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GENERAL
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Volume XXIV

including

CM 237459 to CM 238937

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

SPJGK
CM 237459

2 AUG 1943

UNITED STATES	FORT ORD, CALIFORNIA
v.	Trial by G.C.M., convened at Fort Ord, California, 26 and 29 June 1943. Dishonorable discharge and confinement for one (1) year. Disciplinary Barracks.
Private THOMAS F. IVY (34479886), Medical Section, Service Command Unit #1962.	

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Thomas F. Ivy, Medical Section, Service Command Unit 1962, Fort Ord, California, did, at Monterey, California, on or about April 11, 1943, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per os with 2nd Lt. Lloyd J. Kent, AUS, Service Command Unit 1962, Fort Ord, California.

Specification 2: In that Private Thomas F. Ivy, Medical Section, Service Command Unit 1962, Fort Ord, California, did, at Monterey, California, on or about May 1, 1943, commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per os with 2nd Lt. Lloyd J. Kent, AUS, Service Command Unit 1962, Fort Ord, California.

He pleaded not guilty to and was found guilty of the Charge and Specifications. No evidence of previous convictions was introduced. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due

or to become due, and confinement at hard labor for five years. The reviewing authority approved the sentence, reduced the period of confinement to one year, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on or about 11 April 1943, Second Lieutenant Lloyd J. Kent, Headquarters, Service Command Unit No. 1962, was walking down a street in Monterey, California, and met and conversed with accused. They went to Lieutenant Kent's room at the San Carlos Hotel, where they had a few drinks, after which they spent the afternoon together at a beach. They returned to the hotel around 11 p.m. and left the next morning. Asked what transpired after their return to the hotel, Lieutenant Kent availed himself of his privilege against self-incrimination, and refused to answer (R.13-16; Pros. Ex. B).

On or about 1 May 1943, accused and Lieutenant Kent again met on the street in Monterey. They went to the Brown Derby, where they had a few drinks, and then to Lieutenant Kent's room at the San Carlos Hotel. After spending some time there, they went out for the evening, did some drinking, and returned to the hotel room. They left the room the next morning. Asked what transpired in the room, Lieutenant Kent refused to answer. His refusal undoubtedly was based upon his privilege against self-incrimination (R. 17-18; Pros. Ex. C).

A bellboy at the hotel testified that Lieutenant Kent had a room at the hotel during the weekend of 1 May and that an enlisted man was with him (R.19).

Two statements by accused were admitted in evidence, in both of which accused confessed that on the above occasions Lieutenant Kent and he committed sodomy (R.8,12,20,21; Pros. Exs. A,D).

Accused declined to testify or to make an unsworn statement.

4. The only question involved is whether the evidence of the corpus delicti is sufficient to support the confessions. The Manual for Courts-Martial contains the following provision on the subject:

> "An accused can not be convicted legally upon his unsupported confession. A court may not consider the confession of an accused as evidence against him unless there be in the record other evidence, either direct or circumstantial, that the offense charged has probably been committed; in other words, there must be evidence of the corpus delicti other than the confession itself. * * *

This evidence of the corpus delicti need not be sufficient of itself to convince beyond reasonable doubt that the offense charged has been committed, or to cover every element of the charge, or to connect the accused with the offense. * * *" (M.C.M., 1928, par. 114a).

This represents the majority view in the civil courts (7 Wigmore, Evidence, 3rd ed., secs. 2070, 2071). The purpose of the rule is to protect an accused from the results of a confession improvidently made.

Outside of the confessions, there is no evidence in the record that the offense "has probably been committed". The evidence shows merely that Lieutenant Kent and accused occupied the former's room at the hotel on the occasions in question and that they did some drinking together. A study of the Board of Review cases and of cases from the civil courts discloses no instance where such slim evidence of the corpus delicti was held sufficient (See for example, CM 168904, Knapp; CM 186681, Jackson; CM 187656, Munson; CM 220604, Antrobus; State v. LaLouche, 116 Conn. 691, 166 Atl. 252; Frierson v. Comm., 175 Ky. 684, 194 S.W. 914; In re Kelly, 28 Nev. 491, 83 Pac. 223).

Lieutenant Kent's refusal to answer questions on the ground of his privilege against self-incrimination cannot be considered as evidence to bolster the case against accused (Powers v. State, 75 Neb. 226, 106 N.W. 332; State v. Nelson, 91 Vt. 168, 99 Atl. 881; 8 Wigmore, Evidence, 3rd ed., p. 418).

5. For the foregoing reasons, it is the opinion of the Board of Review that the record of trial is legally insufficient to support the findings of guilty and the sentence.

Percy C. Ege, Judge Advocate.

Thos Bennitell, Judge Advocate.

Esther R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., - To the Commanding Officer,
Fort Ord, California. 3 - AUG 1943

1. In the case of Private Thomas F. Ivy (34479886), Medical Section, Service Command Unit No. 1962, I concur in the holding of the Board of Review and for the reasons therein stated recommend that the findings of guilty and the sentence be vacated.

2. When copies of the published order in this case are forwarded to this office, together with the record of trial, which is returned herewith, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this case in this office is 237459. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place that number in brackets at the end of the published order, as follows:

(CM 237459).

T. H. Green,
Brigadier General, U. S. Army,
Assistant Judge Advocate General,
In Charge of Military Justice.

AUG 4 - 43 PM

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A.G.O.

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

SPJGQ
CM 237479

13 AUG 1943

UNITED STATES	)	XV CORPS
v.	)	Trial by G.C.M., convened at Camp Livingston, Louisiana, 11 June 1943. Dishonorable discharge (suspended) and confinement for five (5) years. Rehabilitation Center, Camp Bowie, Texas.
Private WALTER L. HILL (20621467), Battery A, 993rd Field Artillery Battalion.	)	

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

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

Specification: In that Private Walter L. Hill, Battery "A", Nine Hundred and Ninety-third Field Artillery Battalion, having received a lawful command from Captain Herbert G. Fellner, Nine Hundred and Ninety-third Field Artillery Battalion, his superior officer, to put on his pack and fall into ranks within three minutes, did at Camp Livingston, Louisiana, on or about May 20, 1943, willfully disobey the same.

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

Specification: In that Private Walter L. Hill, Battery "A", Nine Hundred and Ninety-third Field Artillery Battalion, did, at Camp Livingston, Louisiana, on or about May 20, 1943, while accompanying his organization on a practice march without just cause straggle.

He pleaded not guilty to and was found guilty of the Charges and Specifications. There was evidence of one prior conviction of violation of the 61st Article of War by special court-martial for absenting himself from guard duty. 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 five years. The reviewing authority approved the sentence, suspended the dishonorable discharge until the soldier's release from confinement and designated the Eighth Service Command Rehabilitation Center as the place of confinement.

3. The competent evidence of the prosecution showed that on 20 May 1943 a twenty-five mile practice march was scheduled for the battalion of which accused was a member. This march had been scheduled for about a week and it was commonly known to all concerned. The accused during this time was a class "A" prisoner on full duty status with the battalion during drill hours (R. 6, 16). Captain Herbert G. Fellner, the Battery Commander, was informed that the accused had refused to fall in ranks after he had been ordered to do so by the first sergeant and by Lieutenant Norcross (R. 13). Captain Fellner thereupon approached the accused, who was in the battery area dressed in fatigue clothes in front of the battery lined up in formation preparatory to leave on the march, and told the accused to fall in ranks and take the road march. The accused stated that he was not supposed to take road marches; that he had a certificate which he did not have with him. Captain Fellner then had the accused go into the orderly room so as to avoid a scene in front of the battery. In the orderly room the Captain again gave the accused a direct order to "fall in line with his pack" (R. 13). Lieutenant Norcross stated that Captain Fellner's order was to be performed within three minutes (R. 10). Reluctantly and sullenly the accused fell in with his pack about six or seven minutes later. The battery commander did not make any investigation at the time to determine whether or not accused was in condition to make the march or whether or not a doctor had instructed him not to do so (R. 15; 18). Nor did he inspect the feet of the accused (R. 14). The accused just previously had refused to fall in at the order of the first sergeant and Lieutenant Norcross giving as his reason for his refusal that he had fallen arches and that he had a slip from the doctor not to go on road marches (R. 10).

The accused marched along with the battery for about three-quarters of a mile and then dropped out claiming that his legs were tired (R. 20).

The accused subsequently produced a prescription, apparently from a medical officer, for wedges to be placed in the heels of his shoes. The prescription contained nothing about being excused from any duty (R. 12, 14). The wedges are used to prevent walking on the side of the foot and also to support fallen arches. At the time the commanding officer gave the order the accused told him about his feet (R. 15). The accused had not made any long road march during the last few months (R. 17).

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

silent.

5. The requisite elements of proof required to sustain a finding of guilty of willful disobedience of the lawful order or command of a superior officer are as follows: "(a) That the accused received a certain command from a certain officer as alleged; (b) that such officer was the accused's superior officer; and (c) that the accused willfully disobeyed such command." (MCM, 1928, par. 134b, p. 149).

In a very recent case which appears to be directly in point, the following ruling was announced:

> "Accused was found guilty of willful disobedience of a lawful order of a superior officer, in violation of AW 64. There was evidence that a lieutenant ordered accused to get his pack on and fall out for a march which was to start a few minutes later. Accused stated that he had a certificate from a medical officer exempting him from this march because of a knee ailment and argued with the lieutenant, another officer, and several noncommissioned officers, about the matter for some minutes. At the conclusion of the argument accused put on his pack and fell out for the march. Held: The record is legally insufficient to support the finding. The willful disobedience condemned by AW 64 involves intentional defiance of authority. The accused's claim of exemption from the order by reason of the certificate of another officer was not such defiance. CM 233906 (1943)." (Bulletin of The Judge Advocate General of the Army, Vol. II, No. 5, May 1943, p. 186).

The evidence shows that the accused in the subject case did comply with the order given him but failed to comply with it in the time that one of the witnesses states was fixed by the officer giving the order - namely, three minutes. The accused did fall in with his pack and start with the rest of the outfit. The record is silent as to whether or not the order, which was to be executed in the future, could have been reasonably complied with in three minutes. The element of willful disobedience of the order is predicated only on that period of apparent indecision (six or seven minutes) during which time accused is said to have done nothing. These facts are legally insufficient to prove willful disobedience as contemplated under Article of War 64. Such defiance was not shown to exist where the accused claimed exemption from the order by reason of the certificate of another officer, and then after a short interval of indecision, complied with the order.

With reference to Charge II and its Specification charging the accused with straggling it was clearly shown that the accused joined in the march and after marching a short distance dropped out without any authority claiming that his legs were tired. This is a clear case of straggling. If all

foot soldiers quit marching when their legs became tired discipline would soon disappear. The findings of guilty of Charge II and its Specification are therefore sustained.

6. The record shows the accused to be 23½ years of age. He enlisted 19 December 1940 for three years plus the duration.

7. The court was legally constituted. The record of trial is insufficient to support the findings of guilty of Charge I and its Specification but is legally sufficient to support the findings of guilty of Charge II and its Specification. The record of trial is therefore not sufficient to support the sentence, but only sufficient to support a sentence of three months confinement and forfeiture of two-thirds of the accused's pay and allowances.

William A. Rounds, Judge Advocate.

Carlet Seplum, Judge Advocate.

Herbert B. Hudner, Judge Advocate.

1st Ind.

War Department, J.A.G.O. 14 AUG 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 Walter L. Hill (20621467), Battery A, 993rd Field Artillery Battalion.

2. I concur in the opinion of the Board of Review and for the reasons stated therein recommend that the findings of guilty of Charge I and its Specification be vacated and that so much of the sentence be vacated as is in excess of confinement at hard labor for three 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 those portions 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.

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 of guilty of Charge I and its Specification vacated. So much of sentence vacated as in excess of confinement at hard labor for three months and forfeiture of $33.33 per month for a like period. By order of the Acting Secretary of War. G.C.M.O. 207, 27 Aug 1943)

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

SPJGN
CM 237487

30 SEP 1943

UNITED STATES	10TH ARMORED DIVISION
v.	Trial by G.C.M., convened at Fort Benning, Georgia, 18, 19 and 20 June 1943. Dishonorable discharge and confinement for the term of his natural life. Penitentiary.
Private DENIS E. LEMLEY (38322979), Battery "C", 419th Armored Field Artillery Battalion.	

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

- - - - - - - - - - -

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Denis E. Lemley, Battery "C", 419th Armored Field Artillery Battalion, did, at Fort Benning, Georgia, on or about June 5, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Paul L. Hays, 15045242, Private, Battery "C", 419th Armored Field Battalion, a human being by striking him on the head and in the abdomen with a Thompson sub-machine gun, serial No. 115778.

The accused pleaded not guilty to and was found guilty of the Charge and Specification. The offense was committed in time of war. Evidence of one previous conviction by special court-martial for violation of Article of War 61 was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary,

Atlanta, Georgia, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that a few nights before the alleged murder, the deceased without provocation had attacked the accused twice, inflicting facial injuries upon him with his fists for which the accused was still on sick call on 5 June 1943. He had reported these two attacks to his superior officers but no action had been taken by them. Following these attacks the accused manifested no fear of the deceased although the deceased was generally reported as a fighter and bully who was proud of his ability to fight (R. 62-67, 76-77, 67-68, 69-71, 104).

Two witnesses, who slept in the same room with the deceased and the accused, testified that, on the morning of 5 June 1943, they were awakened by "groaning" and sounds like "someone was beating the bed with a belt", and saw a man "in a white undershirt with pants on" walk away from deceased's bed, stoop at a foot locker, and then lie down in the accused's bed. These witnesses continued to watch the person in question until the lights were turned on permitting them to recognize him as the accused. A Thompson sub-machine gun with a broken stock with fresh blood on it was found at a foot locker near deceased's bed (R. 7-9, 10-14, 15-19).

Shortly thereafter, in response to a call, the officer of the day arrived at the scene of the fatal attack. He sent the injured man to the station hospital, briefly questioned the men in the room, and took the number of the machine gun, which he delivered to the military police for finger-print examination. The gun was identified and admitted in evidence. He was present during the investigation conducted by the battalion commander at the barracks later the same morning, at which the acting battery commander, representatives of the military police, the battery's first sergeant, and others were also present. At this investigation the accused received the same treatment as at subsequent investigations, and was fully advised concerning his rights to remain silent or to make a statement. The accused then made a verbal statement which was substantially to the same effect as his subsequent written confession. The substance of this statement was admitted in evidence over the objection of the defense (R. 20-25, 26-31, 31-35, 36-40, 48-51).

The investigating officer, having been present at the investigation conducted by the battalion commander, testified substantially as did the other witnesses concerning the circumstances surrounding the accused's statement at such interview. At this time the accused manifested no fear, but appeared morbid and slow to grasp the fact of Hays' death. The confession was identified, received in evidence without objection, and read to the court by the witness at the request of the defense (R. 52-54, 57-59).

In substance, the confession states that deceased had beaten the accused twice a few nights before, that his efforts to secure redress through his superiors were unsuccessful, and that he awakened at about 4:30 on the morning of 5 June 1943, lay in bed for 15 or 20 minutes thinking how to repay him, saw the "Tommy-Gun" near an adjoining bed, picked it up, walked to deceased's bed and, grasping the gun barrel with both hands, struck him in the face three or four times and once in the stomach while he slept. Also, it states that the gun stock broke about the third lick, that he placed the gun near the foot locker of the next bed, and that he then went to his own bed and lay down where he remained during the period of discovery of the attack. Furthermore, it states that he was dressed in a white undershirt with fatigue pants, that he was fully warned of his rights and understood them before making his statement to the battalion commander that morning, and that, although he did not intend to kill deceased, he had been thinking how to get even with him for the previous two days (Ex. No. 3).

Competent medical testimony by several witnesses conclusively established that deceased's death resulted from the attack described, within a few hours of its occurrence, and a photograph, showing the mortal wounds of deceased, was identified and admitted in evidence (R. 41-47, 59-60, Ex. No. 2).

4. The defense suggested to the court that reason existed to doubt the sanity of the accused and requested the court to submit the accused for investigation as prescribed by the Manual for Courts-Martial. Thereupon, the court, through its president, stated that it then had no reason to doubt the sanity of the accused, and that, if the defense had such reason, the available facts relative thereto should be made known to the court. First Lieutenant John J. Raymond, Adjutant General's Department, 10th Armored Division, after identifying the accused and being qualified as a lay witness with considerable experience as a personnel consultant and psychiatrist with penal institutions, was permitted to testify for the defense that he had examined the accused on 14 June 1943 and had found him to be of low mentality, approximating that of a 10-year-old, and readily susceptible to suggestion. The accused evidenced to him no strong feeling of fear of the deceased but his own assurance that he could not defend himself against the deceased in hand to hand fighting. The accused had dreamed of the deceased "tromping on him" which more closely approached an indication of fear than anything else developed by the examination. The accused during the interview made no claim to having been treated for insanity and seemed to manifest a feeling of accomplishment in "getting even with" deceased, although he stated he was sorry deceased "was not walking around now". Accused's father had told him to "mind his officers and not refuse their orders but if he had to protect himself, to use a club". The witness was of opinion that the accused was sane within the legal definition of sanity (R. 71, 72-75).

Captain Norman R. Shulack, chief of the Nerve Psychiatry Section, Station Hospital at Fort Benning, also testified for the defense. He had examined the accused on both 5 and 9 June 1943, from which examination he was of the opinion that the accused was of the mental age of approximately 9 years and 3 months which meant he had a "reduction in judgment and shows a mental inability toward any act", and "legally it means he is responsible. * * *" The witness had ascertained elsewhere that on the evening of 4 June 1943 a newsboy visiting the barracks asked the accused how he got the black eyes and, upon being told

by the accused, said: "If I were you, I would get that guy. I'd hit him over the head with a tommy gun". The witness said:

> "From that I believe that Hays had been a bully and had actually beaten him up and from the fact that the patient, believing that he was going to be beaten up again and the fact that a man of limited intelligence cannot think well and a stimulus for action had been put into his mind by the newsboy, he was motivated by this fear so he just walked over and bopped him on the head" (R. 77-80).

Captain John Howard Culp, Medical Corps, had treated the accused on 3 and 4 June 1943 at the dispensary for his beaten face, at neither of which times did the accused express any emotions or any fear. Captain Emmett L. Davis, the battery commander, testified that the accused on one occasion was the only man in the platoon who got a zero in a compass examination and that he was sent with about twenty others to the dispensary to see if he could be reclassified. However, he was not reclassified and with additional instruction by Sergeant Hollingsworth learned to work a back azimuth as well as the sergeant, which resulted in the matter of reclassification being dropped. On one occasion the accused was brought in drunk and at that time he broke down and cried. The accused had been subjected to the "infiltration" course at Tiger Camp at which time he displayed fear and was the last man through. From his knowledge of and contacts with the accused, the witness thought he knew right from wrong (R. 80, 81-85).

Upon preliminary evidence and representation by the defense counsel that the accused's father was en route to testify further concerning his sanity, the court granted a short continuance pending the arrival of the father and upon the motion of defense counsel for the appointment of an AR 600-500 board to investigate the sanity of the accused being again urged, it was granted. The report of the board was admitted in evidence without objection. The conclusions of the Board are in part, as follows:

> "a. Diagnosis: Mental Deficiency, Moron, Mental Age 9 years, 3 months. Line of Duty: No. EPTI.
>
> * * *
>
> "d. That this soldier is not insane or imbecile and was not insane or imbecile at the time of the alleged commission of the offense charged and is able to distinguish between right and wrong and to understand the nature of the charge against him. His intellectual capacity is reduced commensurate with the degree of mental deficiency present, but he is considered to be mentally responsible for his actions".

All members of the board testified that the accused was sane as shown by the report (R. 87-93, 94-99, 99-100, Ex. 5).

The accused's father, Denis Herbert Lemley, testified in material part that his son, the accused, from a child had been of a nervous, excitable disposition, different from the other children; that he had raised a few

"rumpuses" but from about 10 years of age on he had been peaceable and would not start any trouble although unable to take a joke; that he had been promoted to the fifth grade in school but at the age of 14 he quit and started to work on the farm; that about 3 years before he was operated for appendicitis and again developed kidney trouble which he had when a child during which early illness he passed blood; that for six months prior to registering for the Army, he did not leave the farm to visit his folks as he was afraid and said somebody would kill him and just sat around and talked to himself and laughed silly laughs; that after he registered for the Army, he seemed to get a little better but even the week before he left for the Army, he was still doing some of those things; and that, "He (the accused) was peaceable and quiet but if he was crossed and you got him mad, why he was nervous and would go all to pieces and I couldn't imagine what he might do". On further questioning it was developed that accused's mother had been in an insane asylum for six months in the latter part of 1927; that there was some record of insanity in his grandfather's family on his mother's side; that accused mentioned that Hays was a "tough guy" and a bully while at home on leave but that he had not "tangled" with Hays and never would as long as Hays left him alone; that the accused had been examined by a physician for insanity within the six months prior to his registering for the Army who said he was "mentally bad off" and advised treatment in an asylum which was never given; and that he always minded his father and had never been in trouble except when he was arrested once for drinking too much whiskey (R. 100-104).

The accused was properly advised of his rights by the Court and elected to make an unsworn statement which was substantially to the same effect as his written statement but also included: "I didn't aim to kill him when I hit him. I felt that I was defending myself. I knew he would beat me up again and I knew I couldn't like him with my fists. I didn't want to beat him up in daylight with a gun where everybody could see it" (R. 105-107).

5. Captain Allen E. Hubner, Medical Corps, was the only rebuttal witness offered by the prosecution. He testified that some time before he had requested the various battery commanders to send in all of those that they thought were either physically or mentally unfit and an effort would be made to reclassify them and the accused along with eight or ten others reported from Battery "C". A physical examination and a cursory mental examination gave the witness the opinion that the accused was not suitable for reclassification (R. 108-109).

6. The accused is charged with murder. The Specification alleges that the accused did "*** with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation kill * * *" the deceased by striking

him on the head and in the abdomen with a sub-machine gun. If the evidence is legally sufficient to support the finding of guilty under this Specification, it must support the conclusion that the accused unlawfully killed the deceased with malice aforethought. Subjected to such test and viewed in the light of pertinent authorities, the legal sufficiency of the evidence cannot be successfully challenged.

Murder is defined as "*** the unlawful killing of a human being with malice aforethought". The word "unlawful as used in such definition means "*** without legal justification or excuse". "A homicide done in the proper performance of a legal duty is justifiable". Consequently, a homicide without legal justification is one not done in the performance of a legal duty. Also, 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 must take place within a year and a day of the act or omission that caused it, ***" (M.C.M. 1928, par. 148a). The most distinguishing characteristic of murder is the element of "malice aforethought". This term, according to the authorities, is technical and cannot be accepted in the ordinary sense in which it may be used by laymen. The Manual for Courts-Martial defines malice aforethought in the following terms:

> "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 (Clark).
>
> "Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; intent to commit a felony. ***" (M.C.M., 1928, par. 148a, underscoring supplied).

Indicative of authorities supporting the principles set forth in the Manual for Courts-Martial are the words of Chief Justice Shaw, who in the leading case of Commonwealth v. Webster (5 Cush. 296; 52 Am. Dec. 711) 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". (Underscoring supplied)

The authorities to the same effect are manifold and further citation thereof would be superfluous.

Viewed in the light of controlling legal principles, the uncontradicted evidence establishes, beyond a reasonable doubt, every element of the crime charged and that the homicide was unlawful, having been consummated without legal justification or excuse. The evidence demonstrates that the accused and the deceased a few nights previous had engaged in two fights in which the deceased was the aggressor and the accused the recipient of a badly beaten face and head resulting in his being on sick call for at least two days, during which time the accused made unavailing efforts to secure lawful redress for his grievances, either real or supposed. Failing in this, the accused, possibly as the result of suggestion from others, undertook to take the law into his own hands and in the quiet hours of early morning while the deceased and others in the room slept and, after thinking for fifteen or twenty minutes of how "to get even" with the deceased, the accused committed the brutal and fatal attack with such an instrument and with such force as to preclude any reasonable doubt that grievous bodily harm was not intended. This is sufficient even if full credence is given to accused's subsequent declarations that death was not intended. Furthermore, the acts of the accused were, within his avowed knowledge, calculated to cause grievous bodily harm, if not death, and the assault unquestionably manifests an intent on the part of the accused to commit a felony. The medical testimony concerning the fatal nature and extent of the injuries of the deceased permit no other conclusions which are likewise inescapably compelled by the statements and confession of the accused.

The undisputed testimony of several witnesses conclusively shows that the statements and confession of the accused were voluntarily made after repeated warnings that they might be used against him, repeated full explanations of his rights, repeated notice that neither hope of benefit was extended nor fear of punishment or injury withheld, and entirely without threats or compulsion of any kind. Such statements, amounting to "admissions" and such confession so given, were most properly admitted into evidence and considered by the court (M.C.M., 1928, pars. 114a, and b). In fact, the accused's unsworn statement made upon the trial, after full explanation to accused of his rights, includes admissions and confessions which could be considered by the court as evidence which, with the evidence of the corpus delicti and the sub-machine gun, would be ample support for the court's findings (M.C.M., 1928, pars. 76 and 114a).

The evidence, therefore, conclusively and beyond a reasonable doubt fastens the crime upon the accused unless by reason of other legal principles he is relieved therefrom or from the burden of expiation of the penalty assessed therefor. This the defense attempted to do in two ways.

7. The defense was predicated upon two theories; both in the nature of confession and avoidance: a. Suggestion of accused's insanity, and b. Suggestion of self-defense. The first was suggested by the defense after the prosecution had rested and was implemented by a request for an examination as prescribed by the Manual for Courts-Martial (M.C.M., 1928, pars. 35c, and 63). The preliminary non-medical testimony of Lieutenant Raymond, and Captain Davis and that of Captains Orenstein, Shulack and Culp, all medical officers, went no further than to establish the fact of accused's mental backwardness or retarded mental development, which was placed at that of a ten-year-old. Although these witnesses, when interrogated upon the precise issue, uniformly were of the opinion that the accused was able to distinguish between right and wrong and was therefore legally sane, the Court, nevertheless, granted the request of the defense and permitted a recess during which an appropriate board was appointed and examined the accused.

The applicable provisions of the Manual for Courts-Martial are as follows:

> "Inquiry into Sanity of Accused. - The court will inquire into the existing mental condition of the accused whenever at any time while the case is before the court it appears to the court for any reason that such inquiry ought to be made in the interest of justice. Reasons for such action may include anything that would cause a reasonable man to question

the accused's mental capacity either to understand the nature of the proceedings or intelligently to conduct or to cooperate in his defense. *** It should be remembered, however, that while a person who is insane to the extent indicated above should not be tried, nevertheless, until the contrary is shown, a person is presumed to be sane, ***.

* * *

"If the court finds that the accused is insane, the proceedings so far as had embodying the finding to that effect will be forwarded to the reviewing authority; otherwise the trial proceeds" (M.C.M. 1928, par. 63).

* * *

"Where a reasonable doubt exists as to the mental responsibility of an accused for an offense charged, the accused can not legally be convicted of that offense. A person is not mentally responsible for an offense unless he was at the time so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right". (M.C.M., 1928, par. 78a).

The report of the AR 600-500 board, finding the accused sane both at the time of the commission of the crime and at the time of the trial was fortified by the testimony of each member of the board from the witness stand. Opposed to such powerful expert testimony, the testimony of the accused's father, sincerely given within latitudinous bounds and springing from a father's compassion for his son, does no more than to further emphasize the arrested mental development of the accused without leaving even a suspicion concerning his legal sanity because all qualified witnesses readily concur in the fact of his retarded mental growth.

The defense made no issue of accused's ability to adhere to the right, which ability is demonstrated in the record by his seeking redress for his grievance from appropriate authorities until the decision was made to take matters into his own hands, and confirmed by the findings of the AR 600-500 board. Neither did the defense move for a special ruling or finding upon the suggestion of insanity. Consequently, the court's findings thereon, adverse to the accused, are merged in the court's findings of guilty.

The second theory advanced by the defense is to the effect that the accused was so overcome with fear of the deceased and his acts were so dominated by this fear that in committing the assault upon the deceased, he was in reality, according to his mental capacity, acting in self-defense. In the absence of insanity, which is a complete defense in itself, it is not the opinion of the Board that the doctrine of self-defense has been thus far extended.

The principles excusing a killing on the ground of self-defense, tersely stated, without amplification by other authority being necessary, are as follows:

> "*** To excuse a killing on the ground of self-defense upon a sudden affray the killing must have been believed on reasonable grounds by the person doing the killing to be necessary to save his life or the lives of those whom he was then bound to protect or to prevent great bodily harm to himself or them. The danger must be believed on reasonable grounds to be imminent, and no necessity will exist until the person, if not in his own house, has retreated as far as he safely can. To avail himself of the right of self-defense the person doing the killing must not have been the aggressor and intentionally provoked the difficulty; but if after provoking the fight he withdraws in good faith and his adversary follows and renews the fight, the latter becomes the aggressor" (M.C.M., 1928, par. 148a, underscoring supplied).

The testimony and evidence in the record relevant to accused's acts both in consummating the crime and for the several days preceding, when measured by the foregoing principles fall wholly short of even a semblance of self-defense. It is but idle talk to seriously suggest avoidance by reason of self-defense when one bludgeons another to death in his sleep under the circumstances presented by this record.

Although it is to be regretted that the accused was not reclassified when the opportunity was presented and that the battery commander did not give him redress for his grievances when sought, either of which possibly would have prevented his commission of the crime, the evidence introduced by the prosecution was competent to establish every element of the offense charged and was ample to sustain the court's findings of guilty of the Specification and the Charge.

8. The accused is about 21 years of age. He was inducted at Tulsa, Oklahoma, 19 November 1942. His record shows no prior service.

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 and the sentence. A sentence either of death or imprisonment for life is mandatory upon a conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by Sections 273 and 275 of the Criminal Code of the United States (18 U.S.C. 452, 454).

Thos. D. Dresson, Judge Advocate.

Abner E. Lidecombe, Judge Advocate.

Benjamin D. Gleffer, Judge Advocate.

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

SPJGH
CM 237521

1 SEP 1943

UNITED STATES	)	SAN FRANCISCO PORT OF EMBARKATION
v.	)	Trial by G.C.M., convened at Camp Stoneman, California, 18 June 1943. Dismissal.
Second Lieutenant DONALD L. WITHINGTON (0-1309465), 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 Charges and Specifications:

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

Specification: In that 2d Lieutenant Donald L. Withington, 130th Infantry, having been alerted for oversea duty, did, without proper leave, absent himself from his organization at Camp Clipper, California, from about June 5, 1943, to about June 14, 1943.

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

Specification: In that 2d Lieutenant Donald L. Withington, 130th Infantry, did unlawfully, at Camp Clipper, California, on or about 5 June 1943, knowingly and willfully apply to his own use and benefit a U.S. one-quarter (1/4) ton truck (4x4) W.20245822, property of the United States furnished and intended for the military service thereof.

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

Specification: In that 2d Lieutenant Donald L. Withington, 130th Infantry, did, at Amboy, California, on or about June 5, 1943, with intent to deceive, direct and cause an enlisted man under his command to alter a trip ticket.

He pleaded guilty to Charge I and the Specification thereunder, and not guilty to Charges II and III and the Specification under each. He was found guilty of all Charges and Specifications. He was sentenced to be "dismissed from the service". The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. Upon arraignment accused pleaded guilty to the Specification, Charge I, except the words "having been alerted for oversea duty". The court declined to receive the plea and advised accused that he must plead either guilty or not guilty to the entire Specification. Thereupon accused pleaded guilty to the Specification (R. 6-7).

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

The morning reports of Company K, 130th Infantry, showed accused from duty to absent without leave 4 June 1943 and from absent without leave to duty 14 June 1943. First Lieutenant Henry L. Hurst, commanding Company K, did not see accused from 4 June until 8:00 p.m. or 9:00 p.m., 14 June when accused awakened him and "reported back in", but did not give a reason for his absence. Accused had previously requested a transfer to the paratroops but his request had been "rejected" (R. 7-13; Ex. A).

On the morning of Friday, 4 June 1943, it was reported to Major Ernest D. Jessup, Executive Officer of the battalion, that accused, a junior officer of Company K, Third Battalion, 130th Infantry, had overslept and missed reveille. Major Jessup, acting under instructions of the commanding officer of the battalion, reprimanded accused and informed him that he would not be permitted to leave the post over the week-end. At about 5:00 p.m., accused asked Second Lieutenant William T. Alexander, Transportation Officer of the battalion, for the use of a vehicle to take a shower, and the request was granted. Water was available for showers at Fenner, in the desert area, about six miles distant from the camp of the 130th Infantry. Lieutenant Alexander was busy and did not issue a trip ticket. Sergeant John Landsaw and "Corporal Burke" also had authority to issue trip tickets (R. 13-18, 21).

At about 7:15 p.m., accused went to the tent of Private Adam E. McAree, the driver of vehicle number 20245822, asked for Sergeant Landsaw and stated that he desired a trip ticket. Accused and McAree went to Sergeant Landsaw's tent, where accused wrote out a trip ticket on a form which he found there. Accused requested McAree to drive him. McAree went to the motor pool, secured his vehicle and picked up accused. At the time that the vehicle was taken from the pool, the speedometer mileage was 1635, and that figure was entered by McAree on the trip ticket. They left the camp about 7:30 p.m., and on instructions of accused, McAree drove out the "Pole Line road" in the opposite direction from Fenner. They went to Cadiz, remained there 20 or 25 minutes, had a "coke", and accused inquired about bus transportation to Los Angeles. They then continued to Amboy, a town about forty miles from camp. After leaving Cadiz, accused told McAree that he had worked twenty-six days in the field without a pass, had lost his privileges for a week-end pass by "sleeping in" for reveille, did not have a pass, and was going to Los Angeles. At Amboy, accused tried unsuccessfully to get on an overloaded bus and, after about twenty minutes, told McAree that he had better go back to camp and gave him some equipment to take back to camp. Accused instructed McAree to say, if questioned by anyone, that he had taken accused to Fenner and brought him back. McAree asked accused what to put on the trip ticket as the "time in", and accused told him to put down 9:00 p.m. as the hour of return, and instructed McAree to change the "out mileage" reading from 1635 to 1695. McAree changed the mileage figure from 1635 to 1695 and inserted "2100" in the blank as the hour of return. McAree returned to camp alone and arrived there about 10:30 p.m. The next morning, Lieutenant Alexander examined the trip ticket and observed that it was not signed, and that it showed a twenty-five mile speedometer reading instead of thirteen miles, the distance to Fenner and return. Personal use of vehicles by officers was not authorized without special permission (R. 20-21, 25-35).

5. For the defense, Lieutenant Alexander testified that the reputation of accused for truth and veracity was good (R. 36).

The accused elected to remain silent (R. 38).

6. In rebuttal, Major Jessup testified that the reputation of accused for truth and veracity was bad (R. 37).

7. a. As to Charge I the pleas of guilty and the evidence show that accused, without proper leave, absented himself from his organization from about 5 June to about 14 June 1943. The Specification contained the words "having been alerted for oversea duty" but no evidence was introduced in proof of this allegation. Accused endeavored to except this language from his plea of guilty to the Specification, but the court erroneously declined to permit him to do so. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of the Specification, Charge I, except the words quoted above, and of Charge I.

b. As to Charge II the evidence shows without contradiction that accused obtained permission from the battalion transportation officer to use a vehicle from the motor pool for the purpose of going to Fenner, distant about 6 miles, to take a shower; that accused then left the camp in vehicle number 20245822, with an enlisted man as driver; and that instead of going to Fenner for a shower accused required the driver to take him a distance of about 40 miles in the opposite direction, to Amboy, where accused left the vehicle and attempted to obtain transportation on a bus.

Although there is no direct evidence that the vehicle used by accused was a one-quarter ton truck, property of the United States, and furnished and intended for the military service thereof, yet the inference is clear that it was a Government vehicle used in the military service. It was obtained from the motor pool at the camp by the enlisted man who was the usual driver, under the authority of a military trip ticket, and by permission of the battalion transportation officer. The specific vehicle was identified by the serial number.

The evidence clearly sustains the findings of guilty of Charge II and its Specification.

c. As to Charge III the evidence shows that accused instructed the driver to insert 9:00 p.m. on the trip ticket as the time of return to camp, and to change the notation of speedometer reading as of the time the vehicle left the motor pool, from 1635 to 1695. The vehicle actually returned to camp about 10:30 p.m. It is apparent from the time they left camp, the distance travelled and to be travelled, and the stops on the way, that accused knew that it would be much later than 9:00 p.m. when the driver returned the vehicle to camp. The proper mileage on departure of 1635 had been inserted on the ticket, but accused directed

that it be changed to 1695. The effect of these two false entries was to make it falsely appear that the vehicle had been out one and one-half hours instead of about three hours and that it had travelled 25 miles instead of about 85 miles. The obvious intention of accused was to conceal his wrongful use of the vehicle.

Among instances of violation of the 61st (95th) Article of War, Winthrop includes abuse of authority over soldiers by requiring or influencing them to do illegal acts, as by ordering a sergeant to report accused present when absent, directing a soldier to make a false statement to another officer in regard to action of the accused, or causing a noncommissioned officer to make a false guard report, in order to relieve the officer from an imputation of neglect of duty (Winthrop's Military Law and Precedents, Reprint, p. 716).

In the opinion of the Board of Review the evidence sustains the findings of guilty of Charge III and its Specification, in violation of the 95th Article of War.

8. The record of trial does not state that the reporter was sworn (R. 3), but does contain a statement that the reporter resumed his seat after a recess (R. 25).

The provision in the 19th Article of War for administering an oath to the reporter is not mandatory, as the 33rd Article of War requires an authentication which alone makes the reporter's transcript the record of trial. The erroneous failure to swear the reporter cannot be said to affect injuriously the substantial rights of the accused (CM 187949, Murphy).

9. The accused is 26 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service since 15 October 1940; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty, 27 January 1943.

10. 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, Charge I, except the words "having been alerted for oversea

duty", legally sufficient to support the findings of guilty of all other Specifications and of all Charges, and legally sufficient to support the sentence and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 61st or 96th Article of War, and mandatory upon conviction of a violation of the 95th Article of War.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

1st Ind.

War Department, J.A.G.O., 3 - SEP 1943 - To the Sectetary 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 Donald L. Withington (0-1309465), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the finding of guilty of the Specification, Charge I, except the words "having been alerted for oversea duty", legally sufficient to support the findings of guilty of all other Specifications and of all Charges, and legally sufficient to support the sentence and to warrant confirmation of the sentence. The accused was absent without leave for about nine days, unlawfully used a Government vehicle to go to a place about 40 miles distant from his camp, and with intent to deceive caused an enlisted man to alter a trip ticket. 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 Action.

(So much of finding of guilty of the Specification, Charge I, as involves finding of guilty of the words "having been alerted for oversea duty", disapproved. Sentence confirmed. G.C.M.O. 280, 30 Sep 1943)

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

SPJGK
CM 237522

10 SEP 1943

UNITED STATES	)	FOURTH SERVICE COMMAND ARMY SERVICE FORCES
v.	)	Trial by G.C.M., convened at Warner Robins, Georgia, 3 and 4 June 1943. Dismissal.
Second Lieutenant DEXTER A. DUGGAN (O-1543597), Medical Administrative 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. 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 Dexter A. Duggan, Medical Administrative Corps, did, without proper leave while enroute from Camp Barkley, Texas, to Warner Robbins Air Depot, Warner Robbins, Georgia, absent himself from his station at Warner Robbins Air Depot, Warner Robbins, Georgia, from about January 26, 1943, to about February 10, 1943.

Specification 2: In that Second Lieutenant Dexter A. Duggan, Medical Administrative Corps, did, without proper leave while enroute from Camp Wolters, Texas, to Warner Robbins Air Depot, Warner Robbins, Georgia, absent himself from his station at Warner Robbins Air Depot, Warner Robbins, Georgia, from about March 22, 1943, to about March 24, 1943.

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

Specification 1: (Finding of not guilty).

Specification 2: In that Second Lieutenant Dexter A. Duggan, sometimes also known as D. Ames Duggan, Medical Administrative Corps, did, at Dallas, Texas, on or about January 21, 1943, with intent to defraud, willfully, unlawfully and feloniously make and utter to Neiman-Marcus Co., Dallas, Texas, a certain check, in words and figures substantially as follows:

Dallas, Texas Jan 21, 1943

Pioneer Bank & Trust Co. OF Chattanooga, Tenn --

Name of Bank City State

Pay to the Order of NEIMAN-MARCUS CO. Dallis, Texas $50 00

Fifty and no/100 - - - - - - - - - - - - - - - DOLLARS

I hereby declare and affirm that I have to my account in the bank on which this check is drawn funds sufficient to meet the amount for which it is given, and it is through this representation that I have obtained value to this amount from the above named corporation.

D. Ames Duggan
O-1543789
A.P.O. 75 New York, N. Y.

D. Ames Duggan
Signature

Phone No. _____ Address 5520 Spring Garden Lane
Chattanooga, Tenn.

indorsed on the back thereof:

Pay to the Order of
Republic National Bank of Dallas
710 Dallas, Texas Jan 21 1943
NEIMAN - MARCUS COMPANY

and other indorsements that are unintellegible; and, by means thereof did fraudulently obtain from Neiman-Marcus Co., Dallas, Texas, $50.00 lawful money of the United States in payment of said check, he, the said Second Lieutenant Dexter A. Duggan, then well knowing that he did not have and not intending that he should have an account with Pioneer Bank & Trust Company, Chattanooga, Tennessee, for the payment of said check.

Specification 3: In that Second Lieutenant Dexter A. Duggan, sometimes also known as D. Ames Duggan, Medical Administrative Corps, did, at Dallas, Texas, on or about January 29, 1943, with intent to defraud, willfully, unlawfully and feloniously make and utter to "cash" a certain check, in words and figures substantially as follows:

Pioneer Bank & Trust Co.
~~MERCANTILE-NATIONAL-BANK-AT-DALLAS~~ 32-61
11

Chattanooga, Tenn.
~~DALLAS, TEXAS~~ Jan. 28 1943 No. _____

Pay To the
Order Of Cash $10.00

Ten and 00/100 ---------- DOLLARS

5520 Spring Garden Lane D. Ames Duggan
0-1,543,579 Lt. Dexter A. Duggan

indorsed on the back thereof:
Butler Cafe
and other indorsements that are unintellegible; and, by means thereof did fraudulently obtain from the Butler Cafe, Dallas, Texas, $10.00 lawful money of the United States in payment of the check, he, the said Second Lieutenant Dexter A. Duggan, then well knowing that he did not have and not intending that he should have an account with Pioneer Bank & Trust Company, Chattanooga, Tennessee, for payment of said check.

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

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

Specification 6: In that Second Lieutenant Dexter A. Duggan, Medical Administrative Corps, did, at Atlanta, Georgia, on or about March 24, 1943, wrongfully make a certain check payable to cash, in words and figures substantially as follows:

Chattanooga, Tenn.
~~Atlanta, Ga.~~ March 24, 1943 No _____
Pioneer Bank and Trust Co.
64-1 FIRST NATIONAL BANK 64-1
West End Branch

Pay To The
Order Of Cash $50.00
Fifty and 00/100 ---------- DOLLARS

Dexter A. Duggan
5520 Spring Garden Lane

and deliver said check to the Military Police at Fort McPherson,

Georgia, with instructions to take the check to H. McKinney, Sr., employed by the Coca Cola Bottling Company, Atlanta, Georgia, to be cashed, and in the event he refused to cash such check, to take it to Miss Maryen Lynn, nee Hodkinson, employed at Rich's Incorporated, Atlanta, Georgia, to be cashed, he, the said Second Lieutenant Dexter A. Duggan, then well knowing that he did not have and not intending that he should have an account with the Pioneer Bank & Trust Company, Chattanooga, Tennessee, for the payment of said check.

Specification 7: In that Second Lieutenant Dexter A. Duggan, Medical Administrative Corps, was at Dallas, Texas, on or about February 1, 1943, drunk in uniform in a public place, to-wit, the Sante Fe Building.

Specification 8: In that Second Lieutenant Dexter A. Duggan, Medical Administrative Corps, was at Dallas, Texas, on or about February 10, 1943, drunk in uniform in a public place, to-wit, the Nite Spot Dance Hall.

He pleaded guilty to Charge I and its Specifications and not guilty to Charge II and its Specifications. He was found not guilty of Specification 1 of Charge II and guilty of all the other Specifications and of the Charges. No evidence of previous convictions was introduced. He was sentenced to dismissal. The reviewing authority disapproved the findings of guilty of Specifications 4 and 5, Charge II, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. Summary of evidence.

a. Charge I and its Specifications.

There was no competent evidence relating to Specification 1 and very little relating to Specification 2. In view of the pleas of guilty, evidence was unnecessary.

b. Specifications 2 and 3, Charge II.

James H. Crawford, Vice-President, Pioneer Bank, Chattanooga, Tennessee, testified that Second Lieutenant Dexter A. Duggan did not maintain an account of any kind with the bank during January, February, or March, 1943, and was not a customer of the bank during that period or previously. He testified further that except for his bank there was no bank in or near Chattanooga by the name of Pioneer Bank and Trust Company, Pioneer Bank, Pioneer Trust and Savings Bank, or any similar name (Pros. Ex. 10).

On 21 January 1943, an Army officer representing himself as D. Ames Duggan requested Francis William Johnson, credit manager of Neiman-Marcus Company, Dallas, Texas, to cash a personal check for $50. Johnson did not know the officer. He agreed to cash such a check and wrote out the check, which the officer signed. The money was paid to the officer from the funds of the company. The check was identical with the instrument set forth in the Specification. The transaction took place at the company's place of business. Upon presentation to the Pioneer Bank, Chattanooga, Tennessee, the check was dishonored and returned, marked "No account". Subsequently, the amount was paid by accused to Neiman-Marcus Company by postal money order (Pros. Exs. 8,10).

On 28 January 1943, a check for $10, signed "D. Ames Duggan, Lt. Dexter A. Duggan", and identical in form with the check set forth in Specification 3, was cashed by Metodi Petroff, acting on behalf of the Butler Cafe, of which Petroff was co-owner. The transaction occurred at the cafe, located at 1705 Young Street, Dallas, Texas. The person desiring the cashing of the check was introduced to Petroff by W. C. Cowart, an acquaintance of Petroff's. Cowart agreed to "stand good" for the check. Petroff had not previously known the person for whom he cashed the check. Upon presentation to the Pioneer Bank, Chattanooga, Tennessee, the check was dishonored (Pros. Exs. 9,10).

c. Specification 6, Charge II.

On 24 March 1943, two members of the Military Police saw accused in the Officer of the Day room, Post Stockade, Fort McPherson, Georgia. Accused wrote and signed a check identical with that set forth in the Specification. He asked the two members of the Military Police to get the check cashed for him in Atlanta, and named a Mr. McKinney of the Coca Cola Bottling Company and a Miss Lynn at Rich's Department Store as the persons to see about cashing the check. The two military policemen followed instructions, but neither McKinney nor Miss Lynn was willing to cash the check. The check was identified by the military policemen (R. 32-38; Pros. Ex. 11).

d. Specification 7, Charge II.

The witnesses concerned with this Specification were Corporals Stavis Ellis and George Wilson, both of the Dallas Military Police Detachment. Each testified by deposition. From their testimony it appears that at about 8 p.m., on 1 February 1943, they were in the Military Police office in the Santa Fe Building, Dallas, Texas, where they saw a person in the uniform and accouterments of a second lieutenant. The person gave his name as Dexter Ames Duggan and said he was stationed at Warner Baxter Field. In the opinion of each witness the person was intoxicated. His

eyes were red, the odor of alcohol was on his breath, his clothing was disarranged, he staggered, and his speech was incoherent. No record of the occurrence was made by the Military Police. Each witness stated that he did not know of his own knowledge whether accused and the person seen at the Santa Fe Building were one and the same (Pros. Exs. 12,13).

e. Specification 8, Charge II.

The witnesses concerned with this Specification were First Lieutenant Lanbon L. Mitchell, 746th Military Police Battalion, Fort Bliss, Texas; Private Ira H. Smith, Dallas Military Police Detachment; and Ellis. Each testified by deposition (Pros. Exs. 14,15). On 10 February 1943, Lieutenant Mitchell and Private Smith were at the "Night Spot Dance Hall" in Dallas, Texas, on duty. The Night Spot is a night club, and on the evening in question a large number of people were present. Among them was a person in the uniform and accouterments of a second lieutenant, who identified himself to Lieutenant Mitchell as Second Lieutenant Dexter A. Duggan. In the opinion of both Lieutenant Mitchell and Private Smith, the person was intoxicated. Both agreed that his breath smelled of alcoholic liquor. Lieutenant Mitchell added that the person's eyes and face were red and that he was boisterous and very noisy. Lieutenant Mitchell stated that the person walked "alright", whereas Smith said that he walked "unsteady". Lieutenant Mitchell said that he was coherent and talked sensibly, but acted as if he didn't know "what it was all about". Smith said that he was not coherent in speech and did not talk sensibly. However, it appeared from the testimony that Smith had no conversation with him and did not overhear any conversation between him and anyone else. The subject was taken to Lieutenant Mitchell's office under arrest, where the latter talked to him for some time. He told Lieutenant Mitchell that he had just graduated from Officer Candidate School, was on his way to Camp Robins, Georgia, and was spending a few days on leave in Dallas. Lieutenant Mitchell eventually took the person to his hotel.

Lieutenant Mitchell and Private Smith each testified that he did not know of his own knowledge whether accused and the person referred to were one and the same. Lieutenant Mitchell added:

> "Having no description as to who you have in custody, I am unable to state at this time whether the man you have or the man who I arrested in Dallas is the one and same".

On the morning of 11 February 1943, in the office of the Provost Marshal in Dallas, Ellis again saw the person referred to in his testimony relating to Specification 7. The odor of alcohol was on his breath, his eyes were red and bloodshot, his walk was unsteady, and he seemed to be dazed and in a stupor. In the opinion of Ellis he appeared to have a

bad "hangover". He was taken under arrest to the White Plaza Hotel, where he paid his bill and obtained his luggage; thence to Camp Wolters, Texas (Pros. Ex. 12).

The defense did not introduce any witnesses and the accused elected to remain silent.

4. In view of the pleas of guilty, no discussion regarding Charge I and its Specifications is called for.

No recapitulation of the evidence relating to the Specifications of Charge II would be profitable until the determination of the major issue in the case, namely, the identity of the person referred to by the witnesses. The difficulty arises from the fact that except for Specification 6, the testimony was by deposition, and since accused was not present at the taking of the depositions, the deponents were afforded no means of identifying him with certainty.

The question of identity was aggressively contested by the defense counsel throughout the trial by means of various objections and motions (R.29,31,39,40-43,45,46,48-54). There is no need to consider each of these separately, as all deal with the same basic problem. At the outset it should be noted that although deponents sometimes referred to the person whom they saw as "the accused", they did not in fact know him to be the accused.

With reference to Specifications 2,3, and 6, dealing with the checks, there is direct evidence that accused wrote and signed the check involved in Specification 6. A comparison of the handwriting on this check with the Specification 3 check and with the signature on the Specification 2 check supports the court's conclusion that the same person was the drawer of all three checks. Furthermore, the officer's address appearing on all the checks is the same, and the serial numbers written on the first two checks are almost identical with the serial number of accused.

With reference to Specification 2, the evidence convinces the Board of Review that accused was the person who reimbursed Neiman-Marcus Company for the amount of the check. The cross-interrogatories and their answers in the deposition of Johnson establish this. In addition, Johnson wrote a letter to Lieutenant D. A. Duggan, Headquarters, Insurance Section, Camp Wolters, Texas, acknowledging receipt of the payment, and Defense's Exhibit Number 2 showed that at the time, accused was attached to that section.

With regard to Specification 3, the evidence shows that Cowart, an

acquaintance of Petroff's, introduced the writer of the check to Petroff and agreed to "stand good" for it. Evidently, Cowart knew the officer, and had the latter been an imposter, Cowart certainly would not have guaranteed the check.

In the opinion of the Board of Review, the identity of accused in the check transactions was clearly proved.

Concerning the charges of drunkenness, Ellis testified that the person he saw on 1 February was the same person whom he saw on 11 February, and it is extremely unlikely that the "Lieutenant Duggan" whom he saw on the latter date in the Provost Marshal's Office in Dallas was anyone other than the "Lieutenant Duggan" taken into custody by Lieutenant Mitchell, Assistant Provost Marshal, the night before. Lieutenant Mitchell testified that "Lieutenant Duggan" stated that he had recently graduated from Officer Candidate School, was on his way to Camp Robins, Georgia, and was spending a few days' leave in Dallas. The record shows that accused graduated from Officer Candidate School, Camp Barkeley, Texas, on 13 January 1943; that he was ordered to proceed to Warner Robins, Georgia (R.57; Pros. Ex. 1); that he admittedly was absent without leave from 26 January to 10 February; and that on 21 January and 28 January he was in Dallas engaged in two of the check transactions. Viewing the evidence as a whole, it is clear that accused was the officer involved in Specifications 7 and 8.

5. The identity of accused being established, there is no doubt of his guilt. He issued and received cash for the checks referred to in Specifications 2 and 3, knowing that he had no bank account from which they could be paid. Subsequent reimbursement is no defense.

With reference to Specification 6, the defense by objection and motion (R.34,50,51) contended that since the check was not presented for payment, no offense was committed. The contention is without merit. In substance the Specification alleges an attempt to procure the cashing of a check, knowing that there are no funds to meet it. Such conduct is dishonest and constitutes an offense. The evidence shows that accused committed the acts alleged.

The prosecution proved that accused was drunk in uniform in a public place as alleged in Specifications 7 and 8. Discrepancies in the testimony relating to Specification 8 are not fatal.

6. Various irregularities require comment.

a. The record does not show any statement by accused as to whom he desired as counsel (R.2,3). Since he made no objection, presumably he was

satisfied to be defended by the counsel designated by the appointing authority.

b. The defense moved for a continuance upon the ground that the charge sheet served upon accused alleged violation of Article of War 95, whereas he was tried for violation of Article of War 96 (R.4,5,16). The change arose apparently by reason of a redrafting of the charges. No change was made in the Specifications (R.5). Since the change in the Article of War could not possibly prejudice accused, the court ruled correctly in overruling the motion.

c. The checks involved in Specifications 2 and 3, Charge II, were not specifically introduced in evidence. However, they constituted exhibits to the depositions and the intention to introduce them as part thereof is manifest.

d. The order appointing the court places Major Tranny L. Gaddy first on the list of members and Major Frank O. Lind second. In the list of those present at the trial, Major Lind's name appears first, and he authenticated the record as president. Presumably Major Lind was the senior officer and therefore the proper person to authenticate the record.

7. In connection with a request for mitigation, the defense introduced a letter to accused from Colonel E.C. Flegel, Infantry, Commanding Officer, Camp Wolters, Texas, containing an extract of a letter to Colonel Flegel from Mr. Murray A. Edwards, Deputy Collector of Internal Revenue, Fort Worth, Texas, expressing appreciation of accused's work in assisting with the filing of 1942 income tax returns (Def. Ex. 1).

The defense also introduced a letter from First Lieutenant Edgar G. Olden, Insurance Officer, Camp Wolters, Texas, commending accused for his work as Lieutenant Olden's assistant, and remarking upon his ability and high character(Def. Ex. 2).

8. Seven members of the court and the trial judge advocate joined in a recommendation for clemency (Ex. T). Among other reasons, the recommendation was based upon the ability of accused; the "feeling" that accused would be useful to the service if retained; the fact that he "made good" the checks prior to trial; and the fact that the offenses were committed while accused "was suffering from overwork, tension, worry, and an unfortunate domestic situation".

The defense counsel and assistant defense counsel also filed a recommendation for clemency, stating their impression that accused genuinely

repented his misdeeds and desired to be "of the greatest possible good to the service" (Ex. U).

9. War Department records show that accused is 39 years of age and attended the University of Chattanooga for two years. He served as an enlisted man from 23 March 1942 until 13 January 1943, when, upon graduation from the Medical Administrative Corps Officer Candidate School, Camp Barkeley, Texas, he was appointed second lieutenant, Army of the United States.

10. 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 as approved by the reviewing authority, and the sentence, and to warrant confirmation thereof. Dismissal is authorized under Articles of War 61 and 96.

Jerry E. Gray, Judge Advocate.
John Wommelsdorf, Judge Advocate.
Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 14 SEP 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Dexter A. Duggan (O-1543597), Medical Administrative Corps.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty, as approved by the reviewing authority, and the sentence, and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the execution thereof be suspended during the pleasure of the President.

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

Myron C. Cramer

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 execution suspended. G.C.M.O. 313, 19 Oct 1943)

1st Ind.

War Department, J.A.G.O., 14 SEP 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Dexter A. Duggan (O-1543597), Medical Administrative Corps.

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

3 Incls.
Inc1.1-Record of trial.
Inc1.2-Draft of ltr. for sig. Sec. of War.
Inc1.3-Form of action.

(Sentence confirmed but execution suspended. G.C.M.O. 313, 19 Oct 1943)

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

SPJGN
CM 237528

4 AUG 1943

UNITED STATES v. Second Lieutenant DORSEY S. BALDWIN (0-1576899), Headquarters Detachment, 250th Quartermaster Service Battalion.	FOURTH SERVICE COMMAND Army Service Forces Trial by G.C.M., convened at Camp Gordon, Georgia, 28 June 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 Charge and Specifications:

CHARGE: Violation of the 61st Article of War.

Specification 1: In that Second Lieutenant Dorsey S. Baldwin, Headquarters Detachment, 250th Quartermaster Service Battalion, Camp Gordon, Georgia, did, without proper leave, while enroute from Camp Blanding, Florida, to Camp Gordon, Georgia, absent himself from his station at Camp Gordon, Georgia, from about May 11, 1943, to about May 17, 1943.

Specification 2: In that Second Lieutenant Dorsey S. Baldwin, Headquarters Detachment, 250th Quartermaster Service Battalion, Camp Gordon, Georgia, did, without proper leave absent himself from his organization and station at Camp Gordon, Georgia, from about June 1, 1943 to about June 7, 1943.

He pleaded guilty to and was found guilty of the Charge and both Specifications. He was sentenced to be dismissed the service, to forfeit all pay

and allowances due or to become due and to be confined at hard labor for a period of five years. The reviewing authority approved only so much of the sentence as provides for dismissal and forwarded the record of trial for action under the 48th Article of War.

3. The accused having pleaded guilty the prosecution did not present any witnesses but introduced, without objections, in corroboration of the plea, as Exhibit 2, extract copy of morning report, showing that the accused was assigned to the 250th Quartermaster Service Company on 9 May 1943; as Exhibit 4, extract copy of morning report of Headquarters Detachment, 250th Quartermaster Service Battalion showing the accused joined as of 17 May 1943, under orders dated May 7, 1943, to report immediately; and as Exhibit 6, extract copy of morning report of the same organization showing the accused from duty to AWOL on 1 June 1943, and from AWOL to arrest in quarters on 7 June 1943 (R. 6a-6b).

4. The evidence for the defense shows that on 7 June Captain Leonard M. Arons, Medical Corps, examined the accused at the hospital; found him in a nervous condition, not sufficient to warrant hospitalization; concluded a rest in quarters would be enough; and marked him for duty (R. 6o-6p).

As Exhibit 1, the defense introduced a letter from Major Asa G. Atwater, Quartermaster Corps, strongly indorsing the accused and stating he was rated "excellent" in both character and efficiency; as Exhibit 2, a letter from Major George W. Trout, Infantry, indorsing the accused for his work and efficiency and inclosing a letter of commendation of the accused from First Lieutenant Joseph Kienly, Quartermaster Corps (R. 6c).

5. The accused, having been advised as to his rights relative to testifying, at his own request was sworn and testified that on 9 May 1943 pursuant to transfer orders, he left Camp Blanding for Camp Gordon. Unable to secure a Pullman reservation out of Jacksonville, Florida, en route, he remained in Jacksonville until the 11th, arriving in Atlanta, on the wrong railroad, 12 May 1943. Complications involved in the transfer of his ticket, which this mistake entailed, resulted in his remaining in Atlanta until the 17th, on which date he missed his train, but left by bus arriving at Camp Gordon about 4 o'clock that afternoon. Several days later, he was told by his commanding officer that the reason given for the delay involved in his change of station was insufficient; he was not reprimanded in any way, but his pay was "docked" seven days, as shown by Defense Exhibit 3, a verification by the finance officer showing a deduction for AWOL from May 11 to May 17, 1943 by virtue of "AR 35-1420, par. #3." From 29 to 31 May he was detailed on police duty; he was sick on 31 May when his organization went on bivouac maneuvers, and stayed in the battalion area all that day; then went to Augusta, thinking if he got away for a short time he would feel better. On 7 June, he returned by bus to Camp Gordon, immediately reported to the Station Hospital, requested an examination, and was given one by Captain Aron. His commanding officer told him, at the hospital, that he

was under arrest there or at his quarters, whatever the medical officer thought best (R. 6c-6n).

6. Both specifications allege absence without leave for periods specified. The pleas of guilty are corroborated by substantial evidence. Neither the administrative deduction from the accused's pay and allowances by reason of his first absence without leave, nor his alleged indisposition during his second, presents any valid legal defense to the Charge and Specifications.

7. The accused is 34 years of age. The records of the Office of The Adjutant General show that he was commissioned second lieutenant 14 August 1942 for the duration plus six months, and had one year, nine months and eight days prior service as an enlisted man.

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 Article of War 61.

Thos. B. Dresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

(46)

SPJGN
CM 237528

1st Ind.

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Dorsey S. Baldwin (0-1576899), Headquarters Detachment, 250th Quartermaster Service Battalion.

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

(Sentence confirmed but execution suspended. G.C.M.O. 268, 25 Sep 1943)

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

SPJGQ
CM 237543

- 2 AUG 1943

UNITED STATES v. Private MIGUEL A. ALVAREZ (39832280), H. & S. Company, 730th Railway Operating Battalion, attached to H. & S. Company, 1st Provisional Railway Operating Battalion.	PERSIAN GULF SERVICE COMMAND U. S. ARMY FORCES, IN THE MIDDLE EAST. Trial by G.C.M., convened at Andimeshk, Iran, 12 June 1943. Dishonorable discharge and confinement for life. Penitentiary.

REVIEW by 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 by the Board of Review.

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

CHARGE: Violation of Article of War 92.

Specification: In that Private Miguel A. Alvarez, H&S Company, 730th Railway Operating Battalion, attached to H&S Company, 1st Provisional Railway Operating Battalion, did, at Do-Roud, Iran, on or about May 2, 1943, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill one Sergeant C. B. McQuade, 73, FSS, British Army, a human being by shooting him with a rifle.

He pleaded not guilty to and was found guilty of the Specification and the Charge. 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 at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement and forwarded the record for action under Article of War 50½.

3. For the Prosecution: The pertinent evidence shows that on 1 May 1943 the First Provisional Railway Operating Battalion of the Persian Gulf Service Command was stationed near the town of Do-Roud, Iran (R. 11).

Among the places of entertainment available to and patronized by the enlisted men when in the town were Pedro's, a wine and liquor shop, and Gold Tooth Annie's - a brothel. Pedro's was about six blocks from camp and Gold Tooth Annie's approximately five or six blocks from Pedro's (R. 12, 14, 28).

Shortly after midnight on 1 May 1943 a group of soldiers of the battalion named above, who were not on duty, congregated at Pedro's. In this group were Technician 4th Grade John R. Ryan, Private Mark R. Lynn, and two others named Hearn and Notcher. (R. 12) When they arrived Private First Class Joaquin L. Gasca, Private Hernandez and accused were in the wine shop, in company with Sergeant Charles Bernard McQuade of the British Army and an unidentified Persian (R. 12, 13, 35, 43).

There was general drinking (R. 27, 39, 41) and moving about from a small front room to a larger one in the rear (R. 13, 35) but there were no altercations or any evident bad feeling between any of those present and according to the testimony of Ryan, Lynn and Gasca there was no loud talking, argument or quarrel between accused and Sergeant McQuade (R. 13, 15, 35, 43).

Pedro did, however, want the boys to go home so that he could close his shop and Ryan tried to persuade the men to leave (R. 14, 35). There is considerable confusion in the testimony as to what happened then. Lynn testified that at about 2 a.m. he and Hearn decided to go to Gold Tooth Annie's and left shortly thereafter in company with Ryan and Sergeant McQuade (R. 35). Gasca had already gone there with the Persian at about 12:30 a.m. (R. 43). Ryan said that he left Pedro's to go to Annie's at about 2:15 a.m. accompanied by Hearn, Lynn, Sergeant McQuade and accused (R. 14). There was no dispute between accused and McQuade on the way (R. 15).

According to Ryan, when they arrived at the brothel they passed through a courtyard and entered a room about 10' x 14' in size through a doorway 3' wide. At the other end of the room and on the same side was another doorway leading to a smaller adjacent room. In the large room were two alcoves, or window seats, each 4' in width, 1' 4" in depth and 3' from the floor. One was in the wall opposite, and to the right of the entrance door, the other centered in the wall at the far end of the room (Ex. C-2). There was a kerosene lamp burning but the light was dim (R. 23, 38). Gasca was already there in company with an old woman, a young girl and the Persian. Accused barely entered the room and then left almost immediately (R. 14, 36, 44). Ryan and McQuade seated themselves in the alcove at the far end of the room, McQuade on the right as he faced the center of the room and Ryan at his left. The old woman and Gasca were sitting on the floor talking with one another, Gasca almost directly in front of and about 4' from McQuade and Ryan (R. 16, 37, 44, 45). The young girl went into the adjoining room and, from time to time, Lynn, Hearn and the Persian visited with her (R. 15, 26). At one time Lynn sat in the corner between the alcoves (R. 45).

Seated thus, the occupants of the large room engaged in drinking and conversation when accused suddenly entered the room through the doorway from the courtyard carrying a rifle. Ryan said the period between the time when accused left and when he returned was about 25 minutes. (R. 18); Gasca thought it was 20 minutes; and, although Lynn did not remember seeing accused when the group arrived at Annie's, he said it was between a half hour and an hour after his arrival before accused appeared (R. 37).

Ryan testified that accused carried the rifle at "high port", stepped just inside of the doorway, said something in Mexican or Spanish which he thought was "halt" and then, pointing the rifle in the direction of McQuade and Ryan fired a shot. (R. 18) It was his thought, from the way the gun was pointed and from the appearance of the flare that the shot had gone through the roof. (R. 19, 24) Gasca stated that accused moved toward the center of the room holding the rifle low and almost parallel with his belt, said "not to move" in Spanish and in English, "pointing the rifle at the whole bunch" meanwhile. Gasca then partly rose from the floor, started towards accused to prevent him from doing harm and had barely touched the rifle barrel when it went off. (R. 46, 48, 49, 51) He was not certain whether he had moved the gun barrel or not (R. 48). Lynn did not see accused when he entered the room but he heard the command "halt" after which "a shot went off" (R. 37) and he knew that "a shot was fired and that Sergeant McQuade was hit". (R. 41)

McQuade immediately "slumped" against Ryan and said "I am gut-shot". (R. 19, 37, 47) He was wearing a long overcoat or great coat (R. 17, 24, 58) and although he was carrying concealed under the great coat a pistol attached to a lanyard around his neck (R. 21, 57) he had made no move of any kind and said nothing from the time accused entered until he was shot (R. 22, 26, 37, 56, 57). Ryan was sitting very close to McQuade but did not feel him make any movement prior to the shooting (R. 18, 27).

Immediately after the shooting Ryan, who had not taken his eyes from accused, turned to McQuade and tried to examine his wounds but was unable to do so because he held his left hand in front of him and his right hand to his back (R. 19, 20, 24). However, Lynn, together with Hearn who had come in from the adjoining room, looked at the injuries and discovered an apparent entrance wound about an inch to the right of the center of the belt line in front and "a nice sized hole" 1½" to the right of the center of the belt line in back (R. 38).

Accused said nothing after the shooting other than to tell the rest not to move, then, after standing in the doorway for a few moments, he went out into the courtyard (R. 20, 47).

Ryan and Lynn again differ materially in their testimony of what transpired thereafter. Ryan stated that McQuade asked to be taken out of the place and that he stood up, put his arms back of Ryan and around his neck.

Ryan thereupon pulled McQuade's overcoat tightly around his own body and they walked out together proceeding for about a block to a corner of a wall where they were intercepted by accused who was still carrying the rifle at "high port" and calling upon them to "halt" in Mexican or Spanish (R. 20). Ryan then laid McQuade on an incline by the wall and made the discovery that he had a pistol under his overcoat attached to a lanyard around his neck. Hernandez had come up meanwhile and inasmuch as Ryan wanted him to go after accused but did not want him to be unarmed he took the pistol from McQuade and gave it to Hernandez (R. 21). Apparently Lynn had also arrived and Ryan left him to watch over McQuade while he went for help. After various unsuccessful attempts to obtain assistance Ryan finally reached the railroad station yard where he remained (R. 22).

Lynn testified that he and Hearn carried McQuade out of the room and "when he couldn't make it any more" they laid him down by the side of a wall and dressed his wounds with a first aid packet. They did not see accused again after the shooting and Lynn stayed with McQuade while Ryan and Hearn went in search of medical assistance (R. 38, 39).

Gasca, as soon as accused had left the scene of the shooting, followed him. He corroborated Ryan and said that accused was found standing at the corner of the adjacent building pointing his rifle at them and telling them not to follow. He nevertheless continued to shadow accused but eventually lost track of him and returned to camp (R. 47).

First Lieutenant Francis W. Chamberlain, Medical Corps, serving with the Railway Operating Battalion, testified that early in the morning of 2 May 1943 he had received a report of the shooting of a British sergeant. He proceeded to the opening of an alleyway just outside of Gold Tooth Annie's and found Sergeant McQuade about 75' from the entrance to the brothel. He was in a semi-reclining position against a mud wall and was accompanied by Lynn and Hearn who were both moderately drunk. He placed a dressing on each wound, neither of which appeared to have had previous dressing, and had McQuade transported by stretcher to a truck and thence to the British Hospital at Do-Roud. He made a rough examination of McQuade and found him suffering with severe shock and a small wound in the right front of his chest and a large, gaping wound with moderate hemorrhage in the right middle of his back. Later in the morning he accompanied McQuade in a railway ambulance car from Do-Roud to Arak (Sultanabad) where McQuade was turned over to an Indian Ambulance Squad (R. 59, 60).

At about 4:30 a.m. in the morning of 2 May 1943, accused appeared at the orderly room of Headquarters, H. and S. Company, First Provisional Railway Operating Battalion, awakened First Sergeant Alvin L. Gay and told him "he had shot an English sergeant down in the village". The Sergeant thereupon took a rifle and cartridge belt from accused. Upon examination the rifle was found loaded and the bore had a smell as though the rifle had been recently fired. The rifle was later found to be one that had been issued to Private Makibroda (R. 29, 33). Accused was then placed in arrest by the company commander (R. 29).

It appearing that accused had been properly advised of his rights by the investigating officer, Major Strange, and that he acted voluntarily when he made them, two sworn statements of accused were admitted in evidence after defense counsel had elicited the fact that Captain Miller of the Judge Advocate General's Department had assisted him in a two hour examination (R. 54, 56; Ex. D-1; Ex. D-2).

In substance accused therein stated that he had met deceased, McQuade, on one occasion prior to 1 May 1943 when, at the mess hall where accused was serving as a cook, he gave McQuade supper and some sandwiches in return for which he received three bottles of beer. He had nothing against McQuade. On the night of 1 May 1943 he had gone to Pedro's and found McQuade and an American soldier inside and three American soldiers outside. The soldiers on the outside told him to go in and tell the American to come out. The night was cold and he carried his hands in his jacket. As he approached the two inside McQuade pulled a pistol saying "you fucking Mexican, pull out your knife". Accused answered "what knife? I haven't got a knife," turning out his pockets to prove he had nothing. McQuade then put his pistol away and said "you ain't got nothing. Well go and get whatever you want and I'll meet you here." No one was present during the conversation but an American soldier whom accused did not know.

Later he accompanied a group including McQuade to Gold Tooth Annie's but he remained there only a short while and then left. He then returned to camp at about 2:30 a.m. to get a rifle but, the bolt being missing from his own, he took the gun belonging to Private Mike Makibroda from under Makibroda's cot while he was asleep. He "borrowed" a belt and cartridge from Private Basham who was also asleep in an adjoining tent. Though he did not intend to do anything with the rifle he loaded it with five cartridges and walked into town carrying it "at sling arms." He intended to bring the other soldiers back to camp as he figured they might get hurt. Accordingly, he proceeded directly to Gold Tooth Annie's. As he entered the doorway he took the rifle from the sling position in which he was carrying it and entered the room carrying at "port arms". The first thing he saw (though it was dark as there was only a lantern burning) was McQuade who, when he saw accused, "started to pull the pistol which he had on a string around his neck". Accused saw him stand up to open the holster but did not see the gun and when McQuade pulled on the string "he shot him". This he did because he was afraid McQuade would shoot him; he had pulled the pistol once before, at Pedro's.

McQuade had never said he would shoot accused. Accused did not know whether he hit McQuade who was about 12' from accused when he was shot but he did see him put his hand over his lower abdomen and bend forward and crumple up. He later said he had not intended to hurt but only to scare him; and he also stated that Gasco had taken hold of the rifle as though to take it away and pulled it down just as it went off.

After the shooting accused left, went out across the courtyard and down the alley for about 100' when he heard footsteps "on the double". He thought it was McQuade but found out it was Gasca. He told Gasca not to come close to him because he "knew he was drunk and didn't know his intentions". At that time he "didn't trust anybody". Later Hernandez appeared and he and Gasca then returned to Annie's. Accused proceeded to Pedro's, bought a bottle of vodka and took two drinks. He then went back to camp, took two more drinks and reported to Lieutenant Johnson that he had shot a British Sergeant in Gold Tooth Annie's. He was placed under arrest after surrendering the rifle to First Sergeant Gay.

Accused was not drunk at the time of the shooting, could walk and see all right, felt all right and though the other American soldiers were drunk, McQuade was "not exactly drunk but was feeling good". During the afternoon and evening preceding the shooting accused drank one glass of vodka, a glass of beer and a bottle of wine.

Major R. H. Strange, Corps of Engineers, the investigating officer, testified that, as such, he had interviewed Major A. H. Kahn of the Indian Hospital at Sultanabad. He identified Major Kahn's sworn statement and said that the entries thereon were extracts of a clinical record and subsequent autopsy of which matters Major Kahn had sworn he had personal knowledge (R. 8-10). It was thereupon stipulated and agreed that if Major Kahn were present he would testify that Sergeant Charles Bernard McQuade, 73 Field Security Section, was admitted for treatment at the 10th Indian Casualty Clearing Station on 2 May 1943, and was treated by Major Kahn; that on 4 May 1943 his condition was so grave that impending death was imminent; that he did die and that a post mortem examination performed on his body on that day showed death resulted from general peritonitis caused by an injury due to a bullet which had injured the right pleura, the diaphragm, the liver, the ascending colon and the right kidney (Ex. A-1, A-2).

It was further stipulated and agreed that Sergeant Charles Bernard McQuade, 73 Field Security Section, was one and the same person as "Sergeant C. B. McQuade, 73, FSS, British Army" described in the specification of the charge on trial (R. 11; Ex. B).

<u>For the Defense</u>: Accused, having had his rights fully explained to him, elected to be sworn as a witness in his own behalf and testified, in substance, that he and Hernandez had gone into the town of Doroud, on pass, at 5:15 p.m. on 1 May 1943 and remained there for about an hour after which they returned to camp (R. 61).

Between 6 and 10 p.m. he remained in camp and attended a religious service in the recreation hall after which he returned to town and went to Pedro's. There he found McQuade in the back room talking with two Persians. Gasca was also present. At about midnight Lynn, Ryan, Notcher and another unidentified soldier entered the front or bar-room. Accused sang a few songs for them and then at Pedro's request asked the soldiers to leave so the shop could be closed. Three of the soldiers then left and shortly after they asked accused to send the other American soldier out (R. 62).

He went into the back room to call him whereupon McQuade pulled out a revolver and asked accused to pull out his knife "insulting" him at the same time. Accused took off his field jacket and unbuttoned his shirt whereupon McQuade put his pistol back in the holster. A soldier by the name of Hearn, since deceased, was present at the time.

At about 2 a.m. Lynn, Ryan, Hearn, McQuade and accused left Pedro's and went to Gold Tooth Annie's. Accused did not enter the room when they arrived but, after walking into the doorway left immediately and returned to camp because he had to be up at 6 a.m. to go to work.

