it is specifically provided that a plea of guilty of absence without leave to a charge of desertion is not in itself a sufficient basis for a conviction of desertion (par. 130, M.C.M. 1928). This principle has been sustained by a long line of decisions and requires no further discussion (sec. 416(8), Dig. Ops. JAG 1912-40).

The record of trial is sufficient to support only so much of the finding of guilty as involves absence without leave between the dates alleged, in violation of Article of War 61, and, inasmuch as the offense was committed prior to the effective date of the executive order removing the limitation upon the punishment for the offense, to wit, December 1, 1942, is legally sufficient to support only so much of the sentence as involves the punishment authorized for the offense by paragraph 104c, Manual for Courts-Martial.

5. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the finding of guilty of the Charge and Specification as involves a finding of guilty of absence without leave from September 28, 1942 to May 17, 1943, in violation of Article of War 61, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, confinement at hard labor for six months and **total forfeitures.** G.A.R.

~~two-thirds pay (§22-28) of both for a like period~~

William A. Hounds, Judge Advocate.

Paul Stephens, Judge Advocate.

Herbert B. Fredericks, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 28 JUN 1943 - To the Secretary of War.

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of August 20, 1937 (50 Stat. 724; 10 U.S.C. 1522), is the record of trial in the case of Private Boyd E. Tindell (33093618), Headquarters Section, 1550th Service Unit, Fort Knox, Kentucky.

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 of the Charge and Specification be vacated as involves findings of guilty of an offense by accused other than absence without leave, at the place and time alleged, terminated by apprehension, at the place and time alleged, in violation of Article of War 61; that so much of the sentence be vacated as is in excess of confinement at hard labor for six months and forfeiture of $33.33 per month for a like period; and that all rights, privileges and property of which accused has been deprived by virtue of that portion of the findings and sentence so vacated be restored.

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

Myron C. Cramer

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

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

(So much of the sentence is vacated as in excess of confinement at hard labor for six months and forfeiture of $33.33 per month for a like period, by order of the Acting Secretary of War. G.C.M.O. 142, 15 Jul 1943)

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

SPJGH
CM 236423

23 JUL 1943

UNITED STATES v. First Lieutenant ARTHUR G. CUNNINGHAM (O-915794), Air Corps.	)	ARMY AIR FORCES SCHOOL OF APPLIED TACTICS Trial by G.C.M., convened at Orlando Air Base, Orlando, Florida, 1 June 1943. Dismissal, total forfeitures and confinement for 5 years. United States Penitentiary, Atlanta, Georgia.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that First Lieutnenat Arthur G. Cunningham, Air Corps, Academic Division, Bombardment Department, Army Air Forces School of Applied Tactics, did, at Orlando, Florida, on or about April 16, 1943, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os with Private First Class Harvey L. Brumett, Headquarters Company, Signal Battalion, United States Marine Corps, Camp Lejune, New River, North Carolina.

He pleaded guilty to and was found guilty of the Charge and Specification. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for five years. The reviewing authority approved the sentence, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement and forwarded

the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that on the evening of 16 April, Private First Class Harvey L. Brumett and Private Parr, members of the Marine Corps, were in the bar of the Angebilt Hotel, drinking beer. Parr became engaged in a conversation with accused, in which Brumett and a Lieutenant Cannon joined. Later Brumett left the bar and when he returned Lieutenant Cannon remarked that he had the use of another officer's room at the Osceola Hotel and suggested that they go there for a drink. Accused obtained a quart of whiskey at the Angebilt and the four men proceeded to the Osceola Hotel. On the way both Lieutenant Cannon and the accused told Brumett and Parr not to make any noise because they didn't want anybody to know about it. When they reached the room, they obtained glasses and Brumett mixed a drink for himself and one for accused. Parr became ill and went out of the room. Accused followed, leaving Brumett and Lieutenant Cannon sitting on the bed. Later Parr returned to the room, took his hat and went out. When Parr entered, Lieutenant Cannon and Brumett sat up but did not stand. Accused then came in the room clad in shirt and shorts, but without his trousers. Brumett sat with his head bent forward as if he were drunk but he could see what was taking place. After what Brumett thought were signals between Lieutenant Cannon and the accused, Lieutenant Cannon left the room. Brumett asked for his drink which was on a table. Accused handed it to him, then sat beside Brumett, took the drink away from him, pushed him back on the bed, and without saying anything, took out Brumett's penis, got between Brumett's legs and put his mouth "on it". Brumett jumped up, "kicked Hell out of him", knocked him down twice and threw him across the room. Brumett then poured the rest of the bottle of whiskey in the face of accused, walked out on the veranda where Lieutenant Cannon and Parr were, and said to Lieutenant Cannon "your friend wants you". When Lieutenant Cannon stood up, Brumett struck him several times and said to Parr "these guys are queer". Brumett then reported the matter to Captain William J. McDermott, a Marine Corps officer (R. 4-9).

4. For the defense the accused elected to make an unsworn signed written statement, Exhibit A. This statement, consisting of 14 manuscript pages, sets forth the chronological sex history of the accused, beginning at the age of 12 years. It relates his interest in the drama, his employment in a repertory theatre and dramatic school at San Francisco, his association, at Hollywood, with a woman twice his age, his work as an instructor and assistant professor of English and as administrative head of certain engineering defense training courses. In the statement, accused admits that he is a homosexual but claims that the condition shows itself only after he has been drinking, that it comes then as a sudden uncontrollable impulse which leaves him remorseful and filled with loathing for himself and his partner in the act. He states that he entered the Army gladly, believing that he could start a new life, that for awhile he was busy and completely satisfied, but that recently he became discouraged and began to drink, that he had no thought of a sexual nature when he went with the marines to his hotel, and that his acts there were the result of "an impulsive and uncontrollable drive". He made a confession to Captain Coxson of the Medical Corps because he wished

to obtain medical advice from someone who could help him to understand his condition and treat him for it, and at the suggestion of Dr. Coxson, he wrote to Dr. Hinsie of the Psychiatric Institute in New York City.

Defense counsel obtained permission of the court to attach to the record in connection with a plea for clemency, certain exhibits, including letters from Captain Carmon A. Savell, First Lieutenant Arthur M. Tighe and First Lieutenant Fred H. Thomas, Chaplains at Orlando Air Base, and Captain Harold P. Coxson, M.C., dispensary surgeon at Orlando, to the effect that homosexuality is a disease rather than a crime, and that restoration to normalcy is possible through proper psychiatric treatment. There are also attached to the record a letter dated 15 May 1943, from accused to Dr. L. E. Hinsie of the Psychiatric Institute and Hospital, New York City, requesting advice, a reply from Dr. Hinsie suggesting a conference in New York, and a letter from Lieutenant Colonel Charles B. Whitehead, the commanding officer of accused, stating that accused's services had been very satisfactory and that Colonel Whitehead had no cause to criticize his work or conduct (R. 10).

5. The pleas of guilty and the evidence show that accused was guilty of sodomy at the time, place and with the person alleged. It does not appear that the pleas of guilty were improvidently entered nor is there anything inconsistent with the pleas in the unsworn written statement of accused.

6. The accused is 34 years of age. The records of the Office of The Adjutant General show his service as follows:

Appointed temporary second lieutenant, Army of the United States, 21 August 1942; active duty, 4 September 1942; appointed temporary first lieutenant, 1 April 1943.

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. Confinement in a penitentiary for sodomy is authorized under Article of War 42 by section 22-107 of the District of Columbia Code.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 29 JUL 1943 - To the Acting Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and opinion of the Board of Review in the case of First Lieutenant Arthur G. Cunningham (0-915794), 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 pleaded guilty to and was found guilty of committing sodomy with an enlisted man of the Marine Corps. I recommend that the sentence to dismissal, total forfeitures and confinement for five years be confirmed and carried into execution.

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

Myron C. Cramer.

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

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

(Sentence confirmed but that part providing for confinement at hard labor remitted. G.C.M.O. 238, 17 Sep 1943)

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

SPJGQ
CM 236424

- 1 JUL 1943

UNITED STATES	)	BOSTON PORT OF EMBARKATION
v.	)	Trial by G.C.M., convened at Camp Myles Standish, Massachusetts, 24 May and 8 June 1943. Dishonorable discharge and confinement for life. Penitentiary.
Private ROBERT KING, JR. (34553599), 780th Sanitary Company.	)	

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Robert (NMI) King, Jr., 780th Sanitary Company, Camp Myles Standish, Taunton, Massachusetts, did, at Providence, Rhode Island, on or about May 14, 1943, forcibly and feloniously, against her will, have carnal knowledge of Charlotte A. Stevens.