At about 3:45 a.m. he got up, dressed and determined to go back to town. He had heard of natives killing British or Indian soldiers and, fearing the "wild natives and bandits" he decided to take a rifle with him for safety. Since his rifle had no bolt he took Private Makibroda's and having no ammunition he went into an adjoining tent and "borrowed" some belonging to Private Basham (R. 63). He "hadn't any ideas to do anything - just wanted to carry the rifle for protection" (R. 64) though he had never before carried one into Doroud (R. 71).

He put five cartridges in the rifle and, carrying it at "sling arms" he proceeded to Gold Tooth Annie's. As he approached the door to the room where he had previously left his companions he unslung the rifle and, in order to get through the door, carried it "at high port-kinda low". (with a cane he then indicated a position slightly lower than "port arms") (R. 64).

Just then Gasca, who was seated on the floor, got up and walked toward him. McQuade was on his back facing accused and Gasca was thus in a direct line between them and accused could no longer see McQuade. Gasca then came close and "with his left hand pushed the rifle" to accused's right and at that moment accused saw McQuade "swing himself into the line of fire".

After the shooting accused left and when about 75' from the brothel heard footsteps following him. He stopped and recognized Hernandez who "threw a flashlight on him". Hernandez then left and Gasca came up and told him he, accused, had shot "the British Sergeant" which he did not believe. He knew Gasca was drunk and wanted to take the rifle away from him so he warned him to stay where he was and not to follow him.

He then went to Pedro's, bought a bottle of vodka, took two drinks while there and a third on the way home. It was then about 4 a.m. (R. 65).

When he arrived in camp he went to the acting commanding officer, Lieutenant Johnstone and, because Gasca had told him he had done so, he reported to him that he had shot a British Sergeant. He was told to leave his rifle in the orderly room and go to his quarters. He did so, turning the rifle over to First Sergeant Gay (R. 66).

On cross examination he stated that he and McQuade had not had any argument and that there had been no loud talking at Pedro's but McQuade had called him a "bloody Mexican", told him he had read about Mexicans and thinking accused wanted to knife him, had directed him to pull out his knife. He had thereupon taken off his jacket and shown McQuade that he had only a fork and spoon in his back pocket (R. 66). There was no further discussion thereafter.

When his attention was called to the statement he had made to the investigating officer in which he said McQuade had called him a "fucking Mexican" he said the words used were "fucking, bloody Mexican". He had not gone into the room at Gold Tooth Annie's when he had first gone there because it was too small and there were too many in the party. After he had returned to camp he went to bed and tried to sleep but could not do so (R. 67). He was concerned about the other men and decided to go and get them (R. 68). He was especially concerned about Gasca who was quite drunk and had been so since midnight. He had on two or three other occasions brought him home when drunk (R. 71).

As he entered the room at Gold Tooth Annie's he saw McQuade "have his overcoat open and he pulled out his pistol". He then twice called out "don't do it" in English and Gasca at once stood up between him and McQuade. He had spoken no Spanish and he saw no others in the room because it was too dark. He did not remember pulling the trigger of the rifle, (R. 69) and he admitted that he had never before carried a rifle into Doroud (R. 71).

Gasca, called in rebuttal, denied that accused had ever taken him home in a drunken condition (R. 73).

5. Accused is charged with the crime of murder in that "he did, at Do-Roud, Iran, on or about May 2, 1943, with malice aforethought, wilfully, deliberately, feloniously and unlawfully and with premeditation, kill one Sergeant C. B. McQuade, 73, FSS, British Army, a human being, by shooting him with a rifle."

The evidence clearly shows that he did shoot a British Sergeant by the name of McQuade at the time and place alleged and the clinical records of 10th Indian Casualty clearing station show that on 2 May 1943, treatment was there given to "Sergeant Charles Bernard McQuade, 73 Field Security Section" who was the person so shot by accused in Gold Tooth Annie's brothel in the early morning of 2 May 1943 and who was transported to said hospital from an alleyway in the vicinity of the place where the crime was committed.

Since, by stipulation, it was agreed that this person was identical with the person described in the specification it was sufficiently shown that accused did shoot the particular human being he is alleged to have murdered.

It remains to be seen whether the evidence shows, with equal clarity, that deceased died as a result of the shooting within a year and a day thereafter and whether the killing was unlawful and, if so, perpetrated with malice aforethought and premeditation.

By further stipulation, it was shown that Sergeant McQuade, while receiving hospitalization for his injuries, died on 4 May 1943 and that an autopsy performed upon his body disclosed that his death resulted from general peritonitis caused by injuries due to a bullet which had passed through his right pleura, diaphragm, liver, ascending colon and right kidney. There is, consequently, no doubt that his death resulted from the rifle shot.

Whether or not a homicide is justifiable or excusable and therefore not unlawful is a question of fact to be determined from all the surrounding circumstances. Of course, if a killing is the result of accident or misadventure, it is unintentional and excusable and no criminal responsibility attaches thereto. It is equally true that, if a slayer is compelled to kill in self defense the homicide is justified; for it is universally recognized that one is not punishable criminally for so taking another's life when he has been put under the real or apparent necessity of doing so, without any fault on his own part, in order to protect himself from the peril of death or bodily harm at the hands of the assailant whose life is taken. One cannot, however, go further than is reasonably necessary in defense of person and carry the right of self-defense to the extent of using a deadly weapon upon his assailant except where, to his apprehension as a reasonable man, such extreme measures are necessary to save himself from death or great bodily harm.

Accused's testimony undoubtedly shows an attempt to interpose self-defense as an excuse for the killing alleged; but, measured by the most liberal interpretation of the applicable rules of law possible under all the facts and circumstances shown, it wholly fails to support the necessity essential to sustain the plea. Assuming it to be true that deceased directed opprobrious epithets against accused; that he caused accused great fear by drawing a pistol and demanding that accused draw his knife; and that, when he discovered accused was unarmed, deceased told him to go and get a weapon of some sort and return, even so, no reasonable man can be said to have been justified in resorting to the measures then adopted by accused. The altercation at Pedro's, such as it was, had subsided and the group of soldiers, including accused and deceased, had peaceably moved on to another locale where accused left his companion and returned to the security of his quarters in camp. Insofar as he was concerned his safety was, at that time, assured. He undressed, went to bed and tried to sleep but could not do so. Then, after meditating upon the events that had preceded, he determined to return to town, got up, dressed, armed himself with a loaded weapon and deliberately sought and created the opportunity for the tragic consequences which followed. It would be absurd to admit that, after he had thereafter walked suddenly and with complete surprise into a semi-darkened room carrying the rifle in a position of readiness to fire, he was under the apparent necessity of killing deceased because according to the uncorroborated testimony of accused, he saw him then reach for the lanyard of his pistol and draw his weapon.

Accused's story, however, lacks corroboration in the most important aspects that would favor his defense. No one but accused knew that deceased was armed until, after he was shot, his pistol was found concealed beneath his great coat. Accused said Hearn was present at Pedro's when deceased drew his gun and insulted accused; but Hearn had died and could not aid him at the

trial. None of the others who were around and about the front and back room at Pedro's heard any of the language or saw any of the incidents described by accused, nor did any of those present in the brothel see deceased make a move of any kind or hear him utter a word from the time accused entered the room until deceased was shot. Clearly accused did not act in self-defense.

Was the shooting accidental? A cursory examination of some of the evidence tends to show that it was, but a careful examination and comparison of all that touches upon the incident impels the conclusion that it was not.

Accused said he carried his weapon at something lower than "port arms" and that he intended, in shooting, merely to scare the occupants of the room. In this he is partly corroborated by Ryan who sat by deceased's side at the moment the shot was fired and who said that, from the position of the rifle and the appearance of the flare, he thought the bullet would go into the roof over his head. Accused insisted that Gasca had moved the barrel of the rifle at the moment of the shooting but Gasca testified that while it was his intention to prevent accused from doing any harm with the rifle and he had gone toward accused with his arm outstretched, he barely touched the rifle barrel when it went off. Accused said Gasca came close and with his left hand pushed the rifle to accused's right and at that moment accused saw deceased "swing himself into the line of fire" thus, by his own testimony, furnishing evidence of the actual position of the rifle when deceased was shot. Of course, the best evidence on this matter is to be found in the fact that deceased was shot in the abdominal region. Ryan said deceased was seated at the time the shot was fired and accused said he was standing up; but, in either event, the rifle must have been level and not pointed upward. Had accused testified that Gasca pulled the rifle down instead of pushing it to a side and if accused had not added other gravely damaging evidence against himself, some credence might be given to the theory that the shooting was accidental. But, when accused admitted that he saw deceased draw his gun at the moment when he was advantageously in the direct line of fire from the rifle, this, in conjunction with all other evidence, so plainly demonstrated his intention to show self-defense - that the incompatible excuse of accident cannot be entertained.

Having thus concluded that the killing was unlawful has it been shown to have been perpetrated with malice aforethought and premeditation?

> "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 the commission of the act or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed (Clark). Malice aforethought may exist when the act is unpremeditated. It may mean any one of the following

states of mind preceding or coexisting with the act or omission by which death is caused; an intention to cause the death of, or grievous bodily harm to any person, whether such person is the person actually killed or not (except where death is inflicted in the heat of passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused . . . . ." (par. 148, MCM 1928).

As was ably stated in the oft-quoted case of Commonwealth v. Webster (5 Cush. 296, 52 Am. Dec. 711):

"Malice, in this definition, is used in a technical sense, including not only envy, 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 by such circumstances as carry in them the plain indication of a heart regardless of social duty and fatally bent on mischief . . . .".

Viewing the conduct of accused on the fateful morning of 2 May 1943, in the light of these principles there can be no doubt that he fired a rifle bullet at deceased with malice aforethought. Although he had never before carried a weapon into the town of Do-Roud he did, on this occasion, determine to do so and, whatever may have been his true intention, he purloined a rifle and a belt filled with ammunition, loaded the weapon, and, thus prepared, went to a place where he knew a fancied antagonist would be awaiting him. When he then pointed the loaded weapon toward a group of his companions with intention to fire the same, even though he only meant to scare them as he said, he clearly indicated that his heart was regardless of social duty and fatally bent on mischief. Every act of his, from the moment he conceived of the notion to take a rifle into town until he shot and killed deceased, abundantly shows the malice which is essential to support the finding of guilt.

Premeditation means simply that the design to kill shall have existed for some appreciable period of time before the commission of the homicidal act. No particular period of time is essential to constitute deliberation. A very brief period will suffice, provided the formed intent to kill was consciously conceived in the mind of the slayer before the act of killing was performed.

Accused's premeditation in this case is so clearly apparent that discussion is hardly necessary. He admitted that he had undressed and gone to

bed after leaving the group at Gold Tooth Annie's but said that he felt obliged to look after their welfare and decided to go to Do-Roud and bring them home although no one had told him to do so and he had never done so before. His explanation of his need for protection against maurauding bandits and his consequent taking of a rifle and ammunition belt so that he would be armed on his way to town is implausible because he had never before armed himself for self protection on other trips to town. It is an inescapable conclusion that he meditated upon and determined to arm himself for an encounter with deceased and his subsequent conduct discloses that he intended to kill.

No reasonable person could come to any other conclusion in this case than that accused deliberately planned and executed the murder of Sergeant McQuade and that when he shot deceased he did so with intent to kill him and the evidence abundantly supports the findings of the court.

6. Attached to the record of trial is a plea for clemency submitted by defense counsel. In this it appears that accused is a Mexican who speaks English only with difficulty; that his schooling consisted solely of 3 years at a Spanish school in El Paso, Texas, in the traditions of Old Mexico; and that, therefore, the words "insult" and "challenge", which enter prominently into the story told by accused, no doubt have a much deeper meaning in his mind than in the average American mind. It is urged that, since accused "had a complete lack of any sense of having done anything wrong" and because his mind "was Mexican (or Latin) rather than criminal" these facts should be taken into consideration by the reviewing authority. They have been considered by the Board of Review.

7. The charge sheet and accompanying data show that accused is 23 years of age. He was inducted on 29 August 1942 at Boise, Idaho and has had no prior service.

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

William A. Founds, Judge Advocate.

Carle Stephens, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

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

SPJGQ
CM 237556

- 5 AUG 1943

UNITED STATES v. Second Lieutenant HORATIO K. HAWKINS (0-1303334), Infantry.	92ND INFANTRY DIVISION Trial by G.C.M., convened at Fort Huachuca, Arizona, 9 and 10 June 1943. Dismissal and total forfeitures.

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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: (Finding of not guilty)

Specification 1: (Finding of not guilty)

Specification 2: (Finding of not guilty)

CHARGE II: Violation of 64th Article of War (Approved only as a violation of 96th Article of War.

Specification 1: In that Second Lieutenant Horatio K. Hawkins, 371st Infantry, having received a lawful command from First Lieutenant James J. Shea, 598th Field Artillery Battalion, his superior officer, to close a certain gate, did at Fort Huachuca, Arizona, on or about May 18, 1943, wilfully disobey the same, saying "I didn't open it and I won't close it", or words to that effect.

Specification 2: (Finding disapproved by reviewing authority)

CHARGE III: (Finding of not guilty)

Specification: (Finding of not guilty)

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

Specification: In that Second Lieutenant Horatio K. Hawkins, 371st Infantry, having been duly placed in arrest at Fort Huachuca, Arizona, did, at Fort Huachuca, Arizona, on or about May 23, 1943, break his arrest before he was set at liberty by proper authority.

ADDITIONAL CHARGE: Violation of the 63rd Article of War (Finding disapproved by reviewing authority).

Specification: (Finding disapproved by reviewing authority).

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Charge I, and the Specifications thereunder, and of Charge III and its Specification. He was found guilty of Specification 1, Charge II, except the words "I won't close it", of the excepted words not guilty, guilty of Charge II and of the remaining Charges and Specifications. No evidence of any previous conviction was submitted. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for one year. The reviewing authority disapproved the findings of guilty of Specification 2 of Charge II (Willfully disobeying an order to dress and report to class in 10 minutes) and the Additional Charge and its Specification (using disrespectful language to a superior officer) and approved only so much of the findings of guilty of Specification 1 of Charge II and of Charge II as involves findings of guilty of saying "I didn't open it" and of failing to obey a lawful command of 1st Lieutenant Shea, his superior officer, to close a certain gate, in violation of the 96th Article of War, approved only so much of the sentence as provides for dismissal and total forfeitures, and forwarded the record for action under Article of War 48.

3. The competent evidence of the prosecution relating to Specification 1 of Charge II shows that the accused was attending the 92nd Division Officers' School of Application and Proficiency as a student in May 1943. On the 18th, during a road march of about fifty officer students, the column was passing through a gate which was to be closed after the column had passed through. First Lieutenant James J. Shea who was one of the tactical instructors of the school, told accused, since he was near the end of the column, to close the gate (R. 9). Accused replied that he did not open the gate, continued walking and did not close the gate (R. 13). There were other officers there at the time behind the accused. No one was attempting to close the gate at the time (R. 16-17).

The prosecution's evidence relating to Charge IV and its Specification (breach of arrest) shows that on Saturday, 22 May 1943, Lieutenant Colonel Duncan Hallock, Commandant of the school, called the accused before him and told him that he would be put in arrest in quarters due to the fact that charges were being preferred against him, and instructed him that the

limits of his arrest were his quarters, the latrine and mess hall. On 22 May 1943 this verbal order was confirmed by a written order delivered to the accused which read as follows: (R. 5-6, Ex. A)

> " 1. Confirming verbial orders of the Commandant, you are hereby ordered into arrest, pending charges.
>
> 2. You will not leave your room except for meals at the prescribed time and place, medical attention, or to visit the latrine. Upon leaving your room, you will leave a note upon your pillow stating time of departure, where you have gone and at what time you will be back."

Accused receipted for a copy of the order on that date (Ex. A). On 23 May 1943 the accused was found out of his quarters visiting in the room of a Lieutenant Compton two doors away in the same barracks (R. 41, 42, 112). When told that he was breaking his restrictions he returned to his own room immediately (R. 41, 112).

4. The accused in defense to Specification 1 of Charge II showed that the gates in question were very heavy requiring two or three men to lift the pine log to open or fasten the gates. He was not the last one in line. Lieutenant Shea approached him and said "Are you going to close that gate, Lieutenant?" Accused glanced around and saw three other officers preparing to close the gate and replied to Lieutenant Shea "It is already being closed", and continued on. Lieutenant Shea later asked him his name which he gave and nothing further was said (R. 108-9). Second Lieutenant Dean F. Miller, another student officer, testified that he was walking alongside of or near accused when Lieutenant Shea asked accused whether he was going to close the gate. He heard accused reply that the "gate is being closed". He also saw three officers in the rear closing the gate. He stated that Lieutenant Shea did not order accused to close the gate (R.76-77).

In defense to the charge of breach of arrest the accused testified that when Colonel Hallock placed him in arrest he specified the limits of his restrictions were the barracks and mess hall. He admitted receiving the written notice on the 22nd but as it started out with the words, "confirming verbal orders", he did not read the rest of the notice carefully and therefore did not notice that the limits of the restrictions were his quarters. He did not knowingly breach the restrictions when he visited two doors away within the barracks. As soon as it was called to his attention, he returned to his own quarters.

5. With reference to Specification 1 of Charge II the accused was charged with willfully disobeying an order given him by his superior officer to close a certain gate. The story of the occurrence as related by Lieutenant Shea clearly supports such a charge. The court accepted this version of the occurrence as true and found the accused guilty of the charge. The reviewing authority has held that the accused did not

willfully disobey the order, but failed to obey it (M.C.M., par. 134b).

It appears that the accused claims that he understood that Lieutenant Shea simply asked him if he was going to close the gate, and, as three other officers were then preparing to close it, he replied that the gate was being closed by others. In this he is corroborated by another student officer. According to this testimony the accused misunderstood the order given. It was not repeated. Lieutenant Shea did nothing to ascertain whether his order was heard and if heard was clearly understood. These circumstances are sufficient to create an honest doubt whether the accused understood Lieutenant Shea's remarks constituted an order. The Board is of the opinion that it was not shown beyond a reasonable doubt that the order to close the gate was communicated to the accused in such a manner as to be understood by him to be an order and that therefore a finding that he failed to comply with the order cannot be sustained. If the accused understood the order as related by Lieutenant Shea then there was a willful disobedience in violation of the 64th Article of War. If he did not understand it to be an order, then there is no violation of either Article of War 64 or Article of War 96. The reviewing authority has ruled out the 64th Article of War. The evidence does not sustain a violation of the 96th Article of War beyond a reasonable doubt.

With reference to the alleged breach of arrest, the offense of breach of arrest is committed when the person in arrest infringes the limits set by the order. The intention or motive that actuated him is immaterial to the issue of guilt, though, of course, proof of a bona fide mistake is relevant to the issue of extenuation (M.C.M., par. 139 a).

It was clearly shown by the prosecution and admitted by the accused that he inadvertently left his room to visit another officer in the same barracks two rooms away. Even though it appears by future events that he is legally innocent of all of the Charges and offenses with respect to which the arrest was imposed, the accused may still be properly found guilty of a breach of the arrest. The record is therefore sufficient to sustain the finding of guilty of the technical breach.

6. The Adjutant General record show the accused to be 25 years of age. Born of a colored family in Florida he was raised in New York State where he graduated from George Washington High School in 1936 and thereafter attended City College of New York and St. Johns University for 2½ years. He was employed as mail clerk, manager of a candy concession and in social service. He was inducted on 8 July 1941, subsequently attended O.C.S. and on 10 December 1942 was commissioned Second Lieutenant and assigned to 92nd Division, Camp Robinson, Arkansas.

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

William H. Rounds, Judge Advocate.

Charles Sedlum, Judge Advocate.

Herbert R. Hedmen, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 12 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 Horatio K. Hawkins (0-1303334), Infantry.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the finding of guilty of Charge II and Specification 1 thereunder, legally sufficient to support the findings of guilty of Charge IV and its Specification, and legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but commuted to a reprimand and that the sentence as thus modified be carried into execution.

3. Inclosed are a draft of a letter for 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.

(Finding of guilty of Charge II and Specification 1 thereunder disapproved. Sentence confirmed but commuted to reprimand. G.C.M.O. 297, 5 Oct 1943)

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

SPJGN
CM 237637

28 JUL 1943

UNITED STATES	FOURTH SERVICE COMMAND ARMY SERVICE FORCES
v.	Trial by G.C.M., convened at Camp Sibert, Alabama, 29 June and 1 July 1943. Dishonorable discharge and confinement for five (5) years. Rehabilitation Center, Fort Jackson, South Carolina.
Private JOHN R. SEERY (35572139) 111th Chemical Impregnating Company.	

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

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 as approved by the reviewing authority.

Charles L. Cresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

SPJGN
CM 237637

MEMORANDUM for The Judge Advocate General.

Subject: Trial by general court-martial of Private John R. Seery (35572139), 111th Chemical Impregnating Company.

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

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

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

Specification 1: In that Private John R. Seery, 111th Chemical Impregnating Company, Camp Sibert, Alabama, did, at Camp Sibert, Alabama, on or about June 8, 1943, behave himself with disrespect toward Second Lieutenant Roland W. Archer, 111th Chemical Impregnating Company, Camp Sibert, Alabama, his superior officer, by wrongfully saying to him, "Now listen son, I'm not calling you sir and I'll tell you why. I hate your God damned guts", or words to that effect.

Specification 2: In that Private John R. Seery, 111th Chemical Impregnating Company, Camp Sibert, Alabama, did, at Camp Sibert, Alabama, on or about June 8, 1943, behave himself with disrespect toward Second Lieutenant Roland W. Archer, 111th Chemical Impregnating Company, Camp Sibert, Alabama, his superior officer, by wrongfully saying to him, "You can stick your bar up your ass" and "Now don't you think you're hot stuff?", or words to that effect.

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

Specification: In that Private John R. Seery, 111th Chemical Impregnating Company, Camp Sibert, Alabama, having received a lawful command from Second Lieutenant Roland W. Archer, 111th Chemical Impregnating Company, Camp Sibert, Alabama, his superior officer, to go to his barracks and go to bed, did, at Camp Sibert, Alabama, on or about June 8, 1943, wilfully disobey the same.

CHARGE III: Violation of the 65th Article of War.

Specification: In that Private John R. Seery, 111th Chemical Impregnating Company, Camp Sibert, Alabama, did, at Camp Sibert, Alabama, on or about June 8, 1943, wrongfully use the following threatening and insulting language toward Master Sergeant Ralph H. Miller, 111th Chemical Impregnating Company, a noncommissioned officer, who was then in the execution of his office, "If it's the last thing I do, I'll get out of here someday and look you up and kill you." "You dirty yellow bellied son-of-a-bitch." "I've no respect for any of the non-coms in this company", or words to that effect.

The accused pleaded not guilty to, and was found guilty of the Charges and Specifications. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due, or to become due, and to be confined at hard labor for five years and eight months. The reviewing authority approved the sentence, but reduced the period of confinement to five years, suspended the dishonorable discharge until the soldier's release from confinement, and designated the Rehabilitation Center, Fort Jackson, South Carolina, as the place of confinement. The result of his trial was published in General Court-Martial Order No. 1061, Headquarters Fourth Service Command, Army Service Forces, Atlanta, Georgia.

3. The only question in this case requiring discussion involves the action of the court in consulting a local staff judge advocate in closed session during the proceedings designed to revise the court's findings. The facts show that after the presentation of evidence was concluded, the court found the accused guilty and announced its findings as follows:

"The accused is found guilty under the Charge of violation of the 63rd Article of War and sentenced to hard labor for six months and to forfeit two-thirds of his pay for that period.

The accused is found guilty under the Charge of violation of the 64th Article of War and sentenced to hard labor for a period of five years and a dishonorable discharge

The accused is found guilty under the Charge of violation of the 65th Article of War and sentenced to hard labor for a period of two months and to forfeit two-thirds of his pay during that period.

It was agreed that the forfeiture of pay should be expressed in terms of so many dollars and that that be $28.00 per month" (R. 24).

After the court had adjourned and reconvened, and after consulting with a local staff judge advocate in closed session, the court announced revised findings as follows:

"Neither the prosecution, nor the defense, having anything further to offer, the Court was closed, and revokes its former findings and sentence, and upon secret written ballot, two-thirds (2/3) of the members present at the time the vote was taken, concurring in each finding of guilty, finds the accused: of all Specifications and Charges: GUILTY" (R. 26).

After the defense counsel had recorded his objection to the court's private consultation with the staff judge advocate, the record records the following procedure:

"The Court was closed, and upon secret written ballot, two-thirds (2/3) of the members present at the time the vote was taken, concurring sentences the accused to be dishonorably discharged the service, to forfeit $28.00 of his

pay per month for eight (8) months and to be confined at hard labor for a period of five (5) years and eight (8) months" (R. 27).

The law member of the court then stated:

"Let the record also show that the Staff Judge Advocate made a full statement in open session of the Court of all that transpired, but not under oath, in the conference between the Staff Judge Advocate and the Court, as to which the Defense Counsel has made objections" (R. 27).

Following the above statement, the defense counsel concluded, as follows:

"In the opinion of the Defense Counsel, after hearing the statement of the Staff Judge Advocate, no substantial rights of the accused have been infringed or prejudiced. On the other hand all the rights the accused has to the benefit of defense caused by the invitation of the Staff Judge Advocate in closed session of the Court, are not waived" (R. 27).

Although The Judge Advocate General has held that "A court-martial is not permitted in closed session to consult any outside authority" (CM 156620), he has also held that the improper appearance of the judge advocate in a closed session of a court-martial which did not injure the substantial rights of the accused did not require the disapproval of the case (CM 114903, CM 141915).

In the present case it clearly appears that the court reached its findings of guilty and sentenced the accused to confinement for five years and eight months and thereafter in its proceedings in revision reaffirmed, in correct form, the same sentence. The only effect, therefore, resulting from the advice of the staff judge advocate was a change in the form in which the sentence was written. The defense counsel recognized that no substantial injury resulted from this procedure by stating that "no substantial rights of the accused have been infringed or prejudiced". The action, therefore, of the defense counsel

in seeking to preserve for the defense the procedural advantage of the trial error was an effort to secure the disapproval of the findings because of an error which did not injure the substantial rights of the accused. The Judge Advocate General has stated that:

> "* * * military justice and the rules and regulations governing trial by court-martial are designed to meet the needs of efficient military administration, which places substance above form and justice above the appearance of justice" (Hatteberg, CM 231963).

In observance of this principle, and because the error in question was one of form rather than of substance, we must conclude that the record of trial is legally sufficient to sustain the findings and the sentence.

Chas. L. Grosson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

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

SPJGQ
CM 237641

12 AUG 1943

UNITED STATES	FOURTH SERVICE COMMAND
v.	Trial by G.C.M., convened at Camp Rucker, Alabama, on June 21-30, 1943. To be hanged by the neck until dead.
Staff Sergeant JOHN BRACKINS (34156204), Company B, 935th Air Base Security Battalion.	

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 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 92nd Article of War.

Specification: In that Staff Sergeant John (NMN) Brackins, 34,156,204, Company "B" 935th Air Base Security Battalion, did at Dothan, Alabama, on or about May 5, 1943 with malice aforethought, willfully, deliberately, feloneously, unlawfully, and with premeditation kill one Technician 5th Grade Silas H. Johnson, Company "B" 933rd Air Base Security Battalion, a human being by striking him on the head with an axe.

He pleaded not guilty to and was found guilty of the Specification and the Charge. No evidence of previous convictions was introduced in the trial. He was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 50½. It has been treated as though forwarded under Article of War 48.

3. For the prosecution it was shown, by pertinent evidence, that Pearl Askew, her husband, R. L. Mourning, her son, Charles, Terossie Carter and Josie Lee Gipe lived together at 401 Houston Street in Dothan, Alabama.

On the night of 4 May 1943 R. L. Mourning, Charles Askew, Terossie Carter, Josie Lee Gipe and accused were present at a party given at the Blue Front Cafe (R. 35, 46). At about 9 p.m. Mourning, Terossie, Josie Lee, accused and an unidentified "white" soldier, whom they had met on the way, went to the home at 401 Houston Street (R. 35, 46, 48).

The "white" soldier sent for some whiskey and they then sat around in the middle room drinking (R. 48). There was a short play with dice which was broken up by an argument over money, but there had been no fighting (R. 51). The "white soldier" was alone in the middle room with Josie Lee for some time (R. 48) after which Annie Lee Smith (Shivers) came in with another "white" soldier who said his name was James Sutton (R. 38, 39, 49). Annie Lee joined Mourning and accused in the middle room and when Josie Lee heard laughing she opened the door and saw Annie Lee "dancing and showing out" while the men laughed at her (R. 49). There were some remarks made later about "Annie pulling up her dress" and she and her soldier companion left. A few moments later accused stated he was going to meet another soldier and catch the 11:30 bus back to camp and he and Mourning left (R. 36).

Charles Askew, who had been at the party in the Blue Front Cafe, then arrived home at about 12:30 a.m. (R. 25, 36). He went through the house directly to the latrine and while there thought he heard "someone snoring in the back" and called his mother. She went to the door and Charles told her he heard something in the cotton which his mother and he had taken from a mattress, washed and spread upon the ticking in the back yard to dry (R. 26, 35).

He then concluded there was someone lying upon the cotton. His mother got a lamp and, standing on the back porch, they discovered a soldier asleep, on his stomach, in the cotton. They did not go any closer but, thinking he was drunk and fearful of the consequences if they disturbed him, they went back into the house. Charles locked the door and was undressing when there was a knock upon the front door and his mother admitted accused who asked for Mourning. Pearl told him Mourning was not at home, then informed accused about the soldier in the back yard and asked him to go and see whether he knew him.

Accused, Charles, Pearl and Josie Lee thereupon went out on the back porch and while the others watched him, accused approached the soldier and tried to arouse him by shaking him and calling "Soldier! Soldier!", but was unable to do so and when he let go of him he fell back limp into the cotton (R. 26, 33, 36). Accused stood there for a few minute and looked at the soldier then asked Pearl "Do you want this soldier out of your cotton?" and Charles testified that she answered "No, that is all right, just let him lay there until the morning" (R. 26). Pearl said she told him "leave him alone, Brackins ..... that is all right, he scattered my cotton but I can pick it up in the morning" (R. 36), and Charles corroborated that statement (R. 26), but said that accused answered "Miss Pearl I am

going to get this soldier out of your cotton" (R. 33). Josie Lee testified that accused said "I will get the son of a bitch up" and reached for an axe whereupon she said "I wouldn't hit that soldier" (R. 54).

At this point Pearl, Josie Lee and Charles turned to go back into the house (R. 26). Charles had "got one foot inside the screen door" when he "heard the axe" as accused drew it toward him, that he then turned around and saw accused hit the soldier on the head with the axe while he lay on the ground (R. 27, 31, 32). Charles "hollered" and pushed Josie Lee who knocked the chimney from the lamp (R. 26). Pearl had "got half way in the screen" when she "heard the lick" but did not see it (R. 36, 42, 43). Josie Lee saw and heard accused hit the soldier with the axe immediately after she had told him not do so so. She turned to run into the house and, in doing so, broke the lamp chimney (R. 54). Terossie had gone to bed before accused arrived the second time (R. 36, 44). She had heard Pearl tell accused about the soldier in the back yard and knew that Charles, Pearl and Josie Lee had gone to the back yard with accused but didn't know what was going on until she heard Charles "holler" at which she got up out of bed, went to the back door and saw accused hit the soldier on the head with an axe so hard she "heard the lick". She saw the soldier lying on the ground bleeding on the head before the blow was struck (R. 34, 44, 51). Charles, Pearl and Josie Lee had come back into the house before Terossie went to the door (R. 26, 44). Terossie called to the accused telling him not to hit the soldier again then told the others "Brackins has hit that soldier another time and has probably killed him" (R. 26). Charles Askew said accused held the axe in both hands when he saw him hit the soldier (R. 35) and Terossie Carter said he used only one hand in delivering the blow she saw (R. 44, 51).

After accused had struck deceased with the axe he sneaked around the outside of the house (R. 44). Terossie and Josie Lee had gone to bed and Charles was undressing when accused knocked on the door and was admitted. Charles told him he had to move the soldier out of the back yard (R. 27). Meanwhile Mourning arrived and told accused to move the body (R. 44). Accused went out and did so by dragging deceased away from the premises while holding him under the armpits.

When he again returned to the house he knocked on the door and told Terossie he wanted a clean suit. She let him in and found blood on his uniform (R. 45). He told them he had carried deceased to one of the fields. When asked why he had hit deceased he said he didn't know and that he had no reason. He warned them not to notify the military police (R. 27) and Josie Lee said he threatened to kill them if they told the police (R. 55). Terossie got him a clean suit which she previously had laundered for him and accused changed clothes in Charles' bedroom. He had taken out

his knife, dice, "dog tags", keys and change and placed them on the bed (R. 27, 45, 46). While he was changing there was a knock on the door and upon learning it was the "M.P.s" accused grabbed his clothes and ran out of the back door (R. 27). Terossie had taken his bloody clothes and put them in a wash pot in the back yard next door (R. 27, 45). Josie Lee identified the knife found later on the bed as accused's knife and stated she had seen him with it on the night of 5 May 1943 before accused hit the soldier with the axe (R. 54, 55; Ex. M), but neither Charles or Terossie had ever seen accused with it before they saw him put it on the bed (R. 27, 45).

There was considerable difference of opinion among these witnesses in their description of the soldiers, besides accused, who had been in the house that night. Pearl said the soldier who came home with the group earlier in the evening was not tall but chunky and "bright colored", with hair that "didn't look to be so thick", and that he left later with accused (R. 38, 40). The soldier who came with Annie Lee was not "bright colored" (R. 39). Terossie described the soldier who accompanied them home as a small white soldier, with bushy, black hair (R. 48). Josie Lee said that he was small "bright-colored" and had black hair (R. 55) but that the soldier who came with Annie Lee was dark (R. 57). Pearl is the only one of the group who described deceased and she said she got a look at the side of his face while he was lying in the back yard and that he was "Kinda light colored". All agreed however, that the deceased soldier had not been in the house that evening (R. 37, 44, 50, 52, 54, 57).

Terossie thought accused was drunk on the night of 5 May 1943 because he had a pint of whiskey at the Blue Front Cafe and there was another pint brought to the house of which accused drank "a little" (R. 46).

At about 3:15 a.m., 5 May 1943, Staff Sergeant Clifton E. Cusick, Corps of Military Police, Camp Rucker, Alabama, received a report about a colored soldier who had been hurt and in response he and Sergeant Nelson went to 401 Houston Street and inquired about the matter from an elderly woman, a girl and a man who were there and who told them the soldier was in the back yard. They went to the rear of the house and saw a lot of cotton with blood on it about 10 feet from the rear porch and following a trail which appeared to have been made by dragging something, they came upon a soldier lying near a junk pile in a vacant lot about 50 yards away from the house. The soldier was seriously injured, had a big gash in his head and was unconscious but he made no sound. The only article found in his clothing was a pass in the name of "Silas Johnson". His clothing were in disorder, his shirt was pulled out of his trousers and was up around his shoulders and the trousers were dirty (R. 7-12). He appeared to be a "light complected colored man" of about six feet in height and weighing about 200 pounds (R. 60, 62, 63). They smelled no alcohol on him (R. 9, 62). He was transported to a first aid station where an ambulance was summoned from Camp Rucker (R. 7).

Meanwhile two deputy sheriffs had come upon the scene of the crime followed by Sheriff B. G. Farmer (R. 14). One of the deputies found an axe with blood and hair on it under some bushes about 12 feet from the cotton pile. Terossie Carter had also taken him to the wash pot in the back yard and shown him accused's clothes (R. 18). The sheriff and his deputy both corroborated material parts of Cusick's testimony.

At about 6 a.m. accused was apprehended by a deputy sheriff after he had come out of a house about three doors away from 401 Houston Street. No odor of alcohol was apparent on accused though he stated he had been drinking (R. 17, 20, 21). When in jail he admitted that he had found deceased on a pile of cotton and after asking him what he was doing there. had hit him with an axe (R. 15, 19), but claimed it was done in self-defense following an argument over whiskey during which deceased had advanced toward him with a knife whereupon he picked up the axe and hit him with it (R. 16, 19).

1st Lieutenant Albert L. Billar, Medical Corps, assistant surgical officer, Station Hospital, Camp Rucker, stated that he had seen deceased at 4:50 a.m. on 5 May 1943 in Dothan, Alabama and later had treated him after his admission to the hospital at 7 a.m. under the name of Silas Johnson though there were no other means of identification. The medical record of deceased was then introduced in evidence (R. 22-24; Ex. H). He described the wounds as follows:

> "The longest laceration of the scalp measured approximately 3½ inches in length and 2½ inches in width with some smaller cuts running from there. I do not know how to describe the shape of the scalp wound: the long axis was vertical. The one on top of the head was more of a gaping wound and looked more or less like an inverted 'T'....and ran approximately 1½ inches by 1½ inches" (R. 24).

There was a depressed fracture of the skull and the brain was injured which injuries were the cause of his death at 5:15 p.m. on 6 May 1943 (R. 24, 25). This testimony was corroborated by Major Albert DeGroat, Medical Corps, in charge of the Station Hospital at Camp Rucker who stated that he had examined the body of Silas Johnson on 7 May 1943 and although there was evidence that pneumonia had been contracted after admission to the hospital, the wounds on the head were the cause of his death (R. 21, 22). There was no evidence of alcohol found in the body (R. 22).

For the defense: R. L. Mourning testified that on the night of 4 May 1943 at a time not fixed, he had been at 401 Houston Street on the side of the house opposite to that occupied by Pearl Askew. While there he saw deceased, whom he described as a "big, red-looking soldier with lots of hair on his head", sitting on the back porch in company with

another soldier by the name of Al. Mourning was acquainted with Al but had never before seen the other man. Al was bathing his companion's face with a towel and when asked why said he was "getting him straight so he could bring him back to camp". Mourning saw no injuries on deceased at that time and except for the fact that he had his head on his chest he appeared to be all right (R. 70). As far as he knew deceased never entered the house that night (R. 71). Mourning had also seen accused in the house next door during the evening in company with Pearl, Terossie, Josie Lee and another soldier, but he never saw accused go out on the back porch while deceased was there. Later that night he had seen deceased lying on the cotton in the back yard after he had been hit but he did not know how he happened to be injured (R. 71).

Algie Cain testified that he and deceased worked together daily at Camp as cooks. He saw deceased in front of the Blue Front Cafe on the night of 4 May 1943 and while talking to him deceased pulled his knife and twenty cents out of his pocket. He had often seen deceased use the knife in peeling vegetables. When shown the knife (Ex. M) he identified it as deceased's knife by the broken point of the blade (R. 74). Deceased then accompanied Cain and his girl friend to 401 Houston Street where they went into the house on the side occupied by C. W. Crews. Later Cain and deceased were on the back porch where Cain washed deceased's face and tried to get him to go home. He said that deceased "did not seem to be drunk enough for it to be necessary for one to stay with him" but was tired and sleepy (R. 76). After several unsuccessful attempts to rouse deceased Cain left him sitting on the back porch at about 11:30 p.m. and went off (R. 74).

Accused elected to be sworn as a witness in his own behalf and testified substantially as follows: On the night of 4 May 1943 he left the Blue Front Cafe in company with Terossie Carter, R. L. Mourning, and Josie Lee Gipe and went to 401 Houston Street where he had rented a room for Terossie with whom he had been having sexual relations. Silas Johnson was in the middle room with Annie Lee Shivers (R. 84) and accused sat on the bed opposite to him. Johnson suggested buying some whiskey but accused refused saying he didn't want any and Terossie agreed because he had already had all he wanted. Johnson insisted however and in the wrangling that followed Johnson ran his hand into his pocket saying to accused "I will run your damn neck out". Then Johnson came toward accused with his knife "wide open" and accused said to him "If I had a pin I would make you use that knife" (R. 80, 81). Johnson held the knife straight in his hand and as he advanced accused backed out of the room and on to the porch (R. 83). Terossie followed in the back of Johnson holding a lamp (R. 81). As Johnson kept coming accused backed off the porch and when on the ground stumbled over an axe lying about 10 feet from the porch (R. 81, 83, 88). Accused picked up the axe and as Johnson, who had just stepped off the porch, stooped over and "ducked" accused hit him and as he fell the knife dropped out of his hand (R. 81, 83, 87). He hit Johnson only once and did not mean to kill him (R. 84, 89, 93). Accused could not turn and run because Johnson was "crowding him too fast" (R. 87).

About 10 minutes later, Mourning came over to accused and told him he had to move the soldier whereupon he picked Johnson up and carried him to the side of the road and after laying him down there returned and went into the house (R. 81, 89). He emptied his pockets placing a knife, his identification tags, and bill fold on the bed and changed into clean clothes which Terossie had brought to him. While changing, Military Police came to the house and when they knocked on the door accused picked up his clean shirt and ran from the house to the Church and stayed there until he was apprehended next morning (R. 81, 92). Accused had picked up deceased's knife from the ground where it had fallen but he denied seeing any cotton on the ground or that deceased's head was bleeding after he was hit (R, 95). When questioned by the court accused said he was afraid deceased would kill him because deceased had told him "he would pull my damned neck off" (R. 95).

Major Robert Cuming, Medical Corps, in charge of the neuropsychiatric section of the station Hospital at Camp Rucker testified that he had examined accused on 17 June 1943 with a view to determining his mental capacity. He found that although accused had a mental age of seven years he was not insane in either the medical or criminal sense and understood the difference between right and wrong.

4. It is alleged in the Specification that accused "did, at Dothan, Alabama, on or about May 5, 1943 with malice aforethought, willfully, deliberately, feloneously, unlawfully, and with premeditation, kill one Technician 5th Grade, Silas H. Johnson, Company "B" 933rd Air Base Security Battalion, a human being, by striking him on the head with an axe".

It was unnecessary to allege and therefore not necessary to prove the rank of deceased and the organization of which he was a member and there is nothing in the record which supports those allegations; indeed, it is doubtful whether, except by circumstantial evidence of a vague and indefinite character, the prosecution did prove that deceased was, in fact, Silas Johnson. However, accused, under oath, testified that the man whom he assaulted on the morning of 5 May 1943 was known to him as Silas Johnson and this was competent proof of identity, which was further corroborated by defense witness Cain, a Technician 4th Grade, Company B, 933rd Air Base Security Battalion, who testified that the deceased was Silas Johnson, a cook, with whom he worked daily. The inference is clear, therefore, that deceased was Silas Johnson, a member of Company B, 933rd Air Base Security Battalion, as alleged. The failure to prove the middle initial of accused is immaterial. The proof of identity of deceased was amply established.

There is no dispute as to the fact that, at the time and place alleged, accused did strike deceased upon the head with an axe. Accused admitted doing so in his own testimony, but, since the burden of his defense is that he was obliged to do so because of an attack made upon him with a knife, by deceased, it is necessary to determine whether he was justified in acting as he did.

According to accused the fatal encounter followed a dispute between him and deceased over the trivial matter of whether or not more whiskey should be purchased for mutual consumption in a house where neither resided. There is not the slightest evidence of any provocative or opprobrious epithets or insults directed by either against the other at any time, nor of any prior threats. Deceased merely insisted that more whiskey be provided and accused persisted in his refusal to agree; yet, because of this short and insignificant banter of words, accused maintains that deceased reached in his pocket and said to him "I will run your damn neck out" or that "he would pull my damned neck off". Deceased then advanced upon accused with an open knife and accused retreated through the house, across and from a porch to the back yard where he picked up an axe over which he had stumbled and then, because deceased "was crowding him too fast", struck deceased on the head with the axe.

Assuming all this to be true was accused obliged to resort to the measure of defense which he adopted? To excuse a killing on the ground of self defense upon a sudden affray, the killing must have been believed on reasonable grounds by the person doing the killing to be necessary to save his life or the lives of those whom he was then bound to protect or to prevent great bodily harm to himself or them. The danger must be believed on reasonable grounds to be imminent. (par. 148a, M.C.M. 1928).

Tested by these rules it might be said that a reasonable man placed in the position of accused under the circumstances portrayed by him, had good reason to believe that his life was sufficiently in danger to justify him in resorting to the taking of life to prevent losing his own. But the rule stated is qualified by the important principle that, before the assaulted person may take life in defense of his own, he must have retreated as far as he safely can.

This common law doctrine requires that a person when attacked by another by whatever means, except when in his own home, must give ground, or, as it is often stated "retreat to the wall", if practicable, before taking the life of his assailant. So long as a safe avenue is open to him he must retreat.

The "wall" is to be presumed whenever retreat cannot be further continued without probable death, and when the only apparent means of escape is to attack the pursuer, though it need not be attempted when the attack is so fierce that the assailed, by retreating, will apparently expose himself to death (Wharton's Criminal Law, 12th Edition sec. 616).

Notwithstanding a disparity in size, weight and strength between deceased and accused it is clearly apparent that having properly retreated from the assault of deceased, accused, when he had reached open ground and was in no sense placed in such jeopardy that he was entitled to stand

his ground but could and should have turned and fled, struck deceased and knocked him down.

He said deceased was, at that time, "crowding him too fast". By his own testimony this is not true. He stumbled over an axe, had time to stoop and pick it up in a dark place, lit only by the lamp carried some distance in rear of deceased. He was in the open, unrestrained by any barrier whatever.

Under these circumstances he voluntarily deprived himself of the right to the plea which he interposed and he cannot be heard to claim that he was obliged to take the life of deceased in order to save his own. However, four witnesses for the prosecution told a story entirely different from and wholly incompatible with that advanced by accused. It appears from their testimony that deceased, whom they did not know, fell asleep upon some cotton which had been washed and spread out, in the back yard of Pearl Askew's house, to dry. Accused, without any reason for doing so, and against the express wish of Pearl Askew, determined to rouse deceased and get him off of the premises. In doing so, accused first shook deceased then failing to arouse him, took a nearby axe and, without any justification or excuse, hit deceased twice with the axe, striking him on the head. Accused then left deceased lying upon the ground until a neighbor, sometime later, insisted that he remove the body from the premises, whereupon accused dragged deceased to a field about 150 yards away and left him there.

Charles Askew and Josie Lee Gipe saw accused strike one blow and Terossie Carter saw and heard the other. Pearl Askew heard one of the "licks". Charles, Pearl and Josie Lee corroborate one another in substantial detail upon the circumstances surrounding the slaying. There is a great deal of evidence in the record which tends to show a possibility of one motive or another behind the altercation between accused and deceased but it is confused and too indefinite to be material and whatever may have been the underlying reasons for the fatal assault it is abundantly evident that it was perpetrated in the manner detailed by witnesses for the prosecution and not as stated by accused.

Malice, in the law of murder as it is applied in courts-martial, 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 the commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act was committed (Clark).

> "Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or

not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused . . ." (M.C.M. 1928 par. 148a).

Moreover, malice is presumed from the use of a deadly weapon (par. 112a M.C.M. 1928). Although an axe may not inherently be a deadly weapon it becomes one when so used that it is likely to cause death or serious bodily injury (Wharton's Criminal Law, 12th Ed. Sec. 850). Where such a weapon is used in a manner likely to and does cause death, the law presumes malice from the act (CM 223574 - Rowe).

While accused had been drinking whiskey on the night of the crime and his paramour thought he was drunk there is no compelling evidence from which the court could, with propriety, have found him so much under the influence of liquor at the time of the homicide that he did not completely realize what he was doing and fully understand the consequences of his acts; nor was this urged in defense, accused himself testifying that he was as sober then as he was on the day of trial. Neither can it be said that his low mental development can furnish any extenuation. The psychiatrist stated that while accused had a mental age of seven years he did have capacity and that only a lack of educational advantages had prevented him from attaining a higher rating. He is not a moron and, according to the expert opinion evidence "neither criminally nor medically insane".

Although the medical officer who performed an autopsy upon the body of deceased testified that deceased had contracted pneumonia after his admission to the hospital and subsequent to suffering the injuries at the hands of accused, both he and the medical officer attending deceased prior to his death stated that the death resulted from the wounds on his head. Major Albert De Groat of the Army Medical Corps who performed the post mortem on Johnson's body testified that there were two wounds on his head, one on the back and one on the top (R. 21) which was corroborated by Lieutenant Billar also of the Medical Corps of the Army (R. 23-24). The blow on the back of the skull appears to have been struck from the rear (R. 24). The skull fracture "included the entire occipital region" (R. 21). This testimony refutes the theory of self defense offered by accused.

In the opinion of the Board of Review the evidence, as a whole, leaves no reasonable doubt that accused, suddenly, unexpectedly and while deceased was sleeping, beat him brutally over the head with an axe without the slightest provocation, justification, or excuse and that the slaying was

perpetrated with malice aforethought, willfully, deliberately, unlawfully and with premeditation as alleged. This was murder in violation of Article of War 92.

5. The Charge Sheet and accompanying data show that accused is 26 years of age, was inducted on 20 January 1942 and has had no prior service.

6. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is sufficient to support the findings 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.

William A. Rounds, Judge Advocate.

Earle Hebburn, Judge Advocate.

Herbert B. Friedman, 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 Staff Sergeant John Brackins (34156204), Company B, 935th Air Base Security Battalion.

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 Specification - alleging murder in violation of Article of War 92. I recommend that the sentence be confirmed but that it be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of the accused's natural life, and that as thus commuted the sentence be carried into execution. I further recommend that the United States Penitentiary, ~~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. S/W
3 - Form of action

(Sentence confirmed but commuted to dishonorable discharge, total forfeitures, and confinement for life. G.C.M.O. 251, 21 Sep 1943)

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

SPJGH
CM 237644

24 AUG 1943

N.D

UNITED STATES	)	28TH INFANTRY DIVISION
v.	)	Trial by G.C.M., convened at Camp Pickett, Virginia, 6 July 1943. Dishonorable discharge and confinement for twenty (20) years. Penitentiary.
Private HAROLD B. MILLER (16068958), Company B, 112th Infantry.	)	

HOLDING by 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 by the Board of Review.

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Harold B. Miller, Company B, 112th Infantry, did, at Camp Pickett, Virginia, on or about June 15, 1943, unlawfully enter the kitchen of Company B, 112th Infantry, with intent to commit a criminal offense, to wit, stealing food, property of the United States furnished and intended for the military service thereof, therein.

Specification 2: In that Private Harold B. Miller, Company B, 112th Infantry, did, at Camp Pickett, Virginia, on or about June 26, 1943, unlawfully enter the kitchen of Company B, 112th Infantry, with intent to commit a criminal offense, to wit, stealing food, property of the United States furnished and intended for the military service thereof, therein.

Specification 3: (Finding of not guilty).

Specification 4: In that Private Harold B. Miller, Company B, 112th Infantry, did, at Camp Pickett, Virginia, on or about June 26, 1943, with intent to commit a felony, viz.

murder, commit an assault upon T/5 Levi D. Bisbee, Company B, 112th Infantry, by willfully and feloniously striking the said T/5 Levi D. Bisbee in the shoulder with a meat hook.

Specification 5: In that Private Harold B. Miller, Company B, 112th Infantry, did, at Camp Pickett, Virginia, on or about June 26, 1943, with intent to do him bodily harm, commit an assault upon T/5 John L. Unger, Company B, 112th Infantry by striking at him with a dangerous instrument, to wit, a meat cleaver.

He pleaded not guilty to the Charge and all Specifications thereunder. He was found not guilty of Specification 3, guilty of Specifications 1, 2 and 5, guilty of Specification 4 except the word "murder", substituting therefor the word "manslaughter", and guilty of the Charge. Evidence of one previous conviction by special court-martial of absence without leave (two Specifications) in violation of the 61st Article of War and breach of arrest in quarters in violation of the 69th Article of War 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 20 years. The reviewing authority approved the sentence, designated the United States Penitentiary at Terre Haute, Indiana as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence is legally sufficient to support the findings of guilty of the Charge and of Specifications 4 and 5 thereunder.

4. The only question requiring consideration is whether the evidence is legally sufficient to support the findings of guilty of Specifications 1 and 2 and the sentence.

The evidence for the prosecution, in pertinent part, is substantially as follows:

a. Specification 1. On 15 June 1943, at about 10:30 or 10:45 p.m., at Camp Pickett, Virginia, Technician 4th Grade Samuel T. Kessel and Technician 5th Grade Levi D. Bisbee entered the mess hall of Company B, 112th Infantry, the company of accused. The mess hall was dark but they heard a commotion and found accused and two other soldiers in the store room. Bread and eggs were "scattered" on the floor, by the stove, there was a pan of bacon and scrambled eggs on the floor and some bread

on the table. The food was the property of the company. Accused ate some of the food after Kessel told him that he could do so. Enlisted men, other than mess personnel, were not permitted to go into the kitchen or mess hall outside of regular mess hours. There was an order to that effect published by "Company B". Kessel had seen such an order on the bulletin board but could not recall whether it was before or after the incident of 15 June. It was customary for the men to go into the mess hall other than at meal times when accompanied by a cook or other kitchen personnel. There was no cook or other kitchen personnel with accused and his companions when they were found in the mess hall (R. 6-8, 27-28).

b. Specification 2. Bisbee and Technician 5th Grade John L. Unger, who was a second cook, found accused in the company mess hall again with another enlisted man at about 9:30 p.m. or 10:30 p.m. on 26 June 1943. Bisbee and Unger had entered the mess hall or kitchen at the direction of the Charge of Quarters to get some ice water. Accused and his companion had some "hot dogs" or "weiners" and a loaf of bread and had ham "scattered all over the floor". Accused stated that he was going to make a sandwich. Unger told accused to take the bread and "weiners" outside and eat them. Accused said he thought Unger would "turn him in", "threatened" Unger with a meat cleaver, and engaged in fist fights, first with Unger and then with Bisbee. Accused had been drinking "some", was "pretty well" drunk, but knew what he was doing (R. 8-19).

5. The defense offered no testimony. The accused elected to remain silent (R. 28).

6. The evidence shows that on 15 June and 26 June 1943 accused was found late at night with one or more companions, in the mess hall of his company, cooking or preparing food which was the property of the United States. The circumstances indicated that he intended to eat such food. He had no right to be in the mess hall outside of meal hours unless accompanied by a cook or other kitchen personnel and none was with him on either occasion.

The crime of housebreaking, of which accused was charged by Specifications 1 and 2, is the unlawful entry of a building of another with intent to commit some criminal offense therein (MCM 1928, par. 149e). Unlawful entry is an essential element of the crime. There is no testimony in the record as to when or in what manner accused entered the mess hall either on 15 June or 26 June. The fact that accused was found

in the mess hall is proof that he entered it but is not proof that his entry was unlawful. He may have entered lawfully at mealtime and thereafter remained in the building until found. No reasonable inference that his entry was unlawful can be drawn from the time at which he was found in the mess hall because the record is silent as to what were the regular meal hours or when the personnel of the company were permitted to be in the building for mess purposes.

To warrant conviction, circumstantial evidence must not only prove all the elements of the offense but must at the same time exclude every reasonable hypothesis except guilt (Bull. JAG, June 1943, p. 238; CM 233766; CM 238485, Rideau).

7. The maximum limit of punishment for assault with intent to commit manslaughter (Spec. 4) is dishonorable discharge, total forfeitures and confinement at hard labor for 10 years and for assault with intent to do bodily harm with a dangerous weapon (Spec. 5) is dishonorable discharge, total forfeitures and confinement at hard labor for 5 years (MCM 1928, par. 104c).

Confinement in a penitentiary for assault with intent to commit manslaughter and for assault with intent to do bodily harm with a dangerous weapon is authorized under Article of War 42 by Sections 22-501 and 22-502 respectively, of the District of Columbia Code, 1940.

8. The accused is 21 years of age. The Charge Sheet shows that he enlisted on 16 March 1942.

9. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Specifications 1 and 2, legally sufficient to support the findings of guilty of Specifications 4 and 5 and of the Charge, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for fifteen years.

_____, Judge Advocate

Samuel M. Drewes, Judge Advocate

F. J. Lotterhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 25 AUG 1943 - To the Commanding General, 28th Infantry Division, Camp Pickett, Virginia.

1. In the case of Private Harold B. Miller (16068958), Company B, 112th Infantry, I concur in the foregoing holding of the Board of Review. I recommend, for the reasons therein stated, that the findings of guilty of Specifications 1 and 2 of the Charge and so much of the sentence as exceeds dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for fifteen years be disapproved. Thereupon you will have authority to order the execution of the sentence.

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

(CM 237644).

Fred W. Llewellyn,
Brigadier General, U. S. Army,
Acting The Judge Advocate General.

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

(89)

19 AUG 1943

SPJGH
CM 237711

UNITED STATES v. First Lieutenant RICHARD FLEISCHER (O-922723), Headquarters and Headquarters Detachment, Office of Strategic Services, Washington, D.C.	)	MILITARY DISTRICT OF WASHINGTON Trial by G.C.M., convened at Fort Myer, Virginia, 22 June 1943. Dismissal and total forfeitures.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that First Lieutenant Richard Fleischer, 0922723, Army of the United States, did at Washington, D. C., on or about May 24, 1943, wrongfully, unlawfully, to the prejudice of good order and military discipline, and to the discredit of the military service, have abnormal, unnatural and obscene relations against the order of nature, with one Thomas Shoemaker, a human being, a boy seventeen years of age, by placing his penis between the legs of the aforesaid Thomas Shoemaker in an homosexual embrace.

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

3. The evidence for the prosecution shows that about 9:15 p.m. on 24 May 1943, Thomas Shoemaker, a civilian 17 years of age, was sitting on a bench in Lafayette Square, Washington, D. C., when accused, whom he had seen a few times before, sat down and started talking to him. After a while accused invited Shoemaker to his apartment for a drink, and the latter accepted. At the apartment Shoemaker had a Coca Cola and accused had some kind of soft drink. Accused showed Shoemaker his collection of guns, and then sat on the arm of Shoemaker's chair and proceeded to "feel" Shoemaker. They moved to a couch, accused removed his clothes, and in a few minutes Shoemaker removed his. Accused pulled down a Murphy bed, they moved to the bed, and accused "fooled around with" Shoemaker. Later accused got on top of Shoemaker, who was in his back, placed his penis between Shoemaker's legs, stayed there a few minutes "before he come", got off and discharged into a towel. After a few minutes they got up and Shoemaker dressed and left. As he left the building he was met at the door by a civilian, who took him to a car occupied by two military police sergeants. They asked him where he had been and he replied that he was visiting a friend. They accused him of wrong doing and he denied it. The civilian told Shoemaker that he knew what was going on, and they told him what happened in the room. Shoemaker then answered "yes" to whatever they told him had happened in the room (R. 37, 41-44, 46-50).

After 10:10 p.m. on 24 May, Staff Sergeant Lester Behrend, Sergeant Francis Breen, military policemen, and "Sergeant Blick" of the Metropolitan Police Department took a statement from Thomas Shoemaker after he came out of the hotel where accused lived, and after he had been taken into custody by Sergeant Blick. Sergeant Behrend then called the Provost Marshal, and later, with Second Lieutenant Richard R. Melcher, who was on duty in Washington as a military police officer, Staff Sergeant Kenneth L. McKinney, a military policeman, Sergeant Blick, and two other military policemen, entered the apartment of accused. (Lieutenant Melcher and Sergeant McKinney were defense witnesses on the interlocutory question whether the confession was voluntary.) Five of the men in the party were armed. When they knocked, accused came to the door, went back and put on his pants, turned on the lights, and told them to come in. Lieutenant Melcher required accused to sit in a chair and advised him that he was under arrest by order of the Provost Marshal. Accused submitted to arrest. Sergeant McKinney had opened the flap on his holster and held his right hand on his gun, and the other men did the same. Lieutenant Melcher posted his men facing the chair in which accused was sitting, and they kept him covered. Lieutenant Melcher did not advise accused of the charge against him, and did not have a search warrant. The room was searched. They then escorted accused to the "carry-all", closely guarded, and then to

the military police cell block (R. 7-10, 14-15, 20-22, 118-121, 123, 139, 141-142, 144-146).

At the cell block, accused was searched, and given a receipt (Def. Ex. A) for his tie, belt, watch, ring, "dog" tags, cap, coat, money, wallet, keys and pen. He was placed in a cell two floors below ground level, with no daylight, but containing an electric light. The cell contained a wash basin, a bowl, a metal bed and a mattress, but no pillow, sheets, blanket, toilet paper nor soap. Lieutenant Melcher had orders to lock accused in the cell and communicate with the Provost Marshal, not to let any one from outside see accused without first getting permission from the Provost Marshal, and not to open the cell unless absolutely necessary. The cell was not opened that evening, and Lieutenant Melcher did not know whether it was opened the next day. When accused wanted to notify his commanding officer of his arrest, Lieutenant Melcher did not comply with the request, because he had orders to notify the Provost Marshal of any request made, and that "the Colonel" would notify accused's commanding officer. Accused was not permitted to communicate with anyone, and it was unusual for orders to be issued forbidding communication. It was unusual for an officer to be confined in one of these cells. Accused was kept in this cell for more than three days (R. 124-125, 127-128, 130, 134-138, 185-186).

On the next day, 25 May, Colonel Stuart R. Carswell, investigating officer, went to the cell block for about five minutes to get some keys, and saw accused for a few minutes. On the same day, 25 May, Colonel Carswell and Mr. Andrew W. Sexton, a civilian, assistant security officer at Office of Strategic Services, who had been called in by Colonel Carswell to assist him, went to the apartment of accused in the afternoon, worked there about two and a half hours, and "really took that apartment to pieces". On the afternoon of 26 May, Colonel Carswell, Mr. Sexton and Chief Yeoman Raymond H. Gehring, United States Naval Reserve, a reporter, went to the cell of accused to interview him and they were there two hours or more. Colonel Carswell advised accused of his rights, and that he was not required to make a statement. Chief Gehring at first took down the conversation, but later stopped by direction of Colonel Carswell. At the beginning of the interview accused denied every charge against him. Then Mr. Sexton, by permission of Colonel Carswell, started asking questions and there was a confidential conversation off the record. The reporter did not take down anything further until accused admitted his guilt and made a statement (R. 53, 55, 58-62, 64-65, 67-71, 73, 81, 104-107, 182, 188).

After accused denied knowing what it was "all about", Colonel Carswell told him about a statement made by Shoemaker and that accused

was charged with sodomy. Accused continued to deny his guilt. The reason accused changed his mind from the original denial to an admission of guilt was, according to Colonel Carswell, as follows: part of the Shoemaker statement was read to accused and Mr. Sexton said, "The Colonel has got all the information and the facts and he has got the goods on you" and "for your own convenience and for everybody else's, why don't you just confess, we have got all the evidence". Accused then said, "I will admit it", but did not want to make a statement and wanted to talk it over off the record. On cross-examination of Colonel Carswell, events leading to the decision by accused to admit his guilt were described as follows: Mr. Sexton stated, "The Colonel knows practically all of the facts and he has got the goods on you" and "It will make it easier for you and all concerned if you tell us all you know", Mr. Sexton "pressed that point a little further", and accused "finally" said "Well, yes, I might as well admit it, I am guilty". According to Mr. Sexton, he did not suggest that accused confess and take the easy way out. Accused discussed the details, they questioned him, and Mr. Sexton cleared up something on the "security angle" of the case. After about 25 minutes or a half hour they asked accused, "Well, what about it?" and he said he was ready to make a statement. Accused was anxious to get back in the service and asked Colonel Carswell if "this would interfere with that". Colonel Carswell replied that he could not answer the question as he was detailed to make the investigation. No threats were made. The statement (Ex. 1) was then typed and signed (R. 56, 70, 72, 83-87, 95-96, 108-110, 182-186, 190, 192-193).

During the questioning of accused, he was asked about a Chinaman bringing dope to him, about some rubber nipples found in his room, and very little about having women in his room. Mr. Sexton had in his possession a letter written by a woman employed at the Office of Strategic Services to her husband, which had been found in the possession of accused, who was questioned about it and gave a satisfactory explanation. It was a personal letter, accused requested that it be kept confidential and was concerned about it, no notes were taken by the reporter, it was cleared up from a "security angle", and came up after the confession. The writer of the letter was called to the office of Colonel Carswell on a day when she was absent from work on account of a cold and interviewed about the letter. During the questioning of accused, he was quite upset and asked for an opportunity to commit suicide (R. 61, 66, 76, 79-83, 88-95, 97-98, 187-191).

Dr. Antoine Schneider, a neurologist, called as a defense witness on the question whether the confession was voluntary, examined accused on

18 June 1943, found him emotionally unstable, and was of the opinion that, under certain circumstances set out in hypothetical questions, accused would likely sign a confession regardless of its truth, in order to protect other persons (R. 150-152, 159-160, 164, 169-170, 179-180).

The confession made by accused was in substance as follows: On the evening of 24 May he sat on a park bench a short time with a "chap" named Tom with whom he had chatted on several prior occasions. Accused invited "this party" to his room for a drink. At the apartment accused showed him some of his equipment. Later on they "got into these subject(s)" and accused entered into homosexual relations with him. They took off their clothes and played with each other in bed. Accused got on top of the other person, facing him, and had an emission between his legs. Just before the emission accused got up and held himself and that was why "it was in the towel". They were in bed about 10 minutes. Accused had had three or four homosexual relations with several other men and boys during the preceding two or three weeks. Afterward, the other person dressed and left. Accused read for an hour or an hour and a half and was then arrested (Ex. 1).

4. For the defense it is shown by testimony of Captain Carl O. Hoffman, Mr. Sebastino Ugarte, legal assistant to the Resident Commissioner of the Philippines to the United States, Mr. Juan A. Barretto, secretary-general of the Office of the Philippine Commonwealth in Washington, D. C., Major Richard H. Oliver, Major George H. White and Mr. Oscar Cox, Assistant Solicitor General of the United States, that the reputation of accused for peace, morality and good order was good, and that nothing derogatory to him had been heard prior to recent developments. Accused is related to a former Resident Commissioner of the Philippines. Accused was commissioned at the request of the Office of Strategic Services for a particular job in the Far East. This was a hazardous assignment, for which accused was given training, and but for his arrest accused would have gone on his mission before 30 May. In the work of accused it was necessary for him to talk privately with soldiers, sailors and civilians. No one went on the mission to which accused was assigned, because Captain Hoffman was unable to find another person with similar qualifications. On the occasion of a housewarming for accused, Captain Hoffman gave him some baby bottle nipples as a joke (R. 209-222; Ex. B-3).

The accused made an unsworn statement, substantially as follows:

Accused came to the United States from the Philippine Islands on 27 February 1942 and immediately offered his services. He was thoroughly investigated by "the OSS Security Office, being checked by ONI, MIS, the FBI, and the investigators of OSS". He was approved by Colonel Ellery C. Huntington, Security Officer. He was given special training for extremely hazardous special duty for which he volunteered. He had one chance in 500 to remain alive on this mission. A change of plan eliminated this mission, and he later volunteered for another, upon which he would have departed before the date of trial, except for his arrest. These facts could be substantiated by Captain Carl O. Hoffman or Commander Davis I. Halliwell of the Office of Strategic Services. Accused had a personal score to settle with "the Japs", his family were taken prisoners in the Philippines, he did not know whether they were dead or alive, they had been successful planters, and accused had always enjoyed a reputation and character beyond reproach. Accused was ready to go on his mission, although he knew that his capture by the Japanese would mean instant death for himself and his family (Ex. C).

On the evening of his arrest about nine o'clock, accused passed through the park in front of the White House, saw a young fellow with whom he had talked four or five times before, and sat on a bench and talked with him about half an hour. Accused usually worked out at the "YMCA" gymnasium each afternoon, and walked through this park on his way to dinner. When accused started home, the young man walked with him, and when they arrived at the apartment house, said he would come up for a short drink. At the apartment the young man took only a Coca Cola and accused had a highball. They had a conversation about the two brothers and a sister of the young man, and on account of the interest of the young man in guns, accused showed him some weapons that were in his room. It was then nearly eleven o'clock, accused said he had to go early to the office the next day, and the young man said good night and left. Accused read a few minutes, then undressed, turned the lights off and went to sleep (Ex. C).

In about an hour there was a knock at the door, accused got up, put on his trousers and opened the door. Four military policemen and a civilian, with their hands on their guns, came in and arrested him. They acted as if they were arresting a dangerous murderer. Accused thought he was being arrested because of the equipment he had, and that the civilian was an "F.B.I. man", especially when they searched the apartment. They made accused sit in a chair, and three guards, with half drawn pistols, were posted during the search. Accused was afraid to cross his knees for fear someone would "lose his head" and shoot. He

was taken downstairs to a station wagon with one "M.P." walking sideways in front of him with his gun half drawn and the rest following with their hands on their guns (Ex. C).

Accused was removed to a cell block, under the ground level, his cap, blouse, necktie, pocketbook, contents of his pockets, and belt were taken from him, and he was placed in a solitary cell, the door was locked, and the lights put out. He was not told why he was arrested, why he was treated like a desperate criminal, or when he could get in touch with someone in his organization. He knew there was a very bad mistake, but thought it would be straightened out the next morning when his office explained why he had the equipment. He was afraid the office would not be advised, so he yelled and banged on the bars until a guard came. He asked the guard to call Captain Hoffman, his superior officer, and the guard said he would. The night seemed like a week. Drunk and hysterical prisoners beat the bars and cried all night. Accused had never been in jail before. Early the next morning most of the prisoners were taken out. The lights were put out and accused sat in darkness most of the day. He kept asking for the Officer of the Day, who came about noon, and said he knew nothing about the case. The next Officer of the Day came in hours later and said accused was booked for investigation. Accused was not given a towel, pillow, sheet, blanket, toilet paper, soap or a chance to take a bath all day Tuesday (25 May), although the cell had a wash bowl, iron bunk and uncovered mattress and a toilet bowl. Tuesday seemed like a year. Sometime Tuesday night "a Colonel Carswell" came to see accused, said accused was charged with conduct unbecoming an officer and Colonel Carswell was investigating, and left in about two minutes. Another unbearable 24 hours went by, accused had refused food, and when one meal was brought it was "shoved" under the cell door. Accused could not eat and was "going nuts". He could not understand why he was being treated like a criminal. He had been an athlete all his life, and the confinement without exercise in a dark cell under these conditions almost made him "crack" (Ex. C).

During the third night a table and four chairs were placed outside of the cell and Colonel Carswell, a civilian named Sexton, and a Chief Petty Officer came in. Colonel Carswell said something about warning him that anything he said might be used against him, and accused him of sodomy. Accused denied it as strongly as he could. Colonel Carswell then said accused had been having girls and boys in his room, and that a boy had confessed to homosexual relations with

accused. Accused told him he had had some men and women in his apartment, but nothing of that nature had ever gone on there. Sexton then instructed the Chief Petty Officer that "the following" was off the record, and said accused might as well confess and that they had a lot on accused. Sexton said accused had had abnormal relations with many men and that the hotel people knew it. Accused said the statement was untrue. Sexton then read a confession of Thomas Shoemaker and accused denied the truth of that. Sexton then said that a number of women had been coming to the apartment and the hotel people had kept track of this. Sexton had a letter, taken from the clothes of accused in his apartment, written by the wife of an officer and mother of two boys, and Sexton said he could prove that accused had been intimate with her. Accused said it was not true. Sexton said he had enough to convict accused "for this" and that it would be better for him to admit it. Accused knew that the circumstances "of this" looked bad and would involve "this very fine lady" in a scandal which was not true, and accused was upset. Accused then asked Colonel Carswell to let him out a few minutes and stated that an accident would happen to him and there would be no scandal involving this innocent lady. Colonel Carswell could not do this. Accused was willing to do anything to keep the "ladies" from becoming involved in a scandal, and to get out of that black solitary cell. Sexton said the names were confidential and would not be revealed, that this was all off the record, and that it would be better for accused to make an admission. Accused could see many of his friends being brought into a "big false" scandal and felt that anything would be better than this. Sexton repeated that the best thing would be to sign an admission. This seemed the easiest way out to keep down a scandal on the friends of accused, based on false and circumstantial knowledge which Sexton had. Sexton prompted the dictation of a confession based on the statement of Thomas Shoemaker. While the statement was being typed Sexton asked about some rubber nipples found on the dresser of accused, which accused explained. Sexton seemed to make a crime out of everything. Accused would not sign the confession as first written, it was then copied over and he would not sign it, and he told Sexton that it would not constitute an easy way out. Accused then changed the statement in ink, and asked Colonel Carswell if by signing it he would ruin himself in the Army, and not be able to perform his mission. Colonel Carswell said not necessarily, and that in time of war the Army was likely to overlook such a charge, and accused thought he would be immediately released. Accused was "all to pieces" and signed the confession. He had not eaten since his arrest and told Colonel Carswell he was not hungry (Ex. C).

Colonel Carswell knew accused was "all to pieces" about being locked up like a mad dog and the threats to involve his friends in a vicious scandal, left word for the guards to come to the cell every 10 minutes, and sent a Chaplain to tell accused not to destroy himself. Sexton said it was against Catholic doctrines for accused to destroy himself. Accused is a Protestant. Accused stayed in the same cell under the same conditions for 11 days, and was in solitary confinement in the Fort Myer Guardhouse "ever since". He told the Officer of the Day that he had signed a confession after being told it was the easiest way to get out and that he did not understand why he was still confined. Accused had been an honorable man all his life and an honorable officer since he was commissioned. This was the first time he had ever been in jail. His record had borne the investigations of all the United States Investigation Departments without a blemish. He signed the statement as the only way to keep an innocent person from being involved in a scandal and as a means to get released from "that black hole". Accused had volunteered to give his life for his country and was ready and willing to do so "today". He was ready to proceed on any mission, knowing the hazards, where his excellent knowledge of the Philippines and special qualifications could help win the war. He relied on his character witnesses, and requested that he be allowed to resume his proper position in the Army (Ex. C).

5. Accused was kept in solitary confinement, denied common conveniences, denied the right to communicate with his commanding officer, and kept in ignorance of the charge against him, from the night of 24 May to the afternoon of 26 May. He was then questioned for more than two hours. He continued to deny his guilt until Mr. Sexton, acting as the assistant of Colonel Carswell, the investigating officer, and in the presence and by permission of Colonel Carswell, said that Colonel Carswell had "the goods" on him, and "for your own convenience and for everybody else's, why don't you just confess" or "It will make it easier for you and all concerned if you tell us all you know". Mr. Sexton then pressed the point further, and accused "finally" said, "I might as well admit it, I am guilty". Accused was still unwilling to make a statement, but was willing to talk it over, off the record. Then accused was questioned for about a half hour, and a letter found in the possession of accused, written by a woman to her husband, which accused was anxious to keep confidential and about which he was concerned, was discussed. There was testimony that this letter came up after the confession, but during the questioning after accused admitted his guilt Mr. Sexton cleared up something on the "security angle" of the case, and the letter was cleared up from a "security angle". It appears that the meaning of the testimony referred to above is that the letter

came up after accused stated that he "might as well admit it". After this questioning accused signed a detailed confession.

> "An officer to whom a confession was made testified that he warned the accused that anything he said might be used against him, and that he used no threats or promises to secure the confession. Is (sic) was shown, however, that accused had been in solitary confinement for 10 days prior to the date of the confession, during which time a confession was sought and not obtained, and that he was still in solitary confinement by order of the officer to whom the confession was made; that accused had been denied the right to communicate with friends or counsel; that during the interrogation the officer required an answer 'Yes' or 'No,' to a question not satisfactorily answered; that the officer told the accused he was very shrewd; that he felt that accused was not telling the truth and that he was reluctant. The warning in words and then following this with treatment such as shown constitutes a defiance of the spirit of our laws. Confessions thus obtained are not voluntary, and are incompetent. * * *" (Dig. Op. JAG, 1912-40, sec. 395 (10); CM 131194).

> "A sergeant obtained a confession from a private by telling the latter, in substance, that he was under suspicion and it would be best for him to tell the truth and 'come clean' as, otherwise, he would be found out sooner or later and then the penalty would probably be more severe. Held, The confession could not be classed as voluntary and was not admissible in evidence. (Dig. Op. JAG, 1912-40, sec. 395 (10); CM 152444).

Although accused was warned that he was not required to make a statement, the Board of Review is of the opinion that under the circumstances the confession was not shown to be voluntary, and should not have been admitted. Evidence that the accused was warned is not conclusive that a confession is voluntary (MCM, 1928, par. 114a). Taking into consideration all of the circumstances, when Colonel Carswell, acting through Mr. Sexton, urged accused to confess, and advised him that they had "the goods" on him and that it would "make it easier" for accused and all concerned, after accused had steadily denied his guilt and when he was in solitary confinement which had lasted approximately two days and nights under the conditions stated, a confession so obtained was not voluntarily made, even though accused had been properly warned at the beginning of his interrogation.

6. It is clearly and positively shown by the competent and uncontradicted evidence, both direct and circumstantial, that accused went to his apartment on the night of 24 May 1943 with Thomas Shoemaker, and there entered into homosexual relations with Shoemaker, as alleged. The unsworn statement of accused admitted that Shoemaker was present in his apartment on this occasion. The testimony of Shoemaker, which was not contradicted by any testimony, either direct or circumstantial, clearly described the details of what occurred. Shoemaker was very carefully advised of his right not to testify to anything which might incriminate him, but nevertheless testified to the homosexual acts, even though he thereby disclosed his own indecent and wrongful conduct. There is in the record no hint of any reason why Shoemaker would have so testified except because it was the truth.

> "It is not necessarily to be implied that the substantial rights of the accused have been injuriously affected by the admission of incompetent testimony; nor is the absence of such prejudice to be implied from the fact that even after the illegal testimony had been excluded enough legal evidence remains to support a conviction. The reviewer must, in justice to the accused, reach the conclusion that the legal evidence of itself substantially compelled a conviction. Then indeed, and not until then, can he say that the substantial rights of the accused were not prejudiced by testimony which under the law should have been excluded. C.M. 127490 (1919).
>
> "The rule is that the reception in any substantial quantity of illegal evidence must be held to vitiate a finding of guilty on the charge to which such evidence relates unless the legal evidence of record is of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty. If such evidence is eliminated from the record and that which remains is not of sufficient probative force as virtually to compel a finding of guilty, the finding should be disapproved. C.M. 130415 (1919)." (Dig. Op. JAG, 1912-30, sec. 1284).

The Board of Review is of the opinion that the evidence other than the confession is of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty, and that the substantial rights of accused were not injuriously affected by the erroneous admission of his confession.

7. A conviction may be based on the uncorroborated testimony of an accomplice, but such testimony is of doubtful integrity and is to be considered with great caution (MCM, 1928, par. 124a).

"Under the practice in military courts it is not necessary that the testimony of an accomplice or co-conspirator be corroborated. C.M. 149318 (1922).

"In court-martial practice the testimony of an accomplice, though uncorroborated, may be legally sufficient of itself to warrant conviction. C. M. 158027 (1923), 192609 (1930)." (Dig. Op. JAG, 1912-40, sec. 395 (57)).

The accomplice, Thomas Shoemaker, was nearly 18 years of age and there was no showing made that his testimony was not worthy of belief. It was substantially the same as the unsworn statement of accused, except that the unsworn statement made no reference, either affirmative or negative, to the alleged homosexual acts. The Board of Review is of the opinion that this testimony, considered with great caution, and along with the unsworn statement of accused, leads only to the conclusion that accused was guilty of the offense as alleged.

8. Consideration has been given to letter of 2 June 1943 by Colonel Carswell, investigating officer, presenting mitigating circumstances for consideration with the report of investigation.

9. The accused is 34 years of age. The records of the Office of The Adjutant General show his service as follows: Appointed temporary first lieutenant, Army of the United States, and active duty, 8 February 1943.

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

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

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JUDGE ADVOCATE GENERAL
NAVY DEPARTMENT

1st Ind.

War Department, J.A.G.O., 20 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 Richard Fleischer (O-922723), Headquarters and Headquarters Detachment, Office of Strategic Services, Washington, D.C.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. The accused wrongfully had abnormal, unnatural and obscene relations with a male person. I recommend that the sentence be confirmed, that the forfeitures be remitted and that the sentence as thus modified be carried into execution.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action 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 Action.

(Sentence confirmed but forfeitures remitted. G.C.M.O. 245, 18 Sep 1943)

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

SPJGK
CM 237741

11 SEP 1943

UNITED STATES	)	NEW YORK PORT OF EMBARKATION
v.	)	Trial by G.C.M., convened at Camp Shanks, New York, 8 July 1943. Dismissal.
First Lieutenant DONALD R. RALPH (O-1298211), Transportation 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. The accused was tried upon the following Charges and Specifications:

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

Specification: In that First Lieutenant Donald R. Ralph, Station Complement, Camp Shanks, New York, did, without proper leave, absent himself from his organization at Camp Shanks, New York, from on or about June 3, 1943, to on or about June 8, 1943.

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

Specification: In that First Lieutenant Donald R. Ralph, Station Complement, Camp Shanks, New York, having received a lawful order from Major Charles K. Lord, T. C. to report to Colonel Spitz immediately, the said Major Charles K. Lord being in the execution of his office, did, at Camp Shanks, New York, on or about June 2, 1943, fail to obey the same.

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

Specification 1: (Finding of not guilty).

Specification 2: In that First Lieutenant Donald R. Ralph, Station Complement, Camp Shanks, New York, then Second

Lieutenant, Station Complement, Camp Shanks, New York, did, at Sparkhill, New York, on or about May 24, 1943, with intent to defraud, wrongfully and unlawfully make and utter to Edward Arnheiter, a certain check in words and figures as follows, to wit:

"Farmersville, Texas 5/24 1943
THE FIRST NATIONAL BANK
Pay to the
order of Cash $5.00
Five and n0/100 ---------- Dollars
Camp Shanks Lt. D.R. Ralph
Endorsements:
Edward Arnheiter
Irving Trust Company"

and by means thereof, did fraudulently obtain from Edward Arnheiter the sum of Five Dollars ($5.00), he, the said First Lieutenant Donald R. Ralph, then well knowing that he did not have and not intending that he should have sufficient funds in the said The First National Bank, Farmersville, Texas, for the payment of said check.

Note: and three additional specifications, identical in form with Specification 2, the date, person with whom the checks were negotiated, and the amount being as follows:

Specification 3:	26 May 1943	Edward Arnheiter	$4.65
Specification 4:	27 May 1943	Edward Arnheiter	$4.65
Specification 5:	23 May 1943	Hotel Lincoln	$5.50

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

Specifications 1 and 2: Identical in form with Specification 2, Charge III, supra, the date, person with whom the checks were negotiated, and the amount being as follows:

Specification 1:	27 May 1943	Edward Arnheiter	$5.00
Specification 2:	28 May 1943	Edward Arnheiter	$4.65

Accused pleaded not guilty to all Charges, the Additional Charge, and their respective Specifications. He was found guilty of all Charges and Specifications except Specification 1 of Charge III, of which he was found not guilty. 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. The evidence was substantially as follows:

a. Charge I, Specification - Absence without leave. There was introduced into evidence a duly authenticated extract copy of the morning report of accused's organization containing an entry showing absence of accused from 3 June 1943, and a termination thereof on 8 June 1943 (R.17-18; Pros. Ex. No. 3).

b. Charge II, Specification - Failure to obey lawful order. On 2 June 1943 Major Charles K. Lord, Transportation Corps, Camp Shanks, New York, gave accused a written order directing accused upon receipt of the order to report to Lieutenant Colonel Allen G. Spitz, Chief Personnel Service, Camp Shanks, New York (R.14; Pros. Ex. No. 1). Written acknowledgment of the receipt of the order was signed by accused 2 June 1943 (R.15; Pros. Ex. No. 2). Accused did not report to Lieutenant Colonel Spitz as ordered but did report at 6:00 o'clock p.m., 8 June 1943. Lieutenant Colonel Spitz stated that Major Lord had the authority to issue the order to accused (R.15-17).

c. Charge III, five Specifications, and the Additional Charge, two Specifications, allege fraudulent negotiation of personal checks in violation of Article of War 95. Accused was found not guilty of Specification 1 of Charge III. All checks were drawn on the First National Bank, Farmersville, Texas (R.18; Pros. Ex. No. 4). The several checks as described in the Specifications were properly identified and introduced in evidence (R.19,20; Pros. Exs. 4,6,7, 8a,9,10, and 11a).

It was stipulated that if the parties with whom the checks are alleged to have been negotiated were present, sworn and testified, each would state that the checks were presented by the accused and that in each instance the accused received in exchange cash, merchandise or credit on account, and that in each instance the check was returned unpaid, marked "insufficient funds" (R.19,20,21). The aggregate amount of the checks as described in the Specifications of which accused was found guilty is $29.45.

Mr. Oscar Edwin Carlisle, President, First National Bank, Farmersville, Texas, the drawee bank, testified through a deposition that he had known the accused about 15 years, that the accused had maintained a checking account in his bank since 1 December 1942, that at the close of the books of the bank on 22 May 1943, accused had a credit balance of $23.85. That when the checks referred to in the Specifications were presented for payment on 2 June 1943, the credit balance of accused had been reduced to $3.29, for which reason and because no credit arrangement had been made between the bank and accused, the checks were unpaid and returned marked "insufficient funds" (Pros. Ex. 4).

The accused did not testify or make an unsworn statement, and no evidence was introduced by the defense.

4. a. Charge I, Specification - Absence without leave, in violation of Article of War 61. The documentary evidence as embodied in duly authenticated extract copy of the morning report of accused's organization supports the finding of guilty of accused of absence without leave as alleged.

b. Charge II, Specification - Failure to obey the lawful order of his superior officer as alleged, in violation of Article of War 96, is established by the undisputed testimony of Major Lord who gave the order for accused to report on 2 June 1943 to Lieutenant Colonel Spitz, by accused's written acknowledgment of the receipt of the order, by the testimony of Lieutenant Colonel Spitz that Major Lord was authorized to issue the order, and that accused did not in fact report to Lieutenant Colonel Spitz until about 6 o'clock p.m., 8 June 1943.

c. As to Charge III, Specifications 2 to 5 inclusive, and the Additional Charge and Specifications thereunder, the evidence as implemented by the stipulation clearly shows that the checks as described in the several Specifications were negotiated by the accused, that accused received in exchange for the checks cash, merchandise or credit, and that each of said checks was dishonored and returned by the drawee bank marked "insufficient funds". The evidence shows that accused had maintained a checking account with the drawee bank since 1 December 1942, that accused had known the president of the bank for 15 years, and that when the checks in the total amount of $29.45 were presented to the bank for payment accused's credit balance had been reduced to $3.29.

The accused has been found guilty of uttering the checks with the intent to defraud, well knowing that he did not have and not intending that he should have funds in the bank for the payment of the checks. Broadly speaking, the only evidence which tends to show a fraudulent intent is that accused with a credit balance of approximately $47 and without having made any credit arrangement with the bank, by the negotiation of the worthless checks overdrew his account in the amount of $26.16.

The accused did not testify and no evidence was offered by the defense to offset such legal inferences as may properly be drawn from these facts. However, at the threshold of the trial the defense counsel in connection with a proposed stipulation, made this statement:

> "* * * With reference to the charges and specifications under the 95th Article of War I am authorized to say that the accused did draw and issue the checks described in the specifications, that he received value for them and that the payees

would testify if present, that the checks were returned marked 'insufficient funds.' He had no intent at any time to defraud anyone and in fact he has not done so. He has been, as many are, exceedingly careless in the handling of his bank account. I am making this offer with a view to expediting this trial as much as possible." (R.13).

The checks, separately and collectively, were for a relatively small amount. All of them were issued between 23 and 28 May 1943. The accused was tried on 8 July 1943. The foregoing statement made in behalf of accused indicates that the checks had been paid before the trial. That the checks were paid is shown by reference to the allied papers accompanying the record of trial. Restitution is, of course, no defense, but these circumstances, the relatively small amount of the checks, the fact that accused in good faith maintained an account at the bank on which the checks were drawn, and the fact that accused had known the president of this bank for more than 15 years, convince the Board of Review that there is no sound legal basis in law or in fact to support the finding of fraudulent intent. The evidence shows beyond a reasonable doubt the wrongful failure of accused to maintain a sufficient bank balance to meet the checks described in the Specifications of Charge III and the Additional Charge, an offense in violation of Article of War 96 (CM 228480, Smith).

5. The accused is 30 years and 8 months of age. The records in the Office of The Adjutant General show that accused was graduated from Farmersville (Texas) High School in 1928 and from Texas A & M College (Bachelor of Science) in 1932. He was appointed a second lieutenant, Infantry Reserve, 28 May 1932, reappointed 28 May 1937, and was discharged 30 June 1937 for failure to answer official communications. He was County Agricultural Agent, Texas, 1933-1938, School Superintendent 1938-1941. He was inducted into the military service 14 March 1942, commissioned temporary second lieutenant, Infantry, Army of the United States, upon graduation from Infantry School, Fort Benning, Georgia, 21 October 1942, promoted to temporary first lieutenant, Army of the United States, 28 May 1943. In recommending accused for appointment to Officer Candidate School, his commanding officer stated:

"1. * * * This man is a sincere, hard-working soldier; he handles his men easily and is a good instructor.
2. Applicant's qualities of leadership are outstanding.
3. Character of applicant is Excellent. * * *"

Colonel K. G. Eastham, Transportation Corps, in recommending accused for promotion to grade of first lieutenant, stated in part:

"By my knowledge of the circumstances, Lt. Ralph, by actual outstanding performance of duty for a period of at least six months, has demonstrated his fitness for promotion to the next higher grade and his capacity for its responsibilities."

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 the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of Charges I and II and their Specifications, legally sufficient to support only so much of the findings of guilty of Specifications 2,3, 4 and 5 of Charge III and the Specifications of the Additional Charge as involves findings that accused wrongfully failed to maintain a sufficient bank balance to meet the checks therein described 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 61 or 96.

Judge Advocate.

Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 14 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 Donald R. Ralph (O-1298211), Transportation 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 Charges I and II and their Specifications, legally sufficient to support only so much of the findings of guilty of Specifications 2,3,4 and 5 of Charge III and the Specifications of the Additional Charge as involves findings that accused wrongfully failed to maintain a sufficient bank balance to meet the checks therein described, in violation of Article of War 96, and legally sufficient to support the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the execution thereof be suspended during the pleasure of the President.

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

Myron C. Cramer.

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 Ex. action.

(Findings disapproved in part in accordance with recommendation of The Judge Advocate General. Sentence confirmed but execution suspended. G.C.M.O. 311, 15 Oct 1943)

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

SPJGH
CM 237782

24 AUG 1943

N.D

UNITED STATES v. Private ROY A. PRENTISS (31043021), Station Complement, Camp Hood, Texas.	EIGHTH SERVICE COMMAND Trial by G.C.M., convened at Camp Hood, Texas, 8 July 1943. To hang by the neck until dead.

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 by the Board of Review, and the Board submits this, its opinion, to The Judge Advocate General.

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Roy A. Prentiss, Station Complement, Camp Hood, Texas, then a member of Company C, 643rd Tank Destroyer Battalion, did, at Camp Hood, Texas, on or about April 5, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully and with premeditation, kill one Technician Fifth Grade Lloyd W. Knapp, a human being, by shooting him with a pistol.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence of one previous conviction by a summary court-martial of being absent without leave for one day, drunk and disorderly, and insubordinate was introduced. He was sentenced to hang by the neck until dead. The reviewing authority approved the sentence and forwarded the record of trial for action under "Article of War 50½". The record is here considered as forwarded for action under Article of War 48.

3. The evidence for the prosecution shows that on 5 April 1943 the 643rd Tank Destroyer Battalion was in bivouac at Table Rock Camp on the military reservation of Camp Hood, Texas. Technicians 5th Grade William E. Kitto and Lloyd Knapp and the accused, members of the organization, had known each other for about a year and four months and Knapp and accused were on very friendly terms. At about 9:00 p.m. Kitto was ordered to take

a jeep and report at the guard tent to Knapp, who was acting as Provost Sergeant. When Kitto drove up to the guard tent accused and Knapp were talking in a friendly manner and the latter said "I am taking Lucky (nickname of accused) to camp". Accused got into the back seat of the jeep and Knapp sat in the front seat beside Kitto who was driving. Knapp was armed with a .45 calibre automatic army pistol which he carried in a holster on his right hip. They started out toward camp, and accused and Knapp talked and were "kidding" about riding motorcycles. When they had traveled about a mile and a half accused leaned over, grabbed Knapp's pistol from the holster, sat back on the left hand corner of the rear seat and pointed the pistol at Knapp, who turned around, held out his arm and said "Come on Lucky we are friends". Accused fired the pistol and Knapp grabbed himself, groaned and fell out of the jeep. Accused then pointed the pistol at Kitto, swore at him and told him to "go on or I will shoot you too". Kitto refused to drive on, remarked that Knapp was badly hurt and would have to be taken to the "Medics". At Kitto's request accused helped lift Knapp, who was unconscious, into the jeep. Kitto turned the vehicle around and drove back to the Battalion area. Accused pointed out a road to the "Medics" and Kitto turned in on it but shortly thereafter accused, who had retained possession of the pistol, said "I have made a mess of my life haven't I" and Kitto heard a shot. When he looked around accused was lying with his head on the tool box bleeding from the head. Kitto drove on to the Medical Corps tent where Knapp and accused were both placed in an ambulance and taken to Camp Hood (R. 15-20, 23-24).

Knapp was dead when the ambulance reached the station hospital at about 10:00 p.m. An autopsy made the next day disclosed that the bullet had gone through the bicep muscle of his left arm, entered the body on the left side below the fifth rib, and lodged just under the skin on the right side exterior to the seventh rib. The bullet had penetrated and left a hole in the aorta and death resulted from internal hemorrhage within a few minutes after the wound was inflicted. Accused, when taken from the ambulance, was suffering from a penetrating head wound and a wound of exit. He was transferred to McCloskey General Hospital for surgical treatment. A specimen of blood was taken from accused for an alcohol test but the specimen was not properly preserved and the test was not completed (R. 6-13, Exs. B and C).

Kitto had seen accused when the latter was drinking on several occasions prior to 5 April 1943 and on such occasions accused did a lot of loud talking. He was talking loudly when he came out of the guard tent with Knapp and in the opinion of Kitto, was drunk then (R. 21-22).

4. For the defense the evidence was substantially as follows:

a. After explaining that a number of witnesses, whose sworn written statements had been taken in connection with a line of duty report on accused, had been "removed from this station" and the material evidence which they could give, if present, was not available to the court, defense

counsel offered the statements in evidence. Over objection of the prosecution they were received in evidence and a number of them were read to the court (Def. Ex. B pages 1-8). The statements read to the court, made by the commanding officer, one first lieutenant, two second lieutenants and four sergeants of the company of accused, show that accused and Knapp had both been motorcycle riders and through their common interest, had become very close friends. Accused was a good worker but went on a drinking spree every two or three months and when under the influence of liquor was mean, a bully and very hard "to handle". On Saturday, 3 April 1943, when informed that because of conditions in the company he could not have a three day pass which he had requested, accused remarked to the company motor sergeant that "he was going anyway". Accused was not present for roll call Sunday morning or at any other time that day but was back in the company for reveille on Monday, 5 April, at which time he had a bad "hang over". He was directed to remain within the company area but disappeared about noon and was gone for two or three hours. At about 8:00 p.m. he was observed in the Post Exchange, bare footed and drinking beer with another soldier. He was brought before the Company Commander who ordered the Sergeant of the guard to lock him up for two days. As accused was leaving the room he dropped a cigarette on the floor and when the officer of the day ordered him to pick it up, refused to do so, picked up a chair, and holding it up in a threatening manner backed into a corner of the room. He was persuaded to put down the chair and leave quietly with the guard. It was then about 8:30 p.m. Several of the signers of the statements under consideration asserted that accused was drunk or under the influence of liquor at that time. According to a certificate of the hospital registrar (Def. Ex. B page 9) the records of McCloskey General Hospital show that when accused was admitted, suffering from a gun shot wound in the head at 12:05 a.m. on 6 April 1943, he was drunk (R. 34-38).

b. On the morning of 7 April Captain William T. Haverfield, Medical Corps, a "Neuro-Surgeon" at McCloskey Hospital gave accused surgical treatment for his head injury. Accused had lost from 1 to 2 ounces of brain tissue as well as considerable blood and was suffering from shock. The wound appeared to have been caused by a bullet. Captain Haverfield removed the fragments of bone and the pulpified portions of the brain and closed the wound with sutures. Accused was unconscious for ten days, could not talk for a month and was unable to move his left leg and arm for about six weeks. After a second operation involving the insertion of a plate to remedy a defect in the skull, accused had an uneventful recovery. Captain Haverfield examined accused from a neuropsychiatric point of view, found that accused had no recollection of what occurred on 5 April 1943, and expressed the opinion that his memory probably would never be restored as to the events of that day. Captain Haverfield also testified that the continual or habitual use of alcohol would cause deterioration of the brain and affect the will power and ability to make decisions; and that the brain injury which accused had suffered could lessen his moral and social senses and his ability to determine right from wrong. On cross-examination, however, Captain Haverfield stated that in his opinion accused was,

at the time of the trial, sane and responsible for his actions, and admitted that it was very unusual for a young man of the age of accused to suffer deterioration of the brain from habitual use of alcohol (R. 27-32).

Lieutenant Colonel Guy G. Randall, Chief of the Neuro-Psychiatric Department, McCloskey Hospital, and two other Medical Corps officers examined accused while he was convalescing in the hospital and the report of their examination, dated 28 June 1943 (Ex. D) was to the effect that accused was mentally deficient, and a moron of the mental age of nine years and nine months; that he had chronic alcoholism; that he was not insane; and that he was considered responsible for his actions at the time of the report, and prior to the time he received his skull injury.

Colonel Randall who testified concerning the report, on cross-examination stated that the finding as to chronic alcoholism was not based upon any medical, pathological or mental symptoms but rested entirely upon what accused told the medical corps officers conducting the examination and "hearsay statements in the record". Colonel Randall further testified that the head injury had not changed the mental condition of accused in any way; that in his opinion accused, at the time of the examination, knew the difference between right and wrong; and that it was not common for a man the age of accused to become a pathological alcoholic (R. 39-44).

c. Accused testified that he had known Lloyd W. Knapp for a year and four months, had seen him frequently, they had ridden a motor bike together and were friendly. He did not remember being with Knapp on 5 April 1943 or any other incidents with reference to the shooting of Knapp or of himself. Accused recalled that he had received a money order from his mother, that he had gone to Waco where he drank rum and beer with another soldier, and that he had returned to camp with a quart of "Seagrams". He remembered that the next morning after his return he drank whiskey in his tent at Table Rock Camp and got drunk, but "after I got drunk I don't remember". He last saw Knapp two days before "it happened" but had not seen him since. Accused was twenty-two years old and had started drinking intoxicating liquor when he was sixteen. He drank every time he had a chance, which was often, and on every occasion drank until he got drunk (R. 47-50).

5. The evidence shows that as Acting Provost Sergeant Knapp was taking accused from the guard tent in the bivouac area of their battalion to Camp Hood in a jeep driven by Technician 5th Grade Kitto, accused, who was in the rear seat, reached over to the front seat where Knapp was riding, lifted Knapp's pistol from the holster hanging on his right hip, and shot and killed Knapp.

While accused and Knapp were close friends and malice aforethought is an essential element of murder, malice does not necessarily mean hatred or personal ill-will toward the person killed. The use of the word "aforethought" does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. Malice aforethought may mean an intention to cause the death of or grievous bodily harm to any person, or knowledge that the act which causes death will probably cause the death of or grievous bodily harm to any person, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not (par. 148, MCM 1928; CM 234838, Blizzard).

It was the contention of the defense that, at the time of the shooting, accused was so drunk as to be incapable of entertaining the necessary intent but the facts, as disclosed by the evidence, do not bear out that contention. Accused, who had been drinking heavily, was, in the opinion of Kitto, drunk when Knapp took him from the guard tent and the records of the hospital where accused was admitted show that he was drunk about three hours after the shooting. However, the actions of accused clearly indicate that he knew what he was doing at the time of the commission of the homicide. At the guard tent he conversed with Knapp in a friendly manner and as the jeep proceeded toward camp he and Knapp were "kidding" about riding motorcycles. After shooting Knapp, he turned the pistol on Kitto and threatened to shoot him if he did not drive on. Kitto succeeded in persuading accused that Knapp was badly hurt and should be taken where he could get medical attention. Accused upon the request of Kitto helped lift Knapp back into the jeep and, as they drove back to the battalion area, directed Kitto as to which road to take to reach the medical tent. By his remark that he had made a mess of his life and his attempt at suicide by shooting himself in the head, accused showed that he had a consciousness of guilt and a proper appreciation of the seriousness of the crime which he had just committed.

In the opinion of the Board of Review, it appears from the evidence beyond any reasonable doubt that accused shot and killed Knapp willfully, unlawfully, with malice aforethought and with premeditation and that, at the time of the killing, the character or degree of the intoxication of accused was not such as to excuse him from the consequences of his acts or to render him incapable of entertaining the requisite intent.

6. The Board of Review has given consideration to a letter requesting clemency for the accused, directed to the President, dated 10 July 1943, written by Miss Belle Arney and attached to the record of trial. Mr. Hodleigh H. Howd, a counsellor at law of Winsted, Connecticut, made an oral argument for the accused before the Board and Representative Joseph E. Talbot of Connecticut also appeared before the Board in behalf of accused.

7. The Charge Sheet shows that the accused is 25 years of age and that he was inducted 25 March 1941.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. The death penalty is authorized upon conviction of murder in violation of the 92nd Article of War.

Arthur S. Fixel, Judge Advocate

Samuel M. Driver, Judge Advocate

F. J. Lotterhos, Judge Advocate

1st Ind.

War Department, J.A.G.O., 1 - 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 Private Roy A. Prentiss (31043021), Station Complement, Camp Hood, Texas.

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. As accused was being transported in a jeep from the guard tent in the bivouac area of his battalion to Camp Hood in charge of Acting Provost Sergeant Knapp, he lifted Knapp's pistol from its holster and shot and killed Knapp. A short time after shooting Knapp accused shot himself through the head with the same pistol. Accused was drunk but not to such an extent as to render him incapable of entertaining the requisite intent. The report of three Medical Corps officers, all Neuro-Psychiatric specialists who examined accused, shows that although accused was sane and responsible for his actions both prior and subsequent to the time he received his self-inflicted brain injury, he is a moron of the mental age of 9 years and 9 months. In view of all of the circumstances I recommend that the sentence be confirmed but commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of the natural life of the accused, and, that the sentence as thus commuted be carried into execution.

3. The United States Penitentiary, 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 carrying into execution the recommendation made above.

Myron C. Cramer

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

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

(Sentence confirmed but commuted to dishonorable discharge, total forfeitures, and confinement for life. G.C.M.O. 225, 10 Sep 1943)

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

SPJGN
CM 237846

18 AUG 1943

UNITED STATES v. Second Lieutenant ERNEST W. COLLINS (O-562746), Air Corps, 316th Service Squadron, 99th Service Group.	TRINIDAD SECTOR AND BASE COMMAND Trial by G.C.M., convened at Waller Field, Fort Read, Trinidad, B.W.I., 28 and 31 May 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 94th Article of War.

Specification 1: In that Second Lieutenant Ernest W. Collins, Air Corps, 316th Service Squadron, 99th Service Group, did, at San Fernando, Trinidad, B.W.I., on or about February 6, 1943, knowingly and willfully apply to his own use and benefit, one one-quarter ton four by four truck of the value of about $752.50, property of the United States, furnished and intended for the military service thereof.

Specification 2: In that Second Lieutenant Ernest W. Collins, Air Corps, 316th Service Squadron, 99th Service Group, did, at San Fernando, Trinidad, B.W.I., on or about February 7, 1943, knowingly and willfully apply to his own use and benefit, one one-quarter ton four by four truck of the value of about $752.50, property of the United States, furnished and intended for the military service thereof.

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

Specification 1: In that Second Lieutenant Ernest W. Collins,

Air Corps, 316th Service Squadron, 99th Service Group, did, in the uniform of an officer of the Army of the United States, at San Fernando, Trinidad, B.W.I., on or about February 6, 1943, publicly associate with Panchita Figero, a common prostitute, known or constructively known by him to be such, to the discredit of the military service.

Specification 2: In that Second Lieutenant Ernest W. Collins, Air Corps, 316th Service Squadron, 99th Service Group, did, in the uniform of an officer of the Army of the United States, at San Fernando, Trinidad, B.W.I., on or about February 7, 1943, publicly associate with Panchita Figero, a common prostitute, known or constructively known by him to be such, to the discredit of the military service.

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 only so much of the findings of guilty of Specifications 1 and 2, Charge I, as finds the truck in each Specification to be of some value more than fifty dollars, approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution shows that the accused was the assistant provost marshal at the Edinburgh Air Base, Trinidad, B.W.I. His duties required his presence from time to time in the nearby town of San Fernando, whither soldiers stationed at the air base frequently adjourned for procreational recreation, facilities for which abounded. The numerous houses of prostitution were constantly checked by the military police, to quell incipient disorders and to insure that adequate means were provided in each establishment for cleanliness and sanitation, to promote which latter a prophylactic station was also maintained under military supervision at a convenient location in the town (R. 34-35, 37, 39, 44, 52, 54).

Among these places, the Union Hotel was notorious as a rendevouz for soldiers and prostitutes. Here, in addition to a bar, were approximately six bedrooms, for rent to men, who were free, having engaged one, to take women there for such purposes as they saw fit. These rooms were in demand, and each was frequently rented, in a single night, to various successive customers. Pans of water, soap and towels were provided by the management, and an effort was made by the military authorities to see that soldier patrons were equipped with condrums, against contraction of venereal disease. The Union Hotel was included in the routine M.P. inspection of houses of prostitution, and was, in fact, visited more frequently than any of the others, because of its persistent violation of the regulation against selling rum after nine o'clock. Moreover its patrons were almost exclusively soldiers - few male civilians ever came there -, and the management had arranged with military police to clear the place of soldiers each night at closing time - so that it could be closed (R. 12, 13, 16, 19, 24, 34-36, 39-40, 42, 44-50).

Several women made a practice of spending so much of their time in the Union Hotel as to become definitely identified with the place. They were usually in the bar, where they were available as drinking companions and/or bed-fellows for patrons, under the arrangements outlined above. Among these habituees was Panchita Figero, a short, stocky native girl - but lighter in color than some of the natives - who, according to the proprietor, visited his place very often, associating with "boyfriends" in general. He characterized her as an irresponsible girl, one of those "girls that really don't care to be too much responsible for themselves. Girls that would go out entertaining friends and having a time regardless of whatever reflection it may be." He would not call her a prostitute, since he was an English subject, and, under the English law, such a characterization might involve him in a serious action, in the absence of proof that she had committed prostitution in his presence. However, Sergeant James A. Burgess, who had been on military duty in San Fernando for five months, testified that he had seen Panchita go into rooms at the Union Hotel with soldiers at least twice; that he had seen her there daily on his routine inspection trips; that she seemed to stay there at all times; that she had told him she did not charge soldiers for sexual intercourse but took whatever they wished to give; that the Union Hotel was generally known to be a house of prostitution; and that he had been accosted and "propositioned" by the girls there (R. 12-13, 15, 20, 21-23, 35, 37, 42-51).

On 6 February 1943, a quarter ton, four by four U.S. Army jeep with driver, was assigned by the Edinburgh Field Motor Pool to the 10th Bombardment Squadron, for general use. About seven o'clock on the evening of 6 February 1943, Corporal Nelson G. Kiesling, assigned as driver along with the jeep, drove Captain Wilson Sparhawk of the 10th Bombardment Squadron and the accused, both wearing their uniforms, in this particular vehicle, from Edinburgh Field to San Fernando. After various stops, at about 10:15 they reached the Union Hotel, which the officers entered, leaving the driver in the parked jeep. The accused, by pre-arrangement, met Panchita at the bar, where they engaged in conversation, while Captain Sparhawk treated Sylvia, another native girl, to drinks. There were two enlisted men at the bar, and a number sitting in the next room, drinking (R. 8-9, 20, 24-25, 27, 28, 54, 59, Ex. 1).

Muriel, a third native woman, joined the two officers and their companions; and the five of them left the bar, passing through the adjoining room to the accompaniment of remarks and laughter from the soldiers sitting there; then, down the stairs and into the jeep. Panchita sat in the back seat between the accused and Muriel, Sylvia in front between the corporal and the captain. They drove three or four miles out of town before they stopped the car, the accused and Panchita remaining on the back seat while the other four alighted and vanished in the darkness. Panchita had seen the accused many times before this night - and cared for him. There in the car after they had discussed a house in Spring Vale, where he was

"to stay with me, pay my rent and support me", she testified, " * * * he gave me ten dollars to get the place, to get the house." Incidentally, she later rented and occupied it. When the others returned, the accused was standing beside the car urinating, while Panchita was fixing her clothes. Having dropped the three girls in town shortly before midnight, the two officers and their enlisted driver visited the prophylactic station, where, in Corporal Kiesling's presence, the accused took a prophylactic (R. 9-10, 12, 13-15, 20-23, 25-27, 66-68).

The following night - 7 February 1943-a quarter ton four by four Willys U.S. Army jeep was assigned by the motor pool to the accused, who, as assistant provost marshal, was authorized to request transportation and drive government vehicles assigned to him. With Sergeant Herman F. Knollenberg, Commander of the Guard, Edinburgh Air Base, he drove to San Fernando in uniform, arriving at about seven o'clock. There, after patrolling the streets for a while, making routine inspections, they finally, at about ten twenty, parked at the Union Hotel, a usual stop. Twenty minutes later, Panchita and Muriel were seen leaving the hotel, followed by the accused and Sergeant Knollenberg. All four got into the jeep. When they stopped outside the city, the sergeant and Muriel got out of the back seat and "walked up the road a little ways". Shortly thereafter, the party reassembled, and the accused drove the jeep back to town (R. 17-19, 21-22, 29-38, 40, 42-43, 59-64, Ex. 2).

Each vehicle involved cost the Government $752.50 new, and had been driven about 30 days. This cost figure appears at the top of the service record of each vehicle (R. 57-58, 61).

4. The evidence for the defense consists of the testimony of Major McKeever, Commanding Officer of the 10th Bombing Squadron, that on 6 February 1943, his organization had one jeep "assigned to the orderly room". According to established custom, the trip ticket assigned this vehicle to Major McKeever, and he made the squadron adjutant responsible for dispatching it to officers of his squadron, who were allowed to use it to leave the post in the evenings, if they were going out for authorized recreation, or on official business, or "anything like that". Captain Sparhawk was a member of Major McKeever's organization, the accused was not. Officers of the 10th Bombing Squadron, to whom this jeep was assigned, were "checked" as to what other officers, if any, they wanted to take with them, but the vehicle was not assigned to these other officers. They were just taken as passengers. Every morning, the squadron officer to whom it had been last assigned, returned the jeep to the motor pool for its regular morning checkup (R. 63-65).

5. The accused, after being duly advised as to his rights as a witness, elected to remain silent.

6. Specification 1, Charge I, alleges that the accused on 6 February

1943 knowingly and willfully applied to his own use a quarter ton four by four army truck, the property of the United States. The evidence clearly indicates that the vehicle in which the accused rode on 6 February 1943, was assigned exclusively for the primary use of officers of the 10th Bombing Squadron. Officers of that organization only were eligible to obtain the use of it; and those who exercised this privilege were responsible for its care, custody, and return to the motor pool for its daily check up. When an officer of the 10th Bombing Squadron who had thus acquired custody of the vehicle "wanted to take with him" other officers, the vehicle was not assigned to them; they were just taken as passengers. Under the circumstances disclosed by the record, the accused was Captain Sparhawk's passenger, the driver subject to Captain Sparhawk's orders only; and such wrongful application as was made of this particular vehicle on 6 February 1943, was not attributable, as an offense, to the accused.

7. Specification 2, Charge I, alleges misapplication to the accused's own use on 7 February 1943 of a government vehicle described therein, military property of the United States of the value of $752.50. Every element of the offense is clearly shown. The vehicle was procured and driven by the accused by virtue of his status as Assistant Provost Marshal, Edinburgh Air Base. After properly employing it in performance of official duties, he knowingly and willfully diverted it to his own use. While the cost to government of the new vehicle was the only substantial proof of value, and while a month's use and concomitant depreciation were shown,

> "The standard of value of Government articles of a distinctive character, made especially for use in the military service * * * is the replacement cost * * *. CM 194353 (1931)." (par. 452 (14), Dig. Op. JAG, 1912-1940).

Moreover, according to generally applicable standards, the difference between the value of the vehicle new and its value on the date of the offense would not, under the evidence, be great enough to constitute the variance material, in a case of misapplication (CM 145331); ibid., Dig. Op. JAG, 1912-1940). The evidence amply supports the finding of value in excess of $50.00.

8. Specifications 1 and 2, Charge II, allege public association with Panchita Figero, a common prostitute, known by the accused to be such, on 6 and 7 February 1943, respectively. The offense described is closely akin to one mentioned in the Manual among other instances of violation of Article of War 95, viz. "public association with notorious prostitutes". In fact, Sergeant Burgess' testimony tends to establish Panchita's notoriety, as well as her promiscuity, which latter characteristic is perhaps more nearly involved in the connotation of the epithet, "common". This evidence - that the girl was an habituee of a notorious brothel, seen there daily drinking

with soldiers and, on more than one occasion, accompanying them to their rooms, according to the custom of the establishment - would support a finding that she was well-recognized and generally known as a prostitute, and hence, in this sense, a notorious one. The proprietor's reluctance to so characterize her was based on grounds that might well be regarded as impliedly corroborating, rather than refuting, Burgess' conclusions. Moreover, Panchita's and her associates' conduct, to which Corporal Kiesling and Sergeant Knollenberg testified, was such as to create a public recognition of her status; and the laughter and remarks of the soldiers sitting and drinking in the Union Hotel as the accused was escorting her past them, were highly significant. The evidence presents a definite picture of an officer associating on terms of obvious intimacy, in a public - albeit disreputable - place, in the presence of various enlisted men, with a woman known by them and him to be a common prostitute, according to the generally accepted use of the term. His routine duties as provost marshal render it inconceivable that he should have been ignorant of Panchita's reputation; and his prompt prophylactic treatment after his trip to the country with her, confirms this inference of his realization of her status. The nature of military police duty in San Fernando may have corroded the accused's awareness of the standards of public behavior which the Army requires of its officers under all circumstances, following the classic pattern of degeneration immortalized by Pope in the following couplets:

> "Vice is a monster of so frightful mien,
> As, to be hated, needs but to be seen;
> Yet seen too oft, familiar with her face,
> We first endure, then pity, then embrace."

Regardless, however, of the apparently demoralizing influence of tropical laxity, and duties involving continuous (and, in a sense, complacent) official contact with its rawer phases, the pleadings and the evidence so unquestionably describe conduct unbecoming an officer and a gentleman within the meaning of Article of War 95, as to require affirmance of the conviction.

9. The accused is 35 years of age. War Department records show enlisted service from 8 January 1942 until temporary appointment as second lieutenant, Army of the United States, 16 September 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 not

legally sufficient to support the findings of guilty of Specification 1, Charge I; legally sufficient to support the findings of guilty of the remaining Specifications and both Charges; 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 94 and is mandatory upon conviction of a violation of Article of War 95.

(ON LEAVE), Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 14 OCT 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 Ernest W. Collins (0-562746), Air Corps, 316th Service Squadron, 99th Service Group.

2. I concur in the opinion of the Board of Review that the record of trial is not legally sufficient to support the finding of guilty of wrongfully appropriating a Government truck as alleged in Specification 1, Charge I, legally sufficient to support the other findings, legally sufficient to support the sentence, and to warrant confirmation thereof. I recommend that the finding of guilty of Specification 1, Charge I, be disapproved, and that the sentence of dismissal be confirmed and ordered executed.

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

Myron C. Cramer

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

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

(Finding of guilty of Specification 1, Charge I, disapproved. Sentence confirmed. G.C.M.O. 371, 15 Nov 1943)

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

SPJGQ
CM 237858

13 AUG 1943

UNITED STATES v. Captain WILSON A. SPARHAWK (0-319911), Air Corps.	TRINIDAD SECTOR AND BASE COMMAND PORT-OF-SPAIN, TRINIDAD, B. W. I. Trial by G.C.M., convened at Waller Field, Fort Read, Trinidad, B.W.I., 3 and 7 May 1943. Dismissal

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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 94th Article of War.

Specification 1: In that Captain Wilson A. Sparhawk, Air Corps, 10th Bombardment Squadron, 25th Bombardment Group, did, at San Fernando, Trinidad, B. W. I., on or about February 6, 1943, knowingly and willfully apply to his own use and benefit one one-quarter ton four by four truck of the value of about $752.50, property of the United States, furnished and intended for the military service thereof.

Specification 2: In that Captain Wilson A. Sparhawk, Air Corps, 10th Bombardment Squadron, 25th Bombardment Group, did, at San Fernando, Trinidad, B. W. I., on or about February 8, 1943, knowingly and willfully apply to his own use and benefit one one-half ton four by four carryall truck of the value of about $992.00, property of the United States, furnished and intended for the military service thereof.

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

Specification 1: In that Captain Wilson A. Sparhawk, Air Corps, 10th Bombardment Squadron, 25th Bombardment Group, did, in the uniform of an officer of the Army of the United States, at San Fernando, Trinidad, B. W. I., on or about February

6, 1943, publicly associate with one Sylvia Jackson, a common prostitute, known or constructively known by him to be such, to the discredit of the military service.

Specification 2: In that Captain Wilson A. Sparhawk, Air Corps, 10th Bombardment Squadron, 25th Bombardment Group, did, in the uniform of an officer of the Army of the United States, at San Fernando, Trinidad, B. W. I., on or about February 8, 1943, appear in public in association with and embrace one Muriel Hudlin, alias Ullalie, a common prostitute known or constructively known by him to be such, to the discredit of the military service.

He pleaded not guilty to and was found guilty of all the Charges and Specifications except the words "and embrace" in Specification 2 of Charge II. No evidence of previous convictions was submitted. He was sentenced to be dismissed the service. The reviewing authority approved only so much of the findings of guilty of Specification 1 of Charge I as finds the accused guilty of having at the place, time, and in the manner alleged, knowingly and willfully applied to his own use and benefit one one-quarter ton truck of the kind and ownership alleged of some value more than fifty dollars ($50.00), and only so much of the findings of guilty of Specification 2 of Charge I as finds the accused guilty of having at the place, time, and in the manner alleged, knowingly and willfully applied to his own use and benefit one one-half ton truck of the kind and ownership alleged of some value more than fifty dollars ($50.00). The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The competent evidence for the prosecution shows that on the evening of 6 February 1943 about 7 p.m. Corporal Nelson G. Kiesling of the 10th Bombardment Squadron stationed at Edinburgh Field, Trinidad, drove the accused and a Lieutenant Collins in the 10th Bombardment Squadron "jeep" to San Fernando, Trinidad, where they visited a club and several hotels, returning to the field about 12:30 a.m. (R. 38-39). Upon their return the three visited the prophylactic station for treatment (R. 40). He denied that at any time during the evening any women were passengers in the "jeep". It appears that a dispatch ticket is issued every morning for the vehicle and turned in to the motor pool the following morning. The vehicle itself is kept by the organization all of the time (R. 50, 51). Corporal Kiesling was an authorized driver for the vehicle (R. 38). The jeep was used by the officers and orderly room personnel of the Squadron of which Kiesling was a member (R. 51).

At about 9 o'clock on the night of 6 February 1943 one Sylvia Jackson, a native colored girl, saw the accused and a lieutenant enter the Union Hotel at San Fernando and go to the bar upstairs (R. 9,10,25). The accused then came back to the table at which Sylvia Jackson was sitting and asked her into the bar to have a drink and to meet his friend (R.10). Sylvia complied, and the accused ordered drinks and asked Sylvia to call

"one of the girls", Muriel (R. 10). That same evening Panchita Figero, another native girl, also saw the accused go to the bar at the Union Hotel and saw him talking to Sylvia, as she says, at about 10:30 p.m. (R. 18). The accused was wearing a khaki suit - - his uniform (R. 10, 18).

Sylvia went looking for Muriel and returned to tell the accused she was not there and saw the lieutenant talking to Panchita. The two officers told the girls to hurry with their drinks and to take a drive with them (R. 18). Also at the bar were two soldiers and the proprietor of the hotel (R. 10). At some time (not stated) Muriel, a native colored girl, appears to have joined the group. Finally, the group consisting of the accused, the lieutenant, Sylvia, Muriel and Panchita left the bar (R. 10) and passed through another room with tables at which there were about twelve soldiers, sitting and drinking (R. 10, 19, 32). As they did so some of the soldiers called out to Muriel, made some remarks, and then laughed as the group went downstairs (R. 10, 11).

Downstairs and outside the hotel they all climbed into a "jeep" (R. 11, 19, 33). The "jeep" was driven by a corporal (R. 11, 20). Sylvia sat in front between the driver and the accused (R. 11, 33). Panchita, Muriel and the lieutenant sat in back (R. 11, 33). The vehicle, referred to as "a jeep", was described as having a "back seat, single one with two raisings on the sides", "two seats in front", "light green" with a "canvas top" (R. 11). It also had painted on the right end of the dash board inside and just under the windshield white letters "USA", about an inch in size (R. 11, 13, 15). It was described as an "Army jeep" (R. 21) and as the property of the American government, marked "USA" (R. 13). The defense stipulated that the witness, Sylvia Jackson, properly described a "jeep" (R. 16). She subsequently pointed out a "jeep" standing outside of the court room (R. 17). The parties stipulated that a one-quarter ton, four by four truck, (commonly called a "jeep") in operating condition, is worth more than fifty dollars (R. 48).

The group of five and the enlisted driver drove a little way out of town to the countryside (R. 20) into a dark little street or trace and at the direction of the accused stopped (R. 11, 20). The accused and Sylvia got out of the jeep (R. 31), took a raincoat and walked to a point a short distance from the car (R. 11, 20, 21, 31) where accused spread the raincoat on the ground (R. 11, 20) and started to make love to Sylvia by putting his arms around her shoulders and coaxing her (R. 12, 20). According to Sylvia they had sexual intercourse (R. 12). Sylvia and the accused then arose, returned to the jeep and searched for the driver (R. 12).

In the meantime Panchita had remained in the jeep with the lieutenant (R. 20). When Sylvia and the accused returned, Panchita was sitting tidying herself (R. 11). Muriel paired with the driver — whom she did not know (R. 31) — and had intercourse with him (R. 33, 56). Upon returning to the jeep the accused turned the light upon the driver and Muriel then at the same place where the accused and Sylvia had been (R. 12). They jumped up and returned to the jeep. The group then returned to San Fernando (R. 12).

On 8 February 1943 about 10:15 p.m. Sergeant James A. Burgess was on duty as an M. P. at the Union Hotel, San Fernando, closing the hotel up, when the accused and two lieutenants came in the hotel and went back to the bar and talked to some girls. Shortly thereafter the accused, the two lieutenants, and two girls came out of the hotel, walked down the stairs and stood on the sidewalk at the bottom of the steps. Burgess heard accused say that he wondered where his car was, so he flashed his flash light on the accused from where he stood on the porch and told him that the driver had told him (Burgess) that he was going to get some tape or other object about ten minutes previously and would return. About five or ten minutes later the car arrived and the five people described got in and were driven off (R. 23). He described the car as a "recon" car with glass all around its sides and over defense counsel's objection was permitted to state that it was the property of the United States Army (R. 23). The basis of his knowledge of ownership was not disclosed. There were no numbers on the car to identify it, and although he made an extensive investigation he was unable to identify the vehicle (R. 25), nor tell what car it was (R. 28), nor to say from whence it had come (R. 26). He based his conclusion that it was a Government vehicle upon the fact that it was being driven by a soldier, and because he had never seen any other car like it other than an Army car. He was "pretty sure" it was an Army vehicle (R. 29).

The two girls in the group with accused were Indian Rita and Muriel Hudlin, who is also known as Marion and Ullalie (R. 24). There was no disorder or disturbance. The witness never saw them again after they drove off until some days later when he made a personal investigation on the quiet and interviewed the girls (R. 28).

Muriel Hudlin was called as a witness and related that she and Sylvia went for a ride in a jeep on Saturday night (6 February 1943). Sylvia accompanied accused out of the hotel. Muriel went out alone (R. 32). On 8 February 1943 she again went for a ride with accused and Sylvia in "the jeep". This time Lt. Collins and Panchita went along (R. 32). She was not sure of the dates. The jeep was subsequently stopped and the couples paired off. She had sexual intercourse with the driver. She did not see what occurred between the others (R. 34).

It was stipulated that a one-quarter ton, four by four truck commonly called a jeep, in operating condition, is worth more than $50, and that a one-half ton, four by four, truck commonly called a carry-all, in operating condition is worth more than $50 (R. 48).

In order to prove that Sylvia and Muriel were common prostitutes the prosecution called as a witness the son of the proprietor of the Union Hotel. He testified that he was joint manager of the hotel. He knew the two girls and in his opinion classified them as irresponsible but not as prostitutes. By irresponsible he meant that they would be seen with various boys and men and "might entertain them in any fashion or mood suitable to themselves" (R. 42). He refused to take the liberty of calling a woman a

prostitute unless he had absolute proof of her having catered to men with the motive of getting remuneration in the form of money (R. 43). He had known Sylvia since she was a little girl. She was not really employed at the hotel but "made pretty good change" from tips. He contended that there was a considerable difference between a prostitute and an irresponsible woman. If he had to call a woman a prostitute he would not call her irresponsible (R. 47).

The court cross-examined Sylvia and established that she was a seamstress or dressmaker by profession and was engaged in sewing all day for a living. She had had intercourse with more than five men but less than ten, but had never been paid for it (R. 52). She had received gifts as a result of her relationship with men. The accused had given her some presents but nothing by reason of the episode of 6 February 1943 (R. 53). She also received $40 per month allotment from her husband, a sergeant in the United States Army (R. 13, 16).

The same type of examination by the court of Muriel brought out that she had had sexual relations with about five men during her life for which sometimes she had received presents, sometimes money, and sometimes nothing (R. 55). She had never had any such relations with the accused at any time and had never received any presents from him (R. 56).

5. With reference to Specification 1 of Charge I the court found the accused guilty of knowingly and willfully applying to his own use and benefit a one-quarter ton truck, commonly known as a "jeep", property of the United States. All of the witnesses described the vehicle used on the night of 6 February 1943 as a jeep. It was marked with white letters "U.S.A.". One witness pointed out to the court a similar vehicle standing outside of the courtroom. A "jeep" is a recognized standard army vehicle. The evidence was sufficient to establish the fact that the vehicle used was an army vehicle, and, taking into consideration the testimony of Corporal Kiesling, it was a fair inference, that the jeep was the 10th Bombardment Squadron jeep of which he was the driver in spite of his testimony to the effect that he had no female passengers in it that night. From all of the circumstances, it was therefore a fair deduction that a one-quarter ton truck commonly known as a jeep, property of the United States, was used by the accused and his associates in driving through the streets of San Fernando to their trysting place - a purely personal use as shown by their conduct after their arrival. The accused was the ranking officer, sat up in front and directed the driver, and therefore, it follows that he knowingly and willfully made use of the jeep for his own pleasure. The finding of guilty of the Specification is accordingly sustained.

Personal use of Government property constitutes a misapplication of Government property violating Article of War 94. M.C.M. par. 150, i.

The finding of guilty of Specification 2 of Charge I cannot be sustained. The finding was to the effect that the accused did on 8 February 1943 apply to his own use and benefit a one-half ton truck, or "carryall", of a value greater than $50, owned by the Government and intended for military service. The only evidence produced by the prosecution in support

of this charge was the testimony of Sergeant James A. Burgess, who, while standing on the porch of the Union Hotel at San Fernando, observed the accused, two lieutenants and two females enter a vehicle which he described as a "recon" car. He observed an enlisted man drive the car up to the front of the hotel. The five persons described entered the car and left. He stated that the vehicle was the property of the United States Army. This statement was permitted by the court to remain on record notwithstanding the objection made by defense counsel. The witness gave no explanation of the source of his knowledge, if he had any. When examined by the court as to his reason for concluding that the vehicle was a government vehicle, he gave as his reasons that the man who was driving was a soldier and that he had never seen any other vehicle of that build other than an Army car. He saw no marking on the vehicle at any time with which to identify it. Although he immediately made a personal investigation, he was never able to further identify the vehicle in any way.

The proof of the Charge was, therefore, lacking in three important elements. In the first place, there was no competent evidence that the vehicle used on the night of 8 February was the property of the United States. Failure to prove ownership is fatal to conviction. CM 192952. In the second place, there was not sufficient evidence produced to show that the accused knowingly and willfully applied the vehicle to his own use. The mere fact that he entered the vehicle as a passenger and that two women also entered the same vehicle as passengers is not sufficient evidence from which one might draw the conclusion that the vehicle was being improperly used for the personal benefit of the accused. In the third and last place, the car was never identified as a carryall or a one-half ton truck intended solely for government use. The only description given was that it was a "recon" car which is not explained in the record. Muriel said the vehicle used upon both occasions was a jeep.

With reference to Charge II, public association with notorious prostitutes is given in the Manual for Courts-Martial (par. 151, page 186) as an instance of a violation of Article of War 95. The gist of the offense under this Article is that such conduct seriously compromises an officer's position as an officer and exhibits him as morally unworthy to remain a member of "the honorable profession of arms" (Winthrop).

// Under Article of War 96 the gravamen of the offense would, as alleged in the Specification, be the discredit that such conduct would bring upon the military service for the public to observe an officer associating with "notorious" prostitutes. The gist of the offense is the unfavorable reaction upon the minds of those who might observe the association. If the observers do not know that the female with whom the accused was associating is a prostitute no discredit is suffered by the service. The Manual for Courts-Martial, in making such conduct an offense, did not idly use the word "notorious" in describing the type of prostitute banned from the society of military personnel. The offense is purely a military one. It therefore follows

that in order to prove the association to be an offense under Article of War 96, it must be shown beyond a reasonable doubt that (1) the woman with whom the accused was publicly associating is a prostitute and (2) that she is a notorious or a commonly known prostitute.

The records of The Judge Advocate General disclose that CM 121330 (1918) is the only instance wherein similar charges were made against an officer. In that case the officer had married a notorious prostitute commonly known as "Big Puss Helen".

It is noted that the Specifications herein omit the word "notorious" and use the word "common" as applied to the alleged prostitute. There is no precedent to sustain the Charges as military offenses unless there is implied from this adjective when coupled with the phrase "to the discredit of the military service" the meaning that the alleg. prostitute is commonly known to be such or is notoriously a prostitute. It would have been better practice to use the word "notorious". For the purposes of this opinion this allegation of notoriety will be implied.

It follows from the foregoing that the burden was upon the prosecution to prove in the subject case,

As to Specification 1,
(1) that the accused was publicly associating with
(2) Sylvia, who was a prostitute, and
(3) was well known to be a prostitute. //

With reference to Specification 2 the same elements of proof are necessary as relating to Muriel.

The Specifications name these girls separately, so it would not be just to the accused to attempt to sustain either Specification by proof of the profession or reputation of the one not named in the particular Specification under discussion, nor of any other woman not named in the Specification.

The conduct of the accused on the two nights in question may have been disgustingly, painfully and grossly immoral but the question for dispassionate judicial consideration is whether in what the accused did he was guilty of the offenses charged - namely, associating with a common prostitute.

With reference therefore to Specification 1 of Charge II, it was shown by competent evidence that the accused publicly associated with Sylvia Jackson on the evening of 6 February 1943. He invited her to join him and others to have a drink at the hotel bar. He was seen by the public escorting her out of the hotel across the sidewalk and into an open "jeep". From Sylvia's lips it was also shown that he

had been on intimate terms with her for some time.

The word "prostitute" is ably and thoroughly discussed in Com. v. Lavery, 93 A. 276, 247 Pa. 139. It was therein held that "prostitution" is not mere fornication or adultery confined to one man, but indiscriminate illicit intercourse for hire with any man seeking it. In arriving at this definition the court followed the same view expressed in Com.v. Cook, 53 Mass. 93. In the latter case prostitution was defined as "the act of setting to sale; the life of a public strumpet; the practice of offering the body to an indiscriminate intercourse with men; the act of permitting illicit intercourse for hire".

In Johnson v. U. S., C.C.A., Ill., 215 F. 679 the court held that the term "prostitution" under the White Slave Act or Mann Act involves the financial element and signifies commercialized vice.

Peterson v. Murray, 41 N.E. 836 was an action for slander for calling the plaintiff a "whore". The court held that a "whore" is a woman who prostitutes her body for hire, and is synonymous with "prostitute".

All cases examined wherein this issue was involved stress the requirement of hire, gain, or pay coupled with indiscriminate intercourse. Numerous decisions indulge in obiter dicta in describing a prostitute, for example, as a woman "who gives herself up to indiscriminate lewdness". This phrase was used in the case of Com. v. Lavery, supra. It must be read in conjunction with the remainder of the decision and the facts of the case, neither of which support the bare conclusion quoted above.

The Board is of the opinion that the better and more precise legal definition of prostitution is that one so clearly defined in the Lavery case above as "indiscriminate illicit intercourse for hire with any man seeking it".

To designate as prostitutes those females who may honestly earn a livelihood but who by reason of desire, dissatisfaction, disagreement, desertion, or otherwise, sever relations with one lover and find a second, to be followed possibly by successors, would not only give the word a meaning contrary to its generally accepted meaning but also would place a burden on every officer to ascertain beforehand the history of every female with whom he might associate or be seen in public.

The prosecution attempted to show that Sylvia was a common prostitute by the testimony of the assistant manager of the Union Hotel. He refused to say that she was a prostitute. He described her as "irresponsible" - a girl who would be seen with various men and "might entertain them in any fashion or mood suitable to" herself. He amplified this description by adding "and if you call her an irresponsible

person, you could not maintain for one minute that an irresponsible person is or should be or will be classed as a prostitute". (Underscoring supplied).

He expressed his idea of the meaning of the term "prostitute" as a female who commercializes her body for cash or other value. Although he had known Sylvia since she was a child he testified that he did not know, of his own knowledge, that she had engaged in such practices and therefore refused to state that she was a prostitute.

Such evidence, in the opinion of the Board, will not support the conclusion that Sylvia was a prostitute. In any event, it certainly does not prove beyond a reasonable doubt that she was a prostitute - which fact is the proof required in this case.

The court was dissatisfied with this evidence and on its own initiative called Sylvia herself as a witness in an attempt to prove that she was a common prostitute.

Sylvia's testimony, which was uncontradicted, is to the effect that she was a seamstress who sewed for a living by day in addition to receiving $40 per month allotment from her husband, who was a sergeant in the United States Army. In the evenings she also acted as a waitress at the Union Hotel and received tips. She denied that she had ever had intercourse with a man for pay. She admitted approximately five affairs with different men including the accused and that, as a result of her relationship with men, she had received gifts of dresses and different things.

Such facts as these cannot support a finding that she was a prostitute, much less a "common" or "notorious" prostitute or any other kind of prostitute. She did not make a practice of offering her body indiscriminately to men for hire. The burden of proof was on the prosecution to prove this essential allegation beyond a reasonable doubt. Having failed to prove her to be a prostitute, it is unnecessary to discuss the question of notoriety. The conviction of accused of Specifications 1 and 2 of Charge II cannot therefore be sustained.

Specification 2 of Charge II alleges that the accused on 8 February appeared in public in association with Muriel Hudlin, a common prostitute,to the discredit of the military service. The evidence of the association was that accused was seen by Sergeant Burgess walk out of the Union Hotel, cross the sidewalk, and enter a motor vehicle as one of a group of six persons,which group included Muriel Hudlin. There was no association of any other kind between the two individually. It is doubtful if that is the type of public association banned by the Manual for Courts-Martial (par. 151, page 136).

It is not necessary to determine this question because when the evidence concerning Muriel's chastity and reputation is subjected to the same test as applied to Sylvia's the Board is forced to the same conclusion that it was not shown beyond a reasonable doubt that Muriel was a common prostitute. While her conduct evidenced more indiscriminate lewdness than Sylvia's, yet there was no evidence that she engaged in such conduct for hire with any man seeking it, nor was she commonly known to be a prostitute. The hotel proprietor was well qualified to know her reputation and to observe her conduct. He refused to say that she was a prostitute. Under these circumstances the finding of guilty of the Specification under discussion cannot be sustained.

6. War Department records show accused to be 33 years of age. He was commissioned second lieutenant, Infantry Reserve, on 4 June 1934 after four years R.O.T.C. cadet training at the University of Akron from which university he graduated 16 June 1934. He was an insurance salesman for 4½ years, then a physical tester of tires for the B. F. Goodrich Tire and Rubber Company until he entered extended service. On 30 June 1937 he was promoted to first lieutenant, Infantry Reserve. During 1938, 1939 and 1940 he was on active duty for a period of two weeks each year. On 28 July 1941 he was ordered to extended active duty and assigned to the Panama Canal Department Air Corps. On 27 July 1942 he was appointed captain in the Army of the United States. He is married and has three daughters. His family lives in Akron, Ohio.

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 Specification 2 of Charge I, and Charge II and its Specifications, but is legally sufficient to support the findings of guilty of Specification 1 of Charge I and Charge I, and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 94.

William H. Downs, Judge Advocate.

Charles Blum, Judge Advocate.

Herbert B. Frederick, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 14 OCT 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 Wilson A. Sparhawk (0-319911), Air Corps.

2. I concur in the opinion of the Board of Review that the record of trial is not legally sufficient to sustain the findings of guilty of wrongfully applying a Government truck to his own use on 8 February 1943 (Spec. 2, Chg. I), legally sufficient to sustain the findings of guilty of wrongfully applying to his own use a Government truck of some value over $50 on 6 February 1943 (Spec. 1, Chg. I and Chg. I), legally sufficient to sustain the sentence, and to warrant confirmation thereof.

I do not, however, concur in the opinion of the Board of Review that the record of trial is not legally sufficient to sustain the findings of guilty of publicly associating with a common prostitute on 6 and 8 February 1943, in violation of Article of War 95 (Spec. 1 and 2, Chg. II and Chg. II).

3. Specification 1, Charge II, alleges that the accused did, on 6 February 1943, at San Fernando, Trinidad, while wearing the uniform of an officer, publicly associate with Sylvia Jackson, whom he knew to be a common prostitute. Similarly Specification 2, Charge II, alleges that the accused did on 8 February 1943, associate with Muriel Hudlin, alias Ullalie, whom he knew to be a common prostitute. The Board of Review is of the opinion that the record of trial fails to show that the two women with whom the accused is alleged to have associated, were common prostitutes. For this reason the Board of Review has asserted that the record is not legally sufficient to sustain the findings of guilty of the two Specifications in question. In reaching this conclusion, the Board of Review has, in my opinion, failed both to evaluate properly the probative forces of certain important evidence, and to interpret the meaning of the word "prostitute" in the manner required by applicatory legal principles.

The uncontradicted evidence shows that on the night of 6 February 1943, the accused and Lieutenant Ernest W. Collins, entered the bar of the Union Hotel, San Fernando, where the accused bought drinks for Sylvia Jackson and Panchita Figero, two native colored girls. After hurrying the two girls to the completion of their drinks, this group, which had been joined by Muriel Hudlin, a third native colored girl, left the bar of the hotel and passed through an adjoining public room where about twelve soldiers were seated. One of the soldiers made some remark to Muriel, and as the group passed from the room, the soldiers laughed (R. 9-11, 18-19).

After leaving the Union Hotel, they were joined by the accused's driver, Corporal Nelson G. Kiesling. The group then entered a Government jeep and drove a short distance into the countryside. At the direction of the accused, the car was stopped, and he and Sylvia Jackson walked about twenty-four feet from the car where they lay down and engaged in sexual intercourse. At the same time Corporal Kiesling paired with Muriel Hudlin and they walked a similar distance from the car and likewise engaged in sexual intercourse. Lieutenant Collins remained in the jeep with Panchita Figero. When the accused and Sylvia Jackson returned to the jeep, Lieutenant Collins was standing by the car urinating, and his female companion was "tidying her clothes". Later on the same night, the accused and his two male companions together visited the local prophylactic station and took a prophylactic treatment (R. 11-12, 20-21, 31, 33, 38, 40, 50, 58).

Two nights later, on 8 February 1943, the accused was seen in one of the public rooms in the Union Hotel with his arm around Muriel Hudlin (R. 23, 24).

Both of the women named in the above Specifications, and their companion Panchita Figero, were described by the assistant proprietor of the Union Hotel as "irresponsible girls" and as girls who "would be seen with various types of boys or men friends, girls that may entertain them in any fashion or mood suitable to themselves" (R. 42). He declined, however, to characterize the girls as prostitutes because, as he explained, if he did so without personal knowledge that they catered to men for remuneration, the result to him under British law would be "very disastrous". Although the girls in question had not been employed at the Union Hotel, they were described as having been there practically every night until they were excluded from the hotel by the proprietor in compliance with orders which he had received from the local police to exclude girls from his hotel (R. 43). Each of the two girls named in the Specification admitted having had various illicit sexual relationships with men and to having received either money or presents from them (R. 52-53, 55). Their companion, Panchita Figero, admitted earning her livelihood at one time by living with a "Chinese fellow" (R. 20). Sylvia Jackson testified that she had received three dresses from the accused (R. 52-53). Muriel Hudlin, around whom the accused placed his arm in public, on 8 February 1943, testified that she did not know the name of the soldier with whom she had had sexual relationship on 6 February 1943, and that she did not know whether he was an officer or a soldier (R. 31). She further testified that "sometimes" she received money from the men whom she had sexual relationships with and that sometimes she received nothing (R. 55).

4. Each of the Specifications under consideration alleges that the accused associated with "a common prostitute, known or constructively known by him to be such, to the discredit of the military service".

Although the Board of Review states that the meaning of the word "prostitute" is limited to the woman who indiscriminately offers her body for sexual intercourse for hire, a number of courts have interpreted the word to include any woman of indiscriminate lewdness. In the case of State v. Marsh (196 N.W. 930), the Supreme Court of Minnesota in defining the word "prostitute" asserted that the word "* * * is reserved for her who is so far gone that she offers herself indiscriminately. The element of hire need not be present". Similarly, the Supreme Court of Iowa, in the case of State v. Clark (43 N.W. 273) made the following statement:

> "Counsel, if we understand him correctly, thinks that prostitution consists in sexual commerce for gain. It is sometimes so defined, but we think if a woman submits to indiscriminate sexual intercourse, which she invites or solicits by word or act, or any device, she is a prostitute. Her avocation may be known from the manner in which she plys it, and not from pecuniary charges and compensation gained in any other manner."

Likewise, Webster's New International Dictionary, Second Edition, Unabridged, although including within its definition of the word "prostitute" the meaning of sexual intercourse for hire, also includes the broader meaning as stated by the courts above, defining the word, as follows: "to offer, as a woman, to a lewd use; to give up to promiscuous lewdness, esp. for hire, also RARE, to seduce".

From the viewpoint of common decency, it is scarcely less dishonorable or discreditable to the military service for an officer to associate publicly with a woman whose indiscriminate lewdness may be prompted by an uncontrolled passion than it is for him to associate with a woman whose indiscriminate lewdness is caused by a desire for pecuniary gain. In either case, the gravamen of the military offense is the public association by an officer with a woman who is commonly known for her indiscriminate lewdness. Under the facts of the present case, however, it is unnecessary to rely upon the meaning of the word "prostitute" in its broader aspects. This is true because the uncontradicted testimony presents the following series of relevant and revealing facts:

(1) Sylvia Jackson was shown to have had sexual intercourse with the accused near a public road within close proximity to the two other couples similarly engaged, whom the accused had transported there for that purpose.

(2) Both Sylvia Jackson and Muriel Hudlin admitted having had various illicit sexual relationships with men, and of having received money or presents from them.

(3) Although the girls in question had not been employed at the Union Hotel, they were described as having been there practically every night until excluded by the proprietor in response to orders from the local colonial police.

(4) As the accused and the girls in question walked past a group of twelve soldiers in the Union Hotel on the night of 6 June, a soldier made some remark and they all laughed.

(5) The girls in question were described by one of the proprietors of the Union Hotel as "irresponsible girls", and as girls who "would be seen with various types of boys or men friends, girls that may entertain them in any fashion or mood suitable to themselves".

(6) The accused and his two male companions visited the local prophylactic station together on the night of 6 February 1943.

(7) Muriel Hudlin, the woman whom the accused publicly carressed on 8 February 1943, admitted not only that she had received money from men with whom she had had sexual relationships, but that she did not even know the name or military rank of the person with whom she had sexual intercourse on 6 February 1943.

(8) The companion and associate of the two girls named in the Specifications admitted that she had earned her livelihood at one time by living with a "Chinese fellow".

The above facts, particularly the admissions by each girl in question of indiscriminate lewdness combined with their admissions that they had at times received either money or presents from men with whom they had engaged in such relationships, and the fact that they were in the Union Hotel practically every night until they had been excluded by an order of the police, compel one to the inescapable conclusion that Sylvia Jackson and Muriel Hudlin were not only prostitutes, but that they were "common" prostitutes in the sense that they were known as prostitutes by a considerable number of persons at San Fernando, Trinidad. I am of the opinion, therefore, that the record of trial is legally sufficient to support, beyond a reasonable doubt, the findings of guilty of Specifications 1 and 2, Charge II and Charge II.

5. The present case is a companion case to the case of Second Lieutenant Ernest W. Collins, CM 237846, in which Lieutenant Collins, an officer junior to the present accused, was properly and legally convicted of publicly associating on the identical occasion, with a common prostitute, Panchita Figero, one of the three women present with the accused on 6 February 1943, in violation of Article of War 95 and sentenced to be dismissed the service. Furthermore, in a case prior to the present one, the accused was convicted of writing a lewd, obscene and licentious letter to his wife, in violation of Article of War 96. Although the sentence in

this latter case was disapproved because of the insufficiency of the evidence to show that he had actually mailed the letter, the finding that he was guilty of writing it, supported by uncontradicted evidence, was not disapproved. The record in that case, as well as in the present one, clearly shows that the influence of the accused upon junior officers and enlisted men is detrimental to the service, and that he is unfit and unworthy to remain an officer, and that the record presents no basis for the extending of clemency. I recommend that the findings of guilty of wrongfully applying a Government truck to his own use on 8 February 1943, in violation of Article of War 94 (Spec. 2, Chg. I) be disapproved, and that the sentence of dismissal be confirmed and ordered executed.

6. Inclosed are two drafts of letters for your signature marked "A" and "B", each transmitting the record and your recommendations to the President. Draft "A" states your concurrence with the opinion set forth above, whereas Draft "B" states your concurrence with the opinion of the Board of Review. There are also inclosed two forms of Executive action marked "A" and "B". Draft "A" is designed to accomplish the disapproval of Specification 2, Charge I, and the confirmation of the sentence in accordance with my recommendations. Draft "B" is designed to accomplish the disapproval of Specification 2, Charge I, and Charge II and Specifications 1 and 2 thereunder, in accordance with the opinion of the Board of Review. Since the only offense of which this draft approves involves a temporary technical conversion of a Government truck (Spec. 2, Charge I), it has been written so as to provide for the suspension of the sentence during the pleasure of the President.

Myron C. Cramer

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

5 Incls.
Incl.1-Record of trial.
Incl.2-Dft. ltr. for sig.
Sec. of War (Draft "A").
Incl.3-Dft. ltr. for sig.
Sec. of War (Draft "B").
Incl.4-Form of action (Draft "A").
Incl.5-Form of action (Draft "B").

(Findings of guilty of Specification 2, Charge I, disapproved. Sentence confirmed. G.C.M.O. 379, 20 Nov 1943)

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

(143)

SPJGH
CM 237935

17 AUG 1943

UNITED STATES v. Second Lieutenant SHIRLEY L. KINES (0-1176395), Field Artillery.	HAMPTON ROADS PORT OF EMBARKATION Trial by G.C.M., convened at Hampton Roads Port of Embarkation, Newport News, Virginia, 9 July 1943. Dismissal.

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

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

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

CHARGE: Violation of the 58th Article of War.

Specification: In that Second Lieutenant Shirley L. Kines, Field Artillery, did at Newport News, Virginia, on or about June 2, 1943, desert the service of the United States by absenting himself without proper leave from his place of duty, with intent to shirk important service, to wit: embarkation for duty overseas, and did remain absent in desertion until he surrendered himself at Camp Patrick Henry, Virginia, on or about June 6, 1943.

He pleaded guilty to and was found guilty of the Specification except the words "June 2, 1943, desert the service of the United States by absenting himself without proper leave from his place of duty, with intent to avoid important service, to wit: embarkation for duty overseas" and "in desertion", substituting therefor, respectively, the words "June 1, 1943, absent himself without proper leave from his place of duty" and "without leave", and the Charge in violation of Article of War 61. 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 in material part is as follows:

Accused, a casual officer, was part of shipment unit RW-550-AAA which under orders for overseas duty, arrived at Camp Patrick Henry, Virginia, from Shenango Personnel Replacement Depot, Pennsylvania, on 5 May 1943. Upon arrival, accused was billeted with other members of the shipment unit in Area 3. A week later, he was moved to Area 7 and billeted in barracks T-7-64. On 14 May 1943 accused was fully processed by medical and dental examination and the issuance to him of overseas Quartermaster, Ordnance and Chemical Warfare Service supplies. He knew that Camp Patrick Henry was a staging area for troops going overseas and that it was a part of Hampton Roads Port of Embarkation (R. 3; Exs. A, B, C, D and E).

At about 11:00 a.m. on 7 June 1943, accused went to the office of Captain Lester Weinberger, Chief of Operations, Camp Patrick Henry, showed a pass to Captain Weinberger and stated that he had overstayed that pass by four days and had been absent without proper leave from 2 June to 6 June 1943. Captain Weinberger examined the pass, remarked that some disciplinary action would be taken, and then wrote a letter in which he stated that the pass granted accused on 1 June 1943 was good from 1700, 1 June, to 0800, 2 June 1943. On 9 June, accused after he had been advised that he need make no statement and that any statement he made could be used against him, signed a written statement that on 1 June 1943 he went on pass to Newport News with the intention of returning to Camp Patrick Henry the following day; that at Newport News, after some rather heavy drinking at the Officers' Club and some joking by other officers, he decided to see a person quite dear to him before leaving the country; that the drinking continued and as a result he did not get back to camp until 6 June; that he had been a casual officer since 21 January 1943 without an assignment or leave; that he did not intend or desire to miss his shipment; and that his actions could be attributed to drinking, to the desire to see a very dear friend and to inactivity as an officer (R. 4-5, 7-11, Ex. F).

At the time that accused obtained his pass, it was the practice to issue passes as a matter of course within an hour or two after application. It was also the practice for Captain Weinberger to issue security orders "sealing" areas occupied by troops scheduled to leave camp. Such orders were usually issued forty-eight hours before the time of departure. Even after the issuance of a sealing order a pass could be obtained for a specific reason. The pass which accused received might have been issued prior to the day for which it was given or might have been an emergency pass. About noon on 1 June 1943, an order was drafted sealing "staged" troops at Camp Patrick Henry, effective at midnight on 1-2 June, and copies were distributed that afternoon to the post

agencies and the commanding officers of the shipments involved. The casual officers in shipment unit RW-550-AAA belonged to the First and Second Provisional Battalions of which Captain Tompkins was the commanding officer. Captain Tompkins received two copies of the order and also verbal notice of the movement. Orders dated 2 June 1943 as amended, called for shipment RW-550-AAA to arrive at Hampton Roads Port of Embarkation on 4 June. When the officer in charge of loading Provisional Battalion 1 called the name of accused, no one answered and he drew a line through the name of accused on the troop transport passenger list of that unit, indicating that accused did not board the vessel (R. 5-15, 35-37; Exs. G and H).

4. For the defense, accused testified that he was inducted into the Army on 13 March 1942 and sent to California. He served as corporal and sergeant, and on 20 October 1942 was sent to Officer Candidate School at Fort Sill. After graduation he was assigned to Camp Roberts, California, where he attended a post graduate school but performed no other duties. On 20 March 1943 he was transferred to Shenango, Pennsylvania, and remained there until 4 May, when with some seventy other officers, he was sent to Camp Patrick Henry under shipment number RW-550-AAA. He was assigned no duties at Shenango or Camp Patrick Henry. Soon after his arrival at Camp Patrick Henry he was informed that no leaves would be granted and he spent most of his time loafing. His processing was completed on 14 May. On 31 May he was paid for the month of May and applied for a pass. He received the pass at 4:00 p.m. and in the company of a number of other casual officers, went to Newport News on the 5:00 o'clock bus. After a visit to a barber shop and supper, they went to the Officers' Club where they drank during most of the evening. Among those present were three officers, Lieutenants Kieffer, Fox and Jackson, whose names also appear on the passenger list, Exhibit H. There was some discussion as to their departure for overseas duty. Everyone was getting "worked up with the inactivity". Lieutenant Kieffer, who was adjutant of their Provisional Battalion "said it looked as though we would be laying around ten days or two weeks more" in view of the fact that "Shipment 5929 had come in and they, in all probability, would go out first". Accused paid for the supper of Lieutenant Jackson and loaned him $50, taking an IOU. Lieutenant Jackson and accused were in the same shipment and accused has not seen him since that time. Accused remained at the Club until it closed. He then went to the Warwick Hotel, found that all of the rooms were taken, purchased a pint of whiskey from an elevator boy and spent the rest of the night in the hotel lobby. The next morning, 1 June, after several drinks, he purchased a round-trip ticket to Washington and got on the train. He had no luggage. When he reached

Washington, he "contacted" his wife, with whom he had not lived for some years, and his son, and then bought a round-trip ticket to New York. He proceeded to New York, purchased some liquor and then went to see a young lady whom he had met after he had separated from his wife. He remained in New York until Sunday morning, 6 June. During this time he made no attempt to ascertain when his unit would leave camp, because he knew of no way of obtaining that information. At about 11:00 p.m. on 6 June, he returned to Camp Patrick Henry and found his barracks empty except for his equipment, and the other officers of his organization gone. He looked for orders, but none were posted, and he went at once to the headquarters of the provisional unofficered unit. He found no one there but the charge of quarters, and decided nothing could be done until the next morning, when he returned and was referred to Captain Weinberger. Accused immediately reported to Captain Weinberger that he had overstayed his pass and in the meantime his shipment had apparently moved out. On 9 June 1943, accused made the written statement, Exhibit F. In his report to Captain Weinberger and in the written statement, accused gave 1 June as the date of his pass and 2 June as the date of the beginning of his absence without leave; in so doing, he fixed the dates with reference to the date on which he was paid, which he recollected as 1 June. When he learned on 8 July in the office of the Trial Judge Advocate that he had been paid on 31 May and not on 1 June, he knew that his pass had been issued on 31 May instead of 1 June and that his unauthorized absence began on 1 June instead of 2 June, and he testified accordingly. Accused knew of other casual officers who had overstayed their passes, he would not stipulate the specific number of days in any case, but "on any number of occasions casual officers had been out of camp for three or four days at a time", and he did not know of any disciplinary action having been taken when they returned. The first time that he saw the "sealing" order, Exhibit G, was when it was shown to him by the Investigating Officer (R. 16-33).