Accused pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to 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 Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. For the prosecution:

In May 1943 Charlotte Amelia Stevens, colored, 33 years of age, 114 pounds, divorced, lived with her mother at 45 Winter St., Providence, Rhode Island. She was a nursery school teacher and a high school graduate. On the second floor of the same house lived another

colored woman named "Delphine", of questionable character, who was frequently visited by men. About 5:15 p.m. on 14 May 1943 accused came into Mrs. Stevens' kitchen and asked for Delphine. She was reading the paper at the time. She told him that Delphine lived upstairs. He said he had been up there, but no one was there. He left. She fastened the kitchen door and talked through the open window to her neighbor, Mrs. Watkins, telling her about "the fresh soldier" who had walked in without knocking. She then observed the accused peering around the corner of the house so she closed the window. Shortly thereafter the kitchen door was forced open and the accused came in. She screamed and ran around the table, and tried to get out of the door. He cornered her by pushing the table over and put his hand over her mouth and picking her up around the waist, carried her into an adjoining bedroom. He threw her on the double bed there. She screamed again and he grabbed her by the throat and told her he would kill her if she did not keep still (R. 33). She was on her back, he on top of her. She continued to struggle until she felt her ears ringing from his choking. She ceased to struggle. He stopped choking her. She asked him what he wanted. He said, "You know what I want." She offered to take him to see some "nice" girls, but he kept pulling her clothes and said he wanted her. She did not scratch or "knee him." Accused had both hands underneath her arms and around the top of her shoulders (R. 23). While in that position for 10 minutes he had intercourse with her. Her underwear consisted of a slip, a "Bando", and a pair of panties. She wore no stockings. None were torn or damaged. The accused was fully clothed except for his hat (R. 54).

Following the alleged intercourse Mrs. Stevens testified:

"Pretty soon, he sat on the side of the bed and I didn't move, I thought he was going to kill me then anyway and I just laid on the bed and he said, 'What were you doing all the screaming for' and then I sat up and said, 'You scared me' and then I pulled my underwear on and I stood up and he stood up. He was buttoning his clothes. Then after I ran out into the kitchen, and he was right behind me, he picked up his cap off the floor and put it on. I knew I was going to call the police if he went away without killing me or something so I knew if I told the police just a colored soldier that there was a lot of camps he could come from, so I didn't want to ask him his name because I thought maybe he would be suspicious and I said, 'What camp did you come from' and he said, 'Myles Standish'. I didn't understand him the first time and he said it again. I said, 'Where is that' and he said, 'It is near Taunton'. And then he took out a package of cigarettes and he lit one and asked me to have one and I took it. At first I thought I would keep him there until my mother came and then I thought maybe my mother would get hurt too, so he said to me, 'Are you mad,' and I said, 'No' and he said, 'How much money do you want' and I said, 'Oh, that's

all right' and then he said, 'Well, how much money do you want for the dishes that I have broke on your table?' and I said, I think I said, 'Forget it' or I said something like that. Anyway, then he said, 'You're a sweet kid, you can have anything that I have got' and I didn't say anything and then he asked me if I would go out with him that night and I said, first I said, 'No' but I said it so quick that I thought maybe he would know something was wrong and then 'Well, how can you take me out, don't you have to go back to camp' I said. Then he took off his cap and inside the cap was like cellophane pocket and in the pocket was a pass and he said, 'You see this pass, I don't have to go back to camp until 8' but I had seen some of my brother's passes and I knew on the top there is always a name, so I said, 'Well, let me see', but I didn't look at the time, I just looked at the name, and it was printed on the top line. It said, 'Private Robert King', so I gave him back his hat and said, 'Well, I am tired now but the next time you come to Providence, I will see you' and he said, 'All right, you are sure you're not mad?' He said, 'You weren't going to call the police were you' and I said, 'No'. Then he puts his arms around me and kissed me and I didn't fight but I got away pretty soon because I was afraid he would know I was so nervous, and he said, 'Will you walk to the door with me?' and I said, 'Yes' and I walked to the door with him and two sailors came in and went upstairs and knocked on the door and he said, 'Is that your boy friend?' and I said, 'No', then I said, 'Well, I have got to go because I have got to clean up the kitchen before my mother comes home'. I went back into the house and looked out the kitchen window and saw him go across the yard and over the fence" (R. 9-10).

After the accused had gone Mrs. Stevens went over to Mrs. Hickman's home and asked her to get a policeman because a soldier had broken into her house and attacked her. The policeman arrived about 10 minutes later.

Police Officer William J. Welling, as a result of a summons, called at Mrs. Hickman's home about 6:45 p.m. and there met Mrs. Stevens who claimed she had been raped (R. 38). He examined the bed where the alleged occurrence took place. It looked as if someone had laid upon it and then pushed the comforter back. It was not badly disarranged (R. 40). The doctor who examined her about 10 o'clock that evening found no bruises or marks on her. Mrs. Stevens complained of a sore neck where she alleged the accused had grabbed her and choked her.

Mrs. Hickman corroborated the fact that Mrs. Stevens came to her house about 6 to 6:15 p.m. on 14 May 1943 and said she had been attacked and to "please get an officer", which she did(R. 36).