First Lieutenant Clifford H. Hanf, Assistant Finance Officer at Camp Patrick Henry, testified that accused was actually paid on 31 May (R. 33-34).

5. The evidence shows and the accused testified that he was absent without leave from Camp Patrick Henry from 1 June to 6 June 1943. He failed to return to camp upon the expiration of an overnight pass. He testified that he drank liquor, went to Washington without luggage to see his wife - from whom he was separated - and his son, went to New York

to see a young woman whom he had met since his separation from his wife, and then returned to camp.

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 March 1942; appointed temporary second lieutenant, Army of the United States, and active duty, 21 January 1943.

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

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

1st Ind.

War Department, J.A.G.O., 20 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 Shirley L. Kines (O-1176395), 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.

The accused absented himself without leave from Camp Patrick Henry, Virginia, a staging area, from 1 June 1943 to 6 June 1943. I recommend that the sentence to dismissal be confirmed and carried into execution.

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

Myron C. Cramer

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

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

(Sentence confirmed. G.C.M.O. 278, 30 Sep 1943)

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

SPJGK
CM 233048

22 SEP 1943

UNITED STATES v. Captain WILLIAM M. BRENNAN (O-182796), Corps of Military Police.	NEW YORK - PHILADELPHIA SECTOR, NACF Trial by G.C.M., convened at Fort Wadsworth, New York, 22, 23, and 24 June 1943. Dismissal.

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

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

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

CHARGE: Violation of the 95th Article of War.

Specification 1: In that Captain William M. Brennan, 348th Military Police Escort Guard Company, Fort Wadsworth, New York, did, at the George Washington Hotel, New York, New York, on or about March 22, 1943, commit an assault and battery upon Yeoman 2nd Class Ruth E. Matchett, United States Naval Reserve, with intent to have an improper sexual connection with the said Ruth E. Matchett, by wrongfully striking the said Ruth E. Matchett on the head with his hand.

Specification 2: In that Captain William M. Brennan, 348th Military Police Escort Guard Company, Fort Wadsworth, New York, was, at New York, New York, on or about March 22, 1943, in a public place, to wit, the George Washington Hotel, disorderly while in uniform.

He pleaded not guilty to the Charge and its Specifications. He was found guilty of Specification 1 of the Charge and guilty of the Charge, not guilty of Specification 2 of the Charge, but guilty of violation of Article of War 96. 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. The evidence of the prosecution shows that accused was a captain, Corps of Military Police, stationed at Fort Wadsworth, New York (R.156, 192,322). He was 50 years of age (R.322).

Yeoman 2nd Class Ruth E. Matchett, 36 years old, Yeoman 2nd Class Dorothy Street, and Yeoman 3rd Class Barbara I. Carter, all of the Women's Reserve, United States Navy Reserve, were on duty, and were residing in the George Washington Hotel, at New York City, between 8 and 22 March 1943 (R.8,27,73,74,134). Matchett lived in Room 714, and Street and Carter shared Room 1038 (R.9,74,134). On 8 March, the three WAVES were in the elevator at the hotel. Accused was also in the elevator (R.8,79). Later that evening accused phoned Dorothy Street and invited her and the other two girls to dinner. She accepted. The WAVES knew accused as "Captain Carter" by which name he introduced himself (R.8,74,134). On the evening of 21 March, accused called Miss Street or Miss Carter. It was about 9:30. Accused said he had three young ladies who were interested in joining the WAVES and that Miss Street who was on recruiting duty should speak to them. Accused appeared at Room 1038 with two young girls, minors, whom he had "picked up" on the street, and two aviation cadets (R.74,75, 115-119,131,135,320). Food and a bottle of Scotch were ordered (R.75,136). "Captain Carter appeared quite drunk", "very drunk" (R.75,297). His language was loud, abusive, obscene and vulgar during the entire evening (R.75,78,104,136,137,298). He proposed to Miss Carter that she go to bed with him. He told her that "it" was all he lived for (R.137). He told Miss Street that he had an idea that he could sleep with her any time he pleased (R.76). He told one of the minors that she looked as if she raped very easily (R.123,128). Accused was in uniform. The cadets and the two minors left because accused "was getting out from under control" (R.127-131). The WAVES asked the cadets "to please take him out". Accused was drunk. Accused went to another tavern around the corner. The cadets and the two minors let accused go in first and then they ran away (R.122,125,293).

Before leaving the room of Miss Street and Miss Carter, and sometime after 10 o'clock, accused called Yeoman Matchett in Room 714. She had just come in from Red Bank (R.8,9), where her parents lived (R.304). Accused asked her to join him in a drink. She refused. In five or ten minutes Miss Street called and asked if she wanted to come and join them. Miss Matchett said she was tired and declined. Accused got on the telephone and urged her to join them. Again she refused. Miss Matchett said that accused again called and "became very abusive over the phone". He called her a "bitch" and a "whore". He told her she was "not good-looking enough to give him a run-around like that" (R.10,11,76). The party in Room 1038 heard accused on the phone and corroborated Miss Matchett's account of the conversation (R.76,77,128,129).

After accused left the hotel he returned. Miss Matchett heard accused at her door around 11 o'clock, after she had retired. He wanted her to let him in. He accused her of having someone in her room. She said: "Please go away". He began to kick the door. She called the telephone operator and told her what was occurring. The telephone operator had already received a complaint because of the noise from Mr. A. W. Zhalat who occupied the adjoining room and heard someone kicking on the door of 714. Mr. Zhalat described it: "There was a man out there * * * who was trying to get in". He telephoned and made the complaint. He fixed the time between 12 o'clock midnight and 1 o'clock. He was unable to say exactly (R.12,305,306). Claudius Powers, telephone operator, corroborated Miss Matchett's story that the latter had phoned her about being disturbed (R.133). Miss Street went down to the seventh floor to see Miss Matchett (R.13,79). There, she saw accused outside Miss Matchett's door. She quickly turned around to avoid him. Accused spoke to her. She pushed the "down" button so as not to go upstairs with him. Accused insisted that she go in the bar and drink with him. She said, "No", but she was in uniform and she wanted no disturbance. In the bar, accused told Miss Street he would "make" her "go to bed with him". He said he would give her a case of Scotch, a hundred dollars. Miss Street said all she wanted was to be left alone, that she wanted to leave. She saw a "naval officer" at the other end of the bar and spoke to him. The house detective came up. They talked. This Navy officer was Lieutenant (s.g.) Bernard Leddy, Jr., stationed at Sheepshead Bay, New York (R.105). He saw Yeoman Street come in to the bar with a captain who had her by the arm, not "as an escort would have a person". "He was holding her pretty strongly by the arm". Lieutenant Leddy observed the couple at the other end of the bar. Accused was leaning over the bar on one arm, very heavily. "He had his arm completely over the bar. He was holding on to the bar", facing Yeoman Street. After Miss Street spoke to him Lieutenant Leddy took her to her room. Miss Street knocked several times and identified herself before her door was unlocked by a "Yeoman third class there". The Lieutenant left (R.79-81,105-109, 139).

Miss Alyce Lovatt, Credit Manager at Sak's, Fifth Avenue, saw this occurrence at the bar that night. According to her, accused did not look entirely sober. Miss Lovatt said: "his walk was not too steady. He was rather loud". Accused was in uniform. Miss Lovatt knew accused as "Captain Carter", having met him in the hotel a few weeks earlier at which time he told her his name was "Carter" (R.110-115).

At about 4 or 4:30 in the morning (22 March), Miss Street and Miss Carter were awakened by a low rapping on their door. Miss Street said, "Who's there". Accused replied, "Bill". Miss Street told him, "Go away". Accused said, "I am in trouble, please take care of me". Miss Street called up the house detective. Accused heard her telephone and left (R.81-82,139).

Archibald W. Rae, house detective at the hotel, in response to a telephone complaint, went to Room 1038 at about 4 o'clock that morning. After talking with Miss Street and Miss Carter, he advised them to double lock their doors (R.268).

Around 5 o'clock, the morning of 22 March (R.13-14), Yeoman Matchett was awakened by a knock at her door. She heard a voice: "Dorothy - Captain Carter - trouble". She thought Dorothy (Yeoman Carter) was in trouble. She was half asleep. She opened the door (R.14), and saw accused in the hall. She inquired why he was there. He stated he was drunk and needed help and wanted to come in and rest. She told him to go to his own room. He pushed her in and she was unable to push him out. She ran to the telephone (R.17). Accused put his finger on the telephone hook. Accused cursed her and accused her of making trouble for him. He called her a "dirty bitch" and a "whore". He had hold of her arm (R.18). He said he wanted to rest and would not bother her. He sat on the bed and pulled her down beside him. She became frightened. He hit her a couple of times across the face with his open palm and forced her down, "half lying down". Then she scratched him (R.19). Accused called her a "whore" and said she entertained other men and not him. He said he would "knock the blank out of " her. He said if she made any noise he would break her jaw and get her out of the Navy. He then took her pajamas off. He lifted her up until she was on the bed and pulled her robe off. She was afraid to scream (R.20). He held her with one arm and pulled the robe off with the other. (R.21) She struggled and then he would hit her. He threatened to knock her unconscious. She cried and asked him to leave her alone. He pulled off her pajama top and pulled down her pajama pants. She struggled but did not scream (R.22). He then removed his clothes. The light was out (R.24). He was holding her down with his weight (R.25). Yeoman Matchett testified that she tried to get up but accused pushed her back and kept slapping her. He used bad language and was lying on top of her. He said he would not "screw" her if she would lie still. She kept moving her legs and knees around trying to keep him off. He said he would "fuck" her if she struggled. He attempted to insert his penis into her body (R.26,28). He opened her legs with his hands. She cried, thinking someone might hear her. She did not consent at any time. Accused "did not succeed in what he was attempting to do". He suddenly stopped. The struggle had lasted a half hour. When he stopped he sat up on the side of the bed. He said she was a good kid and began to put his clothes on. He said he was sorry and dropped money on the bed. She picked it up and handed it back to him. He asked her not to make any trouble and she said she would not. He left at 6:30 a.m. She lay down on the bed and at 7 a.m. got dressed to go on duty. Miss Street called her shortly after accused left. She told Miss Street she had a terrible experience with the accused. She had lunch that day with her former employer, Mr. Kuhn, for whom she had worked about 7 years. He advised her to tell her lieutenant, Lieutenant

(j.g.) Grace Dimelow, United States Naval Reserve. On Thursday, 26 March, she went to Whitehall Street to the Army building where she identified accused. She then went to Lieutenant Commander Grey for a physical examination (R.28-32,56,302).

On cross-examination Yeoman Matchett stated that on 8 March she was in the elevator with Miss Street. Accused was there. Miss Matchett later went to Miss Street's room and found the accused there. They went to dinner. "Lieutenant Brennan" and "Captain Parr", friends of accused, then came in. They all went back to Miss Street's and Miss Carter's room. All were drinking that evening except accused. Miss Matchett admitted she was gay but was not intoxicated. Accused, only, told risque stories. She was there an hour and left with Captain Parr before the other guests (R.33,36-39,52). She walked down to her room with Captain Parr. Captain Parr went in and stayed for a half hour (R.40). Accused called her several times after that evening. She put him off. She did not like his language (R.53). On Thursday (18 March) she did not entertain the accused but did see Captain Parr, whom she met about 11 o'clock p.m. Miss Torey entertained them in her room playing her harp. They had a few drinks. In Miss Torey's room she sat on the bed with Captain Parr for a couple of hours. She then went down to her room with Captain Parr. No one else was present. She liked Captain Parr, was attracted to him. Captain Parr kissed her. She never had sexual intercourse with Captain Parr or accused (R.41-43,55). On Sunday night (21 March) accused called her about 10 o'clock. Accused came to her room between 4 a.m. and 5 a.m. the following morning. He did not stay with her from 1:30 a.m. to 5 a.m. Accused did not look in his wallet and say that somebody had taken his $300. She did not grab him by the testicles and pull them. During the attack she did not scream. She had been a dancing instructor 15 years ago, but not a chorus girl (R.44-50,52).

On redirect examination Miss Matchett testified that she did not scream for two reasons. First, she was afraid accused would hurt her and second, she was afraid it would cause a scandal and she wanted to avoid publicity which might result in her dismissal from the Navy (R.51).

Lieutenant Commander Gray, Medical Corps, United States Naval Reserve, Headquarters Third Naval District, 90 Church Street, New York City, testified that he had practiced medicine since 1930. His work had been heart and lung disease and some gynecology. At 5 p.m. on 26 March 1943, he examined Yeoman 2nd Class Ruth Matchett. She had two contusions on the arms, one on the thigh and one on the right leg. She also had two abrasions in the region of the groin on the right side, one inch away from the vagina. He examined her internally by admitting one finger into her vaginal orifice. Her pelvic organ seemed normal. His conclusion was that the patient had not been "leading a very active sexual life" (R.59-62).

On cross-examination Commander Gray stated that his conclusion that Miss Matchett was inactive sexually was based on a condition which could be produced by constriction or spasm of the muscles of the vagina. He testified that, within reasonable limits, it is possible to tell the extent or presence of sex life by the size of the vaginal canal (R.62,63).

Captain E.L.B. Eberhardt, Internal Security Division, 39 Whitehall Street, New York City, identified the accused. He saw accused on 26 March. Accused had "very severe" scratches on his face (R.71).

Detective John A. Turley, 15th Squad, New York City Police Department, on 21 March 1943, questioned accused in the bar of the George Washington Hotel, after a "request" by the George Washington Hotel house detective (R.156). Detective Turley stated that accused answered all questions clearly, was not under the influence of liquor, and his behavior was not unbecoming an officer and a gentleman (R.158).

4. Accused testified in his own behalf. He said that on the night of 8 March 1943 he got on an elevator in the George Washington Hotel to go to the 17th floor where "Miss Torey" resided. Miss Street and Miss Matchett were in the elevator. Miss Street smiled at him and he smiled back. She gave him her room number, 1038. Later, he went to Room 1038 and was invited in. While in the room he kidded with Miss Street and she said the girls liked to drink. He went downstairs and brought back a bottle. Miss Carter then arrived and both girls had a few drinks. Then Miss Matchett arrived and he invited all three to dinner. The girls all had a few drinks (R.192,193). Accused explained that in using the name of Carter he was only kidding because in the elevator Miss Street had an envelope addressed to "Carter" (R.194). When they left for the restaurant there was about one and a half inches of whiskey left in the bottle. Accused himself did not drink. He had not had anything to drink for the previous month. There was "a lot of kidding" and the girls stated "they were not so hot about" the Navy (R.195). Lieutenant Brennan and Captain Parr joined them at dinner. Lieutenant Brennan introduced accused to Captain Parr as his uncle, "Captain Brennan". At the time, accused was standing between Miss Street and Miss Matchett. The others had a few drinks but he had none (R.196). He cautioned them "not to talk too loud". Accused paid the check and apologized to the proprietor for the disturbance. They all returned to Room 1038. There was more drinking (R.197). Accused talked to Miss Street because she found out he had horses, which interested her. She said her riding master had called her "a son-of-a-bitch, * * * making her get back on her horse". She took accused to the bathroom and said they should spend a weekend in Philadelphia, that she had a horse named Lady Bug. When they came out of the bathroom Captain Parr was on one bed with Miss Matchett and Lieutenant Brennan was on the other bed with Miss Carter. Miss Street then came over and sat on his knee. She showed

him how she developed the muscles of her back, legs and arms from riding horses. She got up to fix herself a drink. Captain Parr joined her. While Captain Parr was talking to Miss Street, Miss Matchett was reclining on the bed. She told accused about her home and that she had been a dancer. She showed him her legs, flexed them for him and he "naturally felt her entire limbs". Accused kissed Miss Matchett and she "fully cooperated". Captain Parr started to go. He had been asked to take Miss Matchett home. Captain Parr kissed Miss Street goodnight and witness kissed Miss Matchett. Accused remained for about an hour and then left. This was on 8 March. He called Miss Matchett later on and asked her for a date. They made a date for Friday, 19 March (R.198-201). On 18 March he took "a Miss Torey" to dinner. They met Lieutenant Brennan and Captain Parr at the restaurant. About 10 p.m. or 10:30, he telephoned Miss Matchett to try to change the date from 19 March to the night in question, 18 March. He then asked Lieutenant Brennan to take Miss Torey back to the hotel. He had had a disagreement with Miss Torey. He took a cab and went to see Miss Matchett. He went to her room and "played around with her" for about 30 minutes. She was expecting Captain Parr. Accused then left and went to the subway about 11:30 p.m. (R.202,203,220). On 19 March he called her at 6 p.m. but she did not want to see him. He next saw her on Sunday night, 21 March. Accused recounted the events of that night. At the bar of the Victoria Hotel, he noticed some cadets and young girls and suggested that they go across the street to another place. There they talked for a while and then left, walking toward 7th Avenue and 52nd Street where his car was parked. They passed two girls who smiled at the two cadets. The cadets stopped to talk. The girls said they wanted to eat, so he bought them a drink and then took them to the George Washington Hotel for supper. Accused called Miss Street and told her to order two steaks and a bottle of Scotch, that he was bringing up a couple of prospects for the WAVES. He had had about three beers before going to the room. He joined the others in drinking the Scotch. He then left with the two girls and the two cadets. Before leaving he called Miss Matchett and asked her to come up. She refused, but suggested he come down and not tell Miss Street or Miss Carter (R.202-206). The conversation in the room that night had been "quite spicy". According to accused, everyone used risque language, drinks were going around and tongues were wagging (R.207). He left the cadets and the two "kids" at 23rd Street and Lexington Avenue. Accused testified that "during the course of the evening" until he went to the George Washington he had had four beers and two Scotches. He then fixed this as his total drinking up until he left with the youngsters (R.208,209). At this point he felt himself "slipping" and was not clear. He went back to the hotel and got off at the 7th floor. He did not go to Miss Matchett's room because he saw a tall fellow standing at her door. Just then Miss Street got off the elevator. He took her down to the bar for a drink (R.209). He had a beer and she a Scotch. They remained there about ten minutes. She then walked out with a Navy officer. Accused was dizzy or sick. He

had another beer. He was getting better. He went out to the lobby and the house detective asked him what he meant by kicking on doors. This he denied (R.210). He then telephoned Miss Matchett's room and she said it was all right to come up. Then Detective Turley came over and said that the hotel people thought he was a phoney. Accused pulled out his "AGO card" and "dog tags" and showed both to the detective. The detective was satisfied so they both went to the bar for a drink. He then went upstairs and knocked on Miss Matchett's door. This was around 1 a.m. (R.238). She opened the door. He walked in and she shut the door. He upbraided her for telling the house detective that he kicked at her door. She said: "The people next door reported that". He took off his clothes and reclined on the bed (R.211). "She did too". His illness made him "ill at ease". He attempted no intercourse "that night". He fell off to sleep. Around 5 o'clock she woke him up and told him it was time to go. He walked over to where his pants were hanging. His "pockets" were bulging open one inch. His purse was in the wrong pocket. He looked in his wallet and his money was gone. He had had three one hundred dollar bills. He accused Miss Matchett of taking the money. She did not deny it but "instantaneously" dragged her claws into his jaws. Accused said: "I then pinned her hands against her sides. I did not want to be scratched anymore. Then she grabbed hold of my testicles" and "pulled [them] causing me great pain. * * * I slapped her on the cheek. She did not let loose. She still kept pulling. Then I ran my hand to her privates and pinched her on it hard" (R.212,213). She then let loose, went to bed and began to cry, saying she did not have the money but maybe the girls upstairs had it. According to accused, his face was bleeding from the scratches and he was sick from the pain in his testicles. He regretted slapping her. He put his clothes on and left the room. He took ten dollars out of his pocket and gave it to her. She kept the money. The first night he was there he also gave her ten dollars (18 March). That was always his policy. Upon his leaving she kissed him goodbye. He then went up to Room 1038 to find out whether Miss Carter or Miss Street had his money. He knocked on the door and announced himself (R.213). They would not open the door or talk to him. It was around 6 o'clock. He then went downstairs. While in the room with Miss Matchett he had told her that unless he found his money it might get her into trouble (R.214). He arrived back at Fort Wadsworth around 7:30 a.m. and called Miss Matchett. He did not see her any more after that (R.215). That day he spent in bed with a headache, upset stomach and a pain in his testicles (R.216,217). He saw a physician, "Captain Loomis", that night. Subsequently he was told that the "Navy" was bringing charges against him; and he was investigated by a "Lieutenant Saltzman" (R.217). He received advice, as a result of which he did not tell the investigating officer the truth about certain phases of the investigation (R.218).

On cross-examination accused testified that he remembered being in-

vestigated by "Lieutenant Saltzman" and being under oath "in a way" (R.222). He said that he was sworn but it was an "informal interrogation" (R.223). The witness did not recall making certain statements to the investigating officer in "contradistinction" to testimony given at the trial (R.224). He did remember telling the investigating officer that the scratch on his face was "superficial" and that he "was trying to recall" how he got it. Accused explained that he did not want to tell the investigating officer that he "had been in bed with this girl" (R.225). He added: "I have never done a trick like that, sir" (R.225). He remembered telling the investigating officer that Miss Matchett would not let him in on 21 March and that he did not remember seeing her at all that night (R.227,228). He remembered stating to the investigating officer that after knocking on Miss Matchett's door that evening his mind was a blank until the following morning when he found himself standing by his car. His motives (in so testifying) were not to besmirch her character. He did not want the investigating officer to know he had been in Miss Matchett's room (R.230). Before leaving Miss Matchett on the morning of 22 March, he questioned her about the $300. He did not "believe" he told this to the investigating officer because this would have shown he was in her room (R.231,232). Accused said he did not report the loss of $300 to anyone. His testimony to the investigating officer "took the form it did" because of his respect for womanhood. He wanted to protect this woman and hoped his money would come back (R.232). He first knew he was in trouble around the end of March. He denied telling Mr. Grippi, the assistant manager of the George Washington Hotel, that he felt like backing his car off the bridge (R.233). The first time accused knew there was a rape charge against him was from "the charges" (R.236). During the examination by Lieutenant Saltzman, accused admitted, he was asked "whether he got in bed and stripped her naked". This question did not reveal the nature of the charges to accused. On 26 April accused was recalled by Lieutenant Saltzman. Charges had not yet been served and he did not then "know about" the charges (R.236). Accused admitted that the testimony he gave Lieutenant Saltzman was not in accord with facts and the reason "primarily" was that he wanted to protect Miss Matchett and he wanted to keep his skirts clean as far as the outside world was concerned (R.237). He would not say he was drunk on the night of 21 March. Accused stated that he was not in such condition that he did not know what he was doing and could not remember.

Captain H. D. Parr. Ordnance Department, 2nd Battalion, 128th Ordnance Motor Supply Regiment, Pine Camp, New York, testified for accused. He first met him on 8 March 1943 at a restaurant in New York City. Captain Parr was with Lieutenant Brennan, nephew of the accused. They joined accused and three WAVES at a table (R.161). After dinner they went to the Hotel George Washington. The WAVES had drinks at dinner. All six went up to the hotel room and ordered more drinks (R.162). The WAVES were not drunk but showed that they had been drinking. Captain Parr left the room and went downstairs to the room of one of the girls (R.163). The girl he left with was Ruth (Matchett). He stayed in her room about an hour and a half (R.164).

On or about 18 March he met accused the second time at "Charlie's" about 10 o'clock p.m. Miss Torey was with accused. After Miss Torey had had two drinks with Captain Parr and Lieutenant Brennan, accused asked the Lieutenant, his nephew, if he would take Miss Torey to her hotel, the George Washington. Captain Parr called Ruth Matchett and invited her to join them in this other girl's room at the George Washington Hotel. They left for the George Washington "and Captain Brennan left us". They all went to Miss Torey's room and had a few drinks (R.165). Miss Torey was a harpist and played for over an hour. Captain Parr then went down to Ruth Matchett's room for an hour and a half (R.166). While there he did not remove his clothes (R.314).

First Lieutenant Stephen L. Brennan, 128th Ordnance Regiment, Pine Camp, New York, testified for accused. He said he was the nephew of accused and that they were very friendly (R.171). The witness testified to meeting accused and the three WAVES on the evening of 8 March, and about the "party" that followed at the George Washington. On 18 March the witness and Captain Parr met accused, who was with Miss Torey (R.176). Accused made a telephone call and left, asking Lieutenant Brennan to take Miss Torey home to the George Washington Hotel. Accused left. The others remained "a few minutes". Captain Parr made a phone call. They then went to the George Washington Hotel. In the lobby Captain Parr met Miss Matchett. They all went to Miss Torey's room and had a few drinks. Captain Parr and Miss Matchett left.

Miss C. H. Torey, harpist, of Hudson, New York, testified that she had known the accused since 1 October 1942. He had been a suitor of hers, but not since January 1943. On the night of 18 March she went to dinner with accused. Later, Captain Parr and Lieutenant Brennan joined them (R.185,186). Accused made a call and left. Lieutenant Brennan, Captain Parr and Miss Torey went to the George Washington Hotel. Captain Parr met Miss Matchett in the lobby. They all went to Miss Torey's room. She played the harp and they had several cocktails. After an hour Captain Parr and Miss Matchett left. Two hours later Captain Parr returned and left with Lieutenant Brennan (R.185-187).

Lieutenant Colonel F. L. Ritter, Medical Corps, 1205th Service Unit, Fort Wadsworth, a defense witness, testified that he was in charge of the Fort Wadsworth Hospital. He was educated at Albany Medical College, University of Physicians and Surgeons, Baltimore, University of Dijon, and University of Basan. He had been an assistant professor of gynecology. He stated that if a digital examination is made on a female the fact that only one finger can be inserted in the vaginal canal is no indication that sex life is lacking (R.66,67).

On cross-examination Colonel Ritter stated that an adult woman's hymen

could be destroyed by means other than sexual intercourse (R.68). "Where a woman is modest you have difficulty making a digital examination" (R.69).

Without objection by the prosecution, the defense then offered the deposition of Captain W. A. Loomis, Jr., Medical Corps which was received in evidence, read to the court by the defense counsel and marked "Defense's Exhibit A". Captain Loomis testified that he was a graduate of Syracuse University Medical School. Captain Loomis saw accused on 22 March 1943 at 8 p.m. Upon examination he found that accused had a short scratch on the lower part of the scrotum and that his testicles were swollen and tender. Certain external veins were broken. Accused had three scratches on the left side of his face. The scratches on accused's face on 22 March were recent.

First Lieutenant "S. Cowan", Military Police, Fort Wadsworth, identified the accused as his commanding officer. He talked to accused on Sunday morning, 21 March. Accused offered to lend witness money and showed Lieutenant Cowan three one hundred dollar bills which were in his wallet (R.245a, 246). Lieutenant Cowan also testified that a day or two later he saw some scratches on accused's face (R.248).

Robert J. DeMayo, a taxi driver, of 330 East 138th Street, New York City, stated that he took the accused in his taxi from 50th Street and Broadway on 18 March to 23rd Street and Lexington Avenue, leaving him at the George Washington Hotel (R.249,250).

5. In rebuttal, Mr. C. J. Kuhn, Vice President National Surety Company, New York City, testified for the prosecution. He said that he had known Miss Matchett for about seven or eight years. She had been his secretary. He believed Miss Matchett to be of the highest integrity. In his opinion, although he had no direct knowledge, she was still a virgin. She had confided her family problems in him. She was not so very attractive and had had very few dates (R.254,256).

Yeoman Street, recalled, stated that a few days after 21 March 1943 she received a call from the accused. He did not mention $300 (R.261). He invited her to dinner and to a show but she refused.

First Lieutenant Nathan J. Saltzman, Inspector General's Department, Fort Hayes, Columbus, Ohio, identified accused. Lieutenant Saltzman took the testimony of accused in April, having been assigned by the Inspector General, Second Service Command, to investigate a complaint against the accused. Accused's testimony was taken under oath (R.269). Accused raised his right hand and was sworn. His rights under Article of War 24 were then explained. He was examined twice. This witness said that he knew for a fact that accused knew the nature of the charges which were being investigated (R.270-272). Lieutenant Saltzman stated that he told

the accused originally he was investigating an alleged assault with intent to commit rape on Yeoman Second Class Ruth E. Matchett (R.275). This witness testified that the investigation was conducted between 2 April and 27 April 1943 (R.278). At the investigation, accused testified that it was some time after he left Miss Street's room that he discovered the loss of his $300 (R.279,280). At the investigation, accused testified that he was only in the room of Miss Street (R.280). Accused also testified to Lieutenant Saltzman that his mind was a blank from the time he talked by phone to Miss Matchett from the room of Miss Street until he found himself in front of his car at about 6 o'clock in the morning (R.282). Later, he testified about overcoming this loss of memory and discovering the loss of the $300 (R.283), in the hall of the hotel (R.282). On examination by the court Lieutenant Saltzman stated that accused testified before him that somebody had put something in his drink at the Hotel Victoria Bar and then he remembered that some stranger had given him what he thought was a marijuana cigarette, which accounted for his lapse of memory (R.284).

Mr. N. Grippi, Assistant Manager, Hotel George Washington, testified that on 21 March 1943 he was acting manager of the George Washington Hotel (R.308). He saw accused on 29 March at the George Washington Hotel. Mr. Grippi told accused an investigator had been in to see him (Mr. Grippi). Accused told him he did not remember what had taken place on the night of the 21st. Accused told Mr. Grippi there was a very serious charge about accused forcing his way into a lady's room, and if that were true he would back his car off the bridge (R.309,310).

6. The Board of Review believes the story of Yeoman Matchett that at about 5 o'clock on the morning of 22 March, 1943, at the George Washington Hotel, New York, New York, accused committed an assault and battery upon her, with intent to have an improper sexual connection with her, by wrongfully striking her on the head with his hand, as alleged in Specification 1 of the Charge.

It is unnecessary to repeat Miss Matchett's story of what took place that morning in Room 714 at the George Washington. Her story of the assault and her testimony as to the concomitant circumstances and details stand unimpeached by any credible evidence and substantiate each factual allegation of Specification 1. There can be no doubt as to the intent behind the assault. A man does not strip a woman, disrobe himself and impose his body on hers for any purpose other than that alleged.

The general conduct of accused that night as established by his own narrative was highly discreditable. And his testimony was so at variance in material matters with the weight of credible evidence as to render accused unworthy of belief.

First, in his sworn statement to the investigating officer accused testified that he was only in the room of Miss Street that night. He also swore that his mind was a blank from the time he talked to Miss Matchett by phone from Yeoman Street's room (around 11 p.m. when he tried to make the "date") until he found himself standing beside his car about 6 o'clock the next morning. To the investigating officer he accounted for this "amnesia" by his theory that someone had put something in his drink at the Victoria Bar or that a stranger had given him a marijuana cigarette. In the course of the investigation he remembered that in the hall of the hotel sometime after leaving Miss Street's room he discovered he had lost $300. On the trial accused told an entirely different story. He remembered everything that happened that night. He said he was an accepted visitor in the room of Miss Matchett at 1 a.m. and that he remained in her room until he discovered the loss of his money there at about 5 a.m. His testimony at the trial compromised the chastity of Miss Matchett. Accused boldly admitted the falsity of his testimony before the investigating officer. He gave three explanations. He said he had received advice as a result of which he did not tell the truth. He said that an admission by him that he had been with Matchett would have injured him. Neither of these explanations is acceptable legally or morally. Also, he explained that womanhood had his respect, that he did not want to tell about having been in bed with the girl, that he had "never done a trick like that, Sir!". Accused attempted to account for this unnatural chivalry, unnatural if he believed himself the victim of a blackmailing prosecutrix, by further testifying that when he protected this woman before the investigating officer (in April) he did not know the nature of the charges. That the very elements of this last explanation were sham and false is proven by the testimony of two witnesses. The assistant manager of the hotel testified that he saw accused on 29 March (before accused's testimony was taken by the investigating officer) and that accused told him then that he was charged with the very serious matter of forcing his way into a lady's room. The investigating officer testified that at the hearing conducted by him he informed accused "originally" that he was investigating an alleged assault with intent to commit rape on Yeoman Second Class Ruth E. Matchett.

Again, to besmirch and discredit Miss Matchett, accused testified that he had intercourse with her in her room on 18 March. His story is that he took Miss Torey to Charlie's, a restaurant, on that evening; that there he met Captain Parr and Lieutenant Brennan, his nephew; that about 10 o'clock or 10:30 he phoned Miss Matchett for an appointment; that thereupon he asked Lieutenant Brennan to take Miss Torey back to the George Washington where she also lived, while he went down to Miss Matchett's, "played around with her" for about 30 minutes and left around 11:30. The falsity of this story is found not only in the denial of Miss

Matchett, but is proven by the testimony of accused's own witnesses. Lieutenant Brennan, testified that he, Captain Parr, and Miss Torey left for the George Washington Hotel "within a few minutes" after accused, and met Miss Matchett in the lobby. Miss Torey, who also testified for accused, said that they met Miss Matchett in the lobby. Captain Parr, a defense witness, told of meeting Captain Brennan at 10 o'clock, of having 2 drinks there with Miss Torey, and of their departure from Charlie's for the George Washington, at which point this witness added: "and Captain Brennan left us". On this testimony, accused could not have preceded the rest of the party to the George Washington, spent a half hour with Miss Matchett in her room and have had her in the lobby when the others arrived.

Accused testified that he phoned Miss Matchett from the room of Yeoman Street, that she consented to his going to her room, and that he went to her room about 1 a.m., knocked on the door, and was admitted. This testimony is contradicted by that of the girls in Miss Street's room who over-heard the phone call made from there, by that of the witness in the room next to Miss Matchett, and by the testimony of the night telephone operator at the hotel. The girls in Miss Street's room heard accused telephone Miss Matchett and, during the conversation, call her a "bitch" and a "whore" and make other insulting remarks to her. It is impossible to believe that Miss Matchett would have consented to this "tryst" after such insults or that accused would have used such language had she first consented. The occupant of the room adjoining Miss Matchett's heard the kicking on the door and telephoned a complaint downstairs, and Miss Matchett phoned the operator and told her what was occurring, facts which contradict accused's story that he was a welcomed visitor to whom the door was opened.

The record is replete with instances where the weight of the evidence controverts the testimony of accused. He said that he assumed the name "Carter" on 8 March to "kid" the girls because of an envelope one of them had bearing the name Carter. It was proven that accused had used the same name on an earlier date in introducing himself to another woman in the same hotel.

Significant is accused's statement that he attempted to gain readmission to the room of Yeoman Street around 6 a.m. (Accused had testified that he was in Miss Matchett's room from 1 a.m. until after 5 a.m.) The house detective fixed the hour when accused returned to Yeoman Street's room at 4 a.m.

The severe scratches on accused's face, noticeable to more than one, and observed distinctly four days later, required explanation. They were mute corroboration of Miss Matchett's story of her struggle at the time of

the assault. Highly incredible is accused's story of the attack on him in Miss Matchett's room, of the reasons for the attack, of how he got his severe scratches, and the two abrasions one inch from her vagina. In view of the false testimony given by accused on other aspects of the case, this explanation is rejected.

On the other hand, Miss Matchett told a consistent, straightforward story. She showed a regard for the truth at all times, even admitting conduct which may have bordered on indiscretion. However, she did not admit nor was there proven any willful indiscretion by her as far as accused was concerned.

The conduct of accused as alleged and proven constitutes a violation of Article of War 95. The conduct of accused was in its nature disgraceful and unbecoming an officer and a gentleman (CM 227793, Anderson).

As to Specification 2 of the Charge, the evidence shows that accused was disorderly in uniform in a public place, the George Washington Hotel, at New York, New York, while in uniform on the morning of 22 March 1943, as alleged. Accused's conduct in kicking on the door of Miss Matchett between 12 and 1 o'clock of the morning in question was disorderly, as was his action in disturbing Yeoman Street and Carter by knocking on their door at about 4 a.m. that morning. His language to Miss Street at the bar of the hotel around midnight of 21 March was disorderly. He told her he would "make" her "go to bed with him". He offered her pay to gain her consent. Such a proposal under the circumstances constituted a grave insult. It was highly provocative, likely to result in a breach of the peace. It was "disorderly conduct" within the meaning, and a violation, of Section 722 of the Penal Law of the State of New York, which in pertinent part reads as follows:

> "Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct: Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior."

The conduct of accused as alleged in Specification 2 of the Charge and as proved constitutes a violation of Article of War 96.

7. Accused is 50 years old. He was appointed Captain, Army of the United States, 9 April 1942. His prior service was: Reserve Officers' Training Corps, 90 days, August to November 1917. He was commissioned

second lieutenant 27 November 1917, promoted to first lieutenant 2 August 1918, and promoted to captain 22 October 1918. He was on active duty status 27 November 1917 to 17 April 1919. He was appointed Captain, Infantry Reserve, 31 August 1923, reappointed 31 August 1928, terminated 30 August 1933. He attended St. Xavier College 1912-1914 and Cincinnati Law School 1915-1917, graduating from neither institution. He is single.

8. 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 is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. Dismissal is mandatory upon conviction of violation of Article of War 95 and authorized upon conviction of violation of Article of War 96.

Percy E. Ego, Judge Advocate.
Wm Hammitt, Judge Advocate.
Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 29 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 Captain William M. Brennan (O-182796), Corps of Military Police.

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

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

Myron C. Cramer

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

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

(Sentence confirmed. G.C.M.O. 356, 12 Nov 1943)

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

SPJGN
CM 238103

UNITED STATES v. First Lieutenant EDWARD R. CLEWIEN (0-1289871), 376th Infantry.	94TH INFANTRY DIVISION Trial by G.C.M., convened at Camp Phillips, Kansas, 7 July 1943. Dismissal.

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

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

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

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

Specification 1: In that First Lieutenant Edward R. Clewien, 376th Infantry, did, at Camp Phillips, Kansas, on or about 25 June 1943, with intent to deceive Captain Alexander Hughes, Jr., Adjutant, 376th Infantry, officially state to the said Captain Alexander Hughes, Jr., that he, the said First Lieutenant Edward R. Clewien, was on Special Duty by verbal orders of the Commanding General, 94th Infantry Division, through the Assistant Chief of Staff G-3, 94th Infantry Division, which statement was known by the said First Lieutenant Edward R. Clewien to be untrue.

Specification 2: In that First Lieutenant Edward R. Clewien, 376th Infantry, did at Camp Phillips, Kansas, on or about 25 June 1943, with intent to deceive Major Charles A. Brenaman, S-3,

376th Infantry, officially state to the said Major Charles A. Brenaman, that he, the said First Lieutenant Clewien, was on Special Duty by verbal orders of the Commanding General, 94th Infantry Division, through the Assistant Chief of Staff G-3, 94th Infantry Division, which statement was known by the said First Lieutenant Clewien to be untrue.

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

Specification: In that First Lieutenant Edward R. Clewien, 376th Infantry, did, without proper leave, absent himself from his duties with Company "A" 376th Infantry, at Camp Phillips, Kansas from about 1300 14 June 1943 to about 2230 25 June 1943.

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. The accused, who was assigned to Company A, 376th Infantry, absented himself without leave from that organization from 14 June 1943, to 25 June 1943. The accused told his company commander that he was going on special duty with the division, and his company commander replied "Well, all right". Thereafter the accused was seen on a number of occasions about his company organization and in the company mess hall (R. 7-12).

On June 22, Major Charles A. Brenaman, Regimental S-3 of the 376th Infantry, asked the accused why he had been absent from the organization to which he was assigned, and if he had been given a special assignment by G-3. In reply the accused stated to him that he had been teaching the Second Army units heavy machine gun work. On the evening of that day, Major Brenaman called the accused and told him that Colonel Clay wanted a written statement as to how the accused had been assigned to special duty. The accused then admitted that he had not been on special duty, and that he had been doing "nothing" (R. 12-15).

On the same date as stated above, June 22, the accused was called by Captain Alexander Hughes, Jr., Regimental Adjutant, 376th Infantry Regiment, and asked what he had been doing. To this inquiry the accused replied that he had been on special duty with the Second Army troops, giving instructions

in the use of machine-guns. On the following day the accused was again called before Captain Alexander, and upon further inquiry by Captain Alexander, the accused stated that on 14 June he had received notice of a change of his post and that he had been told by the sergeant in the G-3 Section that he was to report to the 376th Engineers for special duty from June 14th to 23 June and on 23 June he was to go on duty with the 276th Field Artillery Battalion (R. 16-19).

The operation sergeant of the G-3 office testified that he was familiar with all business of that office and that the accused had not been placed on special duty (R. 19-22).

4. The defense presented no evidence and the accused elected to remain silent.

5. Specifications 1 and 2, Charge I, alleged in the same language that the accused on or about 25 June 1943, with intent to deceive, officially stated to Captain Alexander Hughes, Jr. and to Major Charles A. Brenaman, that he, the accused, was on "special duty, 94th Infantry Division through the Assistant Chief of Staff G-3, 94th Infantry Division" which statement he knew to be untrue.

The evidence shows very clearly that on separate occasions on June 22, the accused made false statements to the officers named in the two Specifications described above concerning a special assignment which he had received from the office of G-3, 94th Infantry Division. In as much as the Specifications alleged that the false representations were made "on or about 25 June 1943", the fact that evidence shows that they were made on 22 June is immaterial (app. 4, p. 237, M.C.M., 1928). We must conclude, therefore, that the findings of guilty under the two Specifications are sustained by evidence beyond a reasonable doubt.

6. The Specification, Charge II, which alleges that the accused was absent without leave from 14 June 1943 to 25 June 1943, is sustained by uncontradicted testimony.

7. The records of the office of The Adjutant General show that the accused is approximately 24 years of age, that he enlisted in the Wisconsin National Guard in September 1938, that he attended Officers' Candidate School, and was commissioned a Second Lieutenant, Infantry, on 12 August 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 thereof. A sentence of dismissal is authorized upon conviction of a violation of Article of War 61 and is mandatory upon conviction of a violation of Article of War 95.

Judge Advocate

Judge Advocate

Judge Advocate

SPJGN
CM 238103

1st Ind.

War Department, J.A.G.O., 10 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 Edward R. Clewien (0-1289871), 376th 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 of dismissal be confirmed and carried into execution.

3. Careful consideration has been given to the accused's plea for clemency, which is attached to the record, in which he seeks to justify his absence from duty on the basis of his wife's illness. His contentions appear, however, to be another illustration of "Inclination snatching argument to make indulgence seem judicious choice".

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

Myron C. Cramer

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

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

(Sentence confirmed. G.C.M.O. 242, 17 Sep 1943)

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

SPJGK
CM 238138

18 SEP 1943

UNITED STATES	SECOND ARMY
v.	Trial by G.C.M., convened at Lebanon, Tennessee, 4 July 1943. To be hanged by the neck until dead.
Private HERRIE BREWSTER (38281127), Company E, 365th Engineer General Service Regiment.	

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 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 92nd Article of War.

Specification: In that Private Herrie Brewster, Company "E", 365th Engineer General Service Regiment, did, in the vicinity of Doaks Crossroad, Tennessee, on or about June 15, 1943, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill Private First Class Robert M. Hardy, Company "E", 365th Engineer General Service Regiment, by stabbing him in the neck.

Originally accused pleaded not guilty to the Charge and Specification, but subsequently changed his plea to not guilty of the Charge and Specification, but guilty of voluntary manslaughter in violation of Article of War 93 (R.41-43). He was found guilty of the Charge and Specification. Evidence of two previous convictions was introduced; one by summary court-martial for breach of restriction in violation of Article of War 96, and one by special court-martial for being disorderly in quarters and gambling contrary to orders in violation of Article of War 96. Accused was sentenced to be dishonorably discharged, to forfeit all pay and allowances due or to become due, and to be hanged by the neck until dead. 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 dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for life, and that the United States Penitentiary, Atlanta, Georgia, be designated as the place of confinement.

3. Summary of evidence.

There was a discrepancy in the testimony concerning the date of the offense, but the more accurate evidence leads to the conclusion that the killing occurred early in the morning of 15 June 1943, the date alleged (R.5,14,19,20,27,36,38).

The eyewitnesses were enlisted members of accused's organization.

During the night in question, two crap games were in progress in a field about 200 yards from the organization's bivouac area at Doakes Crossroad, Tennessee (R.14-16,20,21,25,27). The games were about 20 paces apart (R.22,23,25). Candles and torches were used to illuminate the scene (R.25, 29). The accused and Private First Class Robert M. Hardy, the deceased, were participants in one of the games, and were kneeling near each other in the circle of players gathered around a blanket on which the dice were rolled and the money placed (R.10,16,21,29,38,40).

At a time when Hardy had placed a twenty-dollar bill on the blanket, the candle burned out, and when someone struck a match it was discovered that the bill had disappeared (R.29,39). Someone said, "'I heard it, the hand that got the money came from right over there'", indicating the direction where accused was located. Accused said, "'I never got your money'". Hardy arose, announced that he was going to have his money, and repeatedly declared that he would get a plank off the fence to get his money back and that he would have his money even if he had to get a pick handle and "beat up" everybody present (R.28,29,31,32,40). Although Hardy appeared angry, he did not address his remarks to accused in particular, but rather to the group as a whole (R.29-31,40). However, at one point he did ask accused whether the latter had the twenty dollars, to which accused replied that he did not. Accused "opened both his hands" and offered to be searched (R.38,40). Hardy made no threats toward accused, had no weapon in his hands, and made no move toward obtaining a plank or any other weapon (R.32, 40,47). There was evidence that Hardy was slightly intoxicated and was acting "sort of loud" (R.17,24,25,29).

While Hardy was engaged in his threatening remarks to the group, he and accused "clinched". The witnesses did not know which one grabbed the other first. In the clinch, Hardy had one hand on accused's collar and was pushing him, and accused had one hand on Hardy's collar and the other hand loose (R.29,30,38,40). Neither man struck the other, but one witness saw accused open his knife (R.27,40). Almost immediately after the start of

the clinch, some soldiers separated Hardy and accused and pushed them away so that they were about twelve feet apart, with "a gang" between them (R.27, 28,32,38,40). Within a minute or so accused ran around the crowd toward Hardy, shouting, "'Let me at him'" (R.21,23,28,31). Hardy "ran off down the hill" (R.22,28). He had no weapon and did not threaten accused in any manner (R.18,19,46). Accused caught Hardy and cut him several times with the blade of the knife, slashing him "from the shoulders up" (R.16,21,26, 28,46). To no avail Hardy kept pleading with accused not to cut him any more, saying that he had been "'kidding'" or "'joking'", to which accused replied, "'I will kill you'", "'I told you about messing around me'" (R.16, 22,28,29,39). The pleas of bystanders not to cut Hardy any more were likewise ignored by accused (R.16,18,22). Hardy fell to the ground, bleeding from a gash on the side of his neck, and died shortly thereafter (R.16,19, 22,32-34).

Thereupon one of the bystanders said to accused, "'Brewster, you done killed Hardy'", or similar words, to which accused replied, "'God damn it, that is what I intended to do'" (R.16,22,35). Accused then ran away, evading pursuers (R.16). Hardy's body was taken to the dispensary, where he was pronounced dead by a medical officer, who stated that death resulted from a stab wound in the "supraclavicular" region in the neck, and that there were also other incised wounds on the right temporal region. In the opinion of the medical officer the wounds were inflicted by a knife or similar sharp instrument (R.5,6,16).

When arrested a few hours later, accused was dressed in civilian clothes (R.13-14). The investigating officer testified that he found six liquor bottles on the ground at the scene of the "incident" (R.8).

Accused elected to remain silent and no evidence was introduced by the defense.

4. By his plea of guilty to voluntary manslaughter, accused admittedly killed Hardy intentionally, and the sole question is whether the evidence proves beyond a reasonable doubt that the killing was done with malice aforethought. Malice aforethought does not require the existence of an intent to kill for any particular length of time before the killing, and an intentional killing without justification, excuse, or provocation is murder no matter how short the existence of the intent to kill (M.C.M. 1928, par. 148a, p. 163). A homicide committed in the heat of sudden passion caused by provocation is manslaughter. But of course if the provocation is legally inadequate to reduce the offense to manslaughter, the killing is murder even though committed in the heat of passion; and insulting or abusive words or gestures are inadequate provocation (M.C.M. 1928, par. 149a).

If a sudden quarrel arises between two persons, who strike one another with their fists, and during the course of the fight one person, in the heat of anger, kills the other, the offense is manslaughter, since the blows are regarded as provocation irrespective of who struck first (1 Wharton, Criminal Law, 12th ed., secs. 586,600). On the other hand,

> "In any case where the provocation * * * is not excessive, as where * * * the person is assailed but not seriously * * *, the law will in general hold the killing to be not manslaughter but murder" (Winthrop, Military Law and Precedents, 2nd ed., rev., p. 675).

In the present case Hardy's actions in the clinch were limited to grabbing accused by the collar and pushing him. No blows were struck or even threatened. In the opinion of the Board of Review, no adequate provocation existed to reduce the offense from murder to manslaughter even assuming that accused entered the clinch in the heat of anger and without an intent to kill already formed.

In view of our decision on the issue of provocation, the question of cooling time need not be discussed.

5. The investigating officer testified that accused was not present when the officer interviewed the witnesses (R.8). However, he testified that the statements were shown to accused and that accused was given an opportunity to read them (R.9,10). This was a substantial compliance with Article of War 70 and with paragraph 35a, Manual for Courts-Martial, 1928.

6. The present trial was a rehearing. At the first trial accused was sentenced to be hanged by the neck until dead. As already noted, the sentence in the present trial, in addition to death, included dishonorable discharge and total forfeitures. Article of War 50½ provides that upon a rehearing, "no sentence in excess of or more severe than the original sentence shall be enforced * * *". Since the death penalty operates per se to dishonorably discharge the soldier (Winthrop, Military Law and Precedents, 2nd ed. rev., p. 434), that portion of the sentence adjudging dishonorable discharge does not violate Article of War 50½. However, to quote Winthrop:

> "* * * pay can be forfeited only in express terms - * * * a forfeiture cannot be involved in any other penalty. A simple sentence of death * * * cannot affect the right of the party to such pay as may be due him at the date of the approval or execution of such sentence. Where, therefore, the court intends to forfeit pay, it must express its intention, in terms: pay cannot be forfeited by implication" (Winthrop, supra, p. 428).

As a consequence, that portion of the sentence imposing forfeiture of all pay and allowances due or to become due constitutes a sentence "in excess of or more severe than the original sentence", in violation of Article of War 50½, and is illegal.

7. The Charge Sheet shows that accused is 22 years of age and that he was inducted into the military service on 6 October 1942.

8. The court was legally constituted and had jurisdiction of the person and offense. Except as noted above, 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 the Charge and Specification, legally sufficient to support only so much of the sentence as involves dishonorable discharge and death in the manner adjudged by the court, and legally sufficient to warrant confirmation of the sentence as thus modified. The death penalty is authorized by Article of War 92.

_____, Judge Advocate.

_____, Judge Advocate.

_____ Judge Advocate.

1st Ind.

War Department, J.A.G.O., 25 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 Private Herrie Brewster (38281127), Company E, 365th Engineer General Service Regiment.

2. I concur in the opinion of the Board of Review that the record of trial is not legally sufficient to support that portion of the sentence adjudging forfeiture of all pay and allowances due or to become due. The present trial was a rehearing. At the first trial the sentence did not include forfeitures. In sentencing accused to total forfeitures, the second court violated Article of War 50½, prohibiting a sentence on rehearing in excess of the original sentence. I recommend that so much of the sentence be disapproved as sentences accused to forfeiture of all pay and allowances due or to become due. I recommend that the sentence as thus modified be confirmed, but that in view of the short period of time elapsing between the quarrel and the killing, it be commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, and that the sentence as thus commuted be carried into execution. The disapproval of the total forfeitures in no way affects the power of commutation. I recommend further that the United States Penitentiary, Atlanta, Georgia, be designated as the place of confinement.

3. Consideration has been given to the following letters, attached to or accompanying the record of trial: (a) from accused to the President of the United States, undated; (b) from Mrs. Virginia Parrish to the President of the United States, dated 30 June 1943; (c) from Mrs. Rosie Washington, mother of accused, to the Commanding General, Second Army, dated 10 July 1943; (d) from accused to the Commanding General, Second Army, dated 17 July 1943; (e) from Honorable Ed Gossett, House of Representatives, Washington, D.C., to The Judge Advocate General, dated 7 September 1943, inclosing two letters to Congressman Gossett from Mrs. Carl Olsen, dated respectively 30 June 1943 and 27 July 1943. Consideration has also been given to a telegram from Mrs. Rosie Washington to Mrs. Franklin D. Roosevelt, dated 30 June 1943, attached to the record of trial.

4. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action

designed to carry into effect the recommendation hereinabove made, should such action meet with approval.

Myron C. Cramer

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

5 Incls.
Incl.1-Record of trial.
Incl.2-Draft of let. for sig. Sec. of War.
Incl.3-Form of Ex. action.
Incl.4-Cpy. let. fr. accused to Pres.,undated.
Incl.5-Let. fr. Hon. Ed Gossett, 7 Sep 1943.

(So much of sentence disapproved as sentences accused to total forfeitures. Sentence confirmed but commuted to dishonorable discharge, total forfeitures, and confinement for life. G.C.M.O. 335, 3 Nov 1943)

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

SPJGH
CM 238172

28 AUG 1943

UNITED STATES v. Private BEN SPEAR (32749259), Company B, First Training Battalion, First Regiment, Infantry Replacement Training Center, Fort McClellan, Alabama.	FOURTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort McClellan, Alabama, 7 July 1943. Dishonorable discharge, total forfeitures and confinement for life. Penitentiary.

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 Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Ben (NMI) Spear, Company "B", First Training Battalion, First Regiment, Infantry Replacement Training Center, Fort McClellan, Alabama, did, at Fort McClellan, Alabama, on or about May 19, 1943, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Carrilue O'Neal.

He pleaded not guilty to and was found guilty of the Charge and Specification. 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 "your natural life". The reviewing authority approved the sentence, designated the Federal Penitentiary, Atlanta, Georgia, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. In CM 236801 Smith, et al, a number of soldiers including Private Ben Spear (the accused in the present case) were charged jointly with the

commission of the crime of rape upon Mrs. Carrilue O'Neal. In that case a motion for severance as to accused Spear was granted at the time the prosecution rested and the trial proceeded as to the remaining accused only. In the present case accused Spear was tried separately for the same offense.

4. The evidence for the prosecution shows that at about 9:30 p.m., 19 May 1943, at Fort McClellan, Alabama, Private Erskine O'Neal and his wife, Carrilue O'Neal (both colored) went for a walk along a road back of the Colored Service Club. A "gang" of colored soldiers ran out of the woods and grabbed Private O'Neal. He had his wife's pocketbook in his shirt pocket, she asked him for it, he gave it to her and she started to run away but one of the men caught her. Accused came up and took her by the right arm, another man held her other arm, a third man pushed her from behind and they "carried" her off into the woods, although she begged them to let her go. She screamed once at the edge of the woods. When O'Neal broke away from the soldiers who had seized him they threw rocks at him and he threw rocks back at them. He asked another soldier who was passing along the road to help him and the two of them went into the woods but could not get "up in there" because the soldiers were throwing rocks "so much". O'Neal called to his wife several times but she answered him only once. He then went to the military police station for help (R. 6-8, 19-20, 24, 32).

After her assailants had taken Mrs. O'Neal into the woods and stood her up against a tree, accused tried to kiss her and she slapped him. He tried to "use" her "in front" and remarked "I cannot fool with this son of a bitch standing up". The men attempted to throw her down but she grabbed a tree and tried to hold on to it. They pulled her loose, tore her dress, and threw her to the ground. One of them held her hands and accused got between her legs and held them up. She kept on "tussling" and begged them to turn her loose. Her husband was calling to her and she answered him twice but one of the men who was standing beside her holding a stick over her head said "if you answer him again I will kill you, God damn you". She did not call out again and did not make any further resistance because she was afraid he would kill her. Accused tried to get her pants off and tore them. He had intercourse with her—put his penis in her vagina, and "satisfied his sexual desires". Her other assailants were standing around with their "things" out. When accused had finished with her he asked "who is next" and held her until another soldier "got down on her". All of them, five in addition to accused, "used" her in turn. When her attackers released her Mrs. O'Neal got up, adjusted her pants, which were off of one leg,

picked up her hat and pocketbook and ran out of the woods. When she encountered Private Johnnie Owens who was walking along a path near the Service Club, Mrs. O'Neal ran up to him and cried out "help me, help me, Mister, please don't let them bother me anymore". It was about five minutes before she could tell him what had happened. The dress she was wearing was "kinder messed up", she acted unnerved and frightened and was shaking "like someone with a chill". She told him that she had been attacked and raped by five or six men. Mrs. O'Neal and Owens went to the Service Club and shortly thereafter her husband appeared with the military police (R. 7, 20-22, 25, 29, 34-35, 37).

Several hours after the attack upon her, Mrs. O'Neal went to the orderly room of the Military Police Platoon and identified accused as one of her assailants. She positively identified him at the trial and Private O'Neal at that time also identified accused as one of the men who seized his wife and pushed her into the woods. On the night of 19 May the weather was clear and the moon was shining brightly. When accused "had her down" Mrs. O'Neal had a good look at him, observed that he was wearing glasses and "knew him by his face" (R. 6-7, 9, 24-25, 36, 42-44).

The dress, bloomers or pants and stockings worn by Mrs. O'Neal at the time she was assaulted were received in evidence. One of the stockings and each of the other garments were torn (R. 22-24, Exs. 1, 2 and 3).

Captain Howard M. Rogers, Medical Corps, examined Mrs. O'Neal between 3:00 a.m. and 3:30 a.m. on 20 May 1943. The examination revealed that her vaginal canal was that of a woman who had had previous pregnancies. There were no evidences of bruises of the female organs, the abdomen or the extremities. Captain Howard took a vaginal smear from Mrs. O'Neal and a microscopic examination showed that there were sperm cells present. In his opinion, the indications were that there had been sexual intercourse at some time within twelve hours prior to his examination (R. 46-47).

On 21 May 1943 at about 2:00 p.m., Mrs. O'Neal was examined by another Medical Corps officer, Major Thomas A. Sappington, who found no evidence of injury, new or old, anywhere on her body. A vaginal examination disclosed no abrasions, lacerations or contusions. Her genitalia were found to be relaxed. In the opinion of Major Sappington a woman who had previously had children would not show "any laceration or break", particularly where the genitalia were relaxed. Both Major Sappington and Captain Rogers testified that it is difficult to see

bruises and lacerations on a colored person as they do not show up as plainly as on a white person (R. 48-50).

At the time of his induction, 3 March 1943, Private O'Neal gave the name of his wife as Katie Bell O'Neal, and on 11 March 1943 applied for a family allowance for a wife of the same name. At the trial he testified that around the first of September 1937, when he was short of funds he had married Carrilue by employing a minister to perform the ceremony with a "false license". They lived together as man and wife for three years. Carrilue previously had been married and had separated from her former husband. O'Neal went to Detroit to work in May 1941 and in May 1942 married "Katie Bell" with a "marriage license and everything". He had never told Carrilue about Katie Bell and the former had visited him at Fort McClellan on 19 May 1943 after he had written to her and asked her to come. He had not been divorced from either of the two women (R. 9-16, Def. Exs. 1 and 2).

5. For the defense Private Charles W. Scott, one of the accused in CM 236801, Smith, et al, mentioned above, testified that on the evening of 19 May 1943, he was walking back of the Service Club with accused and "Private Weeks" when they heard a lot of "moaning" up in the woods and decided to investigate. When they got "up there" they found O'Neal and his wife "fucking". Her dress was hanging on a tree and she had on a white underskirt. O'Neal jumped up and started to run and Scott left immediately and went to the Service Club alone. About five minutes after Scott reached the Service Club Mrs. O'Neal came up, said that he was one of the men who had raped her and the military police took him to the stockade. It was then about 9:00 or 9:30 p.m. (R. 52-57).

Private Paul H. Truitt, who was also one of the accused in CM 236801, Smith, et al, testified that at about 9:00 p.m., on 19 May 1943, as he was walking along the road back of the Service Club with accused, Privates "Weeks" and "Scott", and some other soldiers, he saw "Mr." and Mrs. O'Neal in the woods and "it looked like" they were having sexual intercourse. Truitt heard "moaning" and decided to see what was going on. When he "got up there" Private O'Neal was standing up with his pants about half off, and Mrs. O'Neal, who had on an underskirt said "I do not know. This is the first time I have been here". O'Neal put on his shirt, his wife asked for her pocketbook and he told her that he would give it to her at the Service Club. Then O'Neal threw a rock and hit "Private Jennings". Truitt ran through the woods, and after stopping at the Service Club, went to "the company". When he arrived all of "the boys" were there except Private Scott. Truitt did not notice the weather

"exactly" that night but it was "kinder dark" and out in the open "you could not see any too good" (R. 71-74).

The accused made an unsworn statement which was substantially as follows: On the evening of 19 May 1943, Private Weeks told him that Private Truitt had a couple of girls "down there" whom he would like for accused to meet. They went down to "the range" but found that two soldiers had gone away with the girls. "We" heard "noises" and upon going into the woods to investigate, found Carrilue O'Neal and her husband having sexual intercourse with each other. O'Neal got up and, after a short interval, Mrs. O'Neal also got up and "got her dress off of the tree". The "men" all went back to "the company too quick" to have raped Mrs. O'Neal. "Lieutenant Sullivan" and another Lieutenant not in the court room had forced accused to make a statement. He had been kept in "the dungeon" for three days, and, although food was brought to the others, nothing was brought to him. He had to make a statement to get out of there. They took him to the stockade and the men had been sending food over there but they would not give it to him. No one saw him rape the woman and he did not rape her. She was lying on the ground and had nothing on but her underskirt. He knew this man was not her husband because she said "give me my pocket book", and he answered "I will give it to you up at the Service Club", and she replied "No, I want it now". O'Neal ran off into the woods, threw a rock and hit "Private Jennings" and "these men left there". When Private Scott was asked whom he saw "down there on the range" he gave the name of accused. Accused did not know where Lieutenant Sullivan got the idea of trying to frame him and "these fellows". Mrs. O'Neal's clothes were not torn as she had them on in the office of the Provost Marshal the next day. Accused saw her stockings on the desk and they had no hole in them, except "in the foot". Her underwear was not torn, either. Lieutenant Sullivan asked O'Neal why, if accused was "the man", O'Neal had not identified him in the orderly room and O'Neal replied that he was not sure. Mrs. O'Neal stated that they had taken her off into the woods but they had not done so. She and O'Neal were having intercourse and "making this noise" and they had gone "up there" to see what was happening. "Her biggest hollering" was about the pocketbook. He did not see anyone have intercourse with "this woman" and did not know why he had to sign a statement before he could get out of "that hole over there" (R. 86-87).

6. In rebuttal Major Clarence E. Nichols, Provost Marshal at Fort McClellan, testified that about 19 May 1943 when accused was arrested, he was confined in the cell block in the office of the Provost Marshal.

The cell block consisted of one large compartment containing about thirty-two bunks, two smaller ones with eight or ten cots each, and a close confinement block of two cells. Major Nichols did not know which portion of the cell block accused had occupied but thought that, at one time or another he had been in "all of them". Toilet facilities and bunks were provided in each of the compartments. Accused was provided with food during his confinement. Five other men had been confined in connection with the same incident and only one of them, "Private Smith" had been held separately from the others (R. 88-90).

7. The evidence shows that as Private O'Neal and his wife Carrilue O'Neal (both colored) were walking along a road at Fort McClellan at about 9:30 o'clock one night, accused and a number of other colored soldiers came out of the woods, set upon them, seized O'Neal and pushed his wife off into the woods. When O'Neal broke away they threw rocks at him and prevented him from going to his wife's assistance. Accused and two other soldiers took Mrs. O'Neal into the woods, stood her up against a tree and accused, after trying to "use" her, said "I cannot fool with this son of a bitch standing up". Her assailants then threw her to the ground. One of them held her hands and accused got on top of her and held up her legs. She struggled to free herself and begged them to release her. When her husband called to her and she answered him one of them who was standing over her with a stick in his hand said to her, "If you answer him again I will kill you, God damn you". She did not cry out again and made no further resistance because she was afraid he would kill her. Accused put his penis in her vagina and "satisfied his sexual desires". After he had finished he said "who is next" and five other men each, in turn, had sexual intercourse with her. As soon as she was released she ran out of the woods in a highly nervous and agitated condition and complained to the first passerby she met that she had been raped. A physical examination by a medical corps officer about six hours after the attack showed sperm cells in her vaginal canal.

At the time of the assault upon Mrs. O'Neal the weather was clear and the moon was shining brightly. She got a good look at accused and "knew him by his face". She positively identified him about three hours after the attack and again at the trial. Private O'Neal also identified accused at the trial.

It clearly appears that Mrs. O'Neal was assaulted by accused and five other soldiers and overpowered by actual physical force positively applied. She resisted but refrained from making further outcry

and ceased resistance after a threat against her life had been made by one of her attackers who held a stick in his hand. The extent and character of the resistance required of a woman to establish her lack of consent, depends upon the circumstances and the relative strength of the parties (52 C.J. 1019-1020; 44 Am. Jur. 905-906). Although even reluctant consent negatives rape, where the woman ceases resistance under fear of death or other great harm (such fear being gauged by her own capacity) the consummated act is rape (1 Wharton's Criminal Law, 12 Ed., p. 942; CM 236612 Tyree). In the opinion of the Board of Review the evidence is legally sufficient to support the findings that accused had carnal knowledge of Mrs. Carrilue O'Neal by force and against her will.

8. The Charge Sheet shows that accused is 26 years of age and that he was inducted on 19 February 1943.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty 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 offense of rape by section 22-2801 of the District of Columbia Code, 1940.

Arthur T. Hoff 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.

SPJGH
CM 238173

31 AUG 1943

UNITED STATES v. Second Lieutenant MARCUS A. HUTCHINS (0-405167), Army of the United States.	)))))))	FOURTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Camp Tyson, Tennessee, 19 July 1943. Dismissal.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Second Lieutenant Marcus A. Hutchins, Barrage Balloon School, Camp Tyson, Tennessee, did, at Camp Tyson, Tennessee, on or about June 9, 1943, unlawfully marry, take and have for his wife, one Dorothy Paul, the said Second Lieutenant Marcus A. Hutchins, then having a living wife, to wit: Jean Bumgarner Hutchins.

He pleaded not guilty to and was found guilty of the Charge and Specification. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for five years. The reviewing authority approved only so much of the sentence as provides for dismissal and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution shows that accused was married to Jean Bumgarner on 6 May 1927 at Rockford, Winnebago County, Illinois, that he lived with her for sixteen years as husband and wife, that they were never divorced, and that on 9 June 1943 they were living with their children, three girls, at Route 2, McKenzie, Tennessee. On the latter

date, accused was married to Dorothy Paul at Chapel No. 2, Camp Tyson, Tennessee, by Chaplain Peter Vroom, in the presence of Chaplain James Cobb and his assistant, "Private West". The participants had a marriage license issued by the State of Tennessee. Accused and Dorothy Paul lived together as husband and wife from 9 June to 14 June 1943, and during that period accused publicly represented Dorothy Paul as his wife. They were known as husband and wife to practically the whole town of Paris, Tennessee, and to many officers and their wives at Camp Tyson. Captain Elmo C. Rankin, Adjutant General of Camp Tyson, was present when Jean Bumgarner Hutchins identified accused as her husband (R. 2-5; Exs. 1, 2, 3 and 4).

4. The defense offered no testimony. Accused elected to remain silent (R. 5).

5. The evidence shows that on 9 June 1943, while the lawful wife of accused was alive, he was married to another woman, Dorothy Paul, at Chapel No. 2, Camp Tyson, Tennessee, by Chaplain Peter Vroom, that the marriage was performed pursuant to a Tennessee license, and that accused and Dorothy Paul thereafter lived together as man and wife for about five days.

Bigamy is an offense under the Articles of War (CM 217931, Jenkins).

A chaplain is authorized to perform the marriage rite, upon proper legal authorization in each case (par. 4c, AR 60-5, 19 May 1942; Dig. Op. JAG, 1912-40, sec. 94).

For the defense it was argued that if the second marriage was performed under the laws and jurisdiction of the United States (on a military reservation within the exclusive jurisdiction of the United States), the parties were not legally married and therefore accused was not guilty of bigamy. It is not necessary to determine this question or whether Chapel No. 2, where the marriage was performed, was located within that portion of Camp Tyson which is in fact under the exclusive jurisdiction of the United States, because it is sufficient for the purpose of proving the offense of bigamy to show that the second marriage was actually entered into while the first marriage still existed, regardless of whether the second marriage would have been legal and valid but for its bigamous character.

Bigamy is defined as "The criminal offense of willfully and knowingly contracting a second marriage (or going through the form of a second marriage) while the first marriage, to the knowledge of the offender, is still subsisting and undissolved" (Black's Law Dictionary, 3rd Ed., p. 215; CM 220518, Quigley).

"A subsequent marriage, or, more accurately, subsequently going through a form of marriage, is essential to the offense.

"A subsequent marriage is an indispensable element of the offense of bigamy, or, in other language, alone constitutes the offense. Such marriage is, of course, always void.

"While it has been held that the subsequent marriage must be of such a character that but for the existence of a prior legal marriage it would be valid, the weight of authority is that, where the form of ceremony of marriage with another person is gone through, there is a sufficient marriage on which to predicate a charge of bigamy, the view being taken that the word 'marries', when applied to a subsequent marriage, means going through a form of marriage; and does not mean a valid marriage; added formalities are not necessary where mutual consent of the parties alone is sufficient to constitute matrimony, and a common-law marriage is sufficient" (10 C.J.S. Bigamy, sec. 5a).

It is no defense that the second marriage was void on other grounds than that of bigamy (Wharton's Criminal Law, secs. 2037 and 2078).

While lawfully married to one wife, accused undertook to marry a second time and went through the form of a marriage ceremony on 9 June 1943. In the opinion of the Board of Review the evidence supports the findings of guilty of the Specification and Charge.

6. The accused is 36 years of age. The records of the Office of The Adjutant General show his service as follows: Federally recognized as second lieutenant, Q.M.C., Wisconsin National Guard, 16 August 1940; appointed second lieutenant, Q.M.C., National Guard of the United States, 15 October 1940; active duty 15 October 1940 to 3 December 1942; honorably discharged from National Guard of the United States, 17 April 1942; appointed temporary second lieutenant, Army of the United States, 15 August 1942; active duty 24 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 and the sentence, and to warrant confirmation of the approved sentence. Dismissal is authorized upon conviction of a violation of the 96th Article of War.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

1st Ind.

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Marcus A. Hutchins (0-405167), Army of the United States.

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 approved sentence. Accused while lawfully married, went through a marriage ceremony with another woman. 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. of Sec. of War.
Incl.3-Form of action.

(Sentence confirmed. G.C.M.O. 273, 29 Sep 1943)

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

SPJGK
CM 238201

14 SEP 1943

UNITED STATES v. Warrant Officer (J.G.) MICHAEL R. ALTMAYER (W2108468), 430th Antiaircraft Artillery Automatic Weapons Battalion.	FOURTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G. C.M., convened at Camp Davis, North Carolina, 28, 29 June 1943. Dismissal and confinement for life. Disciplinary Barracks.

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 Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Warrant Officer (Junior Grade) Michael R. Altmayer, Four Hundred and Thirtieth Antiaircraft Artillery Automatic Weapons Battalion, Camp Davis, North Carolina, did, near Wilmington, North Carolina, on or near the Carolina Beach Road, on or about June 2, 1943, forcibly and feloniously, against her will, have carnal knowledge of Junior Leader Beatrice Mullis, Women's Army Auxiliary Corps.

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, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for life. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. Evidence for the prosecution.

Early in the evening of 2 June 1943, in Wilmington, North Carolina, accused saw Captain Don A. Bohler, an instructor in the Gun Department, Material Section, Antiaircraft School, Camp Davis, North Carolina. They knew one another, and after talking and having two or three drinks in

accused's hotel room, they decided to drive to Wrightsville Beach in Captain Bohler's car (R.7,77,104,105). Desiring female companionship, accused called the 502nd "WAAC" Detachment, Wilmington Division, and talked with Junior Leader Beatrice Mullis, who apparently answered the telephone, and whom he did not know. According to Miss Mullis, accused gave the name of "Mike Salone", and, since she knew a person by that name, and evidently believed accused to be that person, she agreed to meet him at the gate, although she explained that she could not go out with him (R.7,8,19-21,25,26,77). Miss Mullis was 23 years of age (R.36).

As arranged, they met near the sentry gate. When Miss Mullis discovered that she did not know the occupants of the car, she told them that she could not go with them, but, after some persuasion by accused, she entered the car and they decided to drive to Wrightsville Beach (R.8,9,13,14, 20-22, 25,26,90,96,98,109,112). All three sat in the front seat (R.12).

After they had driven a few miles, accused suggested stopping for some cigarettes, and directed Captain Bohler to turn into the driveway at a place called Captain Ben's. There they parked at the end of a line of cars in a dark spot. Miss Mullis asked them not to stop there, as it was off limits, but they replied that they would be there only long enough to buy the cigarettes (R.9,11,13,16,17,22,27,38,77,91,96, 100,104,106,108).

Accused asked Captain Bohler to get out and buy the cigarettes, which he did (R.11,22,36,91). After five or six minutes, he returned to the car, opened the door, and started to step in, when suddenly he was shoved away by a hand from someone in the car. He saw no one in the car and heard no noise. Believing that accused and Miss Mullis were "petting", he walked away to the other end of the line of parked cars, then back up the highway to a point near the car, being gone five or six minutes from the time of the shove. As he arrived near the rear of the car, he heard the horn blow, and, walking to the car, found accused standing near the front (R.11-13,15,17,18,74,75,77,81,109,110,115,117).

Both accused and Miss Mullis seemed excited. She was sitting in the back seat, with her head down, crying. She appeared to be fully dressed and her clothing did not look disarranged. Accused said that he wanted to get out of there and take the girl back. Captain Bohler entered the front seat and accused sat in back (R.11-13,14,16,75,76, 78,79,80,105,109,113).

Captain Bohler testified further that as they drove away, Miss Mullis was still crying and continued to cry during most of the trip.

Captain Bohler asked what had happened, and received no reply. At one stage of the trip he heard Miss Mullis call accused a "dirty dog", but this was the extent of their conversation. Thereafter the girl asked Captain Bohler the time, which was 10:30 p.m. Accused directed Captain Bohler where to drive and finally told him to stop. Captain Bohler did not recognize the place and there was no sentry box nearby, nor were there any street lights (R.12,14,16,76,77,79,111,114).

Accused descended from the car and assisted Miss Mullis out. She was no longer crying and did not appear to Captain Bohler to be indisposed. Accused said that he would call her the next day. Captain Bohler did not remember whether she replied. She turned and walked away (R.12,14,16,111, 117). Accused entered the car and he and Captain Bohler drove away. When asked by Captain Bohler what had happened, accused said "'Nothing'", but upon being asked a second time, he said that Miss Mullis had played with his penis and that when he "tried to put the head of it in", she "clawed at his face". He added that he had been unable to accomplish the act of intercourse. Captain Bohler did not notice any marks or scratches on accused's face. Captain Bohler dropped accused at his hotel and returned to his post. The next morning he noticed two spots on the right-hand cushion of the front seat. He assumed that they were blood spots (R.12, 14,17-19,76,77,80,114,116,117).

Reverting to the time when Captain Bohler left the car to enter Captain Ben's place, Miss Mullis testified that, almost immediately, accused put his arm around her, tried to pull her over to him, and asked her to kiss him. Upon her refusal, he asked her a second time, grabbed her, said, "'You will kiss me'", and started to choke her. He bore down very hard on both sides of her throat. She remembered tasting blood in her mouth and she was strangling and unable to breathe. She kept fighting him. She kicked him and pulled his hair, and tried to open the door and to call for help, but she was unable to make a sound. She tried to blow the horn, and thought that she succeeded. Her resistance against the choking was futile and she became unconscious and remembered nothing clearly for some time after, although certain occurrences seemed to come back to her in a hazy way (R.22,23,26,28,29,31,32,34,36,37-40,91-93,100).

She dimly remembered partially "coming to" and asking accused to let her up and to let her get some air, in response to which he told her that he would choke her again unless she lay still. At this time she was in the back seat, but she did not know how she got there. She recalled rising to a sitting position. Her clothes were twisted around her and she felt that she was half undressed. Her step-ins were on the floor of the back seat. They were not torn. In some manner which she did not recall, she put them on. Then accused put his hands on her throat again and she relapsed into unconsciousness (R.34-37,93,95,98-102).

Her next vague recollection was that Captain Bohler returned to the car. She was sitting up at the time and her clothes were very bloody and disarranged. She "hurt" all over, especially in the lower part of her body and in her throat. She dimly remembered crying on the way back to camp and recalled that Captain Bohler asked her what the trouble was. She did not know what she told him. She also remembered asking him the time (R.23,35,37,40,93-95,99,101,102).

Through the haze, Miss Mullis recalled stopping in a very dark spot about half a block from the guard post. Although very weak, she left the car and walked to the guard gate, supporting herself by grasping an iron fence. She called for "Corporal Key", and she could see the "blur" of people before her. Through the blur she seemed to see Corporal Key. She talked to him while she was crying, but did not recollect the conversation. Various events in her removal to and presence at the infirmary and hospital imprinted themselves upon her subconsciousness, the details of which it is unnecessary to set forth in this opinion (R.23, 24,34,37,93-95,97,98). She did not know whether accused had sexual relations with her, but was positive that she did not have any such relations voluntarily (R.24).

Corporal Woodrow Key, 603rd Signal Aircraft Warning Company Regional, Wilmington, North Carolina, was Corporal of the Guard at the "WAAC" detachment on the night of 2 June 1943 and saw Miss Mullis at the gate at the time she left camp at about 9 p.m. He next saw her about 10:30 p.m. upon her return. She was "kind of running" and seemed frightened and excited to the point of hysteria. She was in a state of shock and appeared to have been "beaten up". Her face was red, her nose was bleeding, and she was spitting blood. Her hair was mussed, her tie loose, and her uniform wrinkled. Corporal Key noticed a red mark on her neck, which looked as though it might have been made by a finger. Her eyes appeared red from crying, and her shirt and stockings were bloody (R.41-43,45,46, 82-84,86,89). She cried and told Corporal Key that she did not know what to do. Her conversation was rational (R.42,45,46,85).

Corporal Key assisted her to the dispensary where a medical officer was summoned. While sitting there in a chair waiting for the medical officer, Miss Mullis gave a brief account of the evening's events, substantially in accord with her testimony. At her request, Corporal Key summoned her commanding officer (R.43,44,86,87,88,90).

Three medical officers testified. They were Captain John W. Leachman, Regional Surgeon, Wilmington Air Defense Region, Major Robert D. Arthur, and Captain Raymond W. Hammer, both of the Station Hospital, Camp Davis,

North Carolina. Captain Leachman attended Miss Mullis at the dispensary and took her to the Station Hospital in an ambulance (R.52,53). Major Arthur examined and treated her at the hospital about 1:30 a.m., June 3; and Captain Hammer, surgeon in the ward where Miss Mullis was a patient, saw her about 8:30 a.m. when he came on duty (R.58,59,66).

The medical testimony disclosed that Miss Mullis was weak, exhausted, and in a state of shock (R.54,66). She was excited, hysterical, and mentally confused, and, although she could speak, she had difficulty in answering questions and giving a coherent story (R.52-55,66). There was blood in her mouth, some of which came from her nostrils, and her face was swollen and grayish in color (R.52,56,58). She complained of aching all over (R.67). There were no abrasions or bruises on her face or neck, but there were subcutaneous hemorrhages throughout the face, distributed over the eyes, nose, cheeks, forehead, and temples, and in the neck (R.52, 53,56,58,62,63,66). The front of the neck was tender and red on both sides, indicating a congestion of the throat (R.52,56,63,66,67). The upper portion of the neck was gray and swollen (R.53,56).

Her condition was not caused by external blows, but resulted from a cutting off of the venous blood supply due to pressure on the neck (R.53,58,67). The medical officers unanimously reached the opinion that she had been strangled (R.53,55,58,61-63,66,67), and two of them testified that the strangling probably resulted in unconsciousness and loss of memory (R.53,57,64).

The examination of the genital organs revealed two lacerations on the exterior genitalis and an abrasion on each side of the vaginal wall. These abrasions were bleeding slightly. They could not have occurred in the absence of penetration of the vaginal channels, although even a "cooperative act of sexual intercourse" could have caused them. Although there was no indication of a recent break in the hymen (in fact the examining physician saw no hymen), the "smear" taken from the vagina definitely disclosed the presence of male sperm cells (R.53-55,58-61).

Miss Mullis completely recovered (R.66).

On 4 June 1943, accused was called before Lieutenant Colonel E. P. Jolls, Inspector General's Department, who was the investigating officer. After having been properly advised of his rights, accused was sworn by Lieutenant Colonel Jolls and made a statement to him, in substance as follows: Accused and Miss Mullis started to have sexual intercourse on a mutually voluntary basis in the front seat of the car, but conditions there were "very unsatisfactory". Consequently, after accused had pushed away the captain, he and Miss Mullis moved to the back seat, where they resumed their activities. Miss Mullis suggested that she "do it french", meaning "with the mouth", - a suggestion which so disgusted

accused that he slapped her a couple of times, left the back seat, walked around to the front, and blew the horn for the captain. He denied having choked Miss Mullis (R.48-51).

4. Evidence for the defense.

Accused testified in his own behalf. In substance he corroborated the testimony of the prosecution with reference to the events which transpired up to the arrival at Captain Ben's, except that, according to him, Captain Bohler wished to stop for cigarettes and accused did not tell him to get out of the car. When they parked, accused noticed a man in a white shirt in the car parked next to them (R.69-72). The front windows of Captain Bohler's car were open (R.70).

After Captain Bohler's departure, Miss Mullis put her hand on accused's leg, and accused reached over and started to "play with her" (R.69,73). Nothing was said about kissing (R.74). She removed the left leg of her pants, so that they were hanging on her right leg, and spread her legs. Accused started to get ready and rolled over as if he were "going to do something". She "grabbed ahold" of his "thing" and "started steering it in the general vicinity" and rubbing it in her hair (R.69,71). When Captain Bohler appeared, accused told him to go away for a few minutes (R.69,73,74). Accused and Miss Mullis then crawled over to the back seat, Miss Mullis removing her pants en route. She spread her legs and they "tried it again" (R.69,70). She offered no resistance and did not try to leave the car. Accused used no force or threats (R.70). Accused "couldn't say" whether or not there was penetration (R.71).

When Miss Mullis said something "abnormal", giving accused "the impression of a fruit", he became disgusted, slapped her and shook her by the shoulders. He did not grab her neck. He got out of the car and blew the horn, and, upon Captain Bohler's arrival, he said to the Captain, "'Let's go back to town'" (R.69-71,73). Accused and Miss Mullis rode in the back seat. She sat up, seemed perfectly normal, and appeared to be conscious. Accused saw no blood on her. She said nothing to either accused or Captain Bohler during the trip. When Captain Bohler asked her what was the matter, she started to sob.

They drove back to Eighth and Nun Streets and dropped her off in front of the sentry box in "Waacville". Accused assisted Miss Mullis from the car and said he might call her the next day, to which she replied "'O.K.'", or something like that. She appeared to be in possession of her faculties and not in any physical or mental distress. Because of embarrassment, he did not tell Captain Bohler about the

affair (R.70-74).

5. It is not the function of the Board of Review in this case to weigh the evidence, adjudge the credibility of the witnesses, or determine controverted questions of fact. Rather we are to decide merely whether the record of trial contains any evidence which, if true, is sufficient to support the findings of guilty (M.C.M., 1928, p. 216, note 3). Without doubt there is sufficient evidence to establish that accused strangled his victim into unconsciousness and had carnal knowledge of her by force and without her consent. Entry was proved by the medical testimony. Accused was properly convicted of rape (M.C.M., 1928, p. 165).

6. As noted, the reviewing authority designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. This designation was erroneous. Under Article of War 42 and Sections 457 and 567, Title 18, United States Code, confinement in a penitentiary is authorized for rape, and under paragraph 5d, Army Regulations 600-375, May 17, 1943, confinement in a penitentiary is mandatory.

7. The Charge Sheet shows that accused is now 34 years of age and has served approximately 15 years as an enlisted man. He was appointed a warrant officer on December 24, 1942.

8. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review, the record of trial is legally sufficient to support the findings of guilty and the sentence.

Judge Advocate.

Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

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

SPJGK
CM 238202

13 SEP 1943

UNITED STATES	)	FOURTH SERVICE COMMAND ARMY SERVICE FORCES
v.	)	
First Lieutenant DON P. FENN (O-428761), Air Corps.	)	Trial by G.C.M., convened at Municipal Airport, Memphis, Tennessee, 18 June 1943. Dismissal.

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

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

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

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

Specification: In that 1st Lt. Don P. Fenn, 26th Ferrying Squadron, 4th Ferrying Group, did, without proper leave, absent himself from his duties at Municipal Airport, Memphis, Tennessee from about April 8, 1943, to about April 19, 1943.

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

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

The accused pleaded guilty to Charge I and its Specification and not guilty to Charge II and its Specification. He was found guilty of both Charges and their Specifications. Evidence was introduced of one previous conviction by general court-martial for absence without leave. He was sentenced "to be confined for a period of six (6) months and to forfeit One Hundred Eleven Dollars and Eleven Cents ($111.11) of his pay per month for a like period, and to be dismissed the service". The reviewing authority disapproved the findings of guilty of Charge II and its Specification, 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 reviewing authority having disapproved the findings of guilty as to Charge II and its Specification the only question to be considered is the alleged absence without leave (Charge I and its Specification) to which accused pleaded guilty. The plea of guilty was supported and confirmed by the introduction in evidence of an authenticated extract copy of the morning report of accused's organization showing that accused was absent as alleged (R.6: Ex. A).

For the defense the accused stated that he had been confined in "the hospital" from 27 February to 7 April 1943. He was released from the hospital about 6 o'clock p.m. on 7 April and felt that it was too late to report to his organization which was stationed at the Municipal Airport, Memphis, Tennessee, so he spent the night at the Claridge Hotel in Memphis. Accused stated that he intended reporting the next day but that he overslept. He stated:

> "* * * Well, I knew what the situation was, and it was rather frightening, and I put off reporting until the next morning. I had not been drinking, and I began to think it over and I really became frightened and merely put off reporting. * * *" (R.16-17).

Accused admitted that he did not report until "about the 19th" of April.

4. The accused is 25 years and 9 months of age. The records in the Office of The Adjutant General show that accused attended McDonogh School one year, Baltimore City College three years, Trinity College one year and Lafayette College three years. Upon completion of his course in heavier-than-air flying, Advanced Flying School, Barksdale Field, Louisiana, 31 October 1941, he was commissioned a temporary second lieutenant, Air Corps, Army of the United States. He was promoted to the grade of temporary first lieutenant 28 September 1942. His Group Commander, Colonel Ralph E. Spake, Air Corps, 6th Ferrying Group, in recommending accused for promotion said:

> "This officer has held his present grade * * * for 8 20/30 months. He has clearly demonstrated by outstanding performance of duty for 8 20/30 months his fitness for the responsibility and duties of the position and grade herewith recommended. During this period he has served as Twin-Engine Pilot for 6½ months, at 6th Ferrying Group, Ferrying Div., Air Transport Command, Long Beach Army Air Field, Long Beach, California, and has discharged his duties in a highly satisfactory manner."

5. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the

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

Judge Advocate.

Judge Advocate.

Judge Advocate.

1st Ind.

War Department, J.A.G.O., 15 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 Don P. Fenn (O-428761), 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 be confirmed but that the execution thereof be suspended during the pleasure of the President.

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

Myron C. Cramer

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 Ex. action.

(Sentence confirmed but execution suspended. G.C.M.O. 298, 5 Oct 1943)

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

SPJGN
CM 238214

4 SEP 1943

UNITED STATES	)	THIRD ARMY
v.	)	Trial by G.C.M., convened at Fort Sam Houston, Texas, 28-30 June 1943. Dishonorable discharge, and confinement for life. Disciplinary Barracks.
Private VERNON A. JOHNSON (36559373), Company B, 248th Quartermaster Service Battalion.	)	

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

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1. The record of trial in the case of the soldier named above (tried jointly with thirty others) has been examined by the Board of Review.

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

CHARGE: Violation of the 89th Article of War.

Specification 1: In that Corporal Clinton Hall, Corporal Fred L. Jones, Corporal Claude McFay, Corporal D. W. Perry, Private First Class William H. Allen, Private First Class Jack Boose, Private First Class Artis Colemon, Private First Class J. H. Highgate, Private First Class Artis N. Jackson, Private First Class Eugene Jefferson, Private First Class Douglas P. Moseley, Private Warren H. Pulley, Private First Class

Marcellus H. Turner, Private Edward L. Boswell, Private Jonathan Bryant, Private Roger W. Faulkner, Private Leo Gaines, Private Clarence Gates, Private Leonard H. Handy, Private J. D. Hurt, Private Vernon A. Johnson, Private Wilson B. Mahone, Private Stanley McClure, Private Harry L. Price, Private Clifton Sifford, Private Hayes Sumerlin, Private Baxter Surgeon, Private Charlie Tatum, Private Elvan Turner, Private Edward D. Washington and Private Jeffrice Wilson, all of Company "B", 248th Quartermaster Service Battalion, being with Company "B", 248th Quartermaster Service Battalion in the garrison at Fort Sam Houston, Texas, did, at Fort Sam Houston, Texas, on or about 28 May 1943, commit a riot, in that they, together with certain other soldiers to the number of about one hundred, whose names are unknown, did, unlawfully and riotously, and in a violent and tumultuous manner, assemble to disturb the peace of Fort Sam Houston, Texas and San Antonio, Texas, and having so assembled, did, in the area of Company "B", 248th Quartermaster Service Battalion, unlawfully, riotously and in a violent and tumultuous manner disturb and break into certain rifle racks and an ammunition closet, arm themselves with about one hundred twelve rifles and about six thousand six hundred rounds of ammunition and apply to their own use a half ton truck, to-wit: a weapons carrier, all the property of the United States furnished and intended for the use thereof, to the terror and disturbance of the people at Fort Sam Houston, Texas.

Specification 2: In that Corporal Clinton Hall, Corporal Fred L. Jones, Corporal Claude McFay, Corporal D. W. Perry, Private First Class William H. Allen, Private First Class Jack Boose, Private First Class Artis Colemon, Private First Class J. H. Highgate, Private First Class Artis N. Jackson, Private First Class Eugene Jefferson, Private First Class Douglas P. Moseley, Private Warren H. Pulley, Private First Class Marcellus H. Turner, Private Edward L. Boswell, Private Jonathan Bryant, Private Roger W. Falkner, Private Leo Gaines, Private Clarence Gates, Private

Leonard H. Handy, Private J. D. Hurt, Private Vernon A. Johnson, Private Wilson B. Mahone, Private Stanley McClure, Private Harry L. Price, Private Clifton Sifford, Private Hayes Sumerlin, Private Baxter Surgeon, Private Charlie Tatum, Private Elvan Turner, Private Edward D. Washington, and Private Jeffrice Wilson, all of Company "B", 248th Quartermaster Service Battalion, being with Company "B", 248th Quartermaster Service Battalion, in the garrison at Fort Sam Houston, Texas, did, at Fort Sam Houston, Texas, on or about 28 May, 1943, commit a riot, in that they together with certain other soldiers to the number of about one hundred, whose names are unknown, did, unlawfully and riotously, and in a violent and tumultuous manner, assemble to disturb the peace of Fort Sam Houston, Texas and San Antonio, Texas, and having so assembled, did, in the area of Company "B", 248th Quartermaster Service Battalion, unlawfully and riotously assault Private First Class Luther C. Bailey and Private Vatz Zielinski, both of the Military Police Detachment, Fort Sam Houston, Texas, both military policemen being then and there present in the execution of their duties, by striking the said Private First Class Luther O. Bailey on the head with a blunt instrument and kicking the said Private Vatz Zielinski in the groin, to the terror and disturbance of the people at Fort Sam Houston, Texas.

The accused pleaded not guilty to and was found guilty of the Charge and both Specifications thereunder. Evidence of two previous convictions by summary courts-martial for insubordination, and disobeying a non-commissioned officer, in violation of Article of War 65; and for leaving his post without proper authority 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 at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that on Saturday night, 22 May 1943, the accused and two other privates of his organization returned from San Antonio, so volubly resentful over a reported encounter with the military police, in which they claimed to have been "beat up" without cause, that their company commander, First Lieutenant Leslie A. Osterman, wrote a letter to the Inspector General about it. On the following Thursday night, 27 May 1943, when two other members of the same company were reported to have been maltreated by the San Antonio military police, a hundred or more men in the company area started milling around and discussing the situation in a progressively disorderly fashion. Returning about midnight from San Antonio, where he had "seen six M.P.'s running one man", whom he thought he recognized as a member of his company, First Sergeant Andrew Norwood found his organization disturbed and excited, and wanting to go down town. He telephoned the provost marshal and learned that two privates of his company had been arrested, and that one of them was in the hospital. Concerning the other, he told the provost marshal, "I wish you would turn him loose and let him get back to the area as quick as he can". This conversation was overheard by some of the milling crowd outside the window, one of whom "hollered" that the weapons carrier truck was going down town, before Sergeant Norwood had hung up the receiver. When he went out to investigate, the truck was gone. Observing a number of men with rifles, he telephoned Lieutenant Osterman, reporting the disturbance in the company area - and the nature of it - stating, however, that he thought he could handle the men. Later, the cabinet in the company commander's office was raided of some 6,600 rounds of ammunition by the excited crowd, who had already forced open the company rifle rack and possessed themselves of 112 rifles (R. 16, 46-47, 80-84, 98-102, 108-111, 119-130, 134, 144, 150-155, 157-160).

When one of these rifles was discharged, slightly wounding a member of the organization, Corporal Luther C. Bailey, who, with another military policeman, was patrolling the neighborhood, drove his patrol car into the company area, to investigate. He described the colored soldiers he found there as "in an armed rebellion state". Ten or twelve crowded around him when he alighted from his car, and he heard threats that they were going down and "clean out" the San Antonio military police. One soldier pushed him down; another said "Get his gun"; his pistol was taken; and he was struck on the back of the head with a rifle, receiving a scalp wound which bled profusely, and rendered him temporarily

unconscious. Meanwhile the other military policeman was forced out of the patrol car by armed soldiers, kicked in the groin, and disarmed. A colored soldier placed a bayonet against his throat as he lay on the ground; someone urged him to push it through the prostrate military policeman, applying to him an obscene epithet; while another suggested that they should "take him up and hang him, and these M.P.'s down town might quiet down a little bit" (R. 22-41, 79, 103, 102-106, 117-118, 160-161).

When Lieutenant Osterman arrived around 12:30 a.m., he noticed armed men scattered through the area, running around in some confusion. He also found a number of them loaded in two trucks, all ready to go to town. Others were swarming about the parking area. As he approached one group, it dispersed; and he saw a military policeman lying on the ground, his head cut open, bleeding quite freely. He ordered the men out of the trucks and back to the barracks. They dismounted, and most of the crowd started moving slowly in the direction of the barracks. A group of about thirty, however, crowded around the first sergeant, while the company commander was discussing with another sergeant what action should be taken to prevent further mistreatment of his men by the military policemen. One man said, "There is no use going overseas to fight. There is more to fight for right here in this country". Another - the accused Johnson - said "I would just as soon die fighting here as overseas". Arriving at the barracks, some of the soldiers remained outside. Lieutenant Osterman undertook to take the arms and ammunition away from some of them, but, when all whom he attempted to disarm refused to relinquish them, he decided it would be dangerous to persist. He patrolled the area himself, ordering away a contingent of about fifteen military police, whom he found trying to encircle the area with pistols in their hands. By one o'clock most of the men had returned to the barracks, though some remained outside all the time, and others had formed themselves into outposts. Shortly after 1 a.m. the weapons carrier returned to the parking area. When the company commander ran toward it, the occupants were already out, and some of the men who had stayed came forward to meet them (R. 48-87).

Colonel Harry E. Smith, commanding the Third Army's 6th Headquarters Special Troops, reached the company area about 2:20 a.m. and stayed until 5 a.m. He found the first sergeant and six or eight soldiers armed with rifles sitting outside the orderly room, and several men milling around the company streets with field helmets, gas masks and rifles. He asked what the trouble was, and was told by the first

sergeant that they had had some trouble with the military police and the men had armed themselves to go down and look after the situation. The noncommissioned officers preceded Colonel Smith through the various barracks, preparing the men for inspection, collecting ammunition, and assisting generally. The Colonel took the rifles from some of the soldiers, and superintended the taking of them from others; all the rifles he saw were loaded and unlocked (R. 11-21).

With reference to the accused Johnson's participation, the evidence for the prosecution shows that he was a supernumerary guard on the night of the disturbance. He had had trouble with the San Antonio military police the previous Saturday night; and was characterized by his company commander, who observed him on the night of the disturbance, as one of the leaders and chief disturbers - making the most noise, and, among other remarks, one that "There was as much to fight for over here as overseas". He was the soldier who broke into the ammunition cabinet in the company commander's office, from which 6,600 rounds of ammunition were subsequently taken by the men. He carried a loaded rifle, which he refused to relinquish after his company commander arrived, and retained until relieved of it by Colonel Smith, when he was heard to "mutter something about not give up rifle or ammunition". He expressed himself as objecting to allowing the authorities to settle the situation, preferring that he and the other soldiers should settle it themselves (R. 12, 21, 63, 65, 81, 86, 94, 116, 152, 159-160).

Lieutenant Colonel Lamar Tooze, assistant Inspector General, Third Army, who made an official investigation of the disturbance for the commanding general, testified, with reference to the accused Johnson:

> "He stated that he was in bed on that evening, and was aroused by the disturbance going on outside; that he got up and grabbed a rifle, which he stated was in the barracks and not in the rifle rack, and that later he obtained ammunition; he said that he obtained six rounds of ammunition. He also testified he did not board any of the company's trucks, and that he was present when two members of the Post. M. P.'s showed up on the black top on the motor part, and that he had a conversation with one of these M. P.'s, and he stated that as soon as he was informed that this man was a Post M. P. that he shook hands and

turned him loose, -- referring to the Post M.P.). He denied that he made any protest against surrendering his ammunition when it was being collected".

* * *

"He also stated that he didn't pull this Post M.P. out of the patrol car, but that he asked him to get out. He also stated that if the men were going down town he was going too". (R. 206-207).

4. The defense introduced no evidence, and the accused, having been advised as to his rights as a witness, elected to remain silent.

5. Specification 1 of the Charge alleges that the accused, along with thirty other members of his company, engaged in a riot by unlawfully and riotously assembling to disturb the peace of Fort Sam Houston, Texas, breaking into a rifle rack and ammunition cabinet, arming themselves, and applying to their own use a government weapons carrier, to the terror and disturbance of the people of Fort Sam Houston.

> "A riot is a tumultous disturbance of the peace by three or more persons assembled together of their own authority with the intent mutually to assist one another against any one who shall oppose them in the execution of some enterprise of a private nature, and who afterwards actually execute the same in a violent and turbulent manner, to the terror of the people, whether the act intended was of itself lawful or unlawful. (Paragraph 147c, Manual for Courts-Martial, 1928)."

> "It must be . . . . shown in riot that the assembling was accompanied with some circumstances, either of actual force or violence, or at least having an apparent tendency thereto, as were calculated to inspire people with terror, such as being armed, <u>making threatening speeches</u>, turbulent gestures, or the like, or being in disguise. (Underscoring supplied) (<u>Wharton's Criminal Law, 12th Edition, Section 1862</u>)."

> "To connect a riot with a particular defendant the defendant's presence must be first put in evidence; though this rule may be departed from

when from its size, and the number engaged, it is more convenient that the general character of the riot should be first proved." (ibid, sec. 1871).

Applying to the record of trial the principles announced in the foregoing authorities, it becomes clearly apparent that the offense alleged was indeed a riot in violation of Article of War 89, of which all of the essential elements, and the accused's participation therein, were competently established by substantial evidence.

Specification 2 of the Charge alleges that the accused engaged in a riot in garrison by unlawfully rioting and assembling and assaulting two military policemen while in the execution of their duties. The Specification describes and proof establishes the commission of the offense charged, which, at first examination, might appear to be merely a phase - a circumstance of actual force and violence - of the general riot already described in Specification 1, aggravating that offense rather than constituting a new one; in which case the multifariousness would not be prejudicial, since no limit is fixed as a maximum punishment for a violation of Article of War 89. However the evidence is susceptible of the construction - which must have constituted the basis for the two Specifications - that some of the persons, already unlawfully and riotously assembled when the military police arrived, constituted themselves a special group of rioters with the unlawful design of terrorizing the community by mauling these particular military policemen which particular unlawful design was not shared by other participants in the original riot; and that this special group, in carrying out this unlawful design, committed a separate riotous offense, after which they resumed their participation in the original riot. The accused's admissions to Colonel Tooze furnish sufficient evidence to connect him with this special group, and support the court's finding that the accused was guilty of the offense alleged in Specification 2.

6. The accused is 20 years of age. He was inducted 13 January 1943. His record shows no prior service.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence. Such punishment as a court-martial may direct is authorized upon conviction of a violation of Article of War 89.

Chas. L. Grosson, Judge Advocate.

Abner E. L. Ascoli, Judge Advocate.

Benjamin R. Cooper, Judge Advocate.

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

SPJGN
CM 238266

2 SEP 1943

UNITED STATES	5TH DISTRICT AAFTTC
v.	Trial by G.C.M., convened at St. Petersburg, Florida, 9-10 July 1943. Dismissal.
Captain JAMES A. CAMPBELL, JR. (0-406025), 603rd Training Group, BTC No. 6, AAFTTC	

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: In that Captain James A. Campbell, Jr., Air Corps, 603rd Training Group, BTC #6, AAFTTC, St. Petersburg, Florida, did, at St. Petersburg, Florida, between on or about March 7, 1943, and on or about May 9, 1943, as Prison Officer, wrongfully direct, permit, and encourage prison guards to chase and prod, with shotguns, rifles, and fixed bayonet, prisoners under his jurisdiction and control while executing double time orders.

Specification 2: (Finding of not guilty).

Specification 3: In that Captain James A. Campbell, Jr., Air Corps, 603rd Training Group, BTC #6, AAFTTC, St. Petersburg, Florida, did, at St. Petersburg, Florida, between on or about March 7, 1943, and on or about May 9, 1943, as Prison Officer, wrongfully fail and neglect to keep or cause to be kept proper records of punishment meted out by him or his subordinates to prisoners under his control.

Specification 4: In that Captain James A. Campbell, Jr., Air Corps, 603rd Training Group, BTC #6, AAFTTC, St. Petersburg, Florida, did, at St. Petersburg, Florida, between on or about March 7, 1943, and on or about May 9, 1943, as Prison Officer, wrongfully cause prisoners under his jurisdiction and control to inflict upon themselves unwarranted discomfort by compelling them to take dry shaves as punishment.

Specification 5: In that Captain James A. Campbell, Jr., Air Corps, 603rd Training Group, BTC #6, AAFTTC, St. Petersburg, Florida, did, at St. Petersburg, Florida, between on or about March 7, 1943, and on or about May 9, 1943, while Prison Officer, wrongfully gamble during duty hours and at other times with enlisted men under his command, by "shooting craps" and playing black jack.

He pleaded not guilty to the Charge and Specifications. He was found not guilty of Specification 2, guilty of Specifications 1, 3, and 4, guilty of Specification 5, except the words "'shooting craps' and", of the excepted words, not guilty and guilty of the Charge. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. 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, from 1 March 1943 to 15 May 1943, the accused was Police and Prison Officer, Basic Training Center No. 6, A.A.F.T.T.C., St. Petersburg, Florida. The following incidents occurred between 7 March and 9 May during that period (R. 29):

a. The accused criticized the assistant provost sergeant's treatment of prisoners, telling him he was "chicken-hearted" (R. 18-19).

b. The accused ordered one of his shift chiefs, having general supervision over prisoners and their "chasers", to use force on the prisoners, and hit them if they cursed the guards, which instructions were complied with. He also ordered the guards, with reference to double timing prisoners, to "push them around", which they made an open and notorious practice of doing, with shotguns, rifles and fixed bayonets during the period covered by the Specifications (R. 29-31, 34, 35, 38, 39, 42, 43, 45, 51, 69, 104, 109, 115, 128, 136-138).

c. One prisoner, Private Joseph T. Koniecki, was stabbed in the buttocks four times with a fixed bayonet by his "chaser", while being double-timed around the drill field in the presence of the accused, who issued

no reprimand; indeed he laughed (R. 35, 38-39, 42-43, 46-47, 59-60, 72, 95, 104).

d. Prisoners were hit with the butt end of a shot-gun, while double-timing, and, on one occasion, a prisoner was kicked by his "chaser" in compliance with a direct order given by the accused. One "chaser" testified that the prodding with gun butts was in obedience to a standing order, which he did not know whether the accused had authorized or not; but that, at least once, he had so prodded a prisoner in the accused's presence, and had not been reprimanded (R. 30-31, 44-46, 51-52, 79-80, 84, 104, 115, 128, 136-138).

e. Privates H. A. Richards, Jerome C. Lopez, Leo W. Shuler and Charles R. Foster, while prisoners in charge of the accused, were compelled to take "dry shaves" on different occasions, that is, to shave themselves with safety razors without soap, water or mirror, outside, in the presence of the other prisoners and guards, and, in two instances, in the accused's presence in compliance with his direct orders. These "dry shaves" were not particularly painful; but they were irritating and made the prisoners' faces sore for the rest of the day (R. 22, 56-58, 64-65, 76-78, 93, 99-100, 123, 129, 140, 145-146).

f. Three of the four prisoners mentioned above were placed in solitary confinement in the blockhouse, for punishment, as were Privates Marvin J. Moran and Robert R. Naegel. No record of these confinements, during the period specified, appears in the penalty book, kept under the accused's direct supervision (R. 14-18, 58-59, 70, 78-79, 95-96, 104, 116, 119; Ex. 2).

g. Provost Sergeant Frederick M. Cook's testimony that he had seen the accused gambling with enlisted men on a number of occasions was corroborated by Private John M. Amenda, prison chaser, and the testimony of five prisoners. The game was customarily black-jack, played in a shack where the shifts fell out, in the presence of the prisoners. Money was on the table and changed hands between the players, who were generally the accused, Sergeant Cook, shift chiefs, prison chasers, and other enlisted men - not prisoners - assigned to duty at the prison. During the period covered by this testimony, there was a post regulation in effect prohibiting "gambling of any nature, in any place under the jurisdiction of this Headquarters" (R. 23-24, 30-31, 40, 53, 61, 68, 71, 81, 89, 94, 117, 122, 129, 141, 144, 145, Ex. 1).

4. The evidence for the defense shows, by the testimony of four sergeants and one prison chaser under the direct supervision and control of the accused during the period specified, that prior to the accused's assignment as prison officer, the discipline and conduct of prisoners in the guardhouse was very poor. Prisoners had thrown eggs at the assistant provost sergeant,

insulted him, called the prison "chasers", "jews", and pushed them around. The accused issued no orders for the mistreatment of prisoners. After his arrival, there was more discipline. He did give orders that prisoners who misbehaved in formation should be double-timed. The prison clerk testified he entered in the penalty book all offenses (sic) reported to him, in accordance with orders received by him from the accused. On cross-examination, he testified that his instructions were to enter any infractions of rules meriting disciplinary action by the prison officer and higher authority; and that the accused might have looked through the penalty book "dozens of times" (R. 151-173).

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

6. The evidence establishes the commission by the accused of the series of offenses described in Specifications 1, 3, 4 and 5 of the Charge, during the period from 7 March to 9 May 1943. The defense entered a plea in abatement to Specification 1 of the Charge, and a similar plea to each of the other four, alleging that all are too vague, indefinite and uncertain to apprise the accused of the offenses intended to be charged; afford him no ground for a plea of former jeopardy or immunity from subsequent conviction of the same offenses; fail to fix the time with sufficient certainty; and fail to set forth specific circumstances with names, places, times and specific allegations of definite instances of alleged abuses and wrongs with which he is charged, thus violating all rules of criminal proceedure. When the plea in abatement was overruled, the defense moved, for the same reasons, to strike all the specifications from the charge; which motion the court overruled.

While set forth in the affirmative, each Specification, in effect, alleges neglect of duty requiring continuous performance. As prison officer, it was the accused's duty at all times to enforce regulations designed to protect prisoners from abuse; to keep a record of all penalties inflicted; and to enforce the post regulation prohibiting gambling. The conduct attributed to him in the Specifications involves, in each instance, omissions and neglects in the performance of these duties, prejudicial to good order and military discipline.

> "The allegations of the time and place of the commission of an offense should be stated as accurately as possible, but where the act or acts charged extend over a considerable period of time it may be necessary to cover such period in the allegation. Thus, allegations of 'from March to September, 1887' and 'from May to October, 1888' have been countenanced in a case in which the accused was charged with the neglect of a duty that required continuous performance" (App. 4, p. 237, M.C.M. 1928).

The abused prisoners are not named in Specifications 1 and 4 nor are the accused's fellow-gamblers in Specification 5; however, in the applicable Specifications, the former are identified as "prisoners under his jurisdiction and control", and the latter as "enlisted men under his command". Since the gravamen of each offense alleged, as charged under Article of War 96, is essentially malfeasance in office, to the prejudice of good order and military discipline, these designations are deemed sufficient, in view of the absence in the record of any affirmative showing of prejudice to the rights of the accused, who met issues raised by the prosecution's evidence in support of Specifications 1, 3 and 4 with the testimony of numerous witnesses called in his behalf, which evidence, if believed, would have required his acquittal. Although these same witnesses included several of the enlisted men with whom the accused was charged with gambling in Specification 5, none were interrogated on this point. Moreover, the Specifications themselves are each definite enough to preclude subsequent jeopardy by reason of any act of malfeasance in office, of the nature alleged, occurring between 7 March and 9 May 1943. It has been held by The Judge Advocate General that

> "A specification alleging, as a violation of A.W. 95, a series of acts constituting a course of dishonorable conduct amounting to fraud, is not objectionable on the ground of duplicity. CM 153268 (1922; 192530 (1930)". (Dig. Ops. JAG 1912-1940, par. 428 (13)).

There is no basis for any distinction, in this instance, between fraud and the malfeasance in office implicit in the language of each Specification and in the proof adduced thereunder; nor between such an offense charged as a violation of Article of War 96, rather than Article of War 95. The Judge Advocate General has also held "that the chief, if not the sole purpose of bringing an officer to trial under the sixty-first article" (now Article of War 95) "is to obtain the judgment of the court upon the character of his acts or conduct from the point of view of that article". (Sec. II D 19, p. 489, Dig. Ops. JAG 1912). There is no reason why the same consideration should not apply where the charge characterizes the conduct as prejudicial to good order and military discipline. In the light of the above authorities, and taking into consideration both the pleading and the evidence, the board of review has concluded that while the court might in its discretion, have sustained the plea in abatement on the grounds urged in support of it, its failure to do so does not appear to have materially affected the rights of the accused; and that the record is legally sufficient to support the findings of guilty of Specifications 1, 3, 4 and 5 in violation of Article of War 96.

7. At the beginning of the trial, the defense counsel undertook to challenge for cause the entire membership of the court, submitting evidence that all had participated in the trial of two closely related cases. This challenge the law member overruled. After the defense had exercised its peremptory challenge, the president inquired if the accused desired to "challenge individually for cause any member of the court and introduce any

evidence". Defense counsel repeated his blanket challenge, asserting that it applied to each member of the court. Reminded that his collective challenge had been passed upon, and asked, "Does the accused object to any member of the court now present," defense counsel announced, "Since the accused's challenge for cause has been overruled, we have no objection to any member of the court now sitting."

Article of War 18 not only makes no provision for the determination of the relevancy and validity of challenges to more than one member at a time; it expressly prohibits the reception of such challenges. The evidence offered to support the defense's blanket challenge for cause is not eligible for consideration. If the defense was aware of reasonable grounds to challenge for cause any member of the court, its refusal to exercise its opportunity to do so in the manner prescribed by the statute, constituted an effective waiver (CM 219582 (1942)).

8. The accused is 25 years of age. War Department records show enlisted service from 3 June 1937; discharge 19 May 1941; appointment as second lieutenant, Infantry Reserve, effective 28 February 1941; assignment to active duty 20 May 1941; temporary promotion to first lieutenant 1 February 1942; temporary promotion to captain 18 January 1943.

9. The court was legally constituted. No errors 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. Dismissal is authorized upon conviction of violation of Article of War 96.

Elias Glesson, Judge Advocate

Abner E. Lipscomb, Judge Advocate

Benjamin R. Siegfer, Judge Advocate

SPJGN
CM 238266

1st Ind.

War Department, J.A.G.O., 7 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 Captain James A. Campbell Jr. (0-406025), 603rd Training Group, BTC No. 6, AAFTTC.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. I recommend that the sentence of dismissal be confirmed and carried into execution.

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

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

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

(Sentence confirmed. G.C.M.O. 308, 14 Oct 1943)

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

(223)

SPJGH
CM 238335

13 AUG 1943

UNITED STATES v. Second Lieutenant THOMAS E. LEFTWICH, Jr. (0-1289444), Infantry.	93RD INFANTRY DIVISION Trial by G.C.M., convened at Shreveport, Louisiana, 25 May 1943. Dismissal and total forfeitures.

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 64th Article of War.

Specification 1: In that 2nd Lt Thomas E. Leftwich Jr., 368th Inf., having received a lawful command from 1st Lt John A. Titus, his superior Officer, to "keep his platoon in the column", or words to that effect, did at Louisiana Maneuver Area, near Kisatchie, Louisiana, on or about May 2, 1943, wilfully disobey same.

Specification 2: In that 2nd Lt. Thomas E. Leftwich Jr., 368th Inf., having received a lawful command from 1st Lt. John A Titus, his superior Officer, to "go to the rear of the column", or words to that effect, did at, Louisiana Maneuver Area, near Kisatchie, Louisiana, on or about May 2, 1943, willfully disobey same.

He pleaded not guilty to and was found guilty of the Charge and Specifications. He was sentenced to "forfeit all pay and allowances due and to become due, and to be dismissed from the Service of the United States". The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. On the morning of 2 May 1943 "about 6:30 p.m." (sic), Companies B and C, 368th Infantry, were on a tactical march in close formation under

combat conditions but not in contact with the enemy. There was an interval of about 10 yards between platoons. The march began at 1:30 a.m., the men were worn out and morale was low. First Lieutenant John A. Titus was in command of Company C, and accused was in charge of the second platoon. The two companies were marching "due west in the vicinity of Pearson", reached a stream, marched back 15 yards, and then proceeded "due west" again. Lieutenant Titus observed that the second platoon of his company had "pulled out and started going to the left instead of to the right across the stream". He then stated to accused "Keep your platoon in column", and accused replied, "I am taking the Second Platoon across the stream, Come on". When they reached the other side of the stream, the second platoon was still approximately 15 yards from the position of Lieutenant Titus in the column, but accused placed his platoon in column after he crossed the stream. Lieutenant Titus said to accused, "fall out and fall in the rear of the Company", and accused replied, "I am not taking any God Damn orders from you this morning. You take care of the head of the column and I will take care of this platoon". Accused continued to march and did not go to the rear of the column. Lieutenant Titus did not designate a successor to accused as platoon leader. The first order did not contain the words, "Before you cross the stream". (R. 6-11).

4. Lieutenant Titus, recalled by the defense, testified that the column had been marching since about 1:30 a.m., the occurrence was about 6:30 a.m. and the men were "all tired". Accused had just pulled out of the column when the first order was given. It was the opinion of Lieutenant Titus that it was not customary for junior officers to exercise any initiative in the company, because if every platoon leader did as he pleased Lieutenant Titus would have no control over the company (R. 11-12).

The accused elected to remain silent.

5. It is shown beyond any reasonable doubt that as two companies engaged in a tactical march approached a stream, accused pulled his platoon out of the column, and was then ordered by his superior officer, the company commander, to keep the platoon in column. There was no fact or circumstance indicating that the order was to be executed at any time other than immediately. Accused willfully disobeyed the order, in that he did not place his platoon in the column until they had crossed the stream. Accused was then ordered by the company commander to fall out and go to the rear. He also willfully disobeyed this order.

6. Four of the nine members of the court recommended suspension of the sentence, and stated that "the offense was committed by the accused

because he was thinking of the welfare of his men and used, what he believed to be, leadership and initiative to achieve that end". A fifth member of the court joined in the recommendation of clemency, but did not concur in the language quoted above.

7. The accused is 26 years of age. The records of the Office of The Adjutant General show his service as follows:

> Enlisted Service from 8 October 1941; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty, 5 August 1942.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 64th Article of War.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 16 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 Thomas E. Leftwich, Jr., (0-1289444), 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. Accused willfully disobeyed two orders of his superior officer while on a tactical march. Four of the nine members of the court recommended suspension of the sentence, and stated that "the offense was committed by the accused because he was thinking of the welfare of his men and used, what he believed to be, leadership and initiative to achieve that end". A fifth member of the court joined in the recommendation of clemency, but did not concur in the language quoted above. I recommend that the sentence to dismissal and total forfeitures be confirmed, but that the forfeitures be remitted, and, in view of all of the circumstances, that the execution of the sentence as modified be suspended during the pleasure of the President.

3. Inclosed are a draft of a letter for the signature of the Secretary of War, 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-Dft. ltr. for sig. Sec. of War.
Incl.3-Form of action.

(Sentence confirmed but forfeitures remitted. Execution suspended. G.C.M.O. 236, 16 Sep 1943)

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

SPJGH
CM 238349

14 AUG 1943

UNITED STATES	CAMP HAAN
v.	Trial by G.C.M., convened at Camp Haan, California, 26 July 1943. Dishonorable discharge and confinement for life. Disciplinary Barracks.
Private WILLIAM J. SMITH (16051074), 345th School Squadron.	

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 58th Article of War.

Specification 1: In that Private William J. Smith, 345th School Squadron, Luke Field, Arizona, did at Luke Field, Arizona, on or about April 17, 1942 desert the service of the United States and did remain absent in desertion until he was apprehended at Los Angeles, California on or about May 19, 1942.

Specification 2: In that Private William J. Smith, 345th School Squadron, Luke Field, Arizona, did at Camp Haan, California, on or about June 16, 1942 desert the service of the United States and did remain absent in desertion until he was apprehended at Portland, Oregon, on or about July 13, 1942.

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

Specification: In that Private William J. Smith, 345th School Squadron, Luke Field, Arizona, having been duly placed in confinement in the station hospital, Camp Haan, on or about May 28, 1942, did at Camp Haan, California, on or about June 16, 1942, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that Private William J. Smith, 345th School Squadron, Luke Field Arizona, did, at Camp Haan, on or about May 19, 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Seattle, Washington, on or about July 8, 1943.

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

Specification: In that Private William J. Smith, 345th School Squadron, Luke Field Arizona, having been duly placed in confinement in Post Stockade, Camp Haan, on or about May 11, 1943, did, at Camp Haan, California, on or about May 19, 1943, escape from said confinement before he was set at liberty by proper authority.

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

Specification: In that Private William J. Smith, 345th School Squadron, Luke Field Arizona, did, at Camp Haan, California, on or about May 19, 1943, wrongfully and without proper authority, take and use a one-half ton International truck, U.S. registration No. W-25269, property of the United States, of a value of more than $50.00.

He pleaded guilty to Specifications 1 and 2, Charge I, except the words "desert" and "in desertion", substituting therefor the words "absent himself without leave from" and "without leave"; guilty to the Specification, Additional Charge I, except the words "desert", "in desertion" and "apprehended", substituting therefor the words "absent himself without leave from", "without leave" and "returned to military service"; not guilty to Charge I and Additional Charge I, but guilty of a violation of the 61st Article of War; and guilty to all other Charges and Specifications. He was found guilty of all Charges and Specifications. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved so much of the finding of guilty of the Specification, Additional Charge I as finds accused guilty, except the word "apprehended", approved the sentence, and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The record of trial was forwarded forwarded for action under Article of War 50½.

3. The evidence for the prosecution:

a. Specification 1, Charge I: Morning report entries (Exs. 1

and 2) showed accused from duty Luke Field, Arizona to absent without leave, 12:30 a.m. 17 April 1942, and to confinement Camp Haan, California 28 May 1942. Patrolmen J. P. Frary and L. K. Lyndall, Los Angeles Police Department, apprehended accused at 320 West 1st Street, Los Angeles, California, at about 9:00 p.m. on 19 May 1942. At the time, accused was sober, wore a military uniform, "M.P." brassard and first sergeant's stripes, and was armed with a .45 automatic pistol and five rounds of ammunition (Ex. 7).

b. Specification 2, Charge I and Specification, Charge II: Morning report entries (Exs. 3 and 4) showed accused from confinement in hospital Camp Haan, California to escape and absent without leave 16 June 1942, and to confinement Vancouver Barracks, Washington 17 July 1942. Lieutenant of Detectives William D. Browne, Portland Police Bureau, apprehended accused at the George White Servicemen's Center, Portland, Oregon, at about 4:30 p.m. on 13 July 1942. At the time accused was sober and in uniform. Accused gave his name as "Thomas Causon", stated that he was with the Royal Australian Air Force, and later stated that he was with the Royal Canadian Air Forces (R. 11; Ex. 7).

c. Additional Charges I, II and III: Morning report entries (Exs. 5 and 6) showed accused to confinement Camp Haan, California 11 May 1943, from confinement to escape 19 May 1943, and to confinement Fort Lewis, Washington 9 July 1943. Captain L. M. Hebblethwaite, Prison Officer at Camp Haan from January 1943, saw accused about 19 May 1943 when accused was brought to confinement at the Post Stockade. Accused escaped a few days later. Captain Hebblethwaite next saw accused in Los Angeles the day accused returned from Fort Lewis, Washington, and had a conversation with accused while driving from Los Angeles to Camp Haan. Later Captain Hebblethwaite interviewed accused, who made a sworn statement dated 20 July 1943 (Ex. 8), which was prepared for his signature. The next day accused made another sworn statement (Ex. 9). In each instance no duress was used, or promise of reward given, and accused was admonished that the statement might be used against him. The Post Stockade records showed that a man named "DeFoe" escaped about 19 May 1943 with accused (R. 11-14).

The first statement by accused was substantially as follows: He was in the Stockade for a week or a week and a half, and "got along fine" until "DaFoe" came in the Stockade. "DaFoe" had about $100, was acquainted with a guard, and gave most of the money to two guards. At 11:30 "That night" he and "DaFoe" jumped the fence in sight of the two guards after a signal by the guards. They went to the "Engineer's Pool" where the Army trucks were, entered a truck, and "DaFoe" drove it away. "DaFoe" left accused in Los Angeles. Accused obtained his other uniform from his grandmother, spent three days at a hotel under his correct name, and went to Blaine, Washington. He was refused permission to

cross the border, returned to Seattle, worked for a week as an Army employee, and then turned himself in to the "FBI". He was taken to Fort Lewis, was questioned, made a statement, and was kept under guard until he was brought back (Ex. 8).

According to the second statement by accused, the whole escape was the idea of accused, he drove the truck to Los Angeles and "ditched DeFoe" there, and no guards were implicated. They escaped about 11:30 p.m. on 18 May 1943. Accused went to "Top Side" and remained a week. State Police saw him, called the Military Police, and chased him to "Stock Bridge". Accused then went up the Coast, and stopped several cars on the highway as an armed guard of the Army. He returned to Los Angeles, went to Bellingham, Washington, then to Blaine on the Canadian border, and was refused transportation across the border because his papers were not in order. Then he returned to Seattle, was shadowed by a man from the Military Police Intelligence Office, turned in at the United States Marshal's Office of his own free will, and was returned to Camp Haan (Ex. 9).

4. The defense presented no testimony. The accused elected to remain silent.

5. It is shown by the pleas of guilty and the evidence that accused was absent without leave on three occasions for the time alleged, and the evidence sustains an inference of intent to desert in each instance. The first time, accused was absent from 17 April 1942 to 19 May 1942, and was apprehended at Los Angeles. The next time, he was absent from 16 June 1942 to 13 July 1942, began the absence by escaping from confinement, was apprehended at Portland, Oregon, gave a false name, and claimed to belong to a foreign army. The third time, he was absent from 19 May 1943 to 8 July 1943, began the absence by escaping from confinement, took and used a government truck in effecting the escape, went to the State of Washington, was employed by the Army, and attempted to go into Canada.

It is shown by the pleas of guilty and the evidence that accused escaped from confinement on two occasions, and wrongfully and without authority took and used a government truck as alleged.

6. The charge sheet shows that the accused is 23 years of age, and that he enlisted 10 December 1941, with no prior service.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the approved findings of guilty and the sentence.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

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

SPJGK
CM 238365

15 SEP 1943

UNITED STATES	)	FOURTH SERVICE COMMAND ARMY SERVICE FORCES
v.	)	
Second Lieutenant KERMIT R. KITE (O-1174340), Field Artillery.	)	Trial by G.C.M., convened at Camp Mackall, North Carolina, 16 July 1943. Dismissal.

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

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

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

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

Specification: In that 2nd Lt. Kermit R. Kite, Battery B, 465th Glider Field Artillery Battalion, did, without proper leave, absent himself from his organization at Camp Mackall, North Carolina, from about May 24, 1943 to about May 28, 1943.

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

Specification 1: In that 2nd Lt. Kermit R. Kite, Battery B, 465th Glider Field Artillery Battalion, was, at Greensboro, North Carolina, on or about May 23, 1943, in a public place, to wit, city street, drunk while in uniform.

Specification 2: In that 2nd Lt. Kermit R. Kite, Battery B, 465th Glider Field Artillery Battalion, was, at Greensboro, North Carolina, on or about May 24, 1943, in a public place, to wit, pool room on Davie Street between Market and Gaston, drunk while in uniform.

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to dismissal. The reviewing authority approved only so much of the

findings of Specifications 1 and 2 of Charge II as involves findings of guilty of being drunk at the time and place alleged, approved only so much of the finding of Charge II as involves a finding of guilty of Article of War 96, approved the sentence, and forwarded the record of trial for action under Article of War 48.

3. The evidence is substantially as follows:

a. Charge I: Specification: Absence without leave in violation of Article of War 61.

In addition to the oral testimony of Captain Harold D. Rainforth, Battery B, 465th Glider Field Artillery Battalion, Camp Mackall, North Carolina, that accused was absent from his organization from 24 May 1943 to 28 May 1943, there was introduced in evidence a duly authenticated extract copy of the morning report of accused's organization, showing that accused was absent without leave for that period (R.9,10; Ex. B).

b. Charge II: Specifications 1 and 2 - drunk in uniform in a public place 23 and 24 May 1943.

About 8 o'clock of the evening of 23 May 1943, Second Lieutenant John A. Burton, Military Police, Basic Training Center No. 10, Greensboro, North Carolina, saw the accused on the parking lot just off West Gaston Street in the city of Greensboro, North Carolina. Accused was "delivered" to him by two city police officers. The parking lot is adjacent to West Gaston Street, which is a public street. Accused gave the witness the name of the hotel at which he was staying and witness accompanied him to his room. The accused was "physically unbalanced". Lieutenant Burton stated that he had to take him by the arm to keep him from staggering or falling or being "noticeable" on the street. His breath had the odor of an intoxicating beverage. He was perspiring a great deal, his eyes were watery and bloodshot, and his face was very much flushed. In the opinion of the witness accused was drunk and for that reason he suggested that accused remain in his room. Accused stated that he had a date with a young lady at the "college". He was advised to forego this date and take a nap. Witness left accused in his room and proceeded with his inspection of the military patrol. About one hour later he saw accused in the drug store or ice cream parlor "on the grounds of the college" in the city of Greensboro. The place was quite crowded with college girls. At this time the accused "wasn't unseemingly or out of the way" and witness left him talking to the cashier and several young ladies (R.10,14).

Specification 2, Charge II: On the next evening (24 May) about 10 o'clock Lieutenant Burton saw accused in the entrance of a pool room

and beer parlor on Davie Street in Greensboro, North Carolina (R.16). His clothing was "somewhat soiled or dirty", his face was flushed, his eyes were bloodshot and watery. Due to his condition, witness took him from the beer parlor to the police station. Accused staggered. He was helped up the steps into the lobby and to the desk sergeant's desk. In the opinion of the witness the accused was drunk. Lieutenant Burton then took the accused to the Station Hospital and requested that the officer of the day give him the "sobriety test". The accused was not boisterous or disorderly at any time either on the 23rd or 24th of May (R.17,19).

Major Melvyn Berlind, Station Hospital, Basic Training Center No. 10, Greensboro, North Carolina, examined the accused at the Station Hospital Monday night 24 May around 10 o'clock. He had the accused stand at attention, and do an about face, and he asked accused simple questions. In standing at attention accused "reeled over a bit but did not fall down". In executing an about face, "he would have fallen down on the floor, except that he was aided by one of the officers present". His face was flushed, his eyes were bloodshot and his breath had an alcoholic odor. From his examination and observation of accused, Major Berlind was of the opinion that accused was drunk - although he was coherent and mentally alert (R.23-26).

Accused did not testify and no evidence was introduced by the defense.

4. The evidence conclusively shows that accused was absent without leave from his organization from 24 to 28 May 1943 as alleged (Charge I and its Specification) in violation of Article of War 61. The undisputed evidence likewise shows that on the night of 23 May the accused was drunk on the public streets of Greensboro, North Carolina, and that on the night of 24 May the accused was drunk in a pool room and beer parlor in the city of Greensboro, North Carolina.

With respect to Charge II and its Specifications the approved findings are clearly supported by the undisputed evidence.

5. The accused is 30 years and 8 months of age. The records in the Office of The Adjutant General show that accused was graduated from Johnson-Saint Paris High School (Ohio) in 1930, and that he attended Urbana Junior College (Ohio) 6 months. He enlisted in the Regular Army 23 May 1937, served with the 11th Field Artillery, Schofield Barracks, T.H., discharged 23 May 1940, inducted in the military service 9 March 1942. Upon his graduation from Officers' Candidate School, Fort Sill, Oklahoma, 3 December 1942, he was appointed a temporary second lieutenant, Field Artillery, Army of the United States.

6. 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 as approved by the reviewing authority and the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Article of War 61 and 96.

Irving C. Gow, Judge Advocate.
Alton Frankenstein, Judge Advocate.
Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 18 SEP 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant KERMIT R. KITE (O-1174340), 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 as approved by the reviewing authority and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed but that the execution thereof be suspended during the pleasure of the President.

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

Myron C. Cramer

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 Ex. action.

(Sentence confirmed but execution suspended. G.C.M.O. 314, 21 Oct 1943)

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

25 Aug 1943

SPJGN
CM 238368

UNITED STATES v. Second Lieutenant EDWARD I. LEONARD (O-1302484), A.U.S.	FIFTH SERVICE COMMAND ARMY SERVICE FORCES Trial by G.C.M., convened at Fort Hayes, Ohio, 12 and 13 July 1943. Dismissal, total forfeitures, and confinement for five (5) years.

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

1. The Board of Review has examined the record of trial in the case of the officer above named 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 58th Article of War.

Specification: In that Second Lieutenant Edward I. Leonard, AUS, did, at Fort Hayes, Ohio, on or about March 17, 1943, desert the service of the United States and did remain absent in desertion until he was apprehended at Chicago, Illinois, on or about April 27, 1943.

CHARGE II: Violation of the 69th Article of War. (Finding of not guilty).

Specification: (Finding of not guilty).

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

Specification: (Finding of not guilty).

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

Specification 1: In that Second Lieutenant Edward I. Leonard, AUS, did, at Washington, D. C. on or about March 1, 1943, with intent to defraud, wrongfully and unlawfully make and utter to First Sergeant James W. Leonard a certain check in words and figures as follows, to wit: "San Antonio, Texas, March 1, 1943, No.___, National Bank of Fort Sam Houston at San Antonio. Pay to the order of James W. Leonard $20.00, Twenty & No/100 Dollars, Edward I. Leonard," and by means thereof, did, fraudulently obtain from the said First Sergeant James W. Leonard the sum of $20.00, he, the said Second Lieutenant Edward I. Leonard, then well knowing that he did not have and not intending that he should have funds in the said National Bank of Fort Sam Houston at San Antonio, Texas, for the payment of said check.

Specification 2: In that Second Lieutenant Edward I. Leonard, AUS, did, at Columbus, Ohio, on or about March 28, 1943, with intent to defraud, wrongfully and unlawfully make and utter to the Fort Hayes Hotel a certain check, in words and figures as follows, to wit: "March 28, 1943. Pay to the order of Fort Hayes Hotel, $30.00 Thirty & No/100 Dollars, with exchange, to Irwin-Union Trust Company, name of Bank or Trust Co., Columbus, Indiana, city or town and state, I hereby represent that the amount drawn for in this draft, is on deposit to my credit, free of any claims, and acknowledge that this amount has been paid to me upon representation of such facts, Edward I. Leonard," and by means thereof, did, fraudulently obtain from the said Fort Hayes Hotel the sum of $30.00, he, the said Second Lieutenant Edward I. Leonard, then well knowing that he did not have and not intending that he should have sufficient funds in the Irwin-Union Trust Company, Columbus, Indiana, for the payment of said check.

Specification 3: In that Second Lieutenant Edward I. Leonard, AUS, did, at Columbus, Ohio, on or about March 28, 1943, with intent to defraud, wrongfully and unlawfully make and utter to the Fort Hayes Hotel, a certain check, in words and figures as follows, to wit: "March 28, 1943. Pay to the order of Fort Hayes Hotel, $20.00 Twenty & No/100 Dollars, with exchange, To Irwin-Union Trust Company, name of Bank or Trust Co., Columbus, Indiana, city or town and state, I hereby represent that the amount drawn for in this draft, is on deposit to my credit, free of any claims, and acknowledge that this amount has been paid to me upon representation of such facts, Edward I. Leonard," and by means thereof, did fraudulently obtain from the said Fort Hayes Hotel the sum of $20.00, he, the said Second Lieutenant Edward I. Leonard, then well knowing that he did not have and not intending that he should have sufficient funds in the Irwin-Union Trust Company, Columbus, Indiana, for the payment of said check.

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

Specification 1: In that Second Lieutenant Edward I. Leonard, AUS, did, at Washington, D. C., on or about February 24, 1943, with intent to defraud, wrongfully and unlawfully make and utter to Henderson Grill, a certified check, in words and figures as follows, to wit: "February 24, 1943, No. ___, Irwin Union Trust Company, Columbus, Ind., write name of your bank (city and state) on this line, pay to the order of Cash, $20.00, Twenty & No/100 Dollars. For Value received I claim that the above amount is on deposit in said bank in my name subject to this check and is hereby assigned to payee or holder hereof. Edward I. Leonard, Fort Washington, Md.," and by means thereof, did fraudulently obtain from William E. Comer, the sum of $20.00, he, the said Second Lieutenant Edward I. Leonard, then well knowing that he did not have and not intending that he should have sufficient funds in the Irwin-Union Trust Company, Columbus, Indiana, for the payment of said check.

Specification 2: In that Second Lieutenant Edward I. Leonard, AUS, did, at Washington, D. C., on or about March 2, 1943,

> with intent to defraud, wrongfully and unlawfully make and utter to Margaret Dowell, a certain check, in words and figures as follows, to wit: "Ambassador Hotel, 14th and K Streets, Washington, D. C., March 2, 1943, pay to the order of Margaret Dowell, $20.00, Twenty & No/100 Dollars, Irwin-Union Trust Bank, Columbus, Ind., City and State. I hereby represent that the amount drawn for in this draft is on deposit to my credit, free of any claims, and acknowledge that this amount has been paid to me upon my presentation of such facts, signature Edward I. Leonard, Street 2135 S. Drake, City, Memphis, Tennessee," and by means thereof, did fraudulently obtain from Margaret Dowell, the sum of $20.00, he, the said Second Lieutenant Edward I. Leonard, then well knowing that he did not have and not intending that he should have sufficient funds in the Irwin-Union Trust Company, Columbus, Indiana, for the payment of said check.

The accused pleaded not guilty to all Charges and Specifications. He was found not guilty of the Specifications, Charges II and III, and Charges II and III; of Charge I not guilty, but guilty of a violation of the 61st Article of War; of the Specification, Charge I, guilty except the words "desert" and "in desertion", substituting therefor, respectively, the words "absent himself without leave from" and "without leave", of the excepted words not guilty, of the substituted words guilty; and guilty of the remaining Charges and Specifications. No evidence of previous conviction 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 a period of five years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that on 2 January 1943 the accused opened a bank account with the Irwin-Union Trust Company, Columbus, Indiana, in the name of "Edward I. or Ina Leonard" - Ina being his wife. His initial deposit was $200.00; only four subsequent deposits, aggregating $315.95, were ever made to this account, the final one on 1

February 1943. On 24 February 1943, the balance in the account had been reduced by checks drawn on it to $2.86, and remained at that figure until 1 July 1943, the date of the cashier's deposition (R. 21; Ex. L, 1).

On 24 February 1943, at Washington, D. C., the accused drew a check on the Irwin-Union Trust Company for $20 payable to cash. William E. Comer indorsed it, and, below his indorsement is written, "Deposit to credit of Henderson Grill". It was presented to the drawee bank for payment on 28 February 1943. As introduced in evidence, without objection by the defense, this check had a printed slip attached to it, showing it was returned by the drawee bank because there were "not sufficient funds" in the account on which it was drawn. It was stipulated that the accused made and uttered this check to Henderson's Grill and "by means thereof did obtain from William E. Comer the sum of $20.00" (R. 20-22; Exs. H & L).

On 2 March 1943, at Washington, D. C., the accused drew another check for $20.00 on the same bank, payable to Margaret Dowell, who cashed it for him. Both it, and the check referred to in the preceding paragraph contain the following printed recitation just above the accused's signature: "I hereby represent that the amount drawn for in this draft is on deposit to my credit, free of any claims, and acknowledge that this amount has been paid to me upon representation of such facts.". The Dowell check, introduced in evidence, neither bears Margaret Dowell's endorsement nor any indication that it was ever presented for payment to drawee bank (R. 20-22; Exs. I,L).

On 1 March 1943, at W ashington, D. C., the accused drew a check for $20 on the National Bank of Fort Sam Houston at San Antonio, payable to James W. Leonard, and by delivering it to First Sergeant James W. Leonard obtained from him the sum of $20. It was presented to the drawee bank for payment on 13 March 1943 and returned marked "unable to locate account". The National Bank of Fort Sam Houston had no record of an account in the accused's name on 1 March 1943; on or about which date he had no letters of credit to said bank, no monies on deposit there, and was not known there (R. 19, 23, Exs. D,M).

On 5 March 1943, by War Department Special Orders, the accused was released from assignment and duty at the Military Censorship School, Fort Washington, Maryland, effective upon completion of his course of

instruction there, and assigned to Infantry Headquarters, 5th Service Command, Fort Hayes, Ohio; pursuant to which, on 16 March 1943, he departed en route to Fort Hayes, where he had not reported when, wearing his proper uniform, he was apprehended by military authorities in Chicago, Illinois, April 27, 1943 (R. 11-17; Exs. A,B,C,J,K).

In the meantime, on 28 March 1943, at Columbus, Ohio, he made and uttered to Fort Hayes Hotel two checks drawn on Irwin-Union Trust Company, for $30 and $20, respectively, payable to the order of said hotel, each representing in writing above the accused's signature "that the amount drawn for in this draft is on deposit to my credit, free of any claims", and acknowledging "that this amount was paid to me upon representation of such facts"; and by means thereof obtained from the Fort Hayes Hotel the sums of $30 and $20 respectively. These checks were presented for payment to the drawee bank on 31 March 1943, at which time the accused's balance in said bank was $2.86, as it had been at all times since 24 February 1943. Printed appendages to each check, as introduced in evidence without objection on the part of the defense, indicate that both items were returned by the drawee bank because there were "not sufficient funds" to cover them in the account on which they were drawn (R. 21, 22; Exs. F,G,L).

4. The accused testified under oath, after his rights as a witness had been explained to him, that, upon arriving at Columbus, Ohio, on 17 March 1943, being worried about his wife's anticipated confinement, he telephoned his parents in Chicago, with whom she was staying, to inquire about her condition; after which, he departed for Chicago without communicating with Fort Hayes. He found his wife under the care of a doctor, very weak and anemic. On 26 April 1943 he telephoned his status and whereabouts to the Commanding Officer, Chicago Military Police Headquarters, inquiring what he should do, and was told to write his own ticket. He was packed and ready to leave for Columbus the following night, when a military police officer apprehended him at home and took him to 6th Service Command Headquarters, whence he was permitted to return to his parents' home to await further orders. 1 May 1943, he was called via telephone to the M.P. office to sign some papers. While there, the officer in charge remarked, "Lieutenant, I think we will have to place you under arrest". Later, an M.P. sergeant told the accused he had permission to drive him home, and did so. On 3 May 1943 he was instructed via telephone to report to military police headquarters that night. He was on the way, accompanied by his father, when arrested.

His wife was authorized to draw checks on their joint account

in the Irwin-Union Trust Company, but had never done so. The ledger sheet, introduced by the defense, shows no deposit subsequent to 1 February 1943, and a final balance of $2.86, unchanged since 24 February 1943 (R. 35-44, Ex. 1).

5. The Specification, Charge I, alleges desertion on 17 March 1943, terminated by apprehension 27 April 1943. The court's finding of guilty of only the lesser included offense of absence without leave for the period specified is amply supported by the uncontradicted evidence, including the sworn testimony of the accused.

Specification 1, Charge IV, alleges making and uttering to First Sergeant James W. Leonard a $20 check on the National Bank of Fort Sam Houston, with intent to defraud, and, by means thereof, fraudulently obtaining $20 from the payee, knowing that he did not have, and not intending to have, funds in the drawee bank for the payment of said check. The evidence shows that he drew the check and obtained the money as alleged, having no account in the bank either then or when the check was presented. These facts create a clear inference of the fraudulent knowledge and intent alleged in the Specification. The record supports the findings of guilty, in violation of Article of War 95.

Specifications 2 and 3, Charge IV, allege the making and uttering to Fort Hayes Hotel of checks drawn on Irwin-Union Trust Company, with intent to defraud, and by means thereof the obtaining of an aggregate of $50 from said hotel, then knowing that he did not have, and not intending to have, sufficient funds in the Irwin-Union Trust Company for the payment of said checks. Proof was adduced that he made and uttered the checks, and thereby obtained the amounts of money for which each was written, at a time when his balance in the drawee bank was $2.86; at which figure it had remained for over a month previous to the passing of the checks, and still remained when they were presented for payment. The joint character of the account, with his wife's right to check on it as well as the accused, might have precluded the inference of knowledge and intent, in the absence of the accused's positive testimony that his wife had never checked on the account. The accused, having himself written all the checks which reduced his balance to so wholly inadequate an amount, and having, in the meantime, cashed several other checks, drawn on the same account, which, if paid, would have left a large deficit instead of a tiny balance, was charged with notice of the exhaustion of the account on the date the checks were uttered. The record supports the findings of guilty of these two Specifications, in violation of Article of War 95.

Specification 1, Additional Charge, alleges making and uttering to Henderson Grill, with intent to defraud, a $20 check drawn on Irwin-Union Trust Company, thereby fraudulently obtaining from William E. Comer the sum of $20, knowing that he had insufficient funds to cover the check, and not intending to have sufficient funds to cover it. The check was payable to cash. It was indorsed by Comer and deposited to the credit of Henderson Grill. The defense stipulated that it was made and uttered to Henderson's Grill, and that, by means thereof, the accused obtained the amount thereof from Comer. Whether Comer cashed it in the first place, or, by reason of his indorsement, reimbursed Henderson's Grill, becomes immaterial by virtue of the stipulation. The facts shown support the inference of knowledge and intent. When the check was cashed and when it was presented for payment, the accused's balance in the drawee bank was $2.86. He never thereafter increased it, and, on the trial, although he testified, adduced no evidence indicating that for any reason he should not be charged with knowledge of the status of a bank account, checked on by him alone.

Specification 2, Additional Charge, alleges another $20 check payable to Margaret McDowell, drawn on the same account, whereby he fraudulently obtained $20 from the payee. This check was never presented to the drawee bank. However, there is clear proof that his balance was only $2.86 when the check was drawn, that it was never increased, and that it had been insufficient to cover the check for two weeks before the check was issued. The check itself discloses a written representation above the accused's signature that the amount for which it was drawn is on deposit to the accused's credit in the drawee bank, free of any claims. The accused stipulated that he obtained $20 from Margaret Dowell by means of the check, and the proof shows there were not then or thereafter sufficient funds to cover it in the account on which it was drawn. This evidence supports the inference of fraudulent knowledge and intent involved in the finding of guilty.

6. The accused is 21 years of age. War Department records show enlisted service from 5 June 1940, honorable discharge for the convenience of the Government, 3 December 1942, temporary appointment as second lieutenant, A.U.S., and simultaneous assignment to active duty, 4 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 thereof. A sentence of dismissal is authorized upon conviction of Article of War 61 and mandatory upon conviction of Article of War 95.

Edward L. Jessons, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Shafer, Judge Advocate.

(246)

SPJGN
CM 238368

1st Ind.

War Department, J.A.G.O 2 Sep 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Edward I. Leonard (0-1302484), A.U.S.

2. I concur in the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence and to warrant confirmation thereof. I recommend that the sentence be confirmed, but in view of the youth of the accused, that three years of the sentence imposed be remitted, and that the sentence as thus modified be ordered executed.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action designed to carry into effect the foregoing recommendation, should 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. of ltr. for sig. Sec. of War.
Incl 3 - Form of Executive action.

(Sentence confirmed but confinement and forfeitures remitted. G.C.M.O. 304, 7 Oct 1943)

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

(247)

26 OCT 1943

SPJGH
CM 238389

UNITED STATES	)	HAWAIIAN SEACOAST ARTILLERY COMMAND
v.	)	Trial by G.C.M., convened at Fort Kamehameha, T.H., 9 and 10 June 1943. Dishonorable discharge and confinement for life. Penitentiary.
Private FREDDIE H. KINCAID (35212197), Battery A, 15th Coast Artillery.	)	

REVIEW by the BOARD OF REVIEW
DRIVER, LOTTERHOS and LATTIN, 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 on the following Charges and Specifications:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Freddie H. Kincaid, Battery "A", 15th Coast Artillery, did, at Fort Weaver, T.H., on or about 1730 May 11, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private 1st Class Ignace T. Szubski, Battery "A", 15th Coast Artillery, a human being by shooting him with a rifle.

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

Specification 1: (Finding of not guilty).

Specification 2: In that Private Freddie H. Kincaid, Battery "A", 15th Coast Artillery, did, at Fort Weaver, T.H., on or about May 11, 1943, with intent to do him bodily harm commit an assault upon Sergeant Howard C. Fields, Battery "A", 15th Coast Artillery, by shooting at him with a dangerous weapon, to wit, a .30 caliber M-1 rifle.

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Specification 1, Additional Charge and guilty of all other

Specifications and of the Charges. 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 and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement. The record of trial was forwarded for action under Article of War 50½.

3. The evidence for the prosecution is substantially as follows: About 1:00 p.m. on 11 May 1943, accused and Corporal James E. Sementelli went from Fort Weaver, Territory of Hawaii, to Fort Kamehameha by boat. Sementelli was in the Fort Kamehameha Post Exchange between 1:30 and 2:15 p.m. while accused drank about three bottles of beer. When they returned to Fort Weaver on the 4:40 boat, accused had, in Sementelli's opinion, had too much to drink, but was not drunk. They went to the Fort Weaver Post Exchange where accused had one more bottle of beer (R. 89-91, 118, 121-123).

Between 5:00 and 5:45 p.m. accused entered a barracks in Number 2 gun section of Fort Weaver, where he, Private Thurl McDaniel, and Private Bertram B. Patrick were quartered, and asked McDaniel to go with him to "chow". Accused had been drinking "quite a bit", his breath smelled of beer or liquor, he seemed under the influence of liquor but did not appear to be "really drunk", he did not stagger, appeared to be "all right" and was "acting normal". McDaniel stated he did not wish to eat, but accused insisted, and McDaniel then put on his shoes and started to leave the building. Accused struck at McDaniel who warded off the blow and knocked accused down. Accused seized McDaniel by the throat, and McDaniel knocked him down again. Sergeant Howard C. Fields entered the building to stop the fight and stepped between accused and McDaniel. Accused picked up a knife which was lying on the floor and opened it. As soon as McDaniel saw the knife, he ran out of the building, taking with him an unloaded rifle to use as a club if accused should follow him with the knife. Sergeant Fields grasped the knife arm of accused but permitted accused to push him out of the barracks where there would be more room. McDaniel ran to the next barracks where he told Privates First Class James E. Scarboro and Ignace T. Szubski, Privates Joseph Albanese and Patrick, and several others, that accused was "acting up with a knife" or was "after him with a knife". Scarboro, Szubski and Albanese went out and helped Sergeant Fields take the knife from accused. During the scuffle, Scarboro put his arm around the neck of accused who fell to the ground and began "crying" or sobbing. He was on his knees, hunched over with his face on the ground, as if he were hurt or angry. He said nothing, but he looked "a little mad", his eyes were "wild looking". Sergeant Fields and Scarboro picked him up and carried him to his bunk, thinking he would go

to sleep, and then returned to their barracks which are collapsible buildings, sixteen by twenty feet, with screens, and it is easy to see into them (R. 15-28, 34-36, 39-42, 53-57, 60, 67-70, 76-77, 80, 84-85, 92-94, 105, 107-109).

About five minutes later Sergeant Fields looked out of his barracks into the barracks of accused, approximately 50 feet to the west, and saw accused standing in the doorway, working the lock of a rifle and apparently loading it. Sergeant Fields put a loaded pistol in his back pocket, intending to strike accused with it if necessary, and met accused about midway between the two barracks. He asked accused to give him the rifle but the latter refused. Sergeant Fields tried to talk him into surrendering the rifle, and several times it appeared as if accused would do so, but each time that Sergeant Fields moved in to take it, accused would point the rifle directly at him and force him back. Accused said, "Sergeant Fields, I don't want you, but I will get the other guys". He was talking "all the time, saying he was going to get those people that were bothering him", but he did not mention their names. While Sergeant Fields was attempting to get the rifle, he and accused moved about until they were in back of the north or rear end of Sergeant Fields' barracks, a few feet from the rear door. Meanwhile Szubski, evidently intending to get behind accused, had entered Sergeant Fields' barracks through the front door and had come to the rear doorway and pushed the screen door outward six or eight inches. At this time, accused was standing northeast of the door, facing toward it, and about six feet from Sergeant Fields, who was three or four feet in front of the door, facing accused. Scarboro had come up and was standing at the northwest corner of the building about six feet behind Sergeant Fields. Accused could see Szubski standing in the doorway. Szubski and Scarboro were not armed. Sergeant Fields did not take out his pistol or make any threats, except that at one time just before the shooting, he reached his hand back as if to draw a pistol. Accused held the rifle at hip level, pointing toward them and "kept wiggling it around", waving it—slightly—to cover all three of them. Szubski said, "Kincaid, give us the rifle". Accused immediately raised the rifle, pointed it at Szubski and fired. Szubski fell. Accused then lowered the rifle, swung it in the direction of Scarboro and Sergeant Fields, and fired again. Sergeant Fields "ducked" and the bullet passed between him and Scarboro. Sergeant Fields opened the door to see if Szubski had been hit, and saw him lying on the floor with a bullet hole in his right chest. He then pulled out his pistol and fired five times at accused, who ran away (R. 41-51, 58-60, 62-63, 65-66, 70-75, 83, 85-89, 93-97, 103, 105-106).