It was shown that accused was on pass on 14 May 1943. On 17 May Mrs. Stevens identified the accused among five colored enlisted men as her assailant. The accused told conflicting stories regarding the occurrence. He admitted that he was in Mrs. Stevens' home at the time in question and that he had had intercourse with her (R. 49).

4. For the defense.

Captain Nathan K. Bernstein testified as an expert on psychiatry, that, after examining the accused, he was of the opinion that he was mentally defective. He knew right from wrong but would not realize the consequences of his deeds (R. 57).

Private Edward J. W. Martin knew Delphine and had taken the accused to see her one night prior to this occurrence. He gave the accused her address. She was a willing victim for sexual relations (R. 60).

The accused having been advised of his rights elected to make an unsworn statement. He told of having the address of Delphine in his pocket and going to that address by cab, that he just knocked on a door and then gave it a push and went in, and then saw Mrs. Stevens. Mrs. Stevens screamed. He told her what he wanted and she consented and took him in the back bedroom and took off her bloomers and he "done what I wanted to do." She later told him that she had no particular boy friend and to be sure to come back again. On the bed, she acted "like a woman should act, she just went to help me win" (R. 63).

5. The accused is charged with rape upon Charlotte A. Stevens on 14 May 1943 at Providence, R. I. It was clearly shown that on that date and in that place the accused had sexual intercourse with Charlotte A. Stevens. The only issue of fact was that of consent. If Mrs. Stevens in any way consented to the act the accused is not guilty of the crime.

According to the testimony of Mrs. Stevens she did not voluntarily consent to the intercourse. She screamed and fought the accused until he choked her and threatened to kill her if she did not lie still and be quiet. In fear of death or other serious bodily injury she made no further resistance to the sexual relations that followed.

The accused, on the other hand, admitted that she was frightened at first and screamed, but that after he had explained his desires she willingly permitted the intercourse and during the act "helped him to win". It is assumed that he meant from this that she cooperated.

Paragraph 148 b, page 165 Manual for Courts-Martial, provides:

> "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 the 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'".

Wharton's Criminal Law Vol. 1, 12th Edition, 3682:

> "Rape,at common law, is the act of a man having carnal knowledge of a female---without her conscious and voluntary permission; that is, by force,---or when she did not consent because rendered insensible through fright, or ceased resistance under fear of death or great bodily harm, and submitted."

If Mrs. Stevens' account of the occurrence is believed that she submitted through fear of death or great bodily harm, then all of the elements of the crime have been proven. Her testimony alone is sufficient to sustain a finding of guilty. The court by its finding showed that it accepted her testimony as the truth. The court had the advantage of observing the witnesses and having weighed the evidence came to the conclusion indicated. It is not within the province of the Board to weigh the testimony in this case, but merely to ascertain that there was sufficient evidence in the record to sustain the findings. The evidence as pointed out was clear and sustaining. It is unlikely that a strange man could burst into a woman's home and obtain her consent to sexual intercourse in the brief time that preceded the act in this case.

Pursuant to a recommendation made by the court the reviewing authority appointed a board of officers to examine the mental condition of the accused. The report showed the accused to have been born and raised on a farm in Alabama; attended school through fourth grade; no criminal record; quiet and well conducted and well oriented for time, place and person; poor memory; no mood disorders or psychotic manifestations; subject to periodic alcoholic sprees; mental attitude and age of 6 or 7 years; and subnormal knowledge and intelligence.

The board found that accused was not now insane and was not insane at the time of the commission of the offense; that he was capable of realizing right from wrong, but did not have normal control

of his actions; that he is not capable of communicating intelligently with his counsel and of doing the things necessary for the proper presentation of his case; and that institutional care for feeblemindedness is necessary. He was classified as mentally defective.

The record of trial shows that the accused was ably defended by defense counsel, who displayed a complete knowledge of the accused's defense: Mrs. Stevens' consent, his reasons for being where he was at the time, and other matters—all of which indicate close and intelligent communication between counsel and accused. The accused himself elected to make an unsworn statement and intelligently related his version of what happened. No other inference is logical from the accused's conduct during the trial, but that he was fully capable of cooperating with his defense counsel and that he was in no manner whatsoever handicapped by mental disabilities other than his lack of cultural advantages suffered by all persons of his station in life.

6. The record shows the accused to be 22 years of age. He was inducted 5 November 1942 at Fort Benning, Georgia 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 legally sufficient to support the findings and the sentence. A sentence of imprisonment for life is authorized upon conviction of violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 92 for the offense of rape, 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).

William A. Pounds, Judge Advocate.

Carlos Sebum, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

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