Szubski died within a few minutes as a result of the bullet wound, and was pronounced dead by Captain Fred C. Jordan, Medical Corps, who was present when an autopsy was performed. A bullet which was subsequently recovered from a locker in the barracks in which Szubski was shot, was identified by a ballistics expert as having been fired from the rifle of accused (R.117-118, 135-140, 146, 154-155, 158-160, 164; Ex. 6).

A few minutes after the shooting, Private First Class Clark O. Wooley observed accused running, then walking, up the tracks north of the barracks. Accused was carrying a rifle and blood was running down his arm. Wooley stopped accused and took the rifle, which contained four cartridges. Accused was "crying, sort of mumbling to himself". He had a wound, which was not serious, in his left shoulder. Corporal Walter U. Steg, 15th Medical Detachment, arrived in answer to a call, dressed the wound of accused and administered morphine. Accused had to be held down during the dressing, and kept calling out "that he wanted his rifle, he wanted to kill the sons of bitches". Accused recognized Corporal Steg and Sergeant Vallie R. Dungan, called them by name and spoke clearly, but his breath smelled of liquor. At the dispensary when Captain Jordan saw him, accused struggled to get off the litter and stated that he wanted to get his rifle because he wanted to kill a couple of men and that the next time he would do a better job. Accused answered questions about his wound promptly and coherently, knew what he was doing, was not hysterical in the medical sense of the term, his physical state was good but he seemed to be extremely angry, and his breath smelled of alcohol. At the dispensary about 6:10 p.m. and on the way to the hospital, accused called Corporal Sementelli by name, answered questions logically, was nervous and hesitant, and stated to Sementelli that "three of them" were after him, namely Sergeant Fields, Private Szubski and Private Scarboro, and that he "got" two of them. Accused stated to Sergeant Dungan that Sergeant Fields had shot accused and that accused had shot Scarboro. From the dispensary, accused was taken to the North Sector General Hospital, where, on 17 May 1943, he was warned of his rights and questioned by Lieutenant Colonel Rollo E. Venn, the investigating officer, and Lieutenant Colonel Clarence J. Lundblad. Colonel Venn read to accused all the statements which had been obtained from the witnesses and asked accused if he would like to have any witnesses called in his behalf. Accused replied "No, sir. I don't think so. I think you have got everyone that was around at the time. I guess the rest had gone to chow." On 27 May 1943, accused stated to a ward attendant in the hospital that the "man that was killed was a good friend of his, and he slept about twenty feet from him". (R. 81, 94, 111-114, 119-120, 126-128, 141-143, 146-149, 151, 153-154, 161-163, 165).

Prior to the afternoon of 11 May 1943, accused had been on friendly terms with Szubski, Scarboro, Patrick, McDaniel, Sementelli and Fields (R. 32, 61, 90, 92, 122).

4. The evidence for the defense: Accused testified that he was born in West Virginia, attended school until he reached the fourth grade and then went to work. He worked in the coal mines from the time he was seventeen or eighteen until he was inducted on 12 September 1941. He arrived in Hawaii on 7 January 1942 and was assigned to Battery A, 15th Coast Artillery (R. 168-169, 175).

From 5:00 p.m., 10 May to 7:00 a.m., 11 May 1943, accused was on guard duty. In the early afternoon of 11 May the first sergeant gave him oral permission to take some of his home town newspapers to a friend named James McCoy who worked in the Post Exchange at Fort Kamehameha. Accused took the boat to Fort Kamehameha about 1:30 p.m. and went directly to the Post Exchange, where he gave the papers to McCoy. The latter had to go to work and accused had no opportunity to drink with him, so accused sat at a table with George McDonald and another man and drank five or six beers with them. About midafternoon, he joined "Corporal Kirby" and John C. Moffett and did not know how many beers he had with them. Accused remembered leaving the Post Exchange when the sale of beer stopped, and getting on the 4:30 boat for Fort Weaver, but he did not remember leaving the boat, or anything which occurred from the time he boarded the boat until he was given an injection of some kind in the operating room of the hospital at Schofield at about ten o'clock that night. He noticed then that his arm was bandaged and sore but did not know what had happened until about 20 May, when Colonel Venn, the investigating officer, told him that he had shot and killed Szubski. At that time, Colonel Venn read the charge sheets and testimony, stated that he had all the witnesses who were "around there", advised accused of his rights with regard to making a statement, and asked accused if he wished to call any witnesses. Accused stated to a ward attendant on 27 May that accused had killed a friend. Accused supposed that he was drunk on 11 May. He had been drunk before, and had lost his memory on previous occasions when he had been drinking, but "not every time", and the last time was "quite a while back". Accused could not get drunk on three beers but "could feel pretty good" on six. The Fort Weaver Post Exchange sells beer between the hours of 3:30 and 5:00 p.m. In that length of time accused had never drunk more than six or seven beers, nor been drunk on beer, although he had "felt pretty good". While on guard on the night of 10-11 May, accused had had his rifle and ammunition, but had not put a cartridge in the chamber. He did not know that Sergeant Fields possessed a pistol and had never seen him with one except as sergeant of the guard. Corporal Sementelli was a good friend of accused. They were together on

the boat to Fort Kamehameha but accused did not drink with him on 11 May. Sergeant Fields, Szubski, Scarboro and McDaniel were also friends of accused. He had no intention of killing Szubski or anyone else. The relative size of the bullet holes in his shoulder indicated to accused that he was shot while facing Sergeant Fields (R. 170-217).

Private James R. Coy did not see accused on the occasion when accused brought some newspapers to the Fort Kamehameha Post Exchange for him, but another clerk later gave him the papers. Private George H. Crisoli saw accused drink about four beers at the Fort Kamehameha Post Exchange on 11 May up to 2:30 p.m. Corporal Jesse L. Kirby drank four or five beers with accused between 2:00 or 2:30 p.m. and 3:15 p.m. Private John C. Moffett saw accused drink five or six beers between 3:00 and 4:00 p.m., and walked out with him when the Exchange closed at 4:00 p.m. Accused walked all right; he was not sober, but he was not drunk (R. 227-233, 249-255).

Accused entered the Fort Weaver Post Exchange about 4:30 p.m. on 11 May, had a beer with Private Dwight M. Acord and stated to Acord that he had been over "to Kam to make the beer call". Acord knew accused well and had been on passes with him. In Acord's opinion accused was not sober; if not drunk, he was very close to it. Accused spoke clearly, the things he said "made sense", he was not staggering, but his eyes were bloodshot (R. 237-241).

When accused was put into an ambulance after the shooting, he called Private Jerry Simmons by name and asked him to tell Dotson to "take it easy, and to come up and see him as soon as he got well". Dotson was in good health and standing beside Simmons at the time. In Simmons' opinion, accused thought he had shot Dotson (R. 245-249).

Major Aubrey L. Huskey, chief of the psychiatry section of the North Sector General Hospital, gave accused a general psychiatric examination and found that accused could pass the twelve year mental age test and should be considered of the average adult intelligence. When examined, accused had no neuro-psychiatric condition and was sane and legally responsible for his acts. Captain F. L. Waters, assistant chief of the neuro-psychiatric section of the hospital, confirmed Major Huskey, except that Captain Waters stated accused did not have the mental age level of the average adult. Both officers testified that accused showed no evidence of hysterical tendencies, but that such tendencies might exist without being evident, and that it is possible that a man above the mental age of 10 or 12 years, who drank six or eight bottles of beer between one and five o'clock in the afternoon and who lost all recollection of what took place for the next several

hours, would not know of the occurrences in which he was involved. Major Huskey had never seen a case of hysteria of the amnesia type in which the period of blank memory was only a day, as amnesia is usually of the prolonged type (R. 217-227, 233-237).

5. a. As to the Specification, Original Charge, the evidence shows conclusively that at about 5:30 p.m. on 11 May 1943, accused had a fight with another soldier in the barracks, was disarmed by Sergeant Fields, Szubski, Scarboro and others, and was then placed in his bunk. A few minutes later accused came out of his barracks with a loaded rifle. Sergeant Fields approached accused and attempted to prevail on accused to surrender the weapon. Scarboro was standing several feet behind Sergeant Fields, and Szubski stood in a barracks door, near Sergeant Fields and accused, with the screen door partly open. When Sergeant Fields would reach for the rifle accused would point it at Sergeant Fields to stop him. When Szubski asked accused to give them the rifle, accused raised the rifle, pointed it at Szubski, shot and killed him.

Murder is the unlawful killing of a human being with malice aforethought. Malice does not necessarily mean hatred or personal ill-will toward the person killed. The use of the word "aforethought" does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. Malice aforethought may mean an intention to cause the death of or grievous bodily harm to any person, or knowledge that the act which causes death will probably cause the death of or grievous bodily harm to any person, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not (MCM 1928, par. 148a; CM 234838, Blizzard; CM 237782, Prentiss).

The defense was based on the contention that accused was so drunk at the time, or so affected by hysteria, that he did not know what he was doing and could not have had the necessary intent. But the facts as disclosed by the evidence refute this claim. Although accused had consumed a number of bottles of beer during the afternoon, was more or less under the influence of alcohol, and testified that he remembered nothing that occurred between about 4:30 and 10:00 p.m., yet it was shown that he appeared to be all right, did not stagger, acted normally, and did not appear to be "really drunk" at the time when he had a fight in the barracks. After a knife had been taken away from him he cried or sobbed, lay on the ground and appeared to be hurt or angry. When he came out of the barracks with a rifle he handled it in such a manner as to prevent

Sergeant Fields from disarming him. In shooting Szubski, he raised the rifle, pointed it and fired. Shortly afterward, both at the place where he was found and at the dispensary, accused recognized other soldiers, called them by name, spoke clearly, answered questions promptly and coherently, and made comments on what had occurred.

In the opinion of the Board of Review the evidence shows that accused was not so intoxicated as not to know what he was doing, was not in a condition of hysteria, and was capable of entertaining the specific intent required. The evidence further establishes that the homicide was committed by accused with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation as alleged. Such an act constitutes murder in violation of the 92nd Article of War.

b. As to Specification 2, Additional Charge, the evidence shows that after accused shot Szubski, he lowered the rifle, swung it in the direction of Scarboro and Sergeant Fields and fired, and that the bullet passed between the two men. Accused had pointed the rifle at Sergeant Fields previously when Sergeant Fields had attempted to take it from accused. The intent to do bodily harm to Sergeant Fields is inferred from the act of accused in shooting in his direction under the circumstances, and is not negatived by the fact that it may have been his desire to shoot Scarboro rather than Sergeant Fields.

Where a man fires into a group with intent to murder some one, he is guilty of an assault with intent to murder each member of the group (MCM, 1928, par. 149l). This is likewise true when the intent is to do bodily harm.

In the opinion of the Board of Review the evidence supports the findings of guilty of Specification 2, Additional Charge.

6. The Charge Sheet shows that accused is 24 years of age, and that he was inducted 12 September 1941, with no prior service.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. A sentence either of death or of imprisonment for life is mandatory upon conviction of murder in violation of the 92nd Article of War. Confinement in a penitentiary is authorized by the 42nd Article of

War for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by sections 273 and 275 of the Criminal Code of the United States (18 U.S.C. 452, 454).

Samuel M. Dover, Judge Advocate

F. J. Fotthuhos, Judge Advocate

Norman D. Lattin, Judge Advocate

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

SPJGK
CM 238470

16 SEP 1943

UNITED STATES	THIRD ARMY
v.	Trial by G. C.M., convened at Camp Claiborne, Louisiana, 18 June 1943. Dishonorable discharge and confinement for life. Penitentiary.
Private ROBERT LEDBETTER (38259642), 259th Signal Construction Company.	

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 Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Robert Ledbetter, 259th Signal Construction Company, Camp Claiborne, Louisiana, did, at New Iberia, Louisiana, on or about 6 June 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Private Jules P. Decuir, 259th Signal Construction Company, Camp Claiborne, Louisiana, a human being, by shooting him with a pistol.

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 the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence is substantially as follows:

In the early morning of 6 June 1943 the accused and other soldiers were at the Grand Terrace Club, a bar and restaurant located on the highway near the town of New Iberia, Louisiana. The restaurant is separated from the bar by a partition with connecting doors between the two rooms. One of

the soldiers was dancing with his hat on. Mr. Dennis J. Blanchard, a special police officer of New Iberia, was on night duty in the Grand Terrace for the purpose of maintaining order. He asked the soldier to remove his hat. An argument followed. The officer placed a telephone call for police assistance. Following the call, Officer Blanchard was assaulted by one or two soldiers and rendered unconscious. Prior to the assault the officer had on his person a loaded 38 caliber pistol (R.6,7,10,13-16). Mr. Leo Meyers, manager of the Grand Terrace, stated that the accused struck Mr. Blanchard on the head with a chair knocking him to the floor. Meyers told accused to "turn the chair loose", which he did. Accused then walked about 3 feet and picked up the pistol which had been on the person of officer Blanchard. As accused picked up the pistol -

> "* * * He made a circle and got in the center of the front, thumb cocked the gun. * * * He said, 'Anyone who wants this gun, I'll unload it in him'. He walked along the edge of the bar, passed on by me, he was about 2½ feet from me, and walked on through the doors to the back room. He made one shot in the back room. About 1½ minutes later he passed by and made 2 shots in the building, going out the front door and stepping off the porch firing one shot out in front. Four shots I heard fired. At the time, a lady hollered, that a man had been shot. I walked back there, and found Private Jules Decuir shot. He had fell on his face and was bleeding from the mouth and nose. I rushed back in front to call for an ambulance. Waiting for the ambulance, I went to the back room where the body was. Someone had turned the body over on it's back. Then the ambulance came and loaded him on it. I think it was dead then." (R.7-8).

Mr. Meyers stated that accused had a pint of whiskey with him when he came to the club, and that accused had been drinking "a little bit", but that accused did not stagger and that in his opinion accused was not drunk (R.8-13).

Mr. and Mrs. James V. Frilot, Mr. Gerard Frank, and Mr. Earnest Moore, civilians of New Iberia, Louisiana, were in the dining room of the Grand Terrace and witnessed the shooting. Mr. Frilot stated -

> "* * * I was standing up in the room by the table at the time that Private Robert Ledbetter came running in the back room with a pistol in his hand. He threw it in my chest, cocked it, and said, 'Anybody in here have anything to do or say about it'. Nobody said a word. Another soldier ran in through the door, and said, 'Don't do that, Joe'. Private Robert Ledbetter told him to get off to

the side and not get in the way. Then another soldier [deceased] came in through the door. He didn't say anything. Private Robert Ledbetter turned around and shot him. Private Robert Ledbetter walked past him through the door and went out to the front." (R.19)

Witness stated that the deceased fell to the floor, that accused made no effort to help him, and that accused fired but one shot while in the room. Without objection by the defense, witness Frilot identified the pistol which was in the hand of the accused at the time of the homicide (R.18-20; Ex. 1). In the opinion of this witness accused "might have been under the influence of liquor but he was not drunk" (R.20). Each of the other civilian witnesses, Mrs. Frilot (R.21-22), Mr. Gerard Frank (R.22-24), and Mr. Earnest Moore (R.25-26), testified in substance as did Mr. Frilot. Mr. Frank, who had known the deceased (R.23) stated:

"* * * Private Robert Ledbetter came in the room with a pistol, and said, 'Any of you have anything to say about it, let's hear it'. He had a gun on James Frilot. Another soldier walked in, and then Jules [deceased] walked in and Private Robert Ledbetter turned and shot him." (R.23)

Witness was positive in his identification of the accused and stated that accused was standing within 6 or 7 feet of deceased at the time the fatal shot was fired (R.23-24). Mr. Earnest Moore's account of the shooting was as follows:

"* * * We were sitting down in the back room and had ordered some fish, and when we got the fish, we spread the fish out on the table to eat. Jim Frilot was standing up. Then this colored soldier, (indicating the accused, Private Ledbetter), came in with a gun in his hand and stuck it in Jim Frilot's side. He said, 'You son-of-a-bitch, don't move.' Another fellow came in behind him. He said to this fellow, 'Don't come in'. It was a little dark fellow and he went back. The other fellow came in, and he shot that one" (R.25-26).

Witness stated that he had known the deceased and that accused did not say anything to the deceased after he had shot him (R.26).

Between 9 and 10 o'clock on the morning of 6 June 1943, Dr. Robert F. DeRouen, physician and surgeon and coroner of Iberia Parish, Louisiana, examined and performed an official autopsy upon the body of a man in uniform whose name was given to him as Jules Decuir. He removed from the body a 38 caliber bullet which had entered the chest and had gone through the upper portion of the heart and "proceeded straight through and hit the vertebra * * * and advanced and buried itself in the muscles

of the back". In the opinion of the doctor, the deceased had been dead about 9 hours and his death was caused by shock and hemorrhage produced by the bullet wound (R.26-28).

The record does not disclose the circumstances under which the accused was apprehended. Mr. Ferd Porcieau, a deputy sheriff of New Iberia, Louisiana, stated that he saw the accused in the office of the district attorney on 6 June 1943 around noon. At this time the accused was being questioned about the gun by a "Lieutenant, the District Attorney, sheriff and a captain". Mr. Porcieau entered the office and spoke. The accused nodded his head and said, "'Good afternoon'". Accused then told the captain that he knew the deputy sheriff and said, "'If you don't mind I'll get the gun with this man'" (referring to officer Porcieau). The party then went to a private dwelling at the corner of Vine and Washington Streets. A search was made but the pistol was not found. As the party entered the car to leave, one of the girls at the house called and said: "'Mr. Porcieau, here's the gun'". Witness then identified Exhibit 1 as the pistol which was given to him at the house on Vine and Washington Streets (R.28-29).

Corporal Frank Davis and Sergeant James Rose of the 259th Signal Construction Company, testified for the defense. Each stated that he had been with the accused several hours prior to the shooting; that he was at the Grand Terrace at the time of the homicide; and that the accused had had several drinks of whiskey during the evening (R.22,31,32,35,36). Corporal Davis stated that in his opinion accused was drunk. Sergeant Rose stated that the accused was "pretty well lit", and that "he had a funny look that I had never seen before * * * sort of a wild look, seems as if he didn't know what he was going to do. * * * He was unsteady, and I could smell alcohol on his breath" (R.38). Corporal Davis and Sergeant Rose each stated that accused and deceased had been friends over a period of several months (R.33,37). Corporal Davis was asked if he saw the shooting and he replied, "No, sir, they had a shooting but I didn't see it. * * * I was outside" (R.32). Sergeant Rose did not see the shooting. He and Corporal Davis left the building during the assault on Mr. Blanchard, the police officer (R.37).

4. The accused did not testify or make an unsworn statement.

5. The undisputed evidence shows that Jules P. Decuir, 259th Signal Construction Company, came to his death on the morning of 6 June 1943 as a result of a bullet wound from a pistol in the hands of the accused. The shooting occurred at a roadhouse near New Iberia, Louisiana, and followed an assault which the accused and other soldiers had made upon a civilian policeman at the roadhouse. The civilian officer was rendered

unconscious and as a result of the blow the pistol which he was carrying upon his person fell to the floor. The pistol was picked up by the accused who pointed it at the manager and other civilian patrons of the place and threatened to "unload it in" anyone who interfered with him. A few minutes thereafter, accused without any apparent provocation shot and killed the deceased with whom he was on friendly terms. Two witnesses who testified for the defense stated that accused had been drinking over a period of several hours immediately preceding the shooting. Corporal Davis stated that accused was drunk. Sergeant Rose stated that accused was "pretty well lit" and "had a funny look". Mr. Meyers, manager of the Grand Terrace Club, stated that accused had been drinking but that he did not stagger and that in his opinion accused was not drunk. Mr. Frilot, a civilian witness, stated that in his opinion accused "might have been under the influence of liquor but he was not drunk". It is a general rule of law that drunkenness is not an excuse for crime committed while in that condition. As stated in paragraph 126, Manual for Courts-Martial, 1928: "* * * it [drunkenness] may be considered as affecting mental capacity to entertain a specific intent, where such intent is a necessary element of the offense". In the instant case the court upon all the evidence, especially in view of the testimony of Mr. Meyers and Mr. Frilot, was fully warranted in rejecting the theory that accused at the time of the homicide was so drunk as to have been incapable of entertaining a specific intent. Murder is the unlawful killing of a human being with malice aforethought. Paragraph 148a, Manual for Courts-Martial, 1928, states:

> "Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. (Clark.)" (p.163).

Malice may be implied when, as in this case, there is the intentional use of a deadly weapon. Any intentional killing of a human being without justification, excuse or provocation is murder. In the light of all the facts and circumstances, the Board of Review is of the opinion that the evidence is legally sufficient to support the findings of guilty of murder in violation of Article of War 92.

6. The Charge Sheet shows that the accused is 28 years 5 months of age, and that he was inducted into the military service 25 February 1942.

7. The court was legally constituted and had jurisdiction of the person and the subject matter. No errors injuriously affecting the sub-

stantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence. A sentence either of death or imprisonment for life is mandatory upon conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder recognized as an offense of a civil nature and so punishable by penitentiary confinement by sections 273 and 275, Criminal Code of the United States (18 U.S.C. 452,454).

Terry E. Eddy, Judge Advocate.

John Brumbaugh, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

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

(263)

21 AUG 1943

SPJGH
CM 238485

UNITED STATES N.D.	THIRD AIR FORCE
v.	Trial by G.C.M., convened at Lake Charles Army Air Field, 9 July 1943. Dishonorable discharge and confinement for life. Penitentiary.
Private MORLEY RIDEAU (34153081), Company A, 461st Signal Construction Battalion (Aviation).	

HOLDING 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 69th Article of War.

Specification: In that Private Morley (NMI) Rideau, Company "A", 461st Signal Construction Battalion (Aviation), Langley Field, Virginia, having been duly placed in confinement in the Field Guard House, Lake Charles Army Air Field, Lake Charles, Louisiana, on or about April 18, 1943, did, at said air field on or about April 25, 1943, escape from said confinement before he was set at liberty by proper authority.

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

Specification 1: In that Private Morley (NMI) Rideau, Company "A", 461st Signal Construction Battalion (Aviation), Langley Field, Virginia, did, at Langley Field, Virginia, on or about April 8, 1943, desert the service of the United States, and did remain absent in desertion until he was apprehended at Lake Charles, Louisiana, on or about April 18, 1943.

Specification 2: In that Private Morley (NMI) Rideau, Company "A", 461st Signal Construction Battalion (Aviation), Langley Field, Virginia, did, at Lake Charles Army Air Field, Lake Charles, Louisiana, on or about April 25, 1943, desert the service of the United States and did remain absent in desertion until he was apprehended near Palmetto, Louisiana, on or about April 28, 1943, and was returned to military control at Lake Charles Army Air Field, Lake Charles, Louisiana, on or about April 28, 1943.

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

Specification: In that Private Morley (NMI) Rideau, Company "A", 461st Signal Construction Battalion (Aviation), Langley Field, Virginia, did, in conjunction with Private Clarence D. Gibson, Company "G", 25th Infantry, 93rd Division, Fort Huachuca, Arizona, at Lake Charles Army Air Field, Lake Charles, Louisiana, on or about April 25, 1943, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Ralph S. Heimbach, 961st Guard Squadron, Lake Charles Army Air Field, Lake Charles, Louisiana, a prisoner guard, by striking the said Private Heimbach on the head with a blunt instrument.

He pleaded not guilty to all Charles and Specifications. He was found guilty of Specification 1, Charge II, except the words "desert" and "in desertion", substituting therefor the words "absent himself without leave from" and "without leave", and guilty of all other Specifications and all Charges. 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 only so much of the finding of guilty of Charge II "as pertains to Specification 1 thereunder as involves a finding of guilty of said specification in violation of the 61st Article of War", approved the sentence, and designated the United States Penitentiary, Atlanta, Georgia, as the place of confinement. The record of trial was forwarded for action under Article of War 50½.

3. The evidence for the prosecution:

a. Specification 1, Charge II: The morning report of Company A, 461st Signal Construction Battalion (Aviation), Langley Field, Virginia (Ex. 1) showed accused from duty to absent without leave 8 April 1943,

and the morning report of Lake Charles Army Air Field Guard House, Lake Charles, Louisiana (Ex. 2) showed accused to confinement 18 April 1943. About 2:30 or 3:00 a.m. Private First Class John C. Autry, who was on "M.P." duty in Lake Charles, Louisiana, "picked up" accused, who had had a few drinks and wore "O.D." pants, khaki shirt and garrison cap (R. 3-6).

b. The Specification, Charge I, Specification 2, Charge II, and the Specification, Charge III: After accused was arrested on 18 April, he was left in a truck with another "M.P." while Autry made a checkup at a night club. Accused jumped from the truck and ran. The "M.P." caught him, dragged him to the truck, and hit him once or twice with a black jack. Accused was taken to the hospital. First Lieutenant George Y. Siddons, Medical Corps, sutured cut places on accused's head, and at 4:30 a.m. prepared two reports of examination to determine the degree of intoxication of accused (Exs. 3 and 4). These reports showed "Drunk" and "Drunk and unable to perform usual duties fully and reliably". Captain Seigfried H. Brauer, Medical Corps, attended accused in the hospital, and made a diagnosis of moderately severe cerebral concussion, scalp wound and feigned hysteria. While in the hospital accused was morose, and complained that his right arm was paralyzed and was painful. From an examination, Captain Brauer could find nothing wrong with the arm (R. 6-12).

The morning report of Lake Charles Army Air Field Guard House (Ex. 2) showed accused to confinement in guardhouse 18 April 1943, to confinement in hospital 19 April, to guardhouse 10:30 a.m. 24 April, to "escaped" 6:00 a.m. 25 April, and to confinement 28 April 1943 (R. 4).

About Easter (25 April) 1943 Sergeant Clinton H. Harris was Police and Prison Sergeant for the "961st Guard Squadron". He identified the "man sitting in the middle at that table" as "Joseph Rideau". On the night before Easter the only two prisoners in the "colored section of the Guardhouse" were "Joseph Rideau" and Clarence D. Gibson. Fifteen or twenty cigarette butts and some burned match stems were found under a bunk in the colored section of the guardhouse, indicating that someone had slept very little "the night before". That "barracks" was last cleaned out about four o'clock "That afternoon". There was an upper bunk and a lower bunk, one of which had been slept in. Gibson had been in the guardhouse "a week or so", wore a zoot suit when he was picked up and wore civilian clothes in the guardhouse, had a "Bolshevist" attitude, and was considered a dangerous prisoner (R. 5, 24-25, 27-29).

On the morning of 25 April about six soldiers, including Private Rufus Robinson, 913th Quartermaster Platoon, were in the "913th mess hall" at about six o'clock, "waiting on breakfast", when they heard some groaning at the door. It sounded as if someone was trying to "heave" or vomit from being drunk. They thought it was one of the boys "carrying on". They did not hear any noise of fighting or scuffling. After hearing the noise about three times, one of the men went to the door, and they saw "the guard" lying on the ground, gasping for breath, and apparently trying to say something. His gun was gone. Some blood was there. At the time it was almost daylight. Robinson ran to the barracks to wake up "the Sergeant". Private First Class Samuel Griffin observed a piece of pipe lying four or five feet from the guard. It was about a two-inch pipe nearly two feet long which was customarily used to prop the mess hall screen door open (R. 13-16, 19-21).

On the morning of 25 April, about six-thirty, a guard, Private Ralph S. Heimbach, was brought to the "Station Hospital" and died at 11:08 a.m. Captain Brauer attended him when he was brought in, and found him to be in a moribund state and serious condition, with a scalp wound and skull fracture, apparently caused by a blunt instrument. In the opinion of Captain Brauer the skull fracture was the cause of death. The injury was on the left side of the head, above and posterior to the auditory canal. The report of a post mortem examination (Ex. 5), the clinical record (Ex. 6), and death certificate (Ex. 7) of Private Heimbach were placed in evidence (R. 16-19).

Private Charles D. Hull, Charge of Quarters of the 913th Quartermaster Platoon on the morning of 25 April, was at the orderly room, and heard a noise on the pavement "out there" about 6:15. He looked out the window and saw two men running "at open ranks", one at the far left and one at the far right of the "pavement way". These men were running in a southerly direction toward the "Engineers' Warehouse". They were 50 or 60 feet away from Hull, it was semi-dark, and he could neither recognize them nor distinguish whether they were white or black. Private Hull then went out to wake up the men of the platoon according to his duty, and as he passed the mess hall he heard someone yell for the guard, and "this man is dying". There was a man lying there but Hull did not recognize him. Hull drew a diagram showing the location of various buildings but it was not placed in evidence (R. 21-24).

About 6:10 a.m. on 25 April Private First Class Frank Homick, who was on duty as a guard at "the west gate", saw two men "at the west side of the gas chambers, near the fence". They were about 600 feet from him, it was just getting daylight, and he could not see them clearly. He could see the outline of their bodies, but could not determine whether they were white or colored. Mr. Custer P. Hannan, of Lake Charles,

Louisiana, car inspector for the Missouri Pacific, was "looking at" some cars that morning "on the round house lead". About 6:15 or 6:20 he saw two "fellows" about 100 feet from him, running west from the gravel road. A few minutes later an Army car drove up to the crossing and some soldiers got out and ran east. Mr. Hannan then walked around the cars he was "looking at" and saw two "fellows" crouched under a car. One of them had a gun in his hand. Mr. Hannan was within about 40 feet of them. It was light enough for him to see and he had already quit using his light. One of the men saw him, and Mr. Hannan decided it was best to get away. He pretended to be taking some car numbers and "eased on down to the office". One of the men was black, short and heavy set, and the other was light. Mr. Hannan would not be able to recognize the dark man, but identified accused as the light-complected one who held the gun. The dark man wore a blue jumper and the other had on lighter clothes, which could have been either Army or civilian clothing (R. 29-33).

The "man sitting in the middle of the small table there" came to the rooming house of Emma McCrea at 915 Railroad Avenue, Lake Charles, on Easter morning about eight or eight-thirty. He wore a brown hat, cocoa brown shirt, two-tone jacket, and green-bluish pants. He left on Monday evening. It seemed to Emma McCrea that he had on blue overalls when he left. She had never seen him before and did not know his name. She was sure that "This is the boy" because he sat on the porch with them reading the paper, and she saw him all day after he had "taken his rest". He did not act as if he were in trouble. He left a pair of pants and suspenders when he went away. He did not seem to have a gun. Algie Hicks, a civilian, saw "that boy sitting in the middle of that table" at 915 Railroad Avenue about 12:30 on Monday or Tuesday morning after Easter. He had on a pair of "green looking" pants and had a "tan looking" shirt and light jacket. A brown hat, a pair of green elastique suspenders, a two-tone jacket, a brown shirt and a pair of blue pants were introduced in evidence (Ex. 8). This "boy", whom Hicks had never seen before, said he was going to go to work and was going to take some of the girls out, and asked whether Hicks had some old overalls he could wear to work. Hicks told him there were some old overalls and khaki pants behind the door. After the man was gone some military police officers looked in Hicks' room (R. 34-39).

On the "morning the murder occurred" Sergeant Harris looked inside the guardhouse and "went through" Clarence Gibson's clothing that was left in the guardhouse. He took several men with him and searched for "these two men" up the railroad track and into Broad Street. On the next night he found Clarence Gibson's civilian clothing that he had changed. This was a white shirt and, he thought, a pair of light green

pants. Sergeant Harris found an Army .45 revolver on Hutchinson Street in Lake Charles. He had never known of accused being near the "shack" where the pistol was found, but Gibson was supposed to have been in that section. He identified a piece of pipe, weighing about four pounds, as one which was given to him by a Lieutenant Johnson and which he took to Beaumont and Baton Rouge for a chemical test. He identified a white shirt and a pair of blue pants as being those worn by Gibson in the guardhouse. A civilian sweatshirt was also identified as belonging to Gibson. Some articles of clothing were recovered at 201 Front Street, Lake Charles. A shirt and coat of Clarence Gibson (Ex. 9) were introduced in evidence (R. 25-28, 39-40).

Accused went to the home of his sister, Agnes Virl St. Romain, and her husband, Alton St. Romain, at LeBeau, on Monday night or about 1:20 a.m. Tuesday, before Easter. He was wearing coveralls, brown shirt, drape jacket, brown hat and brown pants, did not complain of feeling sick, chopped a few pieces of wood, fished, did not seem worried nor sick, and said he was in trouble. Accused told Alton St. Romain that "there were three out; it was him and a guard and another prisoner", that accused was suffering with stomach trouble, a pain hit him in the stomach, he was falling, he asked the guard to catch him, and when the guard went to catch him, the other fellow hit the guard (R. 40-43).

On Tuesday evening after Easter accused went to the home of his uncle, J. B. Rideau, a farmer near Palmetto, Louisiana. Joseph Rideau, father of accused, was there. Accused wore blue apron overalls and some kind of blouse and did not have a gun. Accused told them what had happened and said that he was innocent, the other man killed the guard, took the guard's gun and coaxed or forced accused to go with him, and accused got sick, had a "hurting" in his stomach and leant over, and was afraid to report back after the other man released him. Accused was advised by his father, uncle, and Mr. W. R. Spears, town marshal at Palmetto, to turn himself in. J. B. Rideau telephoned the military police, and they came to take accused into custody. Accused surrendered voluntarily, and on the way back said he did not try to make a "break" until they "hit the railroad" because Gibson held the gun on him (R. 43-52).

Three photographs (Exs. 10, 11 and 12) of some stains on the sidewalk near the 913th Quartermaster Mess Hall that looked very much like blood stains, were made on 25 April. Two photographs (Ex. 13) of a piece of pipe were made at the request of Lieutenant Williams. Major Neal H. Impaglazzio identified a piece of pipe that someone brought to

him when he asked for the pipe that was used to prop open the mess hall door. Lieutenant Johnson took it to Baton Rouge for an analysis. It was stipulated (Ex. 14) that a chemist at Baton Rouge received from Major Impaglazzio "one iron pipe 18 1/8" long and 5 1/2" outer diameter", made tests between 29 April and 6 May 1943, and found human blood in large quantities on the pipe. About nine o'clock Easter Sunday night, Clarence Gibson was seen at the home of Charlie Hickmon, with a gun, and at the time wore brown pants and a blue or khaki shirt (R. 53-58).

4. For the defense, Mr. Hannon was recalled, but added nothing to his original testimony (R. 58-59).

The defense explained to accused "his rights as a witness" and he testified substantially as follows:

He was released from confinement on 29 March 1943, received pay of about $131 on 5 April and left the base without leave on 7 April. He went to Richmond, then to Lake Charles to spend Easter holidays with his parents, wore his uniform, intended to turn himself in after Easter, and was taken into custody by the military police. He had had "one drink too many" and did not remember the circumstances of his arrest. He was in the hospital until he was taken to the guardhouse about 3 p.m. on a Saturday. He had never seen Gibson before. He was taken to supper that night by a guard, Ralph Heimbach. He went to bed in the lower bunk about eight-thirty and slept all night. When he went to sleep Gibson was sitting on the bed. Gibson woke him the next morning and said, "Let's go to breakfast". Accused said he did not want any breakfast and went back to sleep. Later Gibson waked him again and accused dressed. When they went to breakfast, accused wore "O.D." trousers, blue fatigue hat and blue fatigue jumper. Gibson had on "those clothes there", "all of them", but accused did not know he had all of them on. They went to breakfast in a jeep driven by Heimbach. The two prisoners were in the back. When they left the jeep in front of the mess hall and started to the mess hall, accused was in front, Gibson in the middle and the guard in back of them. When accused was close to the door, Gibson hit "this boy"; accused heard the lick and turned around. Gibson pulled the gun on accused and said, "Come on; get going". Accused was afraid Gibson would shoot him. Gibson made him run part of the way, but he could not run far, because his hip and arm were hurting (R. 59-63).

They went over the fence and across the fields to a railroad yard but did not see anyone. It "wasn't too light". Accused went over the fence first because Gibson told him to. They did not get under the

cars. Gibson kept accused in front of him and accused considered that his life was in danger. Accused tried to get Gibson to let him go back but "couldn't put no sense in his head". They entered a school yard and Gibson made accused change clothes. Gibson took off a brown shirt, "grayish" trousers and an old jacket, gave them to accused, and made accused take off his "O.D." trousers, blue fatigue jumper and a sweat shirt, and throw them away. Gibson had on two suits of clothes when he left the guardhouse (unknown to accused) and still had on a white shirt after taking off the brown one. Gibson kept the gun in his hand and kept accused covered while he was changing clothes. When they reached the street Gibson put the gun in his belt. Accused never did have possession of the pistol. When they were on "Boulevard" accused "got a chance to duck" Gibson, and went between a cafe and another building. Accused then went to Emma McCrea's house about 8:30 or 8:45, and stayed there all that day and part of the next. He thought of turning himself in and talked with two guards who were looking for him and Gibson. One of the guards said if he found "those two boys, he wasn't going to allow no possible chance", and accused was afraid to turn in. He caught a ride to Opelousas, and went to LeBeau. His first safe opportunity of giving himself up was when his uncle called the post (R. 63-67).

Accused complained of a sore arm when he first came "here", because his arm "got shocked" about nine months before, but it was "okay" at the time of trial. He was hit on the hip the night the "M.P." hit him, and it still hurt sometimes. When he went to the guardhouse from the hospital everything was taken from him except a package of cigarettes. Palmetto, Louisiana is about 115 or 120 miles from Lake Charles (R. 59, 67-68).

5. a. As to Specification 1, Charge II, it is shown by morning report entries that accused was absent without leave from 8 April to 18 April 1943, and by other evidence that accused was apprehended in Lake Charles, Louisiana on the latter date.

b. As to the Specification, Charge I and Specification 2, Charge II, it is shown by morning report entries that accused was placed in confinement at Lake Charles Army Air Field on 18 April 1943, escaped on 25 April, and was returned to confinement on 28 April. It is shown by other evidence that accused was a prisoner in the guardhouse on the night of 24 April, that he was seen under a railroad car at Lake Charles about 6:15 or 6:20 a.m. on 25 April, that he spent that day and part of the next at a house in Lake Charles and was dressed in civilian clothes, that he was seeking employment, that he went to LeBeau and Palmetto, Louisiana (about 115 or 120 miles from Lake Charles), where relatives lived, and was there returned to military control about 27 April. The

testimony of accused is to the same effect, except that he claimed that he was forced to escape and change to civilian clothes by Gibson, denied that he was under a railroad car, and did not mention seeking employment.

The inference of intent not to return may be drawn from such circumstances as that the accused was arrested or surrendered at a considerable distance from his station or was under charges or had escaped from confinement at the time he absented himself. A prompt repentance and return, while material in extenuation, is no defense (MCM, 1928, par. 130a).

> "(9) Proof of intent; unauthorized absence.—Accused was found guilty of desertion, in violation of A. W. 58. There was evidence that he was confined in the post stockade for willful and flagrant disobedience of a direct order of a superior officer, that he escaped from the stockade on October 22, and that he surrendered himself, in civilian clothes, at an Army camp in another state and a considerable distance away, on October 28. Held: The record is sufficient to support the finding. Notwithstanding the short absence, the circumstances of accused's departure, his travel, and his use of civilian clothing sufficiently evidence his intent to desert." (Bull. JAG, Feb., 1943, p. 62; CM 229813).

c. As to the Specification, Charge III, it is shown that on 24 April accused was placed in the colored section of the guardhouse, and that the only other prisoner there was Clarence Gibson, who had a "Bolshevist" attitude, was considered a dangerous prisoner and wore civilian clothes. That night at least one of the prisoners stayed awake a long time and smoked cigarettes. The next morning a guard, Ralph Heimbach, took the two prisoners to breakfast in a jeep. At the mess hall the jeep was parked, and the three men proceeded toward the mess hall door, in this order, accused in front, then Gibson, and Heimbach in the rear. Accused had a sudden pain in the stomach, was falling, asked the guard to catch him, and when the guard went to catch him, Gibson hit the guard on the head with a blunt instrument, probably an iron pipe used to prop open the mess hall door. As a result the guard died.

Accused and Gibson then escaped and, after climbing a fence, went to a railroad yard. Accused was seen under a railroad car with a pistol. They went to a school yard, Gibson took off some extra civilian clothes which he was wearing, and accused removed his Army clothing and

put on the civilian clothes which Gibson had removed. Shortly afterward accused and Gibson separated, accused went to a house in Lake Charles, where he remained until the next day, went to his family home about 115 or 120 miles away, and then surrendered to military authorities on 27 April.

On the evening of 25 April, Gibson was seen with a pistol, and during that day and the next, accused did not have a pistol. Later, an Army revolver was found at a house in Lake Charles where Gibson was supposed to have been, and where accused was not known to have been. Accused testified that he had not known Gibson before 24 April, that Gibson forced him to run after Gibson hit the guard and forced accused to change clothes in the school yard, that accused did not know that Gibson was wearing extra clothes that morning until after the escape, that accused did not have the gun at any time, that accused was afraid that Gibson would shoot him, and that he separated from Gibson at the first opportunity.

It is clearly shown that Gibson planned to escape, struck and killed the guard pursuant to that plan, and then escaped. It is necessary to determine whether the circumstantial evidence sustains an inference that accused was a party to the plan and action of Gibson.

Where the only competent evidence is circumstantial, it must, in order to be sufficient to support conviction, be of such nature as to exclude every reasonable hypothesis except that of accused's guilt. Where the evidence is entirely circumstantial the circumstances must not only be consistent with guilt, but inconsistent with innocence. Mere probabilities do not suffice. Proof of mere opportunity to commit a crime is not sufficient to establish guilt (Dig. Op. JAG, 1912-40, sec. 395 (9); CM 120937, CM 153330, CM 169811, CM 196619, CM 195705). To warrant conviction, circumstantial evidence must not only prove all the elements of the offense but must at the same time exclude every reasonable hypothesis except guilt (Bull. JAG, June 1943, p. 238; CM 233766).

The question on appellate review is not one of weighing conflicting evidence or passing upon the credibility of witnesses or determining whether facts relied on to prove the ultimate fact in issue were themselves proved, but merely the question of law whether certain circumstantial facts established by the evidence of record justify the conclusion of guilt as a logical inference from such circumstantial facts (CM 195705, Tyson). Where a conviction is based on inferences, the Board of Review will determine whether there is a reasonable basis

for the inference (CM 212505, Tipton).

In the opinion of the Board no inference of guilt can be drawn from the fact that accused was present in the guardhouse when Gibson planned his escape and at the time and place when Gibson killed the guard, because accused was compelled as a prisoner to be present in each instance. There is no evidence of any collaboration between the two prisoners at any time prior to the time the offense was committed by Gibson. The fact that accused escaped when the opportunity came to him, and afterward made use of civilian clothing made available to him by Gibson, even though freely and voluntarily done by accused and without compulsion by Gibson, would not in the opinion of the Board support an inference that accused joined with Gibson in planning the escape. There is no proof that accused knew that Gibson wore extra clothing that morning, and it cannot properly be inferred that he had such knowledge, as a basis for a further inference that such knowledge showed a guilty intent concurrent with that of Gibson.

The escape of accused after Gibson killed the guard was an offense, of which he was found guilty, but it does not justify an inference that antecedently accused was a party to a plan of Gibson to strike the guard and thus escape from confinement. For accused to be guilty of murder, he must be shown to have cooperated in Gibson's commission of that offense, either in planning it or accomplishing it.

A witness testified that shortly after the escape, accused was seen under a railroad car with a pistol in his hand, which is in conflict with the testimony of accused. Even though the court accepted the testimony of this witness and thus concluded that the accused lied when he claimed that he was forced by Gibson to escape and put on civilian clothes, after Gibson struck the guard, the proper inference to be drawn goes to the willfulness of the escape when the opportunity was presented, and not to the precedent planning of the escape.

There remains for consideration the fact that after his escape accused stated that at the time he had a sudden pain in the stomach, was falling, asked the guard to catch him, and when the guard went to catch him, Gibson hit the guard on the head. If this statement as a whole be accepted as true, no inference of guilt arises therefrom. It would be necessary to infer first that the statement was true to the extent that accused started to fall and asked the guard to catch him, but false as to the sudden stomach pain, and then that this feigned illness was in accordance with a prearranged plan of escape.

The law does not permit an inference or a presumption to be based upon another inference or presumption, nor can an inference rest upon a mere conjecture (Wharton's Criminal Evidence (11th Ed.), sec. 64).

The Board of Review is of the opinion that the evidence does not sustain a finding that accused committed the offense of murder.

6. The record recites (R. 69) that the trial judge advocate read "the attached evidence of previous convictions". No evidence of previous convictions is attached to the record. The accompanying papers however contain a certificate of previous conviction for absence without leave for 23 days.

7. Life imprisonment (or death) is mandatory upon conviction of murder, in violation of the 92nd Article of War, and life imprisonment is authorized upon conviction of desertion, in violation of the 58th Article of War, for an offense committed after 3 February 1942 (E.O. 9048), or upon conviction of absence without leave, in violation of the 61st Article of War, for an offense committed after 1 December 1942 (E.O. 9267).

Confinement in a penitentiary is mandatory upon conviction of murder, in violation of the 92nd Article of War (par. 5d, AR 600-375, 17 May 1943) and authorized upon conviction of desertion in time of war, in violation of the 58th Article of War (AW 42; MCM, 1928, par. 90).

8. The charge sheet shows that the accused is 20 years of age, and that he was inducted 24 October 1941, with no prior service.

9. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge III 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.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

1st Ind.

War Department, J.A.G.O., 2 SEP 1943 - To the Commanding General, Third Air Force, Tampa, Florida.

1. In the case of Private Morley Rideau (34153081), Company A, 461st Signal Construction Battalion (Aviation), I concur in the foregoing holding of the Board of Review, and for the reasons therein stated recommend that the finding of guilty of Charge III and the Specification thereunder be disapproved. Thereupon you will have authority to order the execution of the sentence.

2. Although confinement in a penitentiary is authorized for wartime desertion, it is not customary in normal cases to confine a deserter in a penitentiary, Federal reformatory, or correctional institution. In view of the nature of the offenses as to which the record of trial has been held legally sufficient, it is recommended that the sentence be mitigated to dishonorable discharge, total forfeitures and confinement at hard labor for a term not in excess of ten years, that the execution of that portion of the sentence adjudging dishonorable discharge be suspended until his release from confinement, and that the place of confinement be changed from the United States Penitentiary, Atlanta, Georgia, to a rehabilitation center (par. 5, AR 600-375, 17 May 1943).

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

(CM 238485).

Myron C. Cramer

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

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

(277)

21 AUG 1943

SPJGH
CM 238539

UNITED STATES	)	MILITARY DISTRICT OF WASHINGTON
	)	
v.	)	Trial by G.C.M., convened at Fort Belvoir, Virginia, 23 July 1943. Dismissal.
	)	
Second Lieutenant ALFRED J. BOHALL (O-1110937), Corps of Engineers.	)	

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 94th Article of War.

Specification: In that Second Lieutenant Alfred J. Bohall, Corps of Engineers, Company D, Ninth Engineer Training Battalion, Engineer Replacement Training Center, Fort Belvoir, Virginia, did, at Alexandria, Virginia, on or about June 21, 1943, wrongfully dispose of by pledging with S. M. Wasserman, Bonded Loan Office, 410 King Street, Alexandria, Virginia, one United States Army revolver, Smith and Wesson, Calibre .45 M 1917, serial number 126686, of the value of about sixteen dollars and fifteen cents ($16.15), property of the United States furnished and intended for the military service thereof.

He pleaded not guilty to and was found guilty of the Charge and Specification. He was sentenced to be dismissed the service. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that on 9 April 1943 the supply sergeant of the company of accused issued to accused on a memorandum

receipt, a number of items of equipment, including a "pistol", serial number 126686. A .45 calibre Smith & Wesson revolver bearing that serial number previously had been issued to the company by the supply officer of the 2nd Engineers Training Group. The revolver was the property of the United States and was issued to accused for use in the field. He had been instructed by his company commander Captain Donald S. Stephens to keep it "under lock and key" when it was not in military use (R. 13-19; Ex. 2).

On 21 June 1943 accused entered the place of business of The Bonded Loan Office, operated by Mr. W. S. Wasserman in Alexandria, Virginia, procured a loan of $15 and to secure repayment thereof pledged with Mr. Wasserman the Smith & Wesson revolver mentioned above. Mr. Wasserman asked accused from what source he had "derived the gun" and accused replied that he had purchased it through the National Guard while he was in that branch of the service. The pledge was not redeemed and no part of the loan was ever repaid. Mr. Wasserman turned the revolver over to First Lieutenant John F. Felbinger, the investigating officer, on 28 June 1943 (R. 7-12).

It was stipulated that the value of this revolver was $16.15 (R. 19-20, Ex. 3).

4. For the defense, Captain Stephens, recalled as a witness, testified that he had known accused since the latter was attached to his company on 13 March, that the ability or efficiency of accused as an officer was excellent, that accused was an excellent platoon leader—did very fine work, and that it had been his intention to keep accused as platoon leader for the next course (R. 20-21).

It was stipulated that if Major Richard D. Holtz, commanding officer of the Ninth Engineer Training Battalion since 24 June 1943 were present, he would testify that from 26 April 1943 to about 24 June 1943 as executive officer, he assisted the Battalion Commander in observing and supervising training; that from the observation of Major Holtz, accused, who was a platoon commander in Company D, performed his duties in an excellent manner and was given an excellent performance rating for that period; and that the platoon of accused was well organized and its training was accomplished in an excellent manner (R. 21-22, Def. Ex. 1).

Accused testified that he had been in the Army since October 1941 and had been commissioned as an officer since 3 March 1943. He was 25 years of age, was married, and had three children, a boy nine, a

boy eight, and a girl six weeks old. At the time of the birth of his youngest child on 13 June, his wife had to "attend" a civilian hospital and accused was in need of money (R. 23).

On cross-examination accused stated that he had been married twice, once in 1938 and again on 18 February 1942, and that only the youngest of the three children whose ages he had given, was his own. When he found himself in need of money about 21 June 1943 he sent a telegram to his home, where he had some money in the bank, but it was seven days before he received an answer. He thought the money would "be there in time". When he sent for money it generally came through within three or four days. Accused took no steps to secure money other than the sending of the telegram. He had heard Mr. Wasserman testify that accused pledged a revolver with Wasserman for a loan of $15 on 21 June and the "statement" made by Wasserman was true. Accused obtained the $15 from Mr. Wasserman, used part of it to buy medicine, and his wife used the rest of it to buy food (R. 24-25).

5. According to the undisputed evidence, accused, on 21 June 1943, as security for a loan of $15, pledged with Mr. S. M. Wasserman, proprietor of the Bonded Loan Office of Alexandria, Virginia, the Army revolver described in the Specification of the Charge. The revolver was the property of the United States and had been issued to accused by the supply sergeant of his company for use in the field. In his testimony at the trial accused admitted that he had pledged the revolver with Mr. Wasserman and offered as an excuse for so doing that when his daughter was born on 13 June 1943 it had been necessary for his wife to go to a civilian hospital and he had been in need of money. In the opinion of the Board of Review the evidence clearly is legally sufficient to support the findings of guilty.

6. The accused is 25 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 3 April 1942; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty, 3 March 1943.

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

Miles S. Hoff, Judge Advocate

Samuel M. Kirw, Judge Advocate

F. J. Lotthuhos, 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 Alfred J. Bohall (O-1110937), Corps of Engineers.

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 to dismissal be confirmed and carried into execution.

3. Inclosed are a draft of letter for the signature of the Secretary of War, 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 Action.

(Sentence confirmed. G.C.M.O. 340, 8 Nov 1943)

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

SPJGK
CM 238557

21 AUG 1943

UNITED STATES	)	11TH AIRBORNE DIVISION
v.	)	Trial by G.C.M., convened at Camp Mackall, North Carolina, 4 August 1943. Dishonorable discharge and confinement for five (5) years. Rehabilitation Center.
Private HAROLD J. WHITFORD (39462729), 188th Glider Infantry.	)	

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 findings and the 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 61st Article of War.

Specification: In that Private Harold J. Whitford, Company F, 188th Glider Infantry, did, without proper leave, absent himself from his organization at Camp Mackall, North Carolina from about July 14, 1943 to about July 19, 1943.

He pleaded not guilty to and was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for five years. The reviewing authority approved the sentence, ordered its execution, but suspended the execution of the dishonorable discharge pending the soldier's release from confinement, 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. 13, Headquarters 11th Airborne Division, Camp Mackall, North Carolina, 7 August 1943.

3. The evidence is as follows:

Captain Robert M. Mitchell, 188th Glider Infantry, Camp Mackall, North Carolina, testified that he was the company commander of F Company and that he knew accused, a private in that organization. On 14 July 1943 the "first sergeant" informed him (Captain Mitchell) that accused "could not be found in the area". Captain Mitchell stated that accused did not have permission to be absent and that he told the first sergeant to make a thorough search of the company area and also to place a guard at his (accused's) tent - "due to the fact that he (accused) had left in a pair of fatigues and no hat". Witness stated that about a half hour later the first sergeant reported that accused could not be found. Captain Mitchell was then asked:

"Q. When did you next see or hear of the accused?

"A. I next heard of the accused on the evening of the 19th of July. The Regimental Adjutant informed me in my quarters on that evening that Private Whitford (accused) had been picked up on Highway 15 by two officers of the 188th Glider Infantry and placed in the Post Stockade temporarily" (R. 7).

The accused did not testify or make an unsworn statement and no evidence was introduced by the defense.

4. It will be noted that the morning report of accused's organization was not introduced. Except for the statement that he knew the accused and that accused did not have permission to be absent, every part of Captain Mitchell's testimony was pure hearsay, grossly incompetent and highly prejudicial to the substantial rights of the accused. Since there is no competent evidence of record to support the findings of guilty, the admission of such testimony, even though not objected to, constitutes fatal error (MCM, 1928, par. 113, 126c; CM 178446 (1927); CM 228401, CM 229552, CM 231727 (1943); Dig. Op. JAG, 1912-40, sec. 395 (21), p. 216).

5. 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.

Terry E. Gore, Judge Advocate.

(On Leave), Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O. 27 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 Harold J. Whitford (39462729), 188th Glider 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 the 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 approval.

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

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

(Findings and sentence vacated, by order of the Acting Secretary of War. G.C.M.O. 230, 11 Sep 1943)

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

(285)

SPJGN
CM 238591

16 SEP 1943

UNITED STATES	81ST INFANTRY DIVISION
v.	Trial by G.C.M., convened at Gallatin, Tennessee, 7 July 1943. Dismissal and total forfeitures.
Second Lieutenant JOHN M. NICHOLL (0-1302174), 322nd 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 Specification:

CHARGE: Violation of the 95th Article of War.

Specification: In that Second Lieutenant JOHN M. NICHOLL, 322nd Infantry, was, at Shelton Place on Lebanon Road in vicinity of Nashville, Tennessee, on or about May 30, 1943, in a public place, to wit, a government vehicle, at Shelton Place on Lebanon Road, drunk while in uniform.

He pleaded not guilty to the Charge and Specification and was found guilty of the Specification, and of the Charge, not guilty but guilty of a violation of Article of War 96. Evidence of one previous conviction for becoming intoxicated with an enlisted man, in violation of Article of War 95, was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution which was presented by Major Richard C. Endicott, Commander, Military Police Detachment, Fourth Service Command, Nashville, Tennessee, shows that at about midnight, 30 May 1943, Major Endicott observed a jeep parked in front of a place

called Shelton's beer hall. Upon investigation, he found the accused, wearing his service uniform, asleep in the parked jeep. Major Endicott inquired of an enlisted man standing nearby as to why the jeep was stopping there, contrary to Second Army directives, and the soldier replied that the driver wanted a sandwich (R. 6-A, 6-B).

Major Endicott entered the jeep and shook the accused in an effort to arouse him. When he failed to arouse the accused, he took charge of the jeep and drove five or six miles to police headquarters. When they were about half-way to police headquarters, the accused aroused, opened his eyes, looked around and looked at the major. He then slumped over and went back to sleep. Upon arrival at the police station Major Endicott instructed some men to get the accused from the car. "He was in a dazed condition, apparently from alcohol" and it was necessary to assist him into police headquarters where the accused "sat in a chair all slumped over and stooped" (R. 6-A, 6-D). Major Endicott testified that the accused was drunk and that he, Major Endicott, would definitely state that the accused was intoxicated. When Major Endicott was reminded of his statement to the investigating officer that he had not smelled liquor on the accused's breath, Major Endicott testified, "I didn't get that close to the officer at any time in the fresh air. He was out". He expressed the opinion, however, that unless one examined a person closely, one could not smell alcohol on a man's breath - "Not in the fresh air when you are riding along in a jeep". Major Endicott further explained that the accused did not, at any time, make a scene, asserting, "He couldn't rouse himself enough to make a scene".

4. The evidence for the defense consisted of the testimony of Sergeant Raymond M. Doyle, a member of the accused's regiment. He testified that his regiment had been on maneuvers in Tennessee for the entire week immediately preceding the time of the accused's arrest, and that the accused had been in the field with a convoy. After his company arrived in Nashville at about 3 o'clock on the afternoon of 30 May, Sergeant Doyle left the accused for a while, returning to the trucks about 9:45. During the interim, Sergeant Doyle had had a few beers but had not become drunk; and, although the accused told Sergeant Doyle that he, too, had been drinking, the accused, he explained, did not appear to be drunk, but proceeded with the performance of his duties in a regular manner (R. 6-E, 6-F).

In checking his personnel, preparatory to moving his convoy out, the accused discovered that one enlisted man was missing. Sending his convoy on, shortly after 10 o'clock, the accused, accompanied by Sergeant Doyle, drove to the provost marshal's office, which he entered alone, to check with the provost marshal; then, having parked his jeep, he and the sergeant visited various hotels in search of the absentee.

About midnight, after having completed his search, the accused again reported to the provost marshal's office and as on the first visit there, Sergeant Doyle and the driver remained outside in the jeep. Except for the two occasions when the accused visited the provost marshal's office, Sergeant Doyle was with the accused continuously from 9:45 p.m. until the accused was taken into custody by Major Endicott. Sergeant Doyle did not see the accused take a drink during that period (R. 6-E, 6-G).

After leaving the provost marshal's office to rejoin his convoy, the accused rode on the front seat of the jeep with the driver while Sergeant Doyle rode on the rear seat. As they were driving along, Sergeant Doyle reminded the accused that the driver was tired and wanted some coffee; the accused "said we should stop at the first place and get him (the driver) some coffee". They stopped at "Shelton's", and Sergeant Doyle went in to inquire if any coffee was served there. When he came out he saw Major Endicott talking to the driver. Major Endicott then inquired if he were in command of the jeep and he replied "No, Sir", "the Lieutenant is". The major then shook the accused, and told the enlisted men, to "go in the command car I will drive the jeep" (R. 6-F, 6-H).

5. The accused, having been properly advised of his rights as a witness, elected to remain silent (R. 6-H).

6. The only evidentiary issue presented in this case involves the determination by the court that the accused was drunk at the time and place alleged. Major Richard C. Endicott, who found the accused asleep in a jeep in front of a beer hall and who drove the jeep several miles to the local provost marshal's office, testified that the accused was drunk, and that he, the witness, would definitely state that the accused was intoxicated. This unequivocal testimony is strengthened by Major Endicott's further testimony, as follows:

(1) that the accused could not be aroused by shaking him,

(2) that the accused went to sleep immediately after having been temporarily awakened during the drive from in front of the beer hall to the provost marshal's office,

(3) that it was necessary for the accused to be aided in going from the jeep into the provost marshal's office, and

(4) that the accused sat "all slumped over and stooped" in a chair in the provost marshal's office.

Furthermore, Sergeant Raymond M. Doyle, the witness for the defense, testified that the accused had admitted to him on the day in question that he, the accused, had been drinking.

The testimony of Major Endicott that the accused was "drunk" is in every respect competent testimony. The Manual for Courts-Martial states that "* * * on matters within the common observation and experience of men, a witness may express an opinion, * * * as to whether or not a certain person was drunk at a certain time, * * *" (M.C.M., 1928, p. 111; Wigmore on Evidence, Sec. 1974). It is a well recognized psychological fact that the instantaneous conclusion of the mind of an observer that a certain person is drunk, is based upon the appearance of the person observed - his actions, his conversation, his walk, his odoriferous breath, his lack of body coordination, his flushed face, his rolling eyes, et cetera. It is equally true that such a series of characteristic facts, presented to the senses at one and the same time, creates a definite sense impression in the mind of the observer, which he, as a witness, cannot always analyze or present in detail. Although such a sense impression is of course a conclusion, in the field of evidence it is dealt with as an admissible fact, being frequently referred to as a "shorthand rendition of facts". Justice Lumkin in Choise v. State, 31 Ga. 467, asserted that "Really, no other rule is practical. If the witness must be confined to a simple narration of facts, * * * you shut out not only the ordinary but the best mode of obtaining truth". Obviously, the testimony by a witness that a person was drunk may be either weakened or strengthened on cross-examination according to the witness' ability to describe the various elements of the series which lead to his conclusions. In any event however, the credibility to be attached to the witness' statement depends both upon his apparent integrity, and upon his apparent experience or ability to comprehend and evaluate the matter about which he testifies. In the present case, there is nothing to reflect discredit upon Major Endicott's integrity and it seems reasonable to assume that he, as the commanding officer of a military police detachment, might well have had substantial experience in observing the conduct and demeanor of intoxicated persons. His unqualified assertion, therefore, that the accused was drunk, strengthened as it is by the other evidence outlined, particularly the evidence that the accused could not walk unaided from the jeep to the office of the provost marshal, justified, beyond a reasonable doubt, the court's finding that the accused was drunk as charged.

7. The record shows that it was authenticated by "James A. Newman, Capt. Inf., President" and that under the name, designation and signature of Captain Newman are written the additional words, "In the absence of the President, excused". The Manual for Courts-Martial provides that

when in an order appointing a court, an officer is designated as president and is thereafter excused, the senior of the remaining members of the court becomes the president, and the record of trial should be authenticated by him as president (M.C.M., 1928, par. 39, p. 28). Under this rule, Captain Newman, having signed the record as "president" should not have added the additional words "In the absence of the President, excused" below his signature. It is apparent, however, that this reference which appears to refer to the original president who had been excused, is a surplusage and of no legal effect. Furthermore, since the record does not show the relative seniority of the captains on the court, and since Captain Newman's name appears first on the list of officers present at the trial, we must presume for the purposes of the present record, that he was "* * * senior in rank and president of the court * * *" (390(2) Dig. Ops. JAG 1912-1940). We must conclude, therefore, that Captain Newman was president of the court and that the record is properly authenticated by him.

8. The records of the Office of The Adjutant General show the accused to be 29 years of age, and that he had enlisted service from 21 January 1941, until his temporary appointment as a second lieutenant, Army of the United States, on 2 December 1942.

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

Charles Bresson, Judge Advocate.

Abner E. Lifsecomb, Judge Advocate.

(Dissent), Judge Advocate.

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

SPJGN
CM 238591

22 SEP 1943

UNITED STATES	)	81ST INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Gallatin, Tennessee, 7 July 1943. Dismissal and total forfeitures.
	)	
Second Lieutenant JOHN M. NICHOLL (0-1302174), 322nd Infantry.	)	

DISSENTING OPINION by SLEEPER, Judge Advocate

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1. The evidence for the prosecution consists solely of the testimony of Major Richard C. Endicott, Commander, Military Police Detachment, Fourth Service Command, Nashville, Tennessee. It shows that prior to 30 May 1943 - the date of the alleged offense - the manager of Shelton's, one of the beer halls in the vicinity of Nashville, had experienced difficulties with soldiers. "He tried to close at 11:30 and convoys from town would stop there and try to force him to open the door and he wouldn't", testified Major Endicott, who, on the night of 30 May 1943 - a very busy night for him - was out in his jeep, accompanied by Major Reuben, engaged in "checking Beer Halls" (R. 6-A).

About midnight, Major Endicott, observing a jeep parked in front of Shelton's beer hall, requested Major Reuben to take his car, while he - Major Endicott - got out and investigated. The accused, wearing his service uniform, was asleep in the parked jeep, lying in the front seat on the right side. Of an enlisted man, standing nearby, the major inquired why he was stopping there, contrary to Second Army

directives. The soldier replied that the driver wanted a sandwich (R. 6-A, 6-B).

Major Endicott entered the parked jeep and, discovering that the accused was an officer, shook him in a vain effort to arouse him; then, himself, drove the jeep five or six miles to police headquarters. On the way in the accused was still asleep but, half-way to town, he roused up and opened his eyes, looked around, looked at the major, then slumped over and went back to sleep. At the police station Major Endicott instructed some men to get him from the car. "He was in a dazed condition, apparently from alcohol". Having been assisted into police headquarters, the accused "sat in a chair all slumped over and stooped" (R. 6-A - 6-D).

In addition to the accused's "dazed condition" resulting "apparently from alcohol", Major Endicott testified that he would say from experience that such condition was caused by intoxicating liquor. Although he thought the accused was "just asleep to begin with", he would say from observation that the man was drunk, that he was definitely intoxicated (R. 6-B, 6-D).

On cross-examination defense counsel asked the following question:

> "You state from your observation the accused's condition was due to alcohol rather than weariness. Can you state whether a man would get that way from maneuvers?"

Major Endicott's reply was, "No". Asked if he had searched the vehicle for liquor, Major Endicott replied, "I don't seem to recall having done that, and again I may have. It was a very busy night and I didn't have time." Reminded of his statement to the investigating officer that he had not smelled liquor on the accused's breath, Major Endicott testified "I didn't get that close to the officer at any time in the fresh air. He was out." He did not think, unless you examined him closely, you could smell alcohol on a man's breath - "Not in the fresh air when you are riding along in a jeep". The accused did not, at any time, make a scene - "He couldn't rouse himself enough to make a scene"; nor did Major Endicott give the accused a test for alcohol. He was not a bit disorderly "or anything like that" - he was merely drunk (R. 6-B - 6-D).

2. The evidence for the defense consisted solely of the testimony

of Sergeant Raymond M. Doyle, a member of the accused's regiment, on maneuvers in Tennessee at the time of the accused's arrest, for the entire week immediately preceding which the accused had been uninterruptedly out in the field with a convoy, participating in a maneuver problem. After his company arrived in Nashville at about 3 o'clock on the afternoon of 30 May, Sergeant Doyle left the accused for a while, returning to the trucks about 9:45. During the interim, Sergeant Doyle had had a few beers but was not drunk; and, although the accused told Sergeant Doyle that he, too, had been drinking, he did not appear to be drunk, but proceeded with the performance of his duties in a regular and unexceptionable manner (R. 6-E, 6-F).

In checking his personnel, preparatory to moving his convoy out, the accused found one enlisted man missing. Sergeant Doyle thought he knew where to find him, and the accused said, "we better go look for him". Sending his convoy on, shortly after 10 o'clock, the accused, accompanied by Sergeant Doyle, drove to the Provost Marshal's office, which he entered alone, to check with the Provost Marshal; then, having parked his jeep, he and the sergeant visited various hotels in search of the absentee, who had been heard to say that he was looking for an orchestra. Having completed his search, about midnight, the accused again reported to the Provost Marshal, Sergeant Doyle and the driver remaining outside in the jeep. Except on the two occasions when the accused visited the Provost Marshal's office, Sergeant Doyle was with the accused continuously from 9:45 p.m.; the accused did not take a drink during that period (R. 6-E, 6-G).

Leaving the Provost Marshal's office to rejoin his convoy, the accused rode on the front seat with the driver, Sergeant Doyle behind. The driver said he was getting sleepy, and wondered if he could make the drive all the way back. As they were driving along, Sergeant Doyle reminded the accused that the driver was tired and wanted some coffee; the accused "said we should stop at the first place and get him (the driver) some coffee". They had just stopped at Shelton's and the sergeant had gone in to inquire if they had any coffee there, and found they had none, when, coming out, he saw Major Endicott talking to the driver, who had alighted from the car. Sergeant Doyle reported to Major Endicott, who inquired if he were in command of the jeep. "No, Sir", replied the sergeant, "the Lieutenant is". The major shook the accused; then told the enlisted men, "You go in the command car I will drive the jeep" (R. 6-F, 6-H).

3. The accused, having been properly advised of his rights as a witness, elected to remain silent (R. 6-H).

4. The Specification alleges drunkenness in uniform. Major Endicott's testimony that the accused was drunk was admissible evidence. However, the witness' observations, constituting the basis for such testimony, as well as the other testimony in the record tending to account otherwise for the physical facts observed by Major Endicott and construed by him as manifestations of drunkenness, present an issue as to whether the major's testimony alone - the short hand testimony of drunkenness and its long hand predicate - forecloses "the reasonable doubt" which the findings of guilty disavow.

The civilian rule with reference to the admissibility of testimony that a person was drunk, is, in most states, identical with the rule announced in the Manual, i.e. "it is not inadmissible on the ground that it is an expression of opinion" (M.C.M., 1928, par. 145, p. 160). "Intoxication is a subject of non expert opinion generally" (11 R.L.C. 608). However, such witnesses (non experts, testifying to a state of intoxication) must first state what came under their observation in order that the jury may take "into consideration the opportunity the witnesses had for observing the condition which led them to believe that intoxication existed" (State vs. Forsyth, 131 Wash. 611, 230 Pac. 821); and "When the circumstances upon which the conviction is predicated are equally consistent with innocence as with guilt a conviction will be set aside" (42 A.L.R. 1510).

In Brown v. State (Texas), 300 SW 81, it was held that the conclusions of witnesses that the accused was drunk, predicated on the fact that, after he was extricated from under his car, which ran into the rear end of another car and was wrecked, he staggered and was confused, starting in first one direction and then in another, although admissible in evidence, were insufficient to sustain a conviction for driving while intoxicated or under the influence of intoxicating liquor; such circumstances being just as consistent and harmonious with the theory that his confused, staggering and helpless condition was due to the injury rather than to intoxication, particularly in view of the fact that there was direct testimony that there was no whiskey about the car, and of the fact that the accused denied the use of intoxicants, in which statement he was corroborated, although one of the witnesses claimed to have noticed the odor of whiskey (underscoring supplied).

In Chairez v. State (Texas) 265 SW 905, the Texas Court of Criminal Appeals, reversing a conviction for driving while drunk, employed the following language:

> "We cannot see our way clear to permit this conviction to stand upon the record before us. All of appellant's acts appear to have been compatible with those of a man not under the influence of intoxicating liquor, and his appearance and manner after the accident reasonably explainable upon the ground that he had received a lick on the head or injury of some kind as a result of striking the wall. So explained, the only testimony left to the state is that the smell of liquor was upon appellant's breath. This is denied by appellant and his witnesses, but conceding the testimony of the state's witnesses to be true in this respect, we are not willing to say that under all the facts of the case it shows appellant to have been driving an automobile at a time when he was drunk, or to any degree intoxicated. * * * The whole record leaves our mind in such an unsettled condition relative to the matter that it would not comport with our duty to permit the confiction to stand."

The uncontradicted evidence in this case shows that, when arrested, the accused had just completed a week's manuever problem, for the entire duration of which he had been in the field with his convoy, of which he was in charge. He had nothing to drink and performed his duties in a regular and unexceptionable manner from 9:45 until midnight, when he was arrested. These duties had involved checking his convoy preparatory to leaving Nashville, starting it out shortly after ten, remaining, himself, to search various places in the city where he had reason to believe he might find one of his enlisted men, who had not reported at the appointed time and place for departure. His search completed, he reported to the Provost Marshal in Nashville, as he had done immediately prior to its commencement; then proceeded in his jeep to rejoin his convoy. He had stopped only a moment to try to get a cup of coffee for his sleepy driver, who had expressed himself as wondering if he could make the drive all the way back, when Major Endicott discovered him, asleep in his jeep. Major Endicott at first thought he was "just asleep", but concluded he was drunk as a result of (1) his inability to rouse the accused by shaking him, (2) the accused's dropping off to sleep again after waking temporarily on his way in, (3) his being assisted into military police headquarters in Nashville by the men whom the major had instructed to "get him from the

car", and (4) his manner of sitting in a chair there "all slumped over and stooped". Although the commanding officer of a military police detachment might well be ascribed substantial experience in recognizing drunkenness, giving his testimony to that condition exceptional weight, Major Endicott's failure, in the instant case, to corroborate his impression by smelling the accused's breath, subjecting his blood to an alcohol test, or any other of the usual methods generally employed by law enforcement officers to detect evidence of intoxication, tends to weaken his expressed conclusion; particularly in the light of Sergeant Doyle's uncontradicted testimony of the accused's protracted and uninterrupted participation in a week's manuever, and his regular performance of duty in town until midnight, immediately preceding his arrest; his further testimony that, although the accused had admitted drinking earlier, he had had nothing to drink since 9:45, and the evidence of sleepiness of the driver of his jeep, who, it may be inferred, had participated in the manuever with the accused.

The defense's uncontradicted evidence in explanation of the accused's extreme drowsiness having a tendency to reasonably account for it on the basis of weariness and loss of sleep during the week's manuever, rather than on the basis of intoxication, if taken into consideration at all, gives rise to an honest, substantial misgiving, generated by the insufficiency of the prosecution's proof to exclude any fair and rational hypothesis except that of guilt.

The Judge Advocate General has held in a desertion case involving an accused stationed at Fort Leavenworth:

> "The undisputed evidence was that he received a telegram from his wife asking him to come to Kansas City, as she was seriously ill. His company commander advised him that he could not get a pass before the next day. Accused left without authority, went to Kansas City, stayed with his wife 33 days, during all of which time she was sick. When arrested he was still in uniform. If the burden was upon the accused to explain his absence without leave for 33 days, he met it fully. Refutation of his story, if untrue, was easy, and under the undisputed testimony the court was not authorized to find the intent to desert."

Analogous principles, applied here, require a similar conclusion. Sergeant Doyle's unimpeached testimony furnishes a credible explanation of the physical manifestations attributed by Major Endicott to the drunkenness of the accused. The prosecution having failed completely to rebut this testimony - by such evidence, for instance, as the testimony of the Provost Marshal or that of one or both of the men whom Major Endicott ordered to assist the accused into military police headquarters - the record cannot reasonably be said to exclude an honest, substantial doubt of the accused's guilt. I am of the opinion that the record is insufficient to support the findings of guilty.

5. Raising serious questions of procedural regularity, the record of trial discloses the following facts and circumstances pertaining to this case.

a. The order appointing the court "to meet at the call of the President" (underscoring supplied) bears date 7 July 1943.

b. The court met and proceeded immediately to trial at 8 o'clock on the morning of 7 July 1943, the date of the order appointing it, in the absence of the President, who is shown, at the beginning of the record proper, to have been excused.

c. On the same date, 7 July 1943, the case was referred for trial to the trial judge advocate. The return on the charge sheet shows service by the assistant trial judge advocate named in the order appointing the court, in his official capacity as such, 6 July 1943, a date prior to his appointment.

d. The record is authenticated by Captain James A. Newman "In the absence of the President, excused." Captain Newman is junior in rank to Captain Bart W. Lahatte, who was present as a member of the court during the entire trial. Records in the Office of The Adjutant General show they were commissioned as captains on the same date, but Lahatte has had longer commissioned service.

e. Although in the order appointing the court, Captain Lahatte's name appears second to that of Major William F. Kerr, who is designated as president therein, Captain Newman's appears first in the list of members present in the record proper. This transposition of names, in connection with Captain Newman's authentication of the record, furnishes reasonable grounds for the presumption that Captain Newman presided

during the trial, despite the provision in the Manual that "the senior in rank among the members present is the president and presiding officer of the court" (M.C.M., 1928, par. 39, p. 28).

An examination of the entire proceedings fails to reveal that the practically simultaneous appointment and convening of the court (in the absence of its excused president at whose call it was expressly directed to meet) injuriously affected the substantial rights of the accused, who interposed no objection to proceeding with the trial before the court as constituted. However the authentication of the record by Captain Newman "in the absence of the President, excused" (which designation could apply only to Major Kerr), is not shown to have been authorized "by reason of the death, disability or absence" of Captain Lahatte, who, as senior in rank among the members present, was, according to the Manual, the President and presiding officer of the court upon the trial of the case. Article of War 33 provides that:

> "such record shall be authenticated by the signature of the president and the trial judge advocate; but in case the record cannot be authenticated by the president and trial judge advocate by reason of the <u>death, disability or absence</u> of either or both of them, it shall be signed by a member in lieu of the president * * *" (underscoring supplied).

Before the record may properly be held legally sufficient, it should be authenticated in compliance with the provisions of Article of War 33.

6. For the reasons stated, I am of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

Benjamin R. Sleeper, Judge Advocate.

(298)
SPJGN
CM 238591

1st Ind.

War Department, J.A.G.O., 27 SEP 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant John M. Nicholl (0-1302174), 322nd Infantry.

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

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

(Sentence confirmed but forfeitures remitted. Execution suspended. G.C.M.O. 337, 4 Nov 1943)

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

26 AUG 1943

SPJGH
CM 238597

UNITED STATES	)	SIXTH AIR FORCE
	)	
v.	)	Trial by G.C.M., convened at Albrook Field, Canal Zone, 27 May and 1 July 1943. Dismissal and total forfeitures.
	)	
Second Lieutenant WILLIAM T. LOGGINS (0-563662), Air Corps.	)	

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1. "In that Second Lieutenant William T. Loggins, Air Corps, having received a lawful order from First Lieutenant Karl Cahn, Air Corps, "to report to Lieutenant Colonel Henry E. L'Heureux", Air Corps, the said First Lieutenant Karl Cahn, being in the execution of his office, did at Albrook Field, Canal Zone, on or about April 8, 1943, fail to obey same."

Specification 2. "In that Second Lieutenant William T. Loggins, Air Corps, did at Albrook Field, Canal Zone, from on or about April 7, 1943, to on or about April 11, 1943, by the excessive use of intoxicating liquor render himself unfit for the performance of his duties as an officer of the Army of the United States."

Specification 3. "In that Second Lieutenant William T. Loggins, Air Corps, having received a lawful order from Captain Alfred S. Wolfe, Medical Corps, "to report to the First Air Depot Group Dispensary", the said Captain Alfred S. Wolfe, Medical Corps, being in the execution of his office, did at Albrook Field, Canal Zone, on or about April 10, 1943, fail to obey same."

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

Specification: In that 2nd Lieutenant William T. Loggins, Air Corps, did, at Albrook Field, Canal Zone, on or about May 3, 1943, by the excessive use of intoxicating liquor render himself unfit for the performance of his duties as an officer in the Army of the United States.

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

Specification: In that 2nd Lieutenant William T. Loggins, Air Corps, did, without proper leave, absent himself from his duties at Albrook Field, Canal Zone, from about May 1, 1943 to about May 4, 1943.

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

3. At the beginning of the trial on 27 May the question of the sanity of accused was raised by the defense. The court adjourned to a later date and recommended that a medical board be appointed to examine accused. When the court reconvened on 1 July, Lieutenant Colonel Ogden C. Bruton, Medical Corps, president of the board which had examined accused, identified the report of the board (Ex. A), which contained findings that accused was not, on the day of the findings, 21 June 1943, nor on or about 8, 10 and 11 April and 1, 3 and 4 May 1943, "in such a state of idiocy, imbecility or insanity as to be incapable of understanding the nature and quality of his acts". The court accepted the findings of the board and directed that the trial proceed (R. 7-12).

4. The evidence for the prosecution shows that accused was Assistant Adjutant of the First Air Depot Group, at Albrook Field, Canal Zone, and his duties were to censor mail in the First Depot Repair Squadron (R. 49-51, 55-56).

a. The Original Charge: About 7:30 a.m. "on or about" 8 April 1943, when First Lieutenant Robert C. Mattingly, Commanding Officer

of the First Depot Repair Squadron, in which accused was detailed to duty, walked into his office, accused, who was there at the time, got up and left. When accused did not return, Lieutenant Mattingly notified First Lieutenant Karl Cahn, Group Adjutant. Accused did not report "the following day, April 10", nor on 11 April, and Lieutenant Mattingly did not see accused again until about 23 April, when accused returned to duty from the hospital. On former occasions when accused had left the office he had advised Lieutenant Mattingly. Late in the afternoon of 7 April, Lieutenant Cahn received a report from Lieutenant Mattingly that accused had left his duties about 11:00 a.m. and had not reported back that day. On 8 April it was reported to Lieutenant Colonel Henry E. L'Heureux, Commanding Officer of First Air Depot Group, that accused had left his duty without permission the day before. Colonel L'Heureux sent Lieutenant Cahn and a medical officer to determine and report the condition of accused and to have accused report to Colonel L'Heureux. On cross-examination by the defense, Colonel L'Heureux stated that on former occasions accused had been absent from duty because he was under the influence of liquor, and that medical records indicated that accused was an alcoholic (R. 12-13, 44-45, 47, 50-52, 55).

About 2:00 p.m., 8 April, Lieutenant Cahn and First Lieutenant Webster M. Strayer, Medical Corps, went to the quarters of accused and found him in bed, fully dressed. Lieutenant Strayer examined accused and found him under the influence of alcohol and unfit for military duty, and took a blood specimen, which was examined by the Board of Health Laboratory. The report of examination (Ex. B) showed an alcoholic content of 0.24 percent. At the time of the examination, accused was not drunk enough that he could not understand instructions, was able to get about, answer the telephone and follow simple procedures "of that sort", was somewhat "groggy" at first, was capable of standing and walking, but was unsteady in gait and walked slowly, had a "slur" in his speech and spoke very slowly, but was easy to understand. Lieutenant Strayer advised accused to discontinue drinking and prescribed a diet. A person may be presumed drunk with a blood alcoholic content of 0.16 percent. When Lieutenant Cahn ordered accused to report to Colonel L'Heureux, accused stated he was not "in any shape" to report that day and asked if he could report the next day. Lieutenant Cahn called Colonel L'Heureux and obtained permission for accused to delay reporting until the next day, and ordered accused to report to Colonel L'Heureux at his office at 7:30 a.m. on 9 April. On the afternoon of 8 April about 4:30 or 5:00 o'clock, accused was observed in his quarters, making soup, and appeared to be unfit for duty, was having a hard time getting the soup into the pot, and seemed nervous and weak. Accused did not report to Colonel L'Heureux on 9 April (R. 13-15, 31-38, 45, 56-57).

About 10:15 a.m. on 9 April, when accused had not reported to Colonel L'Heureux, Lieutenant Cahn went to the quarters of accused and made an effort until noon to locate accused, but could not find him. First Lieutenant Mark J. Babb saw accused at the Officers' Club about 10:00 a.m. that day. Accused was sitting in a corner and acknowledged a greeting. About 9:00 a.m. on 10 April, Lieutenant Cahn went to the quarters of accused and found him in bed, fully dressed. Accused gave as a reason for not reporting to Colonel L'Heureux the day before that he was sick, not feeling well, and could not keep any food "on his stomach", and claimed that he had remained in his quarters all day the previous day. He had not made any effort to contact a doctor. About 2:00 p.m. or earlier, Lieutenant Cahn returned to accused's quarters with Major Alfred S. Wolfe, Surgeon in the First Air Depot Group. Accused appeared to be sober, but was markedly weakened due to inadequate diet and the after effects of a drunken spree. Major Wolfe advised accused as to his diet and ordered him to report to the dispensary the following morning for a check-up. Accused appeared to understand, his conversation was coherent, and he stated he "would go ahead and do that". Accused did not report to the dispensary the following morning. On cross-examination Major Wolfe stated that if a person has a blood alcoholic content of 0.24 percent his mind will be dull and his reflexes slow (R. 15-18, 39-41, 43-44, 58-59).

Between 1:00 and 2:00 p.m. on 11 April, Lieutenant Cahn and Lieutenant Strayer returned to accused's quarters and found accused in bed in his pajamas. Lieutenant Strayer examined accused and found him less under the influence of alcohol than before, but his physical condition was seriously undermined by the constant use of alcoholic beverages and abstinence from food. Accused could not give a reason for his failure to report to the dispensary, and said that the reason he continued to drink was that he had severe episodes of vomiting, could not retain food, but could drink alcoholic beverages without vomiting. Accused dressed with assistance, mumbled, staggered, and was sent to the dispensary in an ambulance. A report of examination at Gorgas Hospital on 20 April (Ex. D) showed a diagnosis of acute alcoholism (R. 18-19, 35-36, 63).

b. Additional Charges I and II: On Saturday, 1 May about 8:30 Lieutenant Mattingly returned to his office after an absence and found that accused had been sick and had vomited. When an inspection party arrived about 9:30 accused left by the opposite door, entered a command car and did not return that day. Accused did not report on Monday, 3 May. About 10:00 a.m. that day Lieutenant Cahn and Major Wolfe

went to accused's quarters and found him in bed, and apparently "in bad shape". Accused was weak, his speech was moderately incoherent and dragging, he had a fine tremor, and there was a marked odor of alcohol on his breath. Major Wolfe took a blood specimen which was examined for alcohol. The report (Ex. C) showed an alcoholic content of 0.36 percent. The normal condition of a person with that amount of alcohol would be a light or moderate stupor. Lieutenant Cahn reported what he had observed to Colonel L'Heureux, and was referred to Lieutenant Colonel Van B. Cunningham, Base Executive Officer of Albrook Field, and to Colonel Walter W. Gross, Commanding Officer of the Air Base. Colonel Gross directed Captain Ernest H. Powell, Base Military Police Officer, to find accused and bring him to Colonel Gross. Captain Powell went to accused's quarters about 3:30 p.m., helped accused to get his clothes on, assisted him downstairs and into the command car, and brought him to Colonel Gross' office. Accused staggered, was in a drunken condition, reeked of alcohol, was unshaven and could hardly stand up. In the opinion of Colonel Gross accused was in no condition to perform any duty. Colonel Gross placed accused in arrest in quarters. Accused was admitted to the hospital on that date (R. 19-21, 41-43, 45, 52-54, 60-68; Ex. E).

Extract copies of morning reports of the First Depot Supply Squadron, First Air Depot Group (Exs. F, G and H) showed accused from duty to absent without leave as of 1 May 1943 and from absent without leave to arrest in quarters as of 3 May 1943 (R. 64).

5. The evidence for the defense shows that on 3 May 1943, Major Wolfe gave accused six one-half-grain tablets of phenobarbitol, to take a "little bit of the edge off his nerves". This drug, if taken in sufficient quantity, will cause a person to appear drunk. Six tablets taken by a chronic alcoholic would not cause a stupor. Major Wolfe attributed the "ways and acting" of accused to "alcoholic drinking". A person with an alcoholic content in his blood of 0.24 percent, is drunk, and his mind does not function fully. When the alcoholic content is 0.36 percent, a person is "not responsible exactly for what he does" and would not be expected to follow any sort of instruction (R. 69-72).

The accused elected to remain silent.

6. a. Specification 2, Original Charge: The evidence shows beyond any reasonable doubt that accused left his place of duty on or about 7 April, was found in his quarters under the influence of alcohol and unfit for military duty at about 2:00 p.m. on 8 April, was

in his quarters and unfit for duty that afternoon about 4:30 or 5:00 o'clock, was in the Officers' Club about 10:00 a.m. on 9 April, did not report at his place of duty on 10 and 11 April, was found in his quarters about 9:00 a.m. and about 2:00 p.m. on 10 April in a weakened condition as a result of drinking, and was found in bed in his quarters between 1:00 and 2:00 p.m. on 11 April, with his physical condition seriously undermined from drinking and abstinence from food. He could not dress without assistance, mumbled, staggered, and was taken to the hospital.

b. Specification 1, Original Charge: On 8 April Lieutenant Cahn, the superior officer of accused in the execution of his office, ordered accused to report to Colonel L'Heureux at 7:30 the next morning. Accused did not report in accordance with the order.

Although accused was under the influence of alcohol and unfit for military duty at about 2:00 p.m. on 8 April when the order was given, yet it is shown that he was able to and did understand the order and the necessity of obeying it. Accused was unsteady in gait and walked slowly but was able to get about; he could understand instructions; he had a "slur" in his speech and spoke slowly but was easy to understand. That accused understood the order is demonstrated by the fact that when Lieutenant Cahn first ordered him to report that afternoon, accused realized his condition and asked for and received permission to report the next morning instead. On the morning of 10 April accused gave as a reason for not reporting to Colonel L'Heureux on 9 April that he was not feeling well.

c. Specification 3, Original Charge: On 10 April Major Wolfe, a superior officer in the execution of his office, ordered accused to report to the dispensary the next morning. Accused did not report as directed.

When this order was given to accused about 2:00 p.m. on 10 April, accused appeared to be sober, although he was in a weakened condition as a result of an inadequate diet and the after effects of a drunken spree. The conversation of accused was coherent, he appeared to understand, and stated that he "would go ahead and do that".

d. The Specification, Additional Charge I: On 3 May about 10:00 a.m. accused was found in bed in his quarters, in a drunken condition and unfit for duty, and about 3:30 p.m. was found in the same

condition and taken to the office of Colonel Gross and to the hospital.

e. The Specification, Additional Charge II: Extract copies of morning report entries of First Depot Supply Squadron showed accused absent without leave from 1 May 1943 to 3 May 1943. It is shown by other evidence that accused left his place of duty on Saturday, 1 May about 9:30 a.m. and was not present there the remainder of that day, nor on 3 May.

7. The report of the medical board (Ex. A), introduced at the beginning of the trial, contained under the headings of personal history and medical history, inadmissible hearsay statements and admissions by accused with respect to the conduct of accused and his past. The report was received, however, for consideration on the question of the mental status of accused rather than as proof of his guilt of the offenses alleged, and convincing and uncontradicted evidence was introduced in proof of the specifications on the merits. Although the personal history and medical history contained in the report should have been excluded, or, if received, the court should have been admonished to give no consideration to the inadmissible matter referred to, the Board of Review is of the opinion that, under the circumstances, the receipt in evidence of these parts of the report did not injuriously affect the substantial rights of the accused.

8. The accused is 36 years of age. The records of the Office of The Adjutant General show his service as follows: Enlisted service from 25 July 1941; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty 16 September 1942.

9. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, and to warrant confirmation of the sentence. Dismissal is authorized upon conviction of a violation of the 61st or the 96th Article of War.

Curtis S. Hall, Judge Advocate

Samuel M. Davies, Judge Advocate

F. J. Lotthuhos, Judge Advocate

1st Ind.

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant William T. Loggins (0-563662), 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 failed to obey two lawful orders given by superior officers in the execution of their office, rendered himself unfit for about four days in one instance and for about one day in another for the performance of his duties by the excessive use of intoxicating liquor and was absent from his duties without leave from 1 May to 3 May 1943. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. I recommend that the sentence be confirmed, that the forfeitures be remitted and that the sentence as thus modified be carried into execution.

3. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action 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 Action.

(Sentence confirmed but forfeitures remitted. G.C.M.O. 285, 30 Sep 1943)

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

28 AUG 1943

SPJGH
CM 238607

UNITED STATES N.D	81ST INFANTRY DIVISION
v.	Trial by G.C.M., convened at Gallatin, Tennessee, 23 June and 28 June 1943. Dishonorable discharge (suspended) and confinement for five (5) years. Detention and Rehabilitation Center.
Private LOUIE F. MASHBURN (39245349), Company L, 321st 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, which has been examined in the Office of The Judge Advocate General and there found legally insufficient to support the findings and sentence, has been examined by the Board of Review, and the Board submits this, its opinion, to The Judge Advocate General.

2. The accused pleaded not guilty to and was found guilty of the Specification and Charge. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years. The reviewing authority approved the sentence, ordered its execution but suspended the dishonorable discharge, and designated the Ninth Service Command Detention and Rehabilitation Center, Turlock, California, as the place of confinement.

3. The only question requiring consideration is whether the court which tried this case was legally constituted.

4. The Charge was, by 1st Indorsement, Headquarters 81st Infantry Division, 15 June 1943, referred for trial to First Lieutenant Robert C. Stanfield, Jr., 306th Engineers, Trial Judge Advocate, general court-martial appointed by paragraph 1, Special Orders No. 149, Headquarters 81st Infantry Division, Nashville, Tennessee, 14 June 1943.

The trial began on 23 June 1943. First Lieutenant Arthur W. Wade was present, sworn and sat as a member of the court (R. 2).

Lieutenant Wade was not included in the detail for the court appointed by paragraph 1, Special Orders No. 149, referred to above.

By paragraph 3, Special Orders No. 161, Headquarters 81st Infantry Division, 26 June 1943, paragraph 1, Special Orders No. 149 was amended to substitute the name of Lieutenant Wade in place of that of a member of the court originally detailed.

The court reconvened on 28 June 1943. In addition to the personnel of the court present at the first session, there was then present Captain William W. Edwards, who was sworn and sat as a member of the court (R. 6). Captain Edwards was not included in the detail for the court appointed by paragraph 1, Special Orders No. 149. The trial was completed on 28 June 1943.

By paragraph 7, Special Orders No. 164, 81st Infantry Division, 29 June 1943, paragraph 1, Special Orders No. 149 was amended to substitute the name of Captain Edwards in place of that of a member of the court originally detailed, "effective 26 June 1943".

By paragraph 8, Special Orders No. 164, referred to above, paragraph 3, Special Orders No. 161, which named Lieutenant Wade as a member of the court, was amended by adding the words "effective 23 June 1943".

5. Where an officer who was not detailed thereon sat as a member of the court, the proceedings were thereby invalidated (CM 131672, Corradi; CM 152563, Stone; CM 218157, Beadle; CM 218158, Stewart; CM 218159, Thornal).

Where the proceedings are invalid for the reason stated above, they cannot be validated retroactively by orders issued in amendment of the order or orders detailing the court. Such orders are, regardless of their form, effective only from the date of promulgation.

> "I D. An order can not create a fact to-day and carry it back to some date, and there set it up as a fact occurring on that date, whereas in reality no such fact then occurred. But care should be taken to distinguish between such an impossibility and a legally retroactive executive order or regulation, as when a thing is done without the approval of the Secretary of War, his approval being required, and he subsequently ratifies the thing done. Between such action as this and the attempt to manufacture a fact as happening in the past

it is important but not difficult to distinguish. Thus all orders in the cases of officers and enlisted men, which purport to make appointments, acceptances of resignations, discharges from the service, or muster-out of service date from, or take effect from, dates prior to the issuance of the orders therefor, are instances of the attempts referred to and are illegal. C. 8962, Sept., 1900." (Dig. Op. JAG, 1912, p. 277).

6. In the opinion of the Board of Review, Captain Edwards, who participated in the proceedings on 28 June 1943, was not on that date a legally detailed member of the court.

The Board is also of the opinion that Lieutenant Wade, who participated in the proceedings on 23 June 1943, was not on that date a legally detailed member of the court, and was not legally qualified to act as a member of the court on 28 June 1943 after his detail as a member on 26 June 1943, because he was not sworn as a member after he was legally detailed as a member.

7. The Board of Review is, therefore, of the opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence.

Arthur S. Hedges, Jr., Judge Advocate

Samuel M. Driver, Judge Advocate

F. J. Fetterhoff, Judge Advocate

1st Ind.

War Department, J.A.G.O., 28 AUG 1943 - To the Secretary of War.

1. Herewith transmitted for action 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 Louie F. Mashburn (39245349), Company L, 321st 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 made above.

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 Acting Secretary of War. G.C.M.O. 229, 11 Sep 1943)

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

SPJGK
CM 238640

22 SEP 1943

UNITED STATES	)	94TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Camp Phillips, Kansas, 20 July 1943. Dismissal.
	)	
First Lieutenant CECIL O. AUSTEL (O-1290015), 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 First Lieutenant Cecil O. Austel, Company L, 376th Infantry, did, without proper leave, absent himself from his organization at Newton, Kansas, from about 0500 June 15, 1943 to June 17, 1943.

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

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

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

Specification 3: In that First Lieutenant Cecil O. Austel, Company L, 376th Infantry, did, at Newton, Kansas, on or about June 15, 1943 willfully, wrongfully and unlawfully drive a Government Motor Vehicle to wit: a one quarter ton four by four truck, No. 20247956, in violation of unnumbered memorandum, Headquarters 94th Infantry Division, dated January 12, 1943, which states that no officer of the 94th Division, except officers mentioned in said order, shall drive a Government Vehicle except in the case of an emergency.

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

Specification: In that First Lieutenant Cecil O. Austel, Company L, 376th Infantry, did at Enid Army Air Field, Enid, Oklahoma, on or about 17 June 1943, with intent to deceive First Lieutenant J. F. O'Brien, Air Corps, officially state to the said Lieutenant J. F. O'Brien, that he, the said Lieutenant Cecil O. Austel was one James W. Frazier; that he was not a member of the Armed Forces; that he was seventeen years old having been born on April 22, 1926; that he had been on the road for about a year; that he had never been fingerprinted and that he had never had an army serial number; which statements were known by the said Lieutenant Cecil O. Austel to be untrue.

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

3. The evidence for the prosecution is substantially as follows: Charge I - Specification (Absence without leave in violation of Article of War 61).

There was introduced in evidence a duly authenticated extract copy of the morning report of accused's organization showing accused absent without leave as of "0500" 15 June 1943 (R.6,8; Ex. A) and a duly authenticated extract copy of the morning report of Post Prison, Enid Army Air Field, Enid, Oklahoma, showing accused in confinement as of 18 June 1943 (R.31, Ex. B). In addition to the entries in the morning reports, there was oral testimony of Staff Sergeants Henry M. Cason (R-6) and William F. Garland (R.11) and Captain Julian M. Way (R.22-24), all of Company L, 376th Infantry, 94th Division, Camp Phillips, Kansas, to the effect that accused absented himself without leave, and oral testimony of Private First Class Harold W. Fox (R.25-26), Military Police Complement, Sergeant P. C. O'Hassy, Desk Sergeant, Military Police (R.27-29) and First Lieutenant J. F. O'Brien (R.29), Air Corps, Provost Marshal, all of Enid Army Air Field, Enid, Oklahoma, to the effect that accused was returned to military control 17 June 1943. The absence as alleged, is tacitly admitted by the accused himself (R.34-35).

Charge II, Specification 3 (Findings under Specifications 1 and 2 disapproved), alleges wrongful and unlawful use of a Government vehicle in violation of Article of War 96 and of Memorandum Headquarters 94th Division, dated 12 January 1943.

Without objection there was introduced in evidence a certified copy of a Memorandum, Headquarters 94th Division, Camp Phillips, Kansas, dated 12 January 1943, restricting the use of Government vehicles, except in case of emergency and as prescribed by schedule for driver training, to the commanding general and other unit commanders therein designated (R.21, Ex. E). On the evening of 14 June 1943, after a parade in Newton, Oklahoma (in which accused's organization had participated), the accused in company with Staff Sergeant Garland went to Camp Phillips, got a Government jeep and returned to Newton. Private First Class Stephen Arty of the same organization joined them on the return trip. In Newton they picked up another soldier and while "touring the town" - accused doing the driving - the jeep was in a minor accident (R.9-16,18,22). One of the enlisted men was slightly injured and was taken to the hospital (R.15). Sergeant Garland drove the jeep to camp and notified Captain Way, the company commander, of the accident. The accused disappeared after the injured soldier was placed in the hospital. Captain Way stated that after the parade the officers of the company were entertained at the Elks Club in Newton. During the entertainment, the accused asked Captain Way if it would be all right for him to leave, which request was granted. Captain Way first learned of the wreck about 4:30 on the morning of 15 June. He stated that he was the only one in his organization authorized to permit the use of Government vehicles assigned his organization, and that he had granted no such authority to the accused (R.21-22). Witness further stated that there was no emergency which required the use of the jeep by accused and that if such a condition had arisen, it would have been the duty of accused to report it to him before using the car (R.24).

Charge III.- false official statement. On 17 June 1943 (2 days after the wreck of the car), Private Harold W. Fox, Military Police Complement, Enid Army Air Field, Enid, Oklahoma, saw the accused entering a cafe in the town of Enid. On account of the untidy and dishevelled condition of his uniform, Fox asked accused for his furlough papers and pass. Accused did not have either. Accused was not wearing any insignia of rank. Fox assumed that he was an enlisted man and took him to the police station (R.25-27). Accused arrived at the police station about 7:30 p.m. and was there interrogated by Lieutenant O'Brien, Provost Marshal of Enid Army Air Field. Lieutenant O'Brien stated -

> "Well, I asked him his name and he told me that he was James W. Frazier and I asked him where he was stationed and he asked me what I meant. I assumed that he was in the military service and I told him that what I meant was the place where you were in the Army. Then he said that he had never been in the Army. Then I asked him for his identification card and he said that he was only seventeen years old. I asked him when and where he was born and he said that he was born April 22, 1926. I asked him where he got the Army clothes that he was wearing, and he said that he had bought them in Salina from a soldier that he had met in a tavern

> there. Then I had him remove his clothes and we found there the name Austel. I then questioned him further and asked him if he had ever had a serial number. He said 'no'; that he didn't know what a serial number was or words to that effect and I asked him where he was going and he said that he was going down to the Texas Panhandle to work there in the harvest fields. I asked him for his social security number and he said that he had never had one. Also, he told me that he had never been fingerprinted. * * * Well, he said that he had been on the road for about a year working here and there." (R.30).

Lieutenant O'Brien stated that accused's uniform had no marks of identification as to rank or organization but that an old first lieutenant's bar was found in the watch pocket. He also stated that accused at no time admitted his identity to him (R.32).

Sergeant P. C. O'Hassey, Desk Sergeant of the Military Police, Enid Army Air Field, who was present when the accused was interviewed by Lieutenant O'Brien, stated that after accused had represented that he was not in the Army, the civilian authorities were about to hold him for not having a registration card and that thereupon, after remaining in jail about an hour, the accused without any duress, disclosed his true identity. In the meantime the accused had been photographed and fingerprinted (R.28-29,32; Exs. C and D).

4. For the defense the accused testified that when he was apprehended in Enid, Oklahoma, he was on his way back to Camp Phillips. He had been in Oklahoma City. He stated that his uniform had become badly soiled and that his general appearance was such that in order not to reflect discredit upon his rank and organization he stripped the uniform of all insignia.

> "I decided to take the chance of getting back without disclosing the fact that I was an officer and a member of this organization" (R.35).

He stated that in misrepresenting himself to Lieutenant O'Brien he was motivated by the hope that he might be able to talk Lieutenant O'Brien out of holding him, because he was anxious "to turn in rather than be brought back", and that he voluntarily retracted his false statements when it became evident that they were not going to release him (R.35). Accused said that he became 21 years of age on 13 February 1943. He stated that when he was apprehended he had between $3 and $4 which he was saving to have his clothes cleaned in one of the towns near Camp Phillips, so that he could return to his organization in a presentable condition (R.35-36).

5. It is wholly unnecessary to restate the evidence. Suffice it to say that the unauthorized absence of accused as alleged in Charge I and its Specification is clearly and unmistakably established. The unauthorized and wrongful use by accused of a Government jeep in violation of the memorandum as alleged in Charge II and Specification 3 thereof, is likewise clearly shown. As to Charge III and its Specification the evidence for the prosecution and the admissions of the accused show beyond a reasonable doubt that the accused with the intent to deceive, made a false official statement to First Lieutenant O'Brien, Provost Marshal, as alleged in the Charge and Specification. Such conduct was, of course, in violation of Article of War 95.

6. The accused is 21 years and 7 months of age. The records in the Office of The Adjutant General show that he was graduated from high school in 1939. He enlisted in the Army 5 October 1940, and attained the grade of Platoon Sergeant, Infantry. He attended Officer Candidate School, Fort Benning, Georgia, from which he was commissioned a temporary second lieutenant, Infantry, Army of the United States, 13 February 1942. He was promoted to the grade of temporary first lieutenant 8 February 1943. In recommending accused for promotion, his regimental commander stated: "This officer has served as platoon leader, weapons platoon (81 mm Mortar), Company 'M', 376th Infantry, Fort Custis, Michigan, and Camp Phillips, Kansas, from August 23, 1942 to present date in a superior manner". His Division Commander stated: "The promotion of this officer is definitely to the best interest of the service for the reason that he is considered to be the best qualified officer in the command available for the position and grade to which promotion is recommended".

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 as approved by the reviewing authority and the sentence, and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 61 or 96 and is mandatory upon conviction of violation of Article of War 95.

Henry E. Fox, Judge Advocate.

Thos Tannenbaum, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

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

30 SEP 1943

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 Cecil O. Austel (0-1290015), 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 as approved by the reviewing authority and the sentence, and to warrant confirmation thereof. Under all the circumstances and in view of the youth and previous good character of the accused, I recommend that the sentence be confirmed but that the execution thereof be suspended during the pleasure of the President.

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

Myron C. Cramer

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 Ex. action.

(Sentence confirmed but execution suspended. G.C.M.O. 345, 9 Nov 1943)

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

SPJGN
CM 238644

19 AUG 1943

UNITED STATES	)	CHARLESTON PORT OF EMBARKATION
v.	)	Trial by G.C.M., convened at Charleston Port of Embarkation, Charleston, South Carolina, 31 July 1943. Each: dishonorable discharge and confinement for six (6) years. Disciplinary Barracks.
LA VERNE E. JOHNSON and SIDNEY S. ZIPKIN, both General Prisoners.	)	

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

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

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

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

Specification: In that General Prisoner LaVerne E. Johnson did in conjunction with General Prisoner Sidney S. Zipkin, at Section 2, Staging Area, Charleston Port of Embarkation, Charleston, South Carolina, on or about 23 July 1943, with intent to do him bodily harm, commit an assault upon Private First Class Burton O. Palmer, Jr., by striking him on the head with a dangerous thing, to wit: a lump of coal.

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

Specification: In that General Prisoner LaVerne E. Johnson and General Prisoner Sidney S. Zipkin, having been duly placed in confinement in the Guardhouse on or about 30 June 1943, and 9 July 1943, respectively, did, at Section 2, Staging Area, Charleston Port of Embarkation, Charleston, South Carolina, on or about 23 July 1943, escape from said confinement before they were set at liberty by proper authority.

Each accused pleaded not guilty to and was found guilty of the Charges and Specifications thereunder. Each accused was sentenced to be dishonorably discharged the service, and to be confined at hard labor at such place as the reviewing authority may direct for six years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. Since the record clearly sustains the Charge as to each accused, of escape from confinement as set forth in the Specification, Charge II, the only question requiring discussion is the legal sufficiency of the evidence to sustain that part of the Specification, Charge I, which alleges that the accused did on or about 23 July 1943, "with intent to do him bodily harm, commit an assault upon Private First Class Burton O. Palmer, Jr., by striking him on the head with a dangerous thing, to wit: a lump of coal".

The evidence as presented by the prosecution concerning the above Specification shows that on 23 July 1943, the two accused were assigned as general prisoners to a work detail cutting weeds. They were guarded by Private Burton O. Palmer, Jr. At the time of the alleged attack, Private Palmer was standing at or near the edge of a pile of coal with his back toward the coal, while the two accused were cutting weeds about five feet in front of him. Private Palmer looked away from the accused for a moment and as he turned his head he observed both the accused charging toward him. The accused knocked Private Palmer down and he lost consciousness (R. 9-15).

An officer of the Medical Corps testified that he had examined Private Palmer on 23 July 1943 and that Palmer had two lacerations on the back of his skull. One laceration was about one and one-half inches long while the second laceration about two inches in length. In addition he testified that Palmer had a discoloration and bruise of the right eye. In the opinion of this medical officer, the laceration was caused by a contact with a blunt instrument, but the wounds did not disclose whether they were caused by a blow or by a fall (R. 19-20).

Although Private Palmer testified on direct examination that the accused struck him with a lump of coal, he admitted on cross-examination that he did not see the accused strike him with a lump of coal and that he reached the conclusion that he had been struck with a lump of coal only because coal was "the only thing around" (R. 14).

4. The accused elected to remain silent and no evidence for the defense was presented.

5. Since the offense in question involves an assault with "intent to do bodily harm" by "striking him on the head with a dangerous thing", it is necessary that the proof establish that the accused was struck with

"a certain weapon, instrument, or thing" and "(b) the facts and circumstances of the case indicating that such weapon, instrument or thing was used in a manner likely to produce death or great bodily harm" (M.C.M., 1928, par. 149m). Although the evidence shows that the two accused charged Private Palmer and that he was struck in the eye, and that he thereupon fell and became unconscious, there is no proof as to how he acquired the injuries on the back of his head. Moreover, there is no evidence as to the size of the lump of coal with which Palmer might have been struck by the accused, and there is, therefore, no basis for a lawful circumstantial inference that he was so struck. The injury to Palmer may have resulted from his fall, or in fact the accused may have struck him in the back of the head with a dangerous instrument. As previously stated, however, there is no proof to sustain an assumption that either coal was used as a weapon or that any other dangerous instrument was used to produce the wound on the back of Palmer's head. The evidence, however, is legally sufficient to establish, within the language of the Specification, the lesser included offense of simple assault and battery in violation of Article of War 96. The maximum punishment authorized by M.C.M. 1928, par. 104c, for this offense is confinement at hard labor for six months and forfeiture of two-thirds pay per month for a like period.

6. For the reasons stated, the Board of Review holds that the record of trial is legally sufficient to support the finding of guilty of Charge II and the Specification thereunder, legally sufficient to support only so much of the finding of guilty of Charge I and the Specification thereunder as involves a finding that the accused did, at the time and place alleged, commit an assault upon Private First Class Burton O. Palmer, Jr., by striking him on the head, in violation of Article of War 96, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for one and one half years.

On leave, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

SPJGN
CM 238644

1st Ind.

War Department, J.A.G.O., - To the Commanding General, Charleston Port of Embarkation, Charleston, South Carolina.

1. In the case of Laverne E. Johnson and Sidney S. Zipkin, both general prisoners, I concur in the foregoing holding by the Board of Review, and for the reasons therein stated, recommend that only so much of the finding of guilty of the Specification, Charge I, be approved as involves a finding that the accused did, on the date and at the place alleged, commit an assault upon Private First Class Burton O. Palmer Jr., by striking him in the head, in violation of Article of War 96, and 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 one and one-half years. Upon compliance with this recommendation, you will have authority to order the execution of the sentence.

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

(CM 238644).

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.

(321)

SPJGH
CM 238696

26 AUG 1943

UNITED STATES v. Private CARL E. WHITE (34163572), 894th Guard Squadron.	)	THIRD AIR FORCE Trial by G.C.M., convened at Greenville Army Air Base, Greenville, South Carolina, 25 and 30 June 1943. Dishonorable discharge and confinement for five (5) years. Disciplinary Barracks.

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

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

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

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

Specification 1: In that Private Carl E. White, 894th Guard Squadron, Greenville Army Air Base, did, at Greenville Army Air Base, on or about May 5, 1943 with intent to do him bodily harm, commit an assault upon Private Timothy Toohey, 473rd Bomb Squadron, Greenville Army Air Base, by wilfully and feloniously biting the said Private Timothy Toohey on the back and on the arm with his teeth and by striking him (Toohey) in the eye with his fists.

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

Specification 3: (Finding of guilty disapproved by reviewing authority).

Specification 4: (Finding of not guilty).

Specification 5: In that Private Carl E. White, 894th Guard Squadron, Greenville Army Air Base, did, at Greenville Army Air Base, on or about February 1943, attempt to commit the crime of sodomy with Private Leo Contrera by rubbing his penis against the bare buttocks of said Private Leo Contrera.

Specification 6: In that Private Carl E. White, 894th Guard Squadron, Greenville Army Air Base, did, at Greenville Army Air Base, on or about January 1943, with intent to commit a felony, namely, sodomy, commit an assault upon Private Leo Contrera, 472nd Bomb Squadron, Greenville Army Air Base, by wilfully and feloniously kicking the said Private Leo Contrera in the ribs with his feet.

Specification 7: (Finding of guilty disapproved by reviewing authority).

Specification 8: In that Private Carl E. White, 894th Guard Squadron, Greenville Army Air Base, did, at Greenville Army Air Base, on or about March 1943, with intent to commit a felony, namely, sodomy, commit an assault upon Private William B. Yates, by pushing his (White's) penis against the rectum of said Private William B. Yates.

Specification 9: (Finding of guilty disapproved by reviewing authority).

Specification 10: (Finding of guilty disapproved by reviewing authority).

Specification 11: (Finding of not guilty).

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

Specification 1: (Finding of not guilty).

Specification 2: In that Private Carl E. White, 894th Guard Squadron, Greenville Army Air Base, did, at Greenville Army Air Base, on or about December 1942, wrongfully offer money in the amount of an unknown amount to Private Albert L. Willison, 894th Guard Squadron, Greenville Army Air Base, for the purpose of persuading said Private Albert L. Willison to submit to carnal connection against the order of nature with the said Private White.

Specification 3: In that Private Carl E. White, 894th Guard Squadron, Greenville Army Air Base, did, at Greenville Army Air Base, on or about May 5, 1943, wilfully break, by striking with his slipper two (2) panes of glass, part of a window in the guardhouse at Greenville Army Air Base, of the value of about ten cents issued for use in the military service of the United States.

He pleaded not guilty to all Charges and Specifications. He was found not guilty of Specifications 4 and 11, Charge I and Specification 1, Charge II; guilty of Specification 5, Charge I, except the word "bare"; guilty of Specification 6, Charge I, except the words "with intent to commit a felony, namely sodomy"; and guilty of all other Specifications and the Charges. 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 disapproved the findings of guilty of Specifications 2, 3, 7, 9 and 10, Charge I; approved only so much of the findings of guilty of Specifications 5 and 6, Charge I as involves a finding of guilty in violation of the 96th Article of War; approved the sentence; and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The record of trial was forwarded for action under Article of War 50½.

3. The evidence for the prosecution shows that accused was a prisoner in the guardhouse at Greenville Army Air Base from 2 September 1942 to 27 October 1942 and from 28 December 1942, and that among his fellow prisoners were the following for the periods stated: General Prisoner Leo Contrera from 12 December 1942 to 12 March 1943, General Prisoner Daniel J. Lovelace from 25 January 1943 to 16 March 1943, General Prisoner Richard V. Abney from 1 November 1942 to 12 March 1943, Private William T. Tobar from 21 September 1942 to 6 November 1942, from 4 February 1943 to 5 February 1943, and from 8 February 1943 to 16 April 1943, Private Albert Willison from 16 October 1942 to 10 January 1943 and from 17 May 1943 to 11 June 1943, and Private William B. Yates from 8 February 1943 (R. 35; Ex. P-3).

At the beginning of the trial, Tobar was permitted to testify, over objection, as to the reputation of accused in the guardhouse, and that it was common knowledge in the guardhouse that accused committed acts of sodomy (R. 7-8).

a. Specification 1, Charge I and Specification 3, Charge II: Second Lieutenant Nathan L. Goberman, officer of the day and in charge

of the guardhouse, learned on the night of 4 May, about 10 o'clock, while he was out on inspection, that three or four windows had been broken, and that at the time there were four men in the latrine, where the windows were. Two of these men were transient prisoners who went to Fort Jackson the next day, and the other two were unknown. Immediately after the windows were broken, Lieutenant Goberman questioned the prisoners, but obtained no information. On the morning of 5 May, all of the prisoners in a group were questioned again with no result. Restrictions were placed on all the prisoners. Before lunch, Lieutenant Goberman "accused the guilty man" by saying that he knew who the guilty man was and wanted him to confess so they could lift the restrictions on the others. At that time nobody confessed, although Lieutenant Goberman said they "knew who did it and by his not confessing he was depriving others of privileges". When the prisoners were lined up for the noon meal, Toohey approached Lieutenant Goberman, admitted he was in the latrine at the time the windows were broken, and, as a "direct result" of the deprivation of privileges, stated that he knew who the man was and that unless he confessed within 15 minutes after lunch, Toohey would name him (R. 39, 41-43).

Just after lunch Toohey and accused had a fight in the guardhouse and were separated by Sergeant Homer A. Stevens, at which time they were on the floor, accused was on top, and no one else was near. Accused stated that Toohey had accused him of breaking the windows and threatened "to tell" unless accused confessed, that accused had not done it, and that therefore he "jumped Toohey to start a fight". Lieutenant Goberman questioned all the prisoners in a group and asked the guilty man to step up and admit breaking the windows so they would not have to punish others. He "probably made at the time several statements that it would be kept up until the guilty man confessed. That there would be no cigarettes and other privileges until the guilty man confessed". At that time accused confessed having broken the windows the night before, and on being asked whether it was accidental replied that it was deliberate, and that he did it with his bare fists. Toohey then told Lieutenant Goberman that this was true, and that he was in the latrine with accused and two other prisoners. Accused was then placed in solitary confinement (R. 28, 29, 40, 43-44).

After the fight Sergeant Stevens saw Toohey downstairs and learned that accused "had bit" Toohey on the left arm and on the back. He did not see accused bite Toohey, but later saw the "imprints" on the left arm and back. They were fresh bites. Toohey thought he had scratched himself. On 7 May 1943, First Lieutenant John H. Powell, Medical Corps, examined Toohey, and identified a report of the

examination (Ex. P-2). The defense admitted that "Toohey was bitten" but not that accused did it (R. 28-30, 45-46).

It was stipulated that the value of the two panes of glass was 20 cents and that they were issued for use in the military service (R. 47).

b. Specifications 5 and 6, Charge I: In February Contrera was coming down from the showers with his pants on, but no shirt or shoes, when accused came out of the latrine with his penis in his hand, and rubbed his penis on Contrera's buttocks on top of his pants. Accused did not have "exactly an erection. Just in between". In January accused and Contrera had an argument, accused "got sore" because Contrera "kind of got on his nerves" or because of something Contrera "must have said to make him mad", accused attacked Contrera, and kicked Contrera in the ribs with his knee. Contrera's ribs hurt for two months (R. 25-26, 54-55).

c. Specification 8, Charge I: In March nothing unusual occurred between accused and Yates except that they "had a little rassling, a little horseplay". Accused did not at any time try to have improper relations with Yates. A statement made by Yates to Second Lieutenant Earle E. Garnas (Ex. P-1) on 19 May 1943 was admitted in evidence over objection, to attack Yates' credibility, and he was cross-examined by the prosecution. There was "scuffling" and a "lot of horseplay" but no serious intentions. In February accused and several others were in the shower and there was some horseplay. Accused "came at" Yates but did not place his penis against Yates' rectum. On the "night of a blackout" there was some horseplay, accused and "Private Miller" were trying to "agitate" Yates, and accused jokingly said to Yates that he was going to "corn hole" him. At no time did Yates believe that accused intended to "have connection" with him, but "knew" accused was "teasing" him. The statement made by Yates to Lieutenant Garnas was terribly "misconstrued" by both of them (R. 20-24, 31-32).

The statement made to Lieutenant Garnas was substantially as follows: Whenever accused saw anyone without his clothes on he took his "cock" in his hand and said "I am going to corn hole you". Sometimes he would go through the motions and touch his penis to the other person's rectum. These persons usually jumped away from him. Accused attempted this on Yates on several occasions. One night during a blackout when Yates was lying on his bed, accused said he was going to "corn hole" Yates, and they started to scuffle. Two or three other boys held Yates and tried to turn him over in bed with his back up so

Willison. (These were not shown to be the same occasions as when money was offered, and objection was made to this evidence as not within the Specifications.) Tobar testified that on one occasion accused tried to take Willison's drawers off, in the room where all the prisoners were, but did not succeed (R. 16-17, 48-50, 53).

4. The evidence for the defense shows that the fight between accused and Toohey began after Toohey told accused to turn himself in for breaking the windows. In February on the night of a blackout, Private Elton J. Miller was in the shower with accused and Yates when Tobar came in. They were just playing, throwing soap at one another and taking a bath (R. 73-74, 76-77, 80-81).

Accused elected to testify after both sides had rested and arguments had been made. His testimony was substantially as follows: Accused had a wife, and could not go home and look his people in the face if he "ever even thought of doing something like that". In the guardhouse there was "lots of playing around. Horsing around, rassling and all kinds of talk". There was general horseplay and "kidding". Accused did not commit "anything like that". He was not in the guardhouse in November at the time Willison claimed accused offered him money, nor in December until 28 December. It was all "just a made-up thing". As to the incident in the shower, they were just "kidding around". He never even attempted to commit anything like that. He did not break the window. At the time it was broken, accused, Toohey and two or three transient prisoners were in the latrine. It was dark and accused did not know who broke the window. The fight started when Toohey said that accused broke the window, and accused asked him if his conscience was bothering him. During the fight Toohey hit accused in the testicles. Accused might have bit him, but did not remember biting him. He was in agony. He was kept in solitary confinement continuously after 5 May, except for two days (R. 85-87).

On cross-examination, accused did not remember admitting that he broke the window, but may have admitted it. He knew he would go in "solitary" anyway for fighting, and wanted the rest of the boys to get their privileges back. Other prisoners had at times admitted things they did not do. He did not offer Contrera any money. On the night the lights went out they were playing on Yates' bed. They were teasing him, and "rassling" with him. Accused did not lay hands on him "with intentions of doing anything that way. That is something a dog wouldn't do" (R. 87-91).

5. In rebuttal Private Jesse T. Williams, 894th Guard Squadron, who looked after the guardhouse and kept it clean, testified that Hillman

(a defense witness) had a reputation for not telling the truth, and that he would not believe either Hillman or Tobar. He thought Willison would tell the truth. Sergeant Stevens did not know Hillman's reputation for truth and veracity, nor that of Tobar. First Lieutenant Attilio W. Bedont stated that so far as he knew Tobar was truthful but his character was not of the best, that Willison was not responsible, and that he would not depend on anything Willison said (R. 81-84).

6. a. As to Specification 1, Charge I, it is shown that accused had a fight with Toohey on 5 May, but it is not shown that accused bit Toohey on the back and arm, nor that he struck Toohey in the eye with his fist, as alleged. Shortly after the fight, Toohey was seen to have fresh wounds on his back and arm, which appeared to be bites, and which were later diagnosed as bites, but there was no direct proof that accused caused these injuries. In the absence of proof that these injuries were not present before the fight, it cannot reasonably be inferred that they were suffered during the fight. It is shown that accused started the fight and was on top of Toohey at the time when they were separated. In the opinion of the Board of Review the evidence sustains only a finding of guilty of an assault, in violation of the 96th Article of War.

b. As to Specification 5, Charge I, it is shown that accused rubbed his penis on Contrera's buttocks at a time when Contrera had his trousers on. This proof is not sufficient to sustain a finding of guilty of an attempt to commit sodomy. Under the circumstances, the necessary intent cannot be inferred. The evidence sustains only a finding of guilty of an assault and battery in violation of the 96th Article of War.

c. As to Specification 6, Charge I, it is shown that accused kicked Contrera in the ribs with his knee.

d. As to Specification 8, Charge I, it is shown that on a night in February or March accused and others scuffled with Yates on his bed, some of the other men tried to turn Yates over on his stomach and pulled his pants partly off, and accused said "be still, be nice, I am going to corn-hole you". Then Miller, Yates and accused went into the shower with no clothes on. Accused stood behind Yates, grabbed him, said "I am going to corn-hole you", made the motions, had an erection, and placed his penis between Yates' legs and against his buttocks. The three men were laughing and having a big time. Much crude horseplay was common in the guardhouse.

In other Specifications of which accused was found not guilty or as to which the findings of guilty were disapproved by the reviewing authority, it was alleged that accused committed sodomy per anum with

Yates, in February (Spec. 2, Chg. I), that he committed an assault on Yates with intent to commit sodomy by attempting to turn Yates on his stomach, in March (Spec. 7, Chg. I), that he committed an assault on Yates with intent to commit sodomy by saying to him "I am going to corn-hole you", in April (Spec. 9, Chg. I), and that he committed an assault on Yates with intent to commit sodomy by saying to him "lay still, be nice, I am going to hole you", in March (Spec. 10, Chg.I).

It is obvious that the testimony with respect to what occurred on Yates' bed applied to Specifications 7, 9 and 10, Charge I, rather than to Specification 8, Charge I.

As to what occurred in the shower room, the trial judge advocate stated that "as far as specification 2 is concerned, we have the direct testimony of Private Tobar, proving the allegations in that specification, although he did not testify that White's penis was actually inserted into Private Yates" (R. 33). Specification 2 alleged an offense in February and Specification 8 alleged an offense in March. The testimony of Tobar and Yates was directed to the month of February. It is therefore apparent that this testimony was applicable to Specification 2, Charge I, rather than to Specification 8, Charge I.

In the opinion of the Board of Review the evidence does not sustain a finding of guilty of Specification 8, Charge I.

e. As to Specification 2, Charge II, it is shown by the testimony of Willison that on several occasions in December accused offered him money "to commit sodomy with him". Accused was in the guardhouse in December only on and after 28 December. Lieutenant Bedont, a witness for the prosecution, testified that Willison was not responsible and that he would not depend on anything Willison said. Willison's testimony was in general terms only, and gave no details of the alleged incidents. He was permitted to testify as to efforts of accused to remove his pants and drawers on other occasions, which testimony was not applicable to any other Specification, and was highly prejudicial to the rights of accused with respect to Specification 2, Charge II. The testimony as to the reputation of the accused in the guardhouse as a sodomist was improperly admitted at the beginning of the trial and was highly prejudicial to the rights of accused under Specification 2, Charge II.

"The rule is that the reception in any substantial quantity of illegal evidence must be held to vitiate a finding of guilty on the charge to which such evidence relates unless the legal evidence of record is of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty. If such evidence is eliminated from the record and that which remains is not of sufficient probative force as virtually to compel a finding of guilty, the finding should be disapproved. C.M. 130415 (1919)." (Dig. Op. JAG, 1912-30, sec. 1284; CM 237711, Fleischer).

In the opinion of the Board the evidence is not of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty, that the substantial rights of the accused were injuriously affected by erroneous admission of the prejudicial testimony and that the evidence does not support the finding of guilty of Specification 2, Charge II.

f. As to Specification 3, Charge II, the only evidence that accused broke the windows is contained in the confession of accused and a hearsay statement of Toohey. The confession was obtained at a time when accused had not been advised of his rights and when accused, as one of a group of prisoners, had been told that restrictions which had been imposed would be "kept up until the guilty man confessed". Under the circumstances the confession was not voluntary.

7. When the prosecution rested at the first session of the court on 25 June, the court denied a motion for findings of not guilty on some of the Specifications, continued the case, and directed the prosecution to reopen the case and submit any other evidence available at a later date. When the court reconvened on 30 June, the prosecution was permitted, over objection, to recall the principal witnesses and practically to retry the whole case (R. 34, 36-37).

Although the court permitted the prosecution to go beyond proper limits in repeating testimony which had been developed at the first session of the court, the Board is of the opinion that the substantial rights of accused were not prejudiced thereby.

8. The record recites that the trial judge advocate submitted evidence of one previous conviction of absence without leave from 11 December 1942 to 28 December 1942. No evidence of previous conviction is attached to the record. The accompanying papers, however, contain a certificate of the previous conviction referred to above.

There is attached to the record a letter from accused requesting clemency.

9. The maximum limit of punishment on conviction of an assault under Specification 1, Charge I and of assault and battery under Specifications 5 and 6, Charge I, is dishonorable discharge, total forfeitures and confinement at hard labor for one year and three months (MCM, 1928, par. 104c).

10. The charge sheet shows that the accused is 25 years of age, was inducted 17 November 1941, and had prior service from 12 January 1938 to 26 May 1940, from which he was discharged with a character of "Very Good".

11. For the reasons stated the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Specification 8, Charge I, of Specifications 2 and 3, Charge II, and of Charge II; legally sufficient to support only so much of the finding of guilty of Specification 1, Charge I as involves a finding of guilty of an assault in violation of the 96th Article of War; legally sufficient to support only so much of the finding of guilty of Specification 5, Charge I as involves a finding of guilty of an assault and battery, in violation of the 96th Article of War; legally sufficient to support the approved findings of guilty of Specification 6, Charge I; and legally sufficient to support only so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for one year and three months.

Walter S. Kelly Jr., Judge Advocate.

Samuel M. Driver, Judge Advocate.

F. J. Lotthuhos, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 28 AUG 1943 - To the Commanding General, Third Air Force, Tampa, Florida.

1. In the case of Private Carl E. White (34163572), 894th Guard Squadron, I concur in the foregoing holding of the Board of Review, and for the reasons therein stated recommend that the findings of guilty of Specification 8, Charge I, of Specifications 2 and 3, Charge II, and of Charge II be disapproved, that only so much of the finding of guilty of Specification 1, Charge I as involves a finding of guilty of an assault, in violation of the 96th Article of War, and only so much of the finding of guilty of Specification 5, Charge I as involves a finding of guilty of an assault and battery, in violation of the 96th Article of War, be approved, and that only so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for one year and three months be approved. Thereupon you will have authority to order the execution of the sentence.

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

(CM 238696).

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

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

(333)

SPJGH
CM 238707

17 AUG 1943

UNITED STATES	)	10TH ARMORED DIVISION
v.	)	Trial by G.C.M., convened at Tennessee Maneuver Area, Tennessee, 24 July 1943. Dishonorable discharge, total forfeitures and confinement for five (5) years. Penitentiary.
Private JAMES C. LITTLE (14063169), Company D, 55th Armored Engineer Battalion.	)	

HOLDING by 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 by the Board of Review.

2. The accused was charged with desertion and was found guilty of absence without leave from about 8 June 1943 to about 19 June 1943. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for five years. The reviewing authority approved the sentence, designated the Federal Penitentiary, Atlanta, Georgia, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The only question requiring consideration is the designation of a penitentiary as the place of confinement.

Confinement in a penitentiary in this case is not authorized by the 42nd Article of War. The offense of absence without leave is not punishable by confinement in a penitentiary for more than one year by some statute of the United States of general application within the continental United States, excepting section 289, Penal Code of the United States, or by law of the District of Columbia.

4. There is no maximum limit of punishment for absence without leave committed after 1 December 1942 (Ex. Order 9267, 9 Nov. 1942).

5. For the reasons stated, the Board of Review holds the record of trial legally sufficient to support only so much of the sentence as

involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years, in a place other than a penitentiary, Federal correctional institution, or reformatory.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

1st Ind.

War Department, J.A.G.O., 17 AUG 1943 - To Commanding General, 10th Armored Division, Tennessee Maneuver Area, APO 260, c/o Postmaster, Nashville, Tennessee.

1. In the case of Private James C. Little (14063169), Company D, 55th Armored Engineer Battalion, attention is invited to the foregoing holding of the Board of Review that the record of trial is legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for five years in a place other than a penitentiary, Federal correctional institution, or reformatory, which holding is hereby approved. Upon the designation of a place of confinement other than a penitentiary, Federal correctional institution, or reformatory, you will have authority to order the execution of the sentence.

2. Attention is invited to the fact that the last digit of the serial number of the accused is stated in the action as "0" whereas it appears in all other places in the file as "9".

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

(CM 238707).

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

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

SPJGN
CM 238758

26 AUG 1943

UNITED STATES v. Second Lieutenant WALTER P. JOHNSON, JR. (0-731072), Air Corps, 474th Bombardment Squadron, 335th Bombardment Group.	THIRD AIR FORCE Trial by G. C. M., convened at Barksdale Field, Louisiana, 7 July 1943. Dismissal, total forfeitures and confinement for six (6) months.

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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 64th Article of War.

Specification 1: In that Second Lieutenant Walter P. Johnson, Jr., 474th Bombardment Squadron (M) AAF, 335th Bombardment Group (M) AAF, Barksdale Field, Louisiana, having received a lawful command from Captain FRANK B. CHAPPELL, his superior officer, to fly as Bombardier-Navigator on a navigation mission, May 2, 1943, did, at Barksdale Field, Louisiana, on or about May 2, 1943, willfully disobey the same.

Specification 2: In that Second Lieutenant Walter P. Johnson, Jr., 474th Bombardment Squadron (M) AAF, 335th Bombardment

Group (M) AAF, Barksdale Field, Louisiana, having received a lawful command from Captain DALE S. SEEDS, his superior officer, to fly as Bombardier on a regularly scheduled bombing mission, April 19, 1943, did, at Barksdale Field, Louisiana, on or about April 19, 1943 willfully disobey the same.

He pleaded guilty to, and was found guilty of, the Charge and Specifications thereunder. Evidence of one previous conviction for absence without leave, in violation of Article of War 61, 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 ten years. The reviewing authority approved only so much of the sentence as provides that the accused 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, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that on 1 April 1943, the accused was transferred to the 335th Bombardment Group (M), Army Air Base, Barksdale Field, Louisiana, and was there assigned to the 474th Bombardment Squadron. At about the same time, the Commanding Officer of the 335th Bombardment Group received a letter, relative to the accused and his transfer, from the Headquarters, Third Bomber Command, "By command of Brigadier General Parker", containing the following statements:

"Second Lieutenant Walter P. Johnson, Jr., O-731072, Bombardier, is being transferred to your command on Third Air Force orders and will report to your command approximately April 1.

"Upon his arrival at your headquarters, Lt. Johnson will be given a refresher course in bombardiering and immediately assigned to a combat crew.

"The Commanding General, Third Air Force, desires that Lt. Johnson be placed in a combat crew that is to depart for foreign duty as soon as possible after reporting to your headquarters."

In response to the order directing his transfer, the accused reported to the Adjutant of the 474th Bombardment Squadron on 1 April, and on the same date submitted a letter requesting to be relieved from his duties of a flying officer, and to be assigned to other duties. This

letter was returned to the accused for formal correction, and was resubmitted on 3 April. Subsequently, the request was officially refused (R. 6-10, 16; Ex. D).

On or about 8 April Captain Frank B. Chappell, the Commanding Officer of the 474th Bombardment Squadron, talked to the accused concerning the instructions which had been received directing that the accused be given a refresher course on flying and explained to him the content of the letter quoted above. Following this conference the accused was given a refresher course in ground training and, on 19 April he was ordered by his operations officer, Captain Dale S. Seeds, to fly as a bombardier on a regularly scheduled flight. The accused failed, however, to take part in this flight and when questioned by his operations officer as to why he had not obeyed the order, he replied that "he had no legitimate excuse" (R. 4-5, 6-10).

A day or two later the accused was called before Captain Chappell and asked if he, the accused, remembered their discussion concerning the instructions which had been received from the Commanding General, Third Bomber Command, directing that the accused be given a refresher course in bombardiering. The accused replied that he remembered the conversation. Captain Chappell then asked the accused why he had not complied with the orders given to him. To this question the accused replied that "he was afraid to fly and he did not intend to fly in any type of aircraft on any type of mission"(R. 6-7).

Thereafter, on 1 May 1943, the accused was given an order by Captain Chappell, both orally and in writing, directing the accused to fly as a student bombardier-navigator on a navigation mission on 2 May 1943. The accused acknowledged receipt of this order by first indorsement but failed to comply therewith. The accused was thereupon directed to explain by indorsement why he had not complied with the previous order, to which he responded as follows:

> "1. In compliance with 3rd Ind., no excuse is offered for failure to comply with basic communication dated May 1, 1943."

At the time above indorsement was written the accused stated orally that he had not obeyed the order because he was afraid to fly, and that he did not intend to fly (R. 12; Ex. A, B, and C).

The investigating officer, who had questioned the accused prior to this trial, testified that the accused, after having been warned of his

rights to remain silent, had stated that he was entirely aware of the fact that he had been given orders to fly, and that he had not obeyed those orders because he was afraid to fly. The accused had also stated that because of his fear of flying he felt that he should be reclassified and not forced to fly (R. 10-11).

Captain Daniel M. Greene, a medical officer, testified that he examined the accused about the 24th or 25th of April, and that he had found no organic reason why the accused should be unable to fly. Furthermore, he testified that he found no evidence of a nervousness or mental disorder which would incapacitate the accused as a flying officer. The witness expressed the opinion the accused had not manifested any of the usual signs of a man who is afraid to fly (R. 17-18).

4. The accused testified that on the occasions specified he had received commands from Captain Seeds and Captain Chappell to participate in flying training as a bombardier-navigator, and that he had willfully and deliberately disobeyed those orders. He testified further that he had previously told his squadron commander that he had not flown because he had a definite fear of flying, and because he was so nervous when flying that he felt he could not "do the job". He testified that this fear had developed eight or nine months previous. He explained that he had attended flying school and had earned one hundred or one hundred fifty hours of flying time, and had passed all the tests required of a flying officer. He stated, however, that for about six months prior to his transfer that he had been assigned to duties on the ground. He explained further that while in school as a student bombardier he had not felt "entirely at ease" but that he had thought he would get over his nervousness. He stated "I can't explain it, I had a definite fear of flying but I did not feel good about it at all". He further testified that just prior to his transfer he had talked with General Parker who had told him he would be reclassified "as an officer or as a private", the accused stating then that he did not recall what type of classification General Parker had indicated would be made for him but that General Parker had told him that he, the accused, would not be required to fly. He refused to explain what he was afraid of other than that he had "a very definite fear of flying" and was "afraid of the whole works" (R. 19-22).

5. Specification 1 alleges that the accused willfully disobeyed the lawful order of Captain Frank B. Chappell, his superior officer, to fly as a bombardier-navigator on a navigation mission on 2 May 1943. Similarly, Specification 2 alleges that the accused willfully disobeyed

the lawful order of Captain Dale S. Seeds, his superior officer, to fly as a bombardier on a regularly scheduled bombing mission on 19 April 1943.

The findings of guilty of each of the above Specifications, and of the Charge, are sustained not only by the accused's plea of guilty, but by the uncontradicted evidence presented by the prosecution as well as the testimony of the accused himself. In an apparent effort to present facts in mitigation or extenuation of his conduct the accused testified that he had disobeyed the orders in question because he was afraid to fly. In evaluating the extenuating character of this testimony, it must be observed that the accused professed a fear of flying only after he had acquired credit for a hundred or a hundred and fifty hours of flying time, and only a few days after he had been informed that he was to receive a refresher course in flying preparatory to his being assigned to combat duty abroad. In the face of such facts, the fear professed by the accused appears to be rooted in a reluctance to face the hazards of combat rather than in fear of aerial navigation. This being true

"Fear and Guilt

Are the same things, * * *",

and the fear of the accused reveals a mens rea more ignominious than do the offenses of which he was charged.

6. The records of the Office of The Adjutant General show that the accused is approximately 28 years of age; that he was inducted into the service 18 June 1941, that he completed the course of instruction as a bombardier cadet and that he was commissioned Second Lieutenant, Air Corps Reserve, on 25 September 1942. These records show also that on 22 January 1943, he was tried by a general court-martial for the offense of absence without leave, in violation of Article of War 61, and that he was sentenced to be reprimanded, to be restricted to the limits of his post thirty days, and to forfeit $57.24 of his pay.

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 findings of guilty and the sentence and

legally sufficient to warrant confirmation thereof. The sentence of dismissal is authorized upon a conviction of a violation of Article of War 64.

Chas. L. Cresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleyster, Judge Advocate.

SPJGN
CM 238758

1st Ind.

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Walter P. Johnson, Jr. (0-731072), Air Corps, 474th Bombardment Squadron, 335th Bombardment Group.

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 in deference, however, to the expressed desire of the reviewing authority that the accused be dismissed the service only, and that he be given an immediate opportunity to redeem himself through enlistment, or by his service following induction, I recommend further that the confinement and forfeitures be remitted, and that the sentence as thus modified be confirmed and carried into execution.

3. Consideration has been given to letters concerning the accused from Mr. Garrett Whiteside addressed to Colonel John M. Weir dated 29 July 1943 and from Major General St. Clair Streett addressed to The Judge Advocate General, dated 10 August 1943.

4. Inclosed are a draft of a letter for your signature, transmitting the record to the President for his action, and a form of Executive action 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.

5 Incls.
Incl. 1 - Record of trial
Incl. 2.- Dft. of ltr. for sig. Sec. of War.
Incl. 3 - Form of Executive action.
Incl. 4 - Ltr. fr. Mr. Garrett Whiteside, 29 July 1943.
Incl. 5 - Ltr. fr. Major Gen. St. Clair Streett, 10 Aug. 1943.

(Sentence confirmed but confinement and forfeitures remitted. G.C.M.O. 276, 29 Sep 1943)

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

SPJGK
CM 238771

23 SEP 1943

UNITED STATES	XII CORPS
v.	Trial by G.C.M., convened at Camp Butner, North Carolina, 23 July 1943. Dismissal.
Second Lieutenant ROBERT L. LINEBERGER (O-1180586), Field 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. Accused was tried upon the following Charges and Specifications:

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

Specification: In that Second Lieutenant Robert L. Lineberger, Two hundred and Sixty Ninth Field Artillery Battalion, Camp Butner, North Carolina, was at North Durham, North Carolina, on or about June 7, 1943, in a public place, to wit, a yard adjoining a house on Glendale Street, Durham, North Carolina, disorderly while in uniform.

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

Specification: In that Second Lieutenant Robert L. Lineberger, Two hundred and Sixty Ninth Field Artillery Battalion, Camp Butner, North Carolina, did, at North Durham, North Carolina, while in uniform, on or about June 7, 1943, in a public place, to wit, a yard adjoining a house on Glendale Street, Durham, North Carolina, wrongfully attempt to have sexual intercourse with one, Lucinda Crews.

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

3. Summary of evidence.

The witnesses for the prosecution were H. Wade Carlton, a policeman of Durham, North Carolina (R.10); Lucinda Crews, the colored girl allegedly involved; Egbert G. Rigsbee, a taxicab driver living in East Durham (R.38); and Staff Sergeant Everette R. Sandifer, Military Police Detachment, Station Complement, Camp Butner, North Carolina.

At about 12:15 or 12:30 a.m., 7 June 1943, Carlton and Rigsbee, who were standing outside a service station at Chapel Hill and Mangum Streets, Durham, North Carolina, saw accused, a white officer, and Lucinda Crews, a colored girl, talking together on the sidewalk (R.10,11,15-17,21,23,38, 39,43-46). It appeared to these witnesses that accused handed something to Lucinda, which she put in her pocketbook (R.11,18,39,45). Lucinda and accused then walked along Mangum Street to Corporation Street, thence to Glendale Street. Carlton and Rigsbee followed them in the car, with the lights off. Apparently they walked separately part of the way, but were together at the corner of Glendale and Corporation Streets (R.11, 12,18-20,21,22,24-26,28-31, 39,40,46,47,49,50). Accused was in the uniform of a lieutenant (R.28,48). There was a wet spot on the front of his trousers and also on the back of the girl's dress (R.13,17,32,33,48,49).

A bright street light was located at the corner of Corporation and Glendale Streets and there were a number of people in the neighborhood, which was in a colored section of the town (R.12-15,20,37,41,42,51). Rigsbee parked the car a little distance away (R.32,54).

After conversing briefly, accused and Lucinda walked down Glendale Street past a house, and then left the sidewalk and went between two houses (R.12,15,29-31,40,41,51). Carlton descended from the car and followed them (R.30,31,41). He testified that they were not far from the street and that he had a plain view of them (R.14). The girl was leaning backward against the house, and had her dress pulled up (R.12,14, 35). Accused had his "private" out, was "up against" Lucinda, and was "trying to make connection between his private and her organ" (R.12,14, 35,36). Carlton did not know whether accused succeeded in making an entry, but believed that he did not (R.12,37). Accused put his "private" back in his trousers, the girl put her dress down, and they came out to the sidewalk, where Carlton was standing (R.12,37). Accused's trousers were unbuttoned (R.32).

Carlton asked accused what he had been doing "back there", to which accused replied that he had followed a couple of white soldiers and the girl, and was "doing a little investigating" (R.12,128). In response to Carlton's inquiry whether it was customary to investigate with his "private" out, accused said that he had been urinating. At no time did

Carlton see accused urinate (R.13,128). Carlton told accused to button his trousers, and accused did so (R.12,32,128). Both accused and Lucinda were put into Rigsbee's car and driven to the police station (R.12,54,128). It was then about 12:45 a.m. (R.132).

Lucinda Crews, obviously a colored girl of low intellect, testified that on the night in question she met accused on Fayetteville Street near the White Rock Baptist Church, which was "not so close" to the corner of Mangum and Chapel Hill Streets (R.63-65,68,71,72). She denied receiving any money from accused (R.70). They went back of the church, where she stood against the wall of a house (R.59,66,70). She saw accused urinate (R.71,72). He came close to her, with his penis in his hand, took hold of her, and tried to have sexual intercourse with her (R.58,59,62,63,65, 67,69). Her dress was down, but was short (R.60). Although at one point in her testimony she said that accused did not attempt to do anything to her, that she saw no part of his body, and that his trousers were not open (R.61,69), she confirmed her previous statements after she had been assured that no harm would come to her and had been asked to tell the truth (R.61,62).

Reverting to the trip to the police station, accused begged to be turned loose, stressing the embarrassment to his family which otherwise would result (R.128,137,138). He repeated his plea to Carlton and Sandifer at the police station, admitted that he had been drinking, and added that he was sorry if he had done anything wrong (R.129,134). He also expressed a desire that they shoot him or lend him a gun so that he could commit suicide (R.134).

Carlton and Sandifer testified that it was apparent that accused had been drinking. Sandifer said that accused was not drunk, whereas Carlton said that he was not sober, but that "he wasn't so drunk, either" (R.14,34, 75,130,131,133). They agreed upon the following symptoms: His breath smelled of alcohol; his eyes were bloodshot; he was staggering slightly (R.14,34,130-135). Carlton said that accused's speech was not thick, but that he was more talkative than a person in a normal condition (R.34,130, 132). According to Sandifer, accused was coherent in his conversation and asked some questions relevant to the offense (R.133).

A second lieutenant and several enlisted men of accused's organization testified for the defense, the defense counsel explaining that their testimony was given in order to prove that accused was too drunk to form the intent required for conviction of an attempt (R.77).

According to the testimony for the defense, accused and Second Lieutenant Robert G. Gould met in the Hotel Washington Duke in Durham

about 8 or 8:30 p.m. They had some wine there and a bottle of beer at a resort down the street, and then went to the Blue Bird Inn, where they joined a party of noncommissioned officers (R.78,79,84,89,95,96,102,109, 110). While there, accused had several drinks of whiskey, wine, and beer (R. 79-82,84,85,89,90,95,98,102-104,110,112). Accused danced a few times (R.79).

They left the inn at about 10 or 10:30 p.m. and drove back to town, where Lieutenant Gould left them (R.80,82). Lieutenant Gould stated that at this time accused was "feeling pretty good", but was not "completely" intoxicated, and acted as though he knew where he was going (R.80,83). He was not staggering, but talked more loudly than usual (R.82).

The party, minus Lieutenant Gould, proceeded to the Village Inn, and during the trip accused had a drink of whiskey from a bottle (R.85, 95,103,104,110). At the Village Inn, accused drank a couple of bottles of beer (R.85,86,96,99,111). They rode back to town and let accused out near the Washington Duke Hotel (R.86,93,96,97,106,107,111-113). Accused said that he was going to try to find something to eat and then return to camp (R.107).

One witness testified that immediately before accused entered the Village Inn, he talked a little faster than usual, was "a little more carefree than usual", and was not "exactly" sober (R.103-106). The other witnesses, testifying to his condition at the end of the festivities, indicated in general that he was slightly under the influence of liquor (R.86,90,97, 98,100,111,112). He was not staggering and showed no symptoms of intoxication beyond talking more than usual (R.86,90).

Accused testified that he left Camp Butner at 2 p.m. 6 June 1943, reached Durham about 3 o'clock, had a couple of beers, and called upon some friends who lived out of town. Returning to Durham about 6 o'clock he had two beers and then ate dinner at the Washington Duke Hotel, accompanying the meal with two glasses of wine. After dinner he took a walk. He returned to the Washington Duke Hotel about 8 o'clock, had a glass of wine, met Lieutenant Gould, had two glasses of wine and two bottles of beer with him, and then went to the Blue Bird Inn, arriving between 8:30 and 9 o'clock. After partaking of two glasses of beer at the bar, he and Lieutenant Gould joined the aforementioned enlisted men. During this phase of the evening's activities, accused had three or four drinks of whiskey (each a little more than a "shot"), two glasses of beer, and a glass of wine.

From the Blue Bird Inn, the party went downtown, accused partaking of a drink en route. At this time he was "feeling pretty well" and was becoming intoxicated. He accompanied the party to the Village Inn, where

he drank three bottles of beer. Then the party went downtown.

Accused did not remember where he "got off" downtown, but judged it to be near the Washington Duke Hotel (R.115-119,123,124). He started walking and by this time had become "really hazy". He recalled having a desire to urinate and going behind a house. He did not recollect the location of the house nor was he certain whether or not he urinated, although in part of his testimony he asserted that he did. However, he was certain that when he went back of the house, no one was with him (R.119, 120,124,126).

He did not recall meeting Lucinda Crews, although he did remember that someone spoke to him (R.119,125). He remembered being accosted and placed in a car, but did not know who was in the car or whether anyone else was placed there with him; nor was he aware that it was a police car (R.119, 120,122,123,125-127). He testified that he went to sleep in the car and remembered nothing further until the next morning (R.120-122). However, he stated in a subsequent part of his testimony that he recalled some sort of conversation at the police station, although he remembered neither whom it was with nor what it concerned (R.127). The first time he remembered meeting Lucinda Crews was on the following day in the police station, at which time she failed to recognize him (R.121,122).

In addition to his account of the evening's activities, accused stated that he realized that he had made a big mistake; that he had learned a lesson; and that he believed he could prove his worth in the Army. He also stated that he was a Southerner and native of North Carolina, and that the white people of that section do not mix with the colored people. He added, "I cannot imagine why I put myself in that position" (R.127½).

4. The testimony of Carlton and Lucinda Crews corroborated in certain particulars by Rigsbee, proves beyond the shadow of a doubt that at the place and time alleged, accused attempted to have sexual intercourse with Lucinda Crews, a colored girl. Despite the obviously low intellect of the girl and her faulty recollection of the place where the attempt took place, there is no reason to disbelieve her testimony with reference to the salient facts, - especially in view of the corroborative testimony of Carlton.

Discrepancies in detail between the testimony of Carlton and Rigsbee in no way discredit them. It is a well-known psychological fact that no two witnesses see everything in precisely the same light.

The defense witnesses lend strength to the prosecution's case, for their description of accused at the close of his orgy is not that of a man

whose powers of recollection have vanished. The Board of Review has no difficulty in finding that accused, although somewhat intoxicated, knew what he was doing and did it intentionally. The locale of the offense, close to a public thoroughfare and within sight of passersby, may properly be termed a public place.

The conduct of accused sufficiently offended public decency and propriety to constitute a violation of Article of War 95 (Winthrop, Military Law and Precedents, 2nd ed. rev., p. 718).

5. Certain questions of law merit our consideration.

a. The defense moved to strike Charge II and its Specification upon the ground of duplication. The court overruled the motion (R.4-6,76,77). The court ruled correctly. An officer may properly be convicted under both Articles of War 95 and 96 on the same facts (M.C.M.,1928, p. 224, note to A.W.95). Since accused was sentenced to dismissal only, which is mandatory under Article of War 95, no question arises relating to the legality of a sentence based upon two charges constituting different aspects of the same act (M.C.M.,1928,p.67).

b. A motion to strike the testimony of Lucinda Crews, upon the ground that she was incompetent to testify by reason of low mentality, was overruled, the law member stating that her mental immaturity would be considered in connection with the weight to be given to her testimony (R.70). The law member's ruling was proper. He had an opportunity to see and hear the witness, and taking all her testimony into consideration, we cannot say that her want of understanding was so great as to warrant the rejection of her testimony (See Winthrop, Military Law and Precedents, 2nd ed. rev.,p.334).

c. Over the objection of the defense counsel, Carlton was permitted to testify that accused, while arguing with Sandifer, referred to a previous arrest (R.130,131). The evidence was offered to prove that accused was in possession of his mental faculties. We need not decide whether the admission of the evidence was proper, for, even through improper, it was not prejudicial.

6. War Department records show that accused is 30 years old and a high school graduate. He served as an enlisted man from 13 March 1942 until 15 April 1943, when, upon graduation from the Field Artillery Officer Candidate School, Fort Sill, Oklahoma, he was appointed second lieutenant, Army of the United States. In recommending him for officer candidate school, his commanding officer stated that his qualities of leadership were good, his character excellent, and his efficiency rating satisfactory.

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

person and 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 and sentence and to warrant confirmation thereof. Dismissal is mandatory under Article of War 95 and authorized under Article of War 96.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 2 OCT 1943 - To the Secretary of War.

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Robert L. Lineberger (O-1180586), 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. In the papers accompanying the record of trial there appears a letter dated 9 June 1943 from the Commanding Officer, 402nd Field Artillery Group, stating that shortly before the present offense, accused had been reprimanded for some previous dereliction, and that his services have been unsatisfactory. I recommend that the sentence be confirmed and carried into execution.

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

Myron C. Cramer

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

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

(Sentence confirmed. G.C.M.O. 341, 8 Nov 1943)

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

SPJGK
CM 238792

19 AUG 1943

UNITED STATES	)	PANAMA COAST ARTILLERY COMMAND
	)	
v.	)	Trial by G.C.M., convened at Fort Randolph, Canal Zone, 15 July 1943. Dismissal.
	)	
Second Lieutenant FLORIAN J. KUENNEN (0-1040420), 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. Accused was tried upon the following Charges and Specifications:

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

Specification: In that Second Lieutenant FLORIAN J. KUENNEN, 88th Coast Artillery (AA), was, at Colon, Republic of Panama, on or about May 30, 1943, in public places, to wit, The Minerva Restaurant and the Florida Night Club, drunk while in uniform.

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

Specification 1: In that Second Lieutenant FLORIAN J. KUENNEN, 88th Coast Artillery (AA), did, at Fort de Lesseps, Canal Zone, on or about May 30, 1943, wrongfully strike First Lieutenant WILLIAM R. GRAGG, 760th Military Police Battalion, on the arm and chest with his fist.

Specification 2: In that Second Lieutenant FLORIAN J. KUENNEN, 88th Coast Artillery (AA), did, at Fort de Lesseps, Canal Zone, on or about 30 May 1943, wrongfully tear a wash basin and urinal from the wall of the guardhouse.

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

Specification: In that Second Lieutenant FLORIAN J. KUENNEN,

88th Coast Artillery (AA), did, at Fort de Lesseps, Canal Zone, on or about May 30, 1943, behave himself with disrespect toward First Lieutenant WILLIAM R. GRAGG, 760th Military Police Battalion, his superior officer, by saying to him "you son-of-a-bitch", or words to that effect.

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 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:

Private First Class Frank A. Filozi, 760th Military Police Battalion, Fort DeLesseps, Canal Zone, stated that he was on regular duty as a military policeman in the city of Colon, Republic of Panama, on the morning of 30 May 1943. About 7 o'clock that morning he saw the accused, a second lieutenant, drinking in the Tropical Bar. About one hour later Filozi saw the accused in the Florida Night Club on Bolivar Avenue. The accused was sitting on a chair and leaning over the bar. His hands were folded and his head was resting in his hands on the bar counter. The accused was wearing a complete khaki uniform and the insignia of his rank. Filozi tapped the accused on the back and asked him to get up. The accused did not move so Filozi put his arms under the armpits of accused and "slipped him from the chair". At this time, it was noticed that the fly of accused's trousers was open, his shirt was unbuttoned and his tie pulled down. The accused could not stand alone. Filozi told accused that he would place him in a taxi to which accused offered no objection. Witness assisted the accused from the bar across the street for the purpose of placing him in a taxi. The accused pulled away and staggered into the Minerva Restaurant. There were about twenty people in the Minerva Restaurant. The accused took the only vacant seat at the counter and rested his head and arms on the counter. The patrons sitting on either side of the accused looked at him. Filozi stated that on account of the condition of the accused he telephoned the Officer of the Day, First Lieutenant William R. Gragg, Military Police Company at Fort DeLesseps for assistance (R. 7-16, 29). Lieutenant Gragg arrived at the Minerva Restaurant and found the accused sitting at the counter asleep with his head resting on the counter. He had to shake the accused "pretty hard" to awaken him. Accused's eyes were bloodshot and he looked at the lieutenant with a blank expression. The accused could not walk alone. In the opinion of the witness the accused was drunk. Lieutenant Gragg and Filozi assisted the accused into the command car. Accused was taken to the Fort DeLesseps guardhouse and was assisted from the car into the guardhouse (R. 10-12, 16-17, 19, 23, 26-31). After the accused

was placed in the guardhouse he became angry and boisterous and called Lieutenant Gragg a "son-of-a-bitch". Lieutenant Gragg was wearing an M.P. brassard and was dressed in his service uniform. Lieutenant Gragg was patient with the accused and tried unsuccessfully to quiet him. As the lieutenant placed the accused in the cell block the accused struck him with his fist and said that he could whip any military policeman, or words to that effect. No one was in the cell block with the accused. The cell was in good order. A few minutes after the accused was locked in the cell quite a disturbance was heard in the cell block and upon investigation by Lieutenant Gragg, it was found that the wash basin and urinal bowl had been torn off the wall and scattered on the floor. The accused was then placed in temporary solitary confinement (R. 17, 18, 24, 26).

4. The accused did not testify or make an unsworn statement and no evidence was offered in behalf of the defense.

5. The undisputed evidence clearly shows that the accused was drunk in a public place while in uniform. But drunk though he was, it is the opinion of the Board of Review that his condition and conduct while in the Florida Night Club and Minerva Restaurant fell short of that grossness and conspicuous disorder essential to support a conviction under Article of War 95. Obviously, the stuporous condition of the accused (caused by excessive drinking) constituted a violation of Article of War 96. The undisputed evidence clearly supports the findings of guilty of Charges II and III and their respective Specifications.

6. The record of trial of this officer upon another offense (CM 235738) now before the Board of Review should be considered in connection with action upon this record.

7. The War Department records show that the accused is 26 years of age. He had four years of high school and was graduated from Loras College (B.A.) in 1940. He served as an enlisted man from 1 January 1941 to 5 January 1942 upon which latter date he was graduated from Antiaircraft Artillery School, Camp Davis, North Carolina, and appointed a second lieutenant, Army of the United States. In recommending accused for Officer Candidate School his commanding officer stated that accused was of "excellent character and necessary background and education, either formal or practical to make probable the successful completion of the course".

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 the findings of guilty of Charges II

and III and their respective Specifications, legally sufficient to support only so much of the findings of guilty of the Specification, Charge I, as involves a finding of guilty of the Specification in violation of Article of War 96, and legally sufficient to support the sentence and to warrant confirmation thereof. Dismissal is authorized upon conviction of violation of Articles of War 63 and 96.

Thomas E. Gray, 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 Florian J. Kuennen (O-1040420), Coast Artillery.

2. I concur in the opinion of the Board of Review and for the reasons stated therein recommend that only so much of the finding of guilty of the Specification, Charge I be approved as involves a finding of guilty of the Specification in violation of Article of War 96. I recommend that the sentence be confirmed and carried into execution.

3. The sentence in the instant case (CM 238792) was adjudged 15 July 1943. Accused was previously tried (April 1943) by general court-martial and found guilty of being drunk and disorderly in a public place while in uniform, in violation of Article of War 95 and was sentenced to dismissal. The record of trial in that case (CM 235738) 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 and legally sufficient to support the sentence and to warrant confirmation thereof. 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 235738) to be filed in my office without further action thereon. The opinion of the Board of Review in the other case (CM 235738) is attached hereto for your information.

4. Inclosed herewith are a draft of a letter for your signature, transmitting the record in the instant case to the President for his action, and a form of Executive action 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 235738).
Incl.3-Dft. ltr. for sig. Sec. of War.
Incl.4-Form of action.

(Only so much of finding of guilty of the Specification, Charge I, approved as involves finding of guilty of the Specification in violation of Article of War 96. Sentence confirmed. G.C.M.O. 279, 30 Sep 1943)

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

N.D.

(359)

31 AUG 1943

SPJGH
CM 238799

UNITED STATES	)	79TH INFANTRY DIVISION
	)	
v.	)	Trial by G.C.M., convened at Camp Forrest, Tennessee, 29 July 1943. Dismissal and total forfeitures.
	)	
Captain HERMAN L. DIMMITT (0-270586), 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 85th Article of War.

Specification: In that Captain Herman L. Dimmitt, Headquarters Company, 3rd Battalion, 313th Infantry, was, at Camp Forrest, Tennessee, on or about July 3, 1943, found drunk while on duty as Regimental Police and Prison Officer.

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

3. The evidence for the prosecution shows that accused had been detailed as Police and Prison Officer of the 313th Infantry on 1 July 1943 and continued as such until he was placed in arrest. At about 7:00 a.m. on 3 July 1943, Captain George E. Monroe was in the orderly room of the Service Company of the 313th Infantry on routine matters connected with his duties as S-4 of the regiment, when accused entered the room. Captain Monroe asked accused about a detail and some conversation ensued. Accused was flushed of face, he talked in a high falsetto voice which was

not habitual, his sentence structure was slightly mixed and his syllables ran together. Judging from his speech, his flushed face and his voice, Captain Monroe formed the opinion that accused was drunk. He did not have the appearance of a man with a "hang-over". Second Lieutenant John Darnin, officer of the day for the 313th Infantry, observed accused in the guard tent for twenty minutes at about 8:00 a.m. During that time accused called someone on the telephone, and questioned Lieutenant Darnin with respect to some prisoners. Accused slurred his words and Lieutenant Darnin could not understand what he was trying to say. Accused was not in a stupefied condition but did not have complete control of his faculties and was drunk. His general appearance was presentable. (R. 6a-c, 6o-q).

Between 8:00 a.m. and 9:30 a.m. on the same day, accused was examined at the orderly room by Lieutenant Colonel Clair B. Mitchell, who had been directed by Lieutenant Colonel VanBibber at regimental headquarters to "investigate" accused, and by two medical officers, Captain Albert Shapiro and Captain Arnold Breecker. When Colonel Mitchell entered the orderly room, accused was sitting at a desk. His face was flushed, his eyes were red and he had the appearance of a drunken man. Colonel Mitchell informed accused of his rights and ordered him to stand at attention. Accused brought his feet together, but held on to the side of the desk to steady himself and didn't come to attention for a moment or two. When directed to walk across the room, accused did it very quickly and then sat down. His speech was very thick and heavy; his breath smelled of liquor; at times he would appear to be all right and a few minutes later he would be unable to speak logically, and would jump from one thing to another and "would run off into a rage". Accused stated that he didn't see what Colonel Mitchell was trying to do. When the latter continued questioning him, accused began a "drunken tirade", in the course of which he said that he had arisen at 0445; that he hadn't had a drink that morning; that he didn't know what "this is all about"; that he had never seen so many sons-of-bitches in one outfit; that he wouldn't trust any medical officer in the regiment to give him a blood test; that Major Porter, the officer commanding his battalion, should not be in command of a company; that he wanted to talk to General George C. Marshall on the telephone; that he hadn't had leave in over a year; that he didn't like the regiment; that he was being railroaded; that he was more capable of handling any job in regimental headquarters than any officer there; that he had more service than any officer except Colonel Wood and Lieutenant Colonel VanBibber; and that he wanted to go to Nashville. The rest "was a drunken tirade". He was in a very drunken condition. Colonel Mitchell had "never seen any officer in such

condition before on duty". Accused might have been sick, but Colonel Mitchell did not believe he was. Colonel Mitchell completed his investigation by placing accused in arrest in quarters. Captain Shapiro examined accused and found him drunk both from the "medical and lay viewpoints". Accused made several errors in simple coordination tests; there was an odor of alcohol or liquor on his breath; he walked a straight line more rapidly than usual and he swayed a bit in turning; his face was red; but he could see and hear; and his conversation was understandable. Accused at first agreed to a blood test and then changed his mind, stating that he would let no officer in the regiment touch him and that he was being railroaded. Accused did not appear to be sick, and was angry, but not with Captain Shapiro. Accused stated that he wished to be examined by other medical officers. At the request of Captain Shapiro, Captain Breecker arrived at the orderly room about 8:20 a.m., and conducted the second sobriety test. Accused submitted willingly. In the opinion of Captain Breecker accused was drunk, but was in full possession of some of his faculties, and spoke sensibly, but would break off in the middle of a sentence and go off on a tangent. His speech was blurred, his voice hoarse, his breathing was rather hard and noticeable, his face was flushed, his breath had a definite odor of alcohol and he performed coordination tests poorly. Although there had been some slight personal differences between accused and Captain Breecker on a previous occasion, accused made no harsh remarks to him on the examination and did not use any offensive language. Shortly before 2 July 1943, Captain Breecker had attended accused for diarrhea. Neither diarrhea nor extreme anger would have caused the effects observed by Captain Breecker in his examination of accused on 3 July, although when a person is extremely angry his sentence structure is characteristically defective (R. 6c-6o).

4. For the defense: Various witnesses testified that they had not observed anything unusual in the appearance of accused on 3 July 1943. Warrant Officer Charles H. Phillips was in the officers' latrine about 5:30 a.m. when accused came in and shaved. Mr. Phillips spoke to him and there was nothing unusual about his appearance at the time. When Warrant Officer (j.g.) William B. Taylor passed accused as he came from the latrine accused gave no indication of being drunk. Sergeant Herbert E. Tendler, provost sergeant at the regimental stockade, observed accused at about 7:00 a.m. on 3 July, when accused came to the stockade, sat next to him on one of the beds and gave him his orders for the day. The orders were intelligent, Sergeant Tendler did not smell any liquor and was positive that accused was not drunk. Captain Thurman Hale saw accused after breakfast, a little after seven o'clock, when accused entered the office, went to the latrine, returned, and sat at his desk with a notebook

in his hand. Captain Hale was busy and did not talk to accused, but did not notice any indication of drunkenness. Accused looked as if he were sick. He had been sick all that week. It was stipulated that if Technician Fifth Grade Arthur E. Tew were present in court he would testify that he saw accused in the orderly room about 7:00 a.m. on 3 July and noticed nothing unusual in his speech or demeanor. Second Lieutenant Adam W. Wolfe entered the orderly room about 9:00 a.m. and saw accused talking with Colonel Mitchell. Lieutenant Wolfe stood from six to ten feet away but could not "make out" what they were saying. He observed accused for from three to five minutes and saw him leave with Colonel Mitchell. There was nothing unusual in the walk or conversation of accused, and no indication that he was drunk. Chaplain Lemino T. Fagan saw accused frequently on maneuvers between the 20th of April and the middle of June 1943, ate with him and had quite a few chats with him, but never even suspected that accused drank. Accused was congenial and a clean living man (R. 6q-6y).

Accused elected to make an unsworn statement that on the evening of 2 July he and some friends were in his room celebrating his completion of seven years duty in the Army. During the evening they consumed a large amount of liquor. Accused went to bed shortly after midnight, got up early, bathed and shaved as usual. He had a hang-over, but did not take a drink that morning and was not drunk. He had been ordered to have a detail of seventy-one prisoners at the assault course at 7:30 a.m. They were to report to the stockade with lunches before seven o'clock, but only eight brought lunch. The previous evening accused had ordered four trucks to transport the prisoners to the assault course. The first truck did not arrive until 7:10, two more came at 7:20 and the fourth arrived at 7:30. He could not get his detail to the course on time, and he lost his temper. He had been sick with dysentery and had been to the latrine five or six times that morning. He was sick when Colonel Mitchell and the doctor examined him, so sick that he couldn't stand up. Accused served at Fort Knox for eight months as tank instructor, until he cracked his left elbow. He then served as assistant adjutant and assistant operations officer in charge of forty-two branches at the post. He had charge of the gold in the Fort Knox depository and was one of the three officers who had access to it. He wrote the training program for three divisions stationed at Fort Knox together with thirty thousand special troops. At Camp Butner, North Carolina, he had charge of training seven thousand troops. When he was transferred to the 79th Division in April 1943, there was no place for him, and there was a lot of friction because he was senior captain and quite a few of the lieutenants were due for promotion (R. 6y-6z).

5. Captain Shapiro, recalled as a witness for the court, testified that he could not see any causal connection between diarrhea and the inability to pass coordination tests, but that if a man had diarrhea and were very angry, it would be possible, although not probable, that he could not pass the tests. Weakness would depend on the amount of diarrhea. It is possible that after excessive drinking on the night before, there would still be an odor present on the following morning, and that a person with a very low resistance to alcohol could have acted as accused did, although he had stopped drinking eight or ten hours before (R. 6z-6aa).

6. The Specification alleges that accused was at Camp Forrest, Tennessee, found drunk while on duty as Regimental Police and Prison Officer.

a. On the issue of drunkenness, the proof establishes intoxication sufficient sensibly to impair the rational and full exercise of the mental and physical faculties of the accused (MCM, 1928, par. 145) during the period from about 7:30 a.m. to 9:30 a.m., 3 July 1943. Accused could not pass the simple coordination tests used by the medical officers; he spoke disjointedly; his breath smelled of liquor; his eyes were red and his face was flushed; he could not restrain his temper, and he used scandalous language in referring to other officers of his organization. In the opinion of the two medical officers who examined him, the accused was drunk.

b. There is no direct evidence as to the hours of duty at Camp Forrest. Accused had been detailed as Police and Prison Officer on 1 July and continued up to the time that he was placed in arrest at the close of Colonel Mitchell's investigation, which according to Lieutenant Wolfe and Colonel Mitchell, was between 8:00 a.m. and 9:30 a.m. on 3 July 1943. The accused gave orders to his provost sergeant at the guardhouse at about 7:00 a.m. In his unsworn statement accused stated that he was engaged in getting out a work detail from before 7:00 a.m. until about 7:30 a.m. Captain Hale saw accused come into the orderly room shortly after 7:00 a.m. and seat himself at his desk with a notebook. The officer of the day visited the guard tent on routine business at about 8:00 a.m., met accused there and was asked a question with respect to some prisoners by accused. The evidence shows that the accused was on duty during the period when he was found drunk.

c. While there is no direct evidence that the offense was committed at Camp Forrest as alleged, each witness testified that his organization was the 313th Infantry and that his station was Camp Forrest.

The failure to prove where an alleged offense was committed has been held not to affect the validity of a record of trial (CM 199270, Andrews, Dig. Op. JAG 1912-40, sec. 416 (10)).

7. The accused is 34 years of age. The records of the Office of The Adjutant General show his service as follows: Appointed second lieutenant, Infantry-Reserve, from ROTC, 24 May 1930; active duty (CCC) 1 July 1934 to 11 December 1938; appointed first lieutenant, 14 March 1935; reappointed 15 March 1940; extended active duty, 3 February 1941; appointed temporary captain, Army of the United States, 23 June 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 in time of war of the 85th Article of War.

_____, Judge Advocate

_____, Judge Advocate

_____, Judge Advocate

1st Ind.

War Department, J.A.G.O., 6 - 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 Captain Herman L. Dimmitt (0-270586), 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 was found drunk while on duty as Police and Prison Officer, 313th Infantry. He could not pass simple coordination tests, spoke disjointedly, his eyes were red, his face flushed, his breath smelled of liquor, he could not restrain his temper and used scandalous language in referring to other officers of his organization, and was drunk in the opinion of two medical officers who examined him. I recommend that the sentence to dismissal and total forfeitures be confirmed, but that the forfeitures be remitted, and, in view of all of the circumstances, that the execution of the sentence as modified 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 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 action.

(Sentence confirmed but forfeitures remitted. Execution suspended. G.C.M.O. 319, 23 Oct 1943)

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

SPJGH
CM 238825

11 SEP 1943

UNITED STATES v. Private JOSEPH JONES (35673678), Battery C, 600th Field Artillery Battalion.	)	92ND INFANTRY DIVISION Trial by G.C.M., convened at Fort Huachuca, Arizona, 17 June and 1 July 1943. Dishonorable discharge and confinement for twenty (20) years. Disciplinary Barracks.

HOLDING 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 Joseph Jones, Btry "C" 600th Field Artillery Battalion, did, at Fry, Arizona, on or about 0030 hours, May 7, 1943, forcibly, feloniously, and against her will, assault, with intent to rape, Mary King.

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

Specification: In that Private Joseph Jones, Btry "C" 600th Field Artillery Battalion, did, at Fry, Arizona, on or about May 7, 1943, acting in concert with certain other soldiers to the number of about ten, whose names are unknown, did unlawfully and riotously, and in a violent and tumultuous manner disturb, enter and break into the dwelling house of Odessa Whitney, of Fry, Arizona, and did therein participate in the unlawful breaking up and destruction of furniture, gramaphone records and other property of the said Odessa Whitney.

He pleaded not guilty to the Charges and Specifications, and was found guilty of the Specification, Charge I, and of Charge I in violation of the 93rd Article of War, and guilty of Charge II and the Specification thereunder. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for twenty (20) years. The reviewing authority approved the sentence and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The record of trial was forwarded for action under Article of War 50½.

3. The evidence for the prosecution shows that on the night of 6-7 May 1943 there was a disturbance in Tin Row, Area Number Two, Fry, Arizona. Area Number Two was inhabited by prostitutes. Mary King lived in hut No. 7, across the road from hut No. 16, where Odessa Whitney lived. At about midnight on 6-7 May, Odessa Whitney heard an argument outside her house, went to the door and saw Mary King and "a bunch" of negro soldiers. Mary King was crying "Don't break my arm, don't choke me you are killing me". Odessa Whitney said "You ought to be ashamed", and the soldiers then released Mary King. Odessa Whitney recognized the ringleader, who was not present at the trial. Mary King ran into Odessa Whitney's house. Nothing had happened to Mary King up to that time except that her arm had been twisted. A few minutes later, there was a pounding on the door of Odessa Whitney's house, the window and all the doors fell in, and a group of 25 to 30 soldiers forced their way into her house through both doors and both windows. They jumped on the stove, turned over the tables, broke dishes, broke a gramophone and the records for it, took a wallet containing $25, tore up Odessa Whitney's pass and her marriage license, and broke up all the chairs and a screen door to have something to fight with. Odessa Whitney was struck on the leg and head. The soldiers were smoking brown cigarettes which had a very sickening odor. Two or three of the men then carried Mary King out of the back door into the back yard. Two men stood on Mary King's hands, two others stood on her legs, two others stood with their feet on her body, another man was "in the wrong", the others stood around counting "one, two, three, four and so forth" and "Every fellow had a turn". Accused was in Odessa Whitney's house when she first saw him, and the only thing she was sure he did was to throw gramophone records in the air and break them by hitting them with an iron rod as if they were baseballs. Accused was in the house when Mary King was carried out, and Odessa Whitney could not say that he had anything to do with Mary King. (R. 6-20, 26, 29-31, 35-36).

Private Wallace Hundley, who had known accused in Alabama before entering the army, was in Fry the night of 6-7 May and saw accused, or someone whom he took to be the accused, kick in the front door, enter the house and after a short time leave it by the same door. Some unidentified men carried a girl out of the house into the front yard. Accused was with them. The girl was on the ground and some men were standing on her arms and legs. Accused, the only one recognized by Hundley, was standing with one foot on her chest, but was not "laying" on her. The girl "was just hollering". Hundley stated that "they" tore off her bloomers "because I picked the bloomers up in the yard myself". Hundley did not hear anyone counting. He took accused by the arm and pulled him away to get him out of the crowd. Accused knocked Hundley down. Hundley went away and was later taken to the stockade. He did not see accused again that night. Accused had been drinking (R. 37-46).

Several soldiers on military police duty went into Area Number Two on the night of 6-7 May to stop a disturbance. A woman was lying on the ground with three soldiers stooping over her. Several soldiers, including one with a stab wound in the back, were caught and arrested. The wounded soldier was taken to the hospital. When the prosecution attempted to adduce testimony that the wounded soldier was the accused, the defense agreed "that the man was stabbed and was taken to the hospital". Odessa Whitney afterwards went to the hospital with Mary King and identified accused as "one that was there". Captain William R. Quackenbush, Medical Corps, examined Mary King on the Wednesday following 7 May and found bruises on her left thigh, left jaw and head (R. 13-14, 20-21, 23-29, 31-33, 46-51).

4. For the defense, First Lieutenant James L. Kingsland and three enlisted men testified that when two women were brought to Ward 11 of the hospital on 13 May 1943 to identify someone, they first pointed out soldiers other than accused, but upon being urged by the officer who brought them there to look around further, stated that they thought accused was the man, but did not identify him positively (R. 54-63).

Accused elected to remain silent (R. 63).

5. a. Charge I: The Specification alleges that accused assaulted Mary King with intent to rape. Assault with intent to commit rape is an attempt to commit rape in which the overt act amounts to an assault upon the woman intended to be ravished. The intent to have carnal knowledge of the woman assaulted by force and without her consent

must exist and concur with the assault. The accused must intend to overcome any resistance by force, actual or constructive, and penetrate the woman's person (MCM, 1928, par. 149l). There is no substantial evidence that accused participated in any attempt to commit rape upon Mary King. She was placed on the ground in the back yard and soldiers stood on her arms and legs. According to Odessa Whitney one man was "in the wrong", the rest of the soldiers stood around and counted "one, two, three, four and so forth" and "Every fellow had a turn". Other witnesses saw the soldiers choking Mary King, heard them using vile language and counting and Mary King screaming and pleading with them not to kill her. However, none of these witnesses could state that accused was present during any of these occurrences. Mary King did not testify either in person or by deposition. The only witness who identified accused as one of the soldiers holding Mary King was Private Hundley. He testified that when she was on the ground in front of the house with some men standing on her arms and legs and holding her down, accused was standing with one foot on her chest but was not "laying" on her and the girl was "just hollering". Hundley did not hear any counting. He stated that "they" tore off Mary King's bloomers because he found them in the yard.

Although the evidence shows that accused assaulted Mary King by putting one foot on her chest it does not appear that he attempted to have carnal knowledge of her or that he did or said anything from which an intent on his part to rape her reasonably could be inferred. In the opinion of the Board of Review the evidence is legally sufficient to support only so much of the findings of guilty of the Specification, Charge I as involves findings of guilty of the lesser included offense of simple assault, in violation of the 96th Article of War.

b. Charge II: Accused was one of a group of soldiers who forced themselves into Odessa Whitney's house by breaking in the doors and windows and who riotously smashed and destroyed her furniture and other property. There is evidence that accused was the one who broke in the front door. It clearly appears that he entered the house unlawfully and therein destroyed a number of gramophone records belonging to Odessa Whitney. The Board of Review is of the opinion that the evidence is legally sufficient to support the findings of guilty of Charge II and its Specification.

c. The record shows that two-thirds of the members of the court concurred in the sentence of confinement for twenty years. The 43rd Article of War provides that no person shall be sentenced to

confinement for more than ten years except by the concurrence of three-fourths of all of the members present at the time the vote is taken. When confinement in excess of ten years is imposed under a sentence in which only two-thirds of the members of the court concur, the error may be corrected by reducing the confinement to ten years or less (CM 185899, Polk and Jenkins).

d. The maximum limit of punishment upon conviction of assault in violation of the 96th Article of War is confinement at hard labor for three months and forfeiture of two-thirds pay per month for three months. No maximum limit of punishment is expressly prescribed for unlawfully and riotously breaking into the dwelling house of another and destroying property therein as alleged in the Specification, Charge II, but, in view of the circumstances of aggravation under which the unlawful entry into the dwelling house was effected, the offense is analogous to the offense of housebreaking for which the maximum limit of punishment is dishonorable discharge, total forfeitures, and confinement at hard labor for ten years (MCM, 1928, par. 104c).

6. The accused is 24 years of age. The charge sheet shows that he was inducted on 20 November 1942.

7. For the reasons stated the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of the Specification, Charge I, as involves findings of guilty of assault, in violation of the 96th Article of War, legally sufficient to support the findings of guilty of Charge II and its Specification, and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for ten years.

Curtis S. Kiel Jr., Judge Advocate

Samuel M. Driver, Judge Advocate

F. J. Fetterhoff, Judge Advocate

(372)

AG ——
Misc. ——
Pers. ——
Class. ——
Ins. ——
C/Clk ——

1st Ind.

War Department, J.A.G.O., 28 SEP 1943 - To the Commanding General, 92nd Infantry Division, Fort Huachuca, Arizona.

1. In the case of Private Joseph Jones (35673678), Battery C, 600th Field Artillery Battalion, I concur in the foregoing holding of the Board of Review, and for the reasons therein stated recommend that only so much of the findings of guilty of the Specification, Charge I as involves findings of guilty of assault, in violation of the 96th Article of War, be approved, and that only so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for ten years be approved. Thereupon you will have authority to order the execution of the sentence.

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

(CM 238825).

Thomas H. Green

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.

SPJGK
CM 238838

23 SEP 1943

UNITED STATES	)	XII CORPS
	)	
v.	)	Trial by G.C.M., convened at Fort Bragg, North Carolina, 3 August 1943. Dismissal.
	)	
Second Lieutenant CLAUDIUS N. SKEEN, JR. (O-1172285), Field 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. Accused was tried upon the following Charges and Specifications:

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

Specification 1: In that 2nd Lieutenant Claudius N. Skeen Jr., 793rd Field Artillery Battalion, did, at Fort Bragg, North Carolina, on or about July 9, 1943, feloniously take, steal, and carry away United States currency, value about $20.00, the property of 2nd Lieutenant Charles R. Smith, 793rd Field Artillery Battalion, Fort Bragg, North Carolina.

Specification 2: In that 2nd Lieutenant Claudius N. Skeen Jr., 793rd Field Artillery Battalion, did, at Fort Bragg, North Carolina, on or about July 9, 1943, feloniously take, steal, and carry away United States currency, value about $10.00, the property of 2nd Lieutenant Thomas V. Gibson, 793rd Field Artillery Battalion, Fort Bragg, North Carolina.

Specification 3: In that 2nd Lieutenant Claudius N. Skeen Jr., 793rd Field Artillery Battalion, did, at Fort Bragg, North Carolina, on or about July 9, 1943, feloniously take, steal, and carry away United States currency, value about $20.00, the property of 2nd Lieutenant Harry F. Preston, 793rd Field Artillery Battalion, Fort Bragg, North Carolina.

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

Specification 1: In that 2nd Lieutenant Claudius N. Skeen Jr., 793rd Field Artillery Battalion, did, at Fort Bragg, North Carolina on or about June 24, 1943, wrongfully borrow $70.00 in cash from Cpl Paul S. Ott, Service Battery, 793rd Field Artillery Battalion, Fort Bragg, North Carolina.

Specification 2: In that 2nd Lieutenant Claudius N. Skeen Jr., 793rd Field Artillery Battalion, did, at Fort Bragg, North Carolina on or about July 15, 1943, wrongfully borrow $20.00 in cash from S/Sgt Otto L. Mignot, Service Battery, 793rd Field Artillery Battalion, Fort Bragg, North Carolina.

Specification 3: In that 2nd Lieutenant Claudius N. Skeen Jr., 793rd Field Artillery Battalion, did, at Fort Bragg, North Carolina on or about July 15, 1943, wrongfully borrow $30.00 in cash from Cpl Baldassare S. Indelicato, Service Battery, 793rd Field Artillery Battalion, Fort Bragg, North Carolina.

Specification 4: In that 2nd Lieutenant Claudius N. Skeen Jr., 793rd Field Artillery Battalion, did, at Fort Bragg, North Carolina on or about July 15, 1943, wrongfully borrow $10.00 in cash from Sgt. Roy W. Dent, Service Battery, 793rd Field Artillery Battalion, Fort Bragg, North Carolina.

He pleaded guilty to and was found guilty of all Charges and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, 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 sentence as provides for dismissal, and forwarded the record of trial for action under Article of War 48.

3. In view of the accused's plea of guilty, the evidence need not be stated in detail. It is sufficient to note that as to Charge I and its Specifications, the prosecution introduced as witnesses the officers from whom the money is alleged to have been stolen. Each witness stated that at the place and time alleged there was removed from his billfold or effects the amount as set forth in the respective specifications (R.9-12). The money was taken between 7 and 8 p.m., 9 July 1943, while the officers were having a shower bath (R.10,11,12). The officers did not discover their loss until two or three days thereafter. Lieutenants Smith, Gibson, and Preston belonged to the same organization and occupied the same quarters with numerous other officers. There was no reason to suspect the accused as the party who stole the money (R.11-13). While an investigation was in progress to determine the guilty party, the accused went to Major Hurley W. Chase, his Battalion Commander, and voluntarily said to him, "Major, I am the man you are looking for in this case". The accused told Major

Chase that he took the money on Friday night, 9 July 1943, and that he had been trying to make up his mind to tell him about it for several days but "just didn't have the nerve to do it" (R.14). Accused on the same day made substantially the same statement to Colonel Lewis L. Leavell, 79th Field Artillery Group, Fort Bragg, North Carolina (R.16). The verbal statement by accused to Major Chase is corroborated and confirmed by a written confession dated 21 July 1943 (R.17,18; Ex. A), in part as follows:

> " * * *
>
> "That I am making this statement of my own free will and accord.
>
> "That my previous service is as follows: Enlisted at Ft. MacArthur, California on Sept 1, 1939. Was commissioned as a 2nd Lt. on Oct. 22, 1942.
>
> "That I came to Ft. Bragg, N.C. and when I arrived, I was in debt $300.00.
>
> "That my wife insisted on accompanying me as she had always been with me. She was expecting a child and I wished to be with her when it was delivered.
>
> "That I did not know when I came here that the housing condition was in such a bad condition. I had little time to find a place to live in and had no transportation. My wife of course, was in no condition to search by walking and transportation was too expensive.
>
> "That debts seemed to steadily increase.
>
> "That my mind was torn between duty and home life and I stood it until there seemed to be no other way so I turned everything I had built up down, and on Friday, July 9, 1943, willfully took from other members of my organization, the sum of $60.00 to pay my Hotel bill.
>
> "That later, I confessed to my Battalion Commander, Major H. W. Chase."

With respect to Charge II and its Specifications, alleging that accused wrongfully borrowed money from enlisted men of his organization, suffice it to state that the findings of guilty are supported by the testimony of the enlisted men from whom the loans were obtained. The evidence discloses that the loans in the aggregate amount to $130.00; that they were obtained between 29 June and 15 July 1943 and that the accused in each instance made full payment prior to his trial (R.21,22,24,25).

Major Chase and Colonel Leavell testified with respect to the professional qualifications of accused. Major Chase stated that accused had served as battalion motor officer for 2½ months and stated: "As battalion officer, I would rate this man 'excellent'". He stated that as a reward for accused's excellent work, he had very recently recommended him for a promotion to the next higher grade but that "the promotion was eventually

stopped because of this" (R.15). Colonel Leavell, the accused's Regimental Commander, when asked if the accused's performance of duty had been satisfactory or outstanding, replied, "Accused's work as motor officer was superior" (R.17).

The accused did not testify and no evidence was introduced by the defense.

4. The evidence clearly supports the accused's plea of guilty of larceny in violation of Article of War 93, as alleged in Charge I and its Specifications, and his plea of guilty of wrongfully borrowing money from enlisted men of his organization in violation of Article of War 96, as alleged in Charge II and its Specifications.

5. The accused is 22 years old. The records in the Office of The Adjutant General show that accused is married. He was graduated from Long Beach Polytechnic High School (California) 1939, where he attained the grade of second lieutenant R.O.T.C. He enlisted in the Regular Army 1 September 1939, and was stationed at Schofield Barracks, T.H., until June 1941. He was stationed at Camp Roberts, California, from 12 June 1941 to 12 April 1942, attaining the grade of Gun Sergeant, Section Leader Ammunition and Supply Sergeant. He attended Officer Candidate School, Fort Sill, Oklahoma, and upon his graduation on 22 October 1942, he was commissioned a temporary second lieutenant, Field Artillery, Army of the United States. In recommending accused for appointment to Officer Candidate School, his commanding officer stated: "Applicant has demonstrated outstanding qualities of leadership during the period he has been under my observation", and referred to his character as "Excellent".

6. 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 and to warrant confirmation thereof. Dismissal is authorized upon conviction of a violation of Article of War 93 or 96.

_____, Judge Advocate.

_____, Judge Advocate.

_____, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 7 OCT 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 Claudius N. Skeen, Jr. (O-1172285), 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 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-Draft of let. for sig. Sec. of War.
Incl.3-Form of Ex. action.

(Sentence confirmed but execution suspended. G.C.M.O. 349, 10 Nov 1943)

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

SPJGN
CM 238898

2 SEP 1943

UNITED STATES	)	71st LIGHT DIVISION
	)	
v.	)	Trial by G.C.M., convened at Camp Carson, Colorado, 2 August 1943. Dismissal.
	)	
Captain JOHN MARINUCCI (0-298422), 5th 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 64th Article of War.

Specification 1: In that Captain JOHN MARINUCCI, Fifth Infantry, having received a lawful command from Major WILLIAM R. BAUER, Fifth Infantry, his superior officer, to report to him (Major Bauer) immediately at the Regimental Supply Office, did, at Camp Van Dorn, Mississippi, on or about 15 July 1943, willfully disobey the same.

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

Specification 1: In that Captain JOHN MARINUCCI, Fifth Infantry, did, without proper leave, absent himself from his place of duty at the Regimental Supply Office, Fifth Infantry, Camp Van Dorn, Mississippi, from about 0800, 15 July 1943, to about 1500, 15 July 1943.

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

Specification 1: In that Captain JOHN MARINUCCI, Fifth Infantry, having been duly placed in arrest at Camp Van Dorn, Mississippi, on or about 15 July 1943, did, at Camp Van Dorn,

Mississippi, on or about 15 July 1943, break his said arrest before he was set at liberty by proper authority.

He pleaded not guilty to and was found guilty of all Charges and Specifications. No evidence of prior convictions was introduced. He was sentenced to be dismissed the service of the United States. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War.

3. The evidence for the prosecution shows that on 15 July 1943, the 5th Infantry was preparing to move to a new station from Camp Van Dorn, Mississippi. The accused had been assigned for approximately three days to the regimental supply office, as munitions officer. On 15 July, however, due to the fact that there were no duties for the munitions officer at that particular time on account of the pending move, he was temporarily acting as an assistant to Major William R. Bauer, the regimental supply officer, whose instructions for the operation of the regimental supply service were given each morning to officers under his jurisdiction. These officers were required to report for work at seven o'clock at the supply office, where the accused had no particular desk assigned to him, although many were available (R. 7-10, 13, 15, 20).

Major Bauer was already there when the accused arrived on the morning of the 15th after seven and not later than eight o'clock. Major Bauer had not spoken to him or assigned him any duties for the day when the accused took his departure about eight-thirty. He had not returned to the office and was just emerging from his quarters at one-thirty that afternoon, when Major Bauer drove up, and, calling the accused over to his jeep, directed, "Captain Marinucci, you will report to me immediately at the RSO." When the accused replied, "I am going to the bank", the Major asserted, "You will not go to the bank, you will report to me immediately at the RSO." The accused then asked the Major if he could ride with him in the jeep. The Major replied that he had one or two stops to make and suggested, "if you begin walking now I will arrive there at approximately the same time you will" (R. 7-9, 11, 13-14, 16).

Within five minutes, Major Bauer had arrived, but not the accused; nor had he an hour and a half later, when, at three o'clock, Major Bauer reported the fact to Colonel William H. Bigelow, the regimental commander, who directed his executive officer to find the accused and place him in arrest in quarters. The executive promptly informed the accused of the Colonel's order, and "outlined to him the limits of his arrest, which were the cubicle he occupied, except for forty-five minutes, three times a day, to get his meals, to go to his assigned latrine, and two hours in the afternoon, between two and four o'clock, for exercise" (R. 7, 11-12, 17, 19-21).

About ten or fifteen minutes later, seeing the accused engaged in conversation with another officer in the parking lot between his quarters and regimental headquarters, the Colonel, accompanied by his executive, went to the parking lot, personally told the accused that he was to remain in his quarters, explained the limits of his arrest, and stood there until the accused disappeared into his quarters. He then prepared a letter, prescribing the limits of arrest, and had the acting adjutant take it to the accused and secure his signature, acknowledging receipt. The officer of the day was also informed of the accused's arrest, and directed by regimental headquarters "to make hourly inspections to see he was in his quarters, at the latrine or company's mess hall, or going between one of those three places by the most direct route" (R. 17-19, 21, 23-24).

About seven-thirty that evening, a call for the accused was received at battalion headquarters, via the official telephone - which, however, officers were permitted to use for personal calls. There was no telephone at the officers' quarters occupied by the accused. The battalion duty officer sent an orderly over to tell the accused, who came to battalion headquarters to answer the call. While he was there, the officer of the day, making an hourly inspection, found him missing and reported the fact to the regimental commander, who repaired to the accused's quarters, accompanied by his executive, and conducted an unsuccessful search for the missing officer (R. 18, 21-22, 24-26).

As they were leaving, the accused approached from the direction of battalion headquarters. The Colonel inquired, "Where have you been?" The accused replied, "I have been to make a phone call." "At that," according to the executive officer,

> "Colonel Bigelow ordered Captain Marinucci into his quarters to pack his over-night bag and told him he was going to send him to the stockade. The officer of the day was called, the provost marshal was called, the military police arrived, and Captain Marinucci was turned over to them and taken to the stockade. Approximately an hour later he was returned from the stockade, but kept in confinement in the 5th Infantry area" (R. 18, 21-22, 24).

4. No evidence was introduced by the defense, but the accused's unsworn statement, made to the court, after he had received proper advice as to his rights as a witness, shows that on or about 13 July he was relieved as executive officer of the 1st Battalion, 5th Infantry, and placed on duty with the regimental supply office under Major Bauer, to whom he reported that evening at the close of his business at battalion headquarters, and again the following morning at seven o'clock, when Major Bauer told him he could stay around, and he would try to find a job for him. At eleven he

was given an assignment to "go out to the regimental area and check out the fire plug". He worked all afternoon, and from early the next morning until four-thirty the next afternoon, completing this assignment. He came back about five, just before Major Bauer left the supply office. The Major smiled and the accused "felt happy about it". Then, "There's nothing else," said the Major, "I'll see you in the morning" (R. 27-28).

The next morning the accused was at the supply office by seven o'clock. He asked Major Bauer what there was to do that morning, and was informed that there was nothing yet; also that the movement of the regiment had been postponed. The accused suggested that, if the delay should continue four or five days, something would have to be done about "this laundry", and inquired of Major Bauer if he might go to the post quartermaster's office and find out about it. The Major replied, "I may call up myself". Having waited and received no further orders, the accused "took the privilege, without asking the Major", of going back to his quarters, to attend to personal matters. He was planning to visit the bank to close out his account, when another officer, an old friend, dropped in to see him (R. 28).

"Time slipped by", the accused testified,

> "the Major made no effort to contact me. I felt that everything was alright. The office was half empty, he never did tell me where my desk was. * * * At one fifteen I said I better go down and see what is going on. As I started out I met the Major in the rear of the first battalion headquarters, on the street right next to my quarters. He said to me, 'I was looking for you.' I said, 'Yes, sir.' He was sitting in the jeep with the driver, I said, 'If you want to see me I will be glad to ride with you.' Rather sarcastically he said, 'Never mind that, I have to make several stops, by the time you walk down there I will be down there.' I didn't know whether he was angry or not, but I had known the Major in Panama, I didn't think I had committed any crime, didn't have any intentions of doing so. I did say to him that I would like to go to the bank and close my account. He mumbled something and just then told the driver to go ahead. He claims in the statement he said immediately. If I had understood immediately I would have gone there. I had no intentions of disobeying his orders. I told the gentleman with me, if you will drive me to the bank I think I will have time to close the account, then I will go and see the Major, by that time he will probably be down there. I went to the bank and I returned, I would say about two-thirty or so. I went to my quarters, just then the regimental executive officer walked

in and tells me I am under arrest. He did explain to me my limits and what they were. Naturally, I was excited and nervous to hear I had been placed under arrest. So about fifteen minutes or so after that I began to feel kind of sick, my stomach felt kind of bad and I couldn't reach a medical officer, I thought there would be no harm in getting some air. I believe that was the time I was walking along the duck-board near the parking lot that they saw me out there. I felt much better and I walked back in my quarters. I had remained there until the runner came over about seven-fifteen and said, 'Sir, there is a phone call at battalion headquarters for you.' I thought it was alright as a matter of answering a phone call. I went and answered the call. As I came out I was stopped by Colonel Bigelow and Colonel Wooten. Colonel Bigelow told me I had broken the arrest. I told him I had answered a phone call and I was on my way back to quarters. Just then they said I should pack up and go up to the stockade. Gentlemen, that is the whole story." (R. 28-29).

5. The Specification, Charge I, alleges willful disobedience of the lawful command of the accused's superior officer in violation of Article of War 64.

"The willful disobedience contemplated is such as shows an intentional defiance of authority, as where a soldier is given an order by an officer to do * * * a particular thing at once and * * * deliberately omits to do what is ordered * * *. The order must relate to military duty and be one which the superior officer is authorized under the circumstances to give the accused." (MCM, 1928, par. 134b, p. 148).

The evidence shows that Major Bauer was the accused's superior officer and authorized, under the circumstances, to order him to report immediately to the regimental supply office as a military duty; he did so order him; and the accused willfully omitted to report immediately - indeed, Major Bauer waited an hour and a half before reporting the disobedience to the regimental commander. While the accused's unsworn statement indicates that Major Bauer "mumbled something" and that the accused did not hear him say "Immediately", both Major Bauer and his chauffeur testified that the order was given and repeated, clearly and distinctly. Although it seems probable from the four corners of the record, that inattention, preoccupation, and poor judgment on the part of the accused may have been contributing factors in his commission of this offense, still, under all of the sworn testimony adduced, his unconscionable delay when ordered to report immediately, involves all the elements of willful disobedience, in violation of Article of War 64.

6. The Specification, Charge II, alleges absence without leave from his place of duty at Camp Van Dorn. While he may have felt that there was no reason, in the absence of any specific duty assignment that morning, why he should not "take the privilege" (as he expressed it) of returning to his quarters without permission from his chief, to attend to personal affairs, again the accused's poor judgment resulted in a clear violation of Article of War 61, which "is designed to cover every case not elsewhere provided for where any person subject to military law is through his own fault not at the place where he is required to be at a time when he should there." (MCM, 1928, par. 132).

7. The Specification, Charge III, alleges breach of arrest. "The offense * * * is committed when the person in arrest infringes the limits set by orders * * * and the intention or motive that actuated him is immaterial to the issue of guilt, though, of course, proof of inadvertance or bona fide mistake is admissible in extenuation." (MCM, 1928, par. 139a, p. 153.) The testimony is clear that the limits of his arrest had been carefully explained to the accused, twice verbally, and once in writing, and that battalion headquarters was not included; despite which, when a runner arrived to notify him that there was a phone call for him there, he thought, according to his unsworn statement, that breaching the prescribed limits of his arrest "was alright as a matter of answering a phone call". The circumstances surrounding this breach, the slight distance and the short time involved, its object, and the accused's alleged misconception, may and should be taken into consideration in extenuation of the offense; all the elements of which, however, are clearly established by the uncontradicted testimony.

8. War Department records show the accused is 36 years of age; appointment as second lieutenant, Infantry Reserve, 2 June 1932; active duty, 15 October 1932 to 28 October 1932, 21 September 1933 to 11 June 1934; promotion to first lieutenant, Infantry Reserve, 28 June 1935; active duty, 1 July 1935 to 14 July 1935, 1 August 1937 to 14 August 1937, 23 July 1939 to 5 August 1939, 31 March 1940 to 25 April 1940; appointment as captain, Infantry Reserve, 3 August 1940; active duty, 26 May 1941 to 2 December 1941, and from 26 March 1942 to date.

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 dismissal is authorized upon a conviction of Articles of War 64, or 61 or 69.

Silas B. Bresson, Judge Advocate.

Abner E. Lipscomb, Judge Advocate.

Benjamin R. Sleeper, Judge Advocate.

SPJGN
CM 238898

1st Ind.

War Department, J.A.G.O., 6 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 Captain John Marinucci (0-298422), 5th 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 of dismissal be confirmed but suspended during the pleasure of the President.

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

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

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

(Sentence confirmed but execution suspended. G.C.M.O. 299, 5 Oct 1943)

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

(387)

- 6 SEP 1943

SPJGH
CM 238905

UNITED STATES	)	8TH ARMORED DIVISION
	)	
v.	)	Trial by G.C.M., convened
	)	at North Camp Polk,
Second Lieutenant HENRY G.	)	Louisiana, 6 August 1943.
REYNOLDS, JR. (0-1016915),	)	Dismissal, total for-
Army of the United States.	)	feitures and confinement
	)	for two (2) years.

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that 2nd Lt. Henry G. Reynolds, Jr. Company "I", 36th Armored Regiment, did, near Cameron, Louisiana, on or about May 1, 1943, wilfully and wrongfully fondle in an indecent manner the person of Private First Class Franklin S. Harmon, Company "I", 36th Armored Regiment.

Specification 2: In that 2nd Lt. Henry G. Reynolds, Jr., Company "I", 36th Armored Regiment, did, near Slagle, Louisiana, on or about June 22, 1943, wilfully and wrongfully fondle in an indecent manner the person of Private Hugo R. Edwards, Company "I", 36th Armored Regiment.

Specification 3: In that 2nd Lt. Henry G. Reynolds, Jr., Company "I", 36th Armored Regiment, did, at North Camp Polk, Louisiana, on or about April 26, 1943, wilfully and wrongfully fondle in an indecent manner the person of Corporal Leo A. Ruff, Company "I", 36th Armored Regiment.

Specification 4: In that 2nd Lt. Henry G. Reynolds, Jr., Company "I", 36th Armored Regiment, did, at North Camp Polk, Louisiana, on or about July 11, 1943, wilfully and wrongfully fondle in an indecent manner the person of Private First Class Lawrence H. Swinehart, Company "I", 36th Armored Regiment.

Specification 5: In that 2nd Lt. Henry G. Reynolds, Jr., Company "I", 36th Armored Regiment, did, at North Camp Polk, Louisiana, on or about July 18, 1943, wilfully and wrongfully fondle in an indecent manner the person of Corporal George Compton, Company "I", 36th Armored Regiment.

Specification 6: In that 2nd Lt. Henry G. Reynolds, Jr., Company "I", 36th Armored Regiment, did, at North Camp Polk, Louisiana, on or about July 25, 1943, wilfully and wrongfully fondle in an indecent manner the person of T/5 Boyd Mather, Company "I", 36th Armored Regiment.

He pleaded not guilty to and was found guilty of the Charge and all the Specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for two years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48.

3. The only testimony upon each Specification was that of the soldier concerned and of the accused. All of the soldiers concerned were members of the company of accused.

a. Specification 1: Private First Class Franklin S. Harmon testified that on the night of 1 May 1943, when Company I, 36th Armored Regiment was in bivouac on a beach of the Gulf of Mexico near Cameron, Louisiana, the accused requested him to accompany accused to an adjacent company area to investigate a supposed drowning. On the way back they talked about how bad the mosquitoes were, and accused suggested that Harmon sleep with him, stating that he had a mosquito bar and a bed roll, and he was sure the mosquitoes would not bother them. Harmon did not think it was right, but when the invitation was repeated, went with accused to the truck. Accused suggested that Harmon take off his "fatigues" because of the heat, and they got in the bed roll and talked for awhile.

Accused took a drink of rum and offered one to Harmon, who touched it to his lips but did not drink it. A few minutes later, accused began rubbing Harmon's arms and legs and "fooling" with his privates. Harmon said it was stuffy in the truck and that he did not feel well, got up and left (R. 6-7).

The accused testified that on the occasion mentioned, he had no tent and had chosen to sleep in the back of a truck. The mosquitoes were bad. Accused was standing near the truck talking and smoking with several enlisted men and non-commissioned officers when he found that Harmon had been bitten by mosquitoes and was ill. Accused had a mosquito bar and told Harmon that he could sleep in the truck and that he and accused could throw the mosquito bar over their heads. Both drank some rum and lay down. Harmon seemed to be sick. Accused was feeling "over exuberant" and began to rub around on Harmon, but not lower than his stomach. Harmon "kidded" accused about it and accused stopped. After a short time, Harmon got up, said he was very ill and left the truck (R. 13-14).

b. Specification 2: Private Hugo R. Edwards testified that on 22 June 1943 the organization of accused was in bivouac near Slagle, Louisiana. At about 11:30 p.m. on that day accused had a conversation with him about women. A little later, Edwards was going to roll out his bed on the back of a tank, when accused offered to show Edwards and another private who was present, how to do it. They rolled out the bed. Edwards sat on one side of it. Accused lay down next to Edwards, reached over and patted him on his privates but desisted when told to stop. About 4:30 o'clock in the morning, Edwards awakened from a dream to find accused "pulling on my private parts". Edwards rolled over on his stomach. Accused pulled Edwards back and "went after" him again, took his hand and tried to make him "handle" accused. Edwards pulled away and when accused continued his attentions, left the tank. Edwards mentioned the incident to Corporal Ruff (R. 7-8).

The accused testified that on 22 June 1943, he returned about 10:30 p.m. from giving a compass problem, and drank a number of bottles of beer and a small quantity of rum. After a visit to another bivouac area, he walked over to Edwards' tank with him and several others. Edwards and another private were planning to sleep on the tank. Accused showed Edwards how to spread the blanket and all three of them sat on the back end of the tank. Accused had no recollection of patting Edwards on the testicles at that time. They then stretched out and began talking about snakes. While lying there accused fell asleep, and awoke about 2:30 a.m. "wrapped up in somewhat of an embrace" with Edwards,

touching him on the private parts; Edwards also had his hand on accused. Accused immediately got up and went back to sleep in his own bed (R. 14).

c. Specification 3: Corporal Leo A. Ruff testified that on or about 26 April 1943, he went to the arms room to get the serial numbers of some revolvers. Accused was there and gave Ruff about half the numbers, then "grabbed" him "by the balls". Ruff moved away and got the rest of the numbers. Accused then seized him again, but Ruff walked out. On 19 July 1943, Ruff, Corporal George Compton and accused were in the orderly room, when accused remarked that Compton would be a good one to sleep with in winter and Ruff would be a good one to sleep with in summer (R. 9-10).

The accused testified that he had no recollection of either of the occurrences of which Corporal Ruff testified (R. 14).

d. Specification 4: Private First Class Lawrence H. Swinehart testified that on 11 July 1943, he was charge of quarters and was lying on a bed in the orderly room about 10:00 p.m., when accused, who was duty officer that night and was sleeping in the officers' room next to the orderly room, entered the orderly room clad only in shorts, and sat on Swinehart's bed. Accused began talking about a girl and rubbing Swinehart's knees; he then took hold of Swinehart's penis several times and tried to put Swinehart's hand on the penis of accused. Each time Swinehart pulled away. Accused then left the room (R. 10).

The accused testified that on the evening of 11 July 1943 he attended a party. He had been detailed as duty officer for the following day and about 11:30 p.m. he went to the company commander's office to sleep on a cot so as to be present to take reveille and attend to such matters as might come up before the arrival of the company commander. He noticed that the day room lights were still on, went into the orderly room and told Private First Class Swinehart, who was lying on a cot but was not yet asleep, to turn them off. Swinehart mentioned that his wife was coming to see him within a day or two. Accused sat on the edge of Swinehart's cot, and they began to hand-wrestle. Swinehart was stripped to the waist and accused attempted to tickle him under the arms. They scuffled playfully for a minute and then accused returned to the company commander's office (R. 14-16).

e. Specification 5: Corporal George Compton testified that on 19 July 1943, he was charge of quarters, and was asleep in the orderly room about midnight, when accused wakened him by placing a hand on his ankle. He turned over on his side and accused then put a hand on his leg above the knee. Compton rolled out of bed. There was a friendly scuffle

which ended when Compton gave accused a shove and left the room (R. 11).

The accused testified that he had no recollection of the incident which was alleged to have taken place on or about 18 July. Corporal Compton was the driver of accused's tank and they were in the habit when in the field of teasing one another and scuffling in a friendly fashion, but there was nothing of an indecent nature (R. 15).

f. Specification 6: Technician Fifth Grade Boyd Mather testified that on 25 July 1943, he was charge of quarters and was sitting in a chair in the orderly room about 1:30 p.m., when accused came up behind him, reached over his shoulder and started playing with his private parts. Mather asked accused to stop once or twice, then got up and went outdoors (R. 12-13).

The accused testified that on 25 July 1943, he was leaving the orderly room to keep a swimming engagement at the division swimming pool, and on the way out the door, walked up behind the chair in which Technician Fifth Grade Mather was sitting, pulled it back and tilted it in a playful manner, then reached over and pulled a few stray hairs on his chest. Mather was eating a sandwich, and accused pretended to take the sandwich away and tickled him in the ribs. Mather said "Stop Lieutenant", arose from the chair and left the room. Accused asked him if he were going to the mess hall and he said "Yes". Accused did not touch Mather "around the private parts" (R. 15).

6. This officer is charged with six instances of indecent fondling of the person of six enlisted men of his company. The accused had no recollection as to the incidents alleged in Specifications 3 and 5. With respect to Specification 1, accused admitted that he was feeling "over exuberant" and began to "rub around" on Harmon, but "did not reach below" his stomach. As to the allegation in Specification 2, accused had no recollection of patting Edwards, but admitted that he fell asleep in the bed roll which he shared with Edwards, and when he awoke about 2:30 a.m. was "wrapped up in somewhat of an embrace" with Edwards and was touching the private parts of Edwards. With respect to Specification 4, he was "hand wrestling" with Swinehart, scuffled round and attempted to tickle Swinehart--who was stripped to the waist--under the arms. As to Specification 6, accused tilted back a chair in which Mather was sitting, held him by the shoulders, reached over and pulled a few hairs on his chest, and tickled him in the ribs. Accused denied that he touched Mather around his private parts.

7. As to Specification 5, the evidence shows that while Private Compton was asleep in the orderly room, he woke and found that the hand of accused was on his ankle. Compton turned over, the accused put his hand on the leg, above the knee, of Compton, who then rolled off the side of the bed and "scuffled a little bit" with accused. The scuffle, which Compton believed to be merely friendly, ended when he gave the accused a little shove and left. The proof does not, in the opinion of the Board, support the allegation of fondling in an indecent manner. The court may have been influenced by the fact that accused employed substantially the same method of approach as in other Specifications. The accused is entitled to have each Specification considered separately. As to each of them he should be presumed to be innocent until his guilt has been established beyond any reasonable doubt. The Board of Review has frequently quoted with approval the following language from Buntain v. State (15 Tex. Appeals 490):

> "We must look alone to the evidence as we find it in the record, and applying to it the measure of the law, ascertain whether or not it fills that measure. It will not do to sustain convictions based upon suspicions or inadequate testimony. It would be a dangerous precedent to do so, and would render precarious the protection which the law seeks to throw around the lives and liberties of the citizen."

In the opinion of the Board of Review, the evidence is legally insufficient to support the finding of guilty of Specification 5.

8. With respect to Specifications 1, 2, 3, 4 and 6, the statement of each soldier as to the offense committed upon him is convincing. It is to be noted that each soldier, after the offense was committed, left the presence of the accused, except as to Specification 4.

The accused specifically denied the offenses alleged only with respect to Specifications 1 and 6. He did however admit actions which constitute undue familiarity with the soldiers named in the two Specifications. He disclaimed any recollection of the incidents alleged in Specification 3. With respect to Specification 4, he admitted scuffling, hand wrestling with and tickling the soldier under the arms, and with respect to Specification 2, waking up to find himself "wrapped up in somewhat of an embrace" with and touching the private parts of the soldier. The explanations by the accused of his conduct are not convincing in the face of the cumulative effect of the testimony of the five soldiers, each with respect to the particular incident in which he was involved.

The Board of Review is convinced beyond any reasonable doubt that the accused committed each offense alleged in Specifications 1, 2, 3, 4 and 6 as related in each case by the individual soldier involved.

9. Specification 1 alleges an offense committed on Private First Class Franklin S. Harmon. His name is so stated in the heading to his testimony in the record, but in his answer to the first question his first name is recited as "Francis" (R. 6). In view of the absence of any objection upon the part of the defense and the references to Harmon in the question of defense counsel and in the testimony of accused, it is apparent that the witness Harmon was the same Harmon alleged in the Specification (R. 13).

10. Careful consideration has been given to a letter dated 16 August 1943, from Representative J. W. Fulbright, forwarded to The Adjutant General by Colonel Wm. Pearson, A.G.D., War Department Liaison Officer, and to a letter dated 17 August 1943, from Representative Fadjo Cravens, urging a most careful examination of the facts in this case.

11. The accused is 22 years of age. The records in the Office of The Adjutant General show his service as follows: Enlisted service from 3 August 1942; appointed temporary second lieutenant, Army of the United States, from Officer Candidate School, and active duty, 13 March 1943.

12. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally insufficient to support the finding of guilty of Specification 5; legally sufficient to support the findings of guilty of Specifications 1, 2, 3, 4 and 6, and of the Charge; 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.

Walter S. Hilborne, Jr., Judge Advocate

Samuel M. Dower, Judge Advocate

F. J. Lotterhos, Judge Advocate

1st Ind.

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

1. Herewith transmitted for the action of the President are the record of trial and the opinion of the Board of Review in the case of Second Lieutenant Henry G. Reynolds, Jr. (0-1016915), Army of the United States.

2. I concur in the opinion of the Board of Review that the record of trial is legally insufficient to support the finding of guilty of Specification 5, legally sufficient to support the findings of guilty of Specifications 1, 2, 3, 4 and 6, and of the Charge, and legally sufficient to support the sentence and to warrant confirmation of the sentence. The accused willfully and wrongfully, in an indecent manner, fondled the person of enlisted men on five occasions. I recommend that the sentence to dismissal, total forfeitures and confinement at hard labor for two years be confirmed, but in view of all the circumstances that the confinement and 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 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 action.

(Finding of guilty of Specification 5 disapproved. Sentence confirmed but confinement and forfeitures remitted. G.C.M.O. 303, 7 Oct 1943)

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

SPJGK
CM 238937

18 OCT 1943

UNITED STATES	HAWAIIAN ANTIAIRCRAFT ARTILLERY COMMAND
v.	Trial by G.C.M., convened at Fort Shafter, T. H., 27 July 1943. Dismissal.
First Lieutenant CHARLES F. MITCHELL (O-1043173), Coast Artillery (AA).	

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that First Lieutenant Charles F. Mitchell, Headquarters First Battalion, Ninety-eighth Coast Artillery (Antiaircraft), did, at A.P.O. No. 958, on or about 5 June 1943, feloniously take, steal, and carry away the sum of about $109.00, lawful money of the United States, the property of Captain Stanley Herrling, Air Corps.

Specification 2: In that First Lieutenant Charles F. Mitchell, Headquarters, First Battalion, 98th Coast Artillery (Antiaircraft), did, at A.P.O. No. 958, on or about 5 June 1943, feloniously take, steal, and carry away one "Homis" wrist watch, value about $48.00, the property of Second Lieutenant John P. Johns, 98th Coast Artillery (Antiaircraft).

The accused pleaded not guilty to and was found guilty of the Charge and Specifications. He was sentenced to dismissal and forfeiture of all pay and allowances due or to become due. The reviewing authority approved only so much of the finding of guilty of the Charge as involves a finding of guilty of a violation of the 96th Article of War, approved only so much of the sentence as provides for dismissal, and forwarded the record of trial for action under Article of War 48.

3. The evidence for the prosecution shows that on the evening of

5 June 1943 there was removed from the billfold of Captain Stanley Herrling, 7th Fighter Command, Air Corps, Fort Shafter, T. H., $109 in cash and a check for $4.35 payable to cash (R. 10). Captain Herrling, in changing uniforms to go to a picture show, left his billfold on the bed or table and on returning to his quarters about 10:15 or 10:20 p.m. he found the billfold, but the money and check had been removed. A bottle of liquor had been moved from the dresser drawer and was lying outside (R. 10, 18). Having been assured by his roommate and other officers in the quarters that they knew nothing about the matter, he reported the loss to the Investigation Department, Military Police, in Honolulu. Between 7:00 and 10:00 o'clock on the same night there was taken from Quarters 202, Fort Shafter, a wrist watch of the value of $48, the property of Second Lieutenant John P. Johns, 98th Coast Artillery (AA), Fort Shafter (R. 21, 22).

On the afternoon of 5 June 1943 Captain Herrling, First Lieutenant Charles R. Gaa, 64th Coast Artillery, 7th Fighter Command, and the accused had visited the quarters of "Miss Shannon". Captain Herrling stated that he joined the party about 5:00 o'clock, had one drink, and left about 6:00 o'clock (R. 10). Everyone was "jovial" (R. 13). While at Miss Shannon's quarters he jokingly took out his billfold and thumbed through the bills "as much as to say 'I am right'". This incident, coupled with his remarks upon leaving that he might join the party later in the evening and bring some liquor with him, caused him to suspect that a member of the party had been to his quarters looking for the liquor and failing to find him, had taken the contents of his billfold (R. 12). Captain Herrling turned over to the Military Police for examination for fingerprints the bottle of whiskey and the billfold. The report of the examination was negative. Early the next morning Captain Herrling telephoned the accused that someone had entered his quarters and removed money from his billfold (without stating the amount), and told accused that if he knew anything about it or knew who was "playing this prank" he should say so, as fingerprints had been found on the billfold by the Military Police, who were then at headquarters checking over the fingerprint files. The accused immediately replied that he knew about it and that he would see Captain Herrling and explain everything that afternoon. About 1:30 p.m., 6 June, Captain Herrling received through the message center a letter of apology from the accused in which were inclosed $87 in cash and a "Homis" wrist watch (R. 10, 11, 12, 15-17). Accused's letter of transmittal was as follows:

"Dear Stan:

Will you forgive my stupid joke. I would never have done [it] except that I thought you needed a lesson. And to top it off I was very drunk. I will see you soon but not this evening as the Colonel won't let me go out.

Mitch

P.S. Don't leave it around any more.

C.M." (R. 13; Pros. Ex. A).

Captain Herrling gave this information to Major Tomasello of the Honolulu Military Police. Major Tomasello suggested that Captain Herrling and the accused report to his office for interview. Two days thereafter this was done and on the way Captain Herrling, for the first time, informed accused that $109 had been taken from his billfold whereas accused had returned only $87, and inquired whether the watch was intended as security for the balance of $22. The accused replied in the negative, saying that he did not know the exact amount which he had taken, but that he was under the impression that $87 was the correct amount. However, he promptly paid the difference (R. 17, 19, 21). After they had explained the episode to Major Tomasello, the latter reprimanded accused and the matter was considered closed (R. 11). Although Captain Herrling had recovered his money and understood that the watch had not been given to him as security, for some reason he continued the possession of the watch, thinking, as he stated, that it belonged to the accused. On 13 June, while Captain Herrling was showing the watch to another officer, Lieutenant Johns asked to see it, and upon examination thereof identified it as his and stated that it was taken from his quarters between 7:00 and 10:00 o'clock on the night of 5 June 1943, the same night that Captain Herrling's money was taken (R. 11). In testifying Lieutenant Johns stated that in changing clothes that night to go to a picture show he left his watch and wallet in his quarters. His quarters were not locked. The watch was left on a dresser or table. He left his wallet containing money in his trousers, which were thrown over a chair. Upon his return around 10:00 o'clock the watch was gone but the wallet had not been disturbed.

Lieutenant Johns lived about a quarter of a mile from Captain Herrling's quarters (R. 22, 25, 26; Pros. Ex. B). Captain Herrling had known accused about seven weeks. They had worked together in the 7th Fighter Command. He had been in accused's car several times but regarded his association with accused as more or less casual (R. 14). Lieutenant Johns and accused had occupied the same quarters at Fort Shafter from 5 April 1943 to about the middle of May, when accused was transferred and moved out. Thereafter, Lieutenant Johns occupied the room vacated by the accused. This was the room from which the watch was taken (R. 21-24).

It appears from the testimony of First Lieutenant Charles R. Gaa, 64th Coast Artillery, who had known accused since September 1942, that accused and Miss Shannon came to his quarters around 5:00 o'clock, 5 June. Accused was "very happy". He said that he was going home. He invited Lieutenant Gaa over to Miss Shannon's quarters for a "couple of drinks". Shortly after their arrival at Miss Shannon's Captain Herrling joined the party, which then consisted of the witness, the accused, Captain Herrling, Miss Shannon, and "Miss Hester". The liquor was supplied by the accused and Miss Shannon (R. 31, 32). Captain Herrling

left early and when Lieutenant Gaa left about 7:00 o'clock, the accused was "feeling happy" and remained at Miss Shannon's quarters. In the opinion of Lieutenant Gaa accused was "half drunk", but appeared to have control of his senses (R. 27-32).

Lieutenant Gaa again saw Captain Herrling on about 7 June and asked him if he had found his money. Captain Herrling said that he had, and showed him accused's note of apology and also a watch which he said accused had returned with the money. Witness stated that Captain Herrling asked him whose watch it was and witness told him "it looked like Mitchell's (accused's) watch" (R. 31).

Ensigns David M. Evans and Curtis J. Parker, United States Naval Reserve, Intelligence Center, Pearl Harbor, each stated that around 9:30 on the night of 5 June the accused came to their quarters, 108 South Drive, Pearl Harbor, looking for a schoolmate named "Norman Evans". The accused was "quite voluble". His speech was "thick, and his manner rather enthusiastic, - exuberant". He showed that he had been drinking. It developed in the conversation that accused was expecting to leave the Island and that his car was for sale. Mr. Evans jokingly offered him $200 for the car, sight unseen. They went out and examined the car and the accused took them for a short drive. Accused drove "fairly well" but on turning at Hickam gate when accused was told that he was on the wrong side of the road he said that it was a small matter and drove over the curb that runs down the center of the two-lane highway into the proper traffic lane. After they returned to their quarters there was some vague understanding of renewing negotiations for the purchase of the car, but the matter was dropped, because in the opinion of the Naval officers the accused "was quite high", so much so that one of them remarked after accused departed, "Well, he will never remember this tomorrow morning" or something to that effect (R. 37, 33-41).

4. The accused testified in his own behalf. His explanation of the matter is briefly as follows: On 5 June 1943 he was stationed at Waipahu, T. H. Understanding that he was soon to return to the States he obtained permission from "Major Barnes" to go to his former station, Fort Shafter, to say goodbye to friends there and also to collect a debt of $11 from "Lieutenant Cox". He got a quart bottle of liquor and drove to Fort Shafter. He first stopped at Lieutenant Gaa's and Lieutenant Cox's quarters but they were absent. He then went to Miss Kay Shannon's quarters. Miss Shannon had a roommate, Miss Hester, who formerly worked at the Officers' Club. This was around 3:30 p.m. Accused produced his bottle and they had some drinks. About 5:00 o'clock Captain Herrling and Lieutenant Gaa joined the party. The drinking continued until his quart had been consumed and then Miss Shannon brought out a bottle. Accused did not recall the time that Captain Herrling left but understood that he was to return in about an hour.

Lieutenant Gaa had a date and he left around 7:00 o'clock. In the meantime, they "finished up" Miss Shannon's bottle of liquor. About that time the girls' dates arrived with another bottle of liquor and accused had more to drink with them. The girls and their dates left for the Officers' Club about 7:15 or 7:30 o'clock. Accused "figured" that Captain Herrling was at home and went over to see him. Captain Herrling was not in, but accused noticed his wallet "lying there" and thought it would be "a good joke on him to extract the contents of his wallet, giving it to him the next day or later". He stated that to the best of his knowledge he took $87. Leaving Captain Herrling's he went to "Miss Pabst's" quarters. She was not in, but some officer whom he had never met was there and accused had a few drinks with him. Accused did not remember leaving Miss Pabst's quarters, but later found himself driving his car along Hickam Field on the main road into Pearl Harbor. Realizing where he was he decided to call on Norman Evans, a schoolmate from his home town, who had quarters in the Naval Housing. He recalled entering the quarters in the Naval Housing and asking for his friend Evans, who was absent, and recalled engaging in conversation with an Ensign Evans. He remembered taking Ensign Evans and another officer for a ride, but did not recall where they went, the purpose of the ride, or any conversation with respect to the sale of the car. He recalled a "sudden jar" when the car was driven over the curb, but had no recollection of returning to the Naval Housing except that he remembered the Naval officers getting out of the car, after which he returned to his station (Waipahu). After putting his car away he went to his quarters, changed into fatigue uniform, and reported to the CP for duty as Duty Officer around 11:00 o'clock. He was supposed to have gone on duty at 5:00 o'clock. During his absence on pass Major Barnes took the duty for him. His quarters and the CP were in the same building. He remained on duty until 6:30 the next morning (R. 42-46, 53).

The statements of accused with respect to the telephone conversation the next morning with Captain Herrling, his account of the return of the money and watch, and the related events which followed, embrace substantially the same facts as testified to by Captain Herrling. Suffice it to say that accused admitted taking the money and that he returned $87 in cash and the watch to Captain Herrling with the note of apology (Pros. Ex. A). His reason for sending $87 was that when he left for Fort Shafter that afternoon he had $50 in $10 bills. He did not recall spending any part of it except $1 or $1.05 for gas (R. 42), and right after his telephone conversation with Captain Herrling he counted all the cash he had, which amounted to $136. By subtracting $49 which he thought was his money, he struck a balance of $87, which he assumed was the amount that belonged to Captain Herrling (R. 48).

As to the watch, the accused stated that he had no recollection whatever of being in Lieutenant Johns' quarters on the evening of 5 June (R. 49). He stated that when he went through his trousers after his

telephone conversation with Captain Herrling and found the watch and the money, he had a vague recollection of getting the watch and the money from the same table (R. 47, 49, 50, 52), and that he therefore assumed the watch also belonged to Captain Herrling. His contention was that this belief was confirmed when Captain Herrling did not return the watch or disclaim its ownership after he was told that the watch was not given to him as security. Accused stated that he remained under this impression until a week later when he was again called to Major Tomasello's office and learned for the first time that the watch belonged to Lieutenant Johns (R. 48, 49). Accused stated in effect that there was no reason for him to steal the money or the watch; that he had $300 in the bank. He exhibited to the court a handsome wrist watch which had been given to him by his parents for Christmas 1942 (R. 53).

5. The evidence thus discloses that the accused, on the night of 5 June 1943, after a drinking party in celebration of his expected return to the States, went by the quarters of Captain Herrling, with whom he had been drinking, and removed from Captain Herrling's billfold $109, and that some time later in the evening he evidently visited his old quarters, then occupied by Lieutenant Johns, and removed therefrom a wrist watch belonging to Lieutenant Johns. Captain Herrling reported the loss of the money to the Military Police. Early the next morning he called accused on the telephone, told him of his loss without stating the amount, fabricated the statement that the Military Police had found fingerprints on the billfold, and stated to accused that if he knew anything about the incident "or who was playing this prank" he should say so as the Military Police had found fingerprints on the billfold and were searching the files for the identity of the guilty party. The accused immediately replied that he knew about it and that he would see Captain Herrling and explain everything. That afternoon accused sent Captain Herrling a note of apology and inclosed $87 in cash and a wrist watch. Two days thereafter Captain Herrling informed accused for the first time that $109 had been taken from the billfold, whereas accused had returned only $87, and asked if the wrist watch was intended as security for the difference of $22. Accused replied that the watch was not intended as security and that he was under the impression that $87 was all the money that he had taken. However, in deference to Captain Herrling's statement, accused gave him the $22. In the explanation to the Military Police nothing was said about the watch. Captain Herrling thought the watch belonged to accused and accused thought it belonged to Captain Herrling. The incident was considered closed. A few days later Lieutenant Johns saw Captain Herrling wearing the watch and identified it as his property.

There is no material conflict in the evidence. Accused admitted the conscious and wrongful taking of the money but stated that it was done as a joke. He had no recollection whatever of taking the watch from Lieutenant Johns' quarters and upon finding himself in possession of the

watch the next morning he assumed that it too was the property of Captain Herrling.

6. The court found the accused guilty of the larceny as alleged, in violation of Article of War 93. As noted, the reviewing authority approved only so much of the finding of guilty of the Charge as involves a finding of guilty of a violation of the 96th Article of War. However, the action of the reviewing authority as it now stands constitutes an approval of the finding of guilty of the Specifications. Thus in effect the reviewing authority declares that accused committed two larcenies, but that the larcenies were in violation of Article of War 96, not Article of War 93. This action is improper, for larceny is a violation of Article of War 93, and there is no legal basis for placing it under Article of War 96. Consideration of the staff judge advocate's review makes it manifest that the reviewing authority meant to hold that the intent to permanently deprive the owners of their property was not proved beyond a reasonable doubt, and that the record of trial was legally sufficient to support only so much of the findings of guilty of Specifications 1 and 2 as involves findings of guilty of wrongfully taking the specified property without the consent of the owner, in violation of Article of War 96 (CM 202846, Shirley). The Board of Review concurs in the view that the larcenous intent was not proved beyond a reasonable doubt; consequently it is our opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Specifications as involves findings of guilty of a wrongful taking of the specified property, without the consent of the owner, in violation of Article of War 96.

7. The accused is 23 years of age. He was graduated from San Jacinto High School (Texas), 1938. He attended the University of Texas one year and was an instructor in commercial art at Emig Art Academy one year. He was a member of the Texas National Guard from October 1935 to March 1936 and was inducted into the military service 14 November 1941. He was graduated from the Antiaircraft Artillery School, Camp Davis, North Carolina, 20 August 1942, and commissioned a temporary second lieutenant, Coast Artillery Corps, Army of the United States.

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 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 Specifications 1 and 2 of the Charge as involves findings of guilty of those 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 a violation of Article of War 96.

Terry C. Eyre, Judge Advocate.

John Rosenfeld, Judge Advocate.

Fletcher R. Andrews, Judge Advocate.

1st Ind.

War Department, J.A.G.O., 22 OCT 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 Charles F. Mitchell (O-1043173), Coast Artillery (AA).

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 Specifications 1 and 2 of the Charge as involves findings of guilty of wrongfully taking the specified property without the consent of the owner in violation of Article of War 96, legally sufficient to support the sentence and to warrant confirmation thereof. In view of the circumstances, I recommend that the sentence be confirmed but commuted to a reprimand, and that as thus modified the sentence be carried into execution.

3. Inclosed are a draft of a letter for your signature transmitting the record to the President for his action and a form of Executive action designed to carry into effect the 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 Ex. action.

(Only so much of findings of guilty of Specifications of Charge approved as involves findings of guilty of wrongful taking of specified property in violation of Article of War 96. Sentence confirmed but commuted to reprimand. G.C.M.O. 387, 4 Dec 1943)

